International Legal Standards for the Protection from Refoulement

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International Legal Standards for the Protection from Refoulement

A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture

PROEFSCHRIFT

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Cornelis Wolfram Wouters

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in 1970

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Overige leden:	Prof. mr. T. Barkhuysen
	Prof. dr. R.A. Lawson
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‘We believe that human rights transcend boundaries and must prevail over state sovereignty’

José Ramos-Horta

Preface

The idea of writing this book was born sometime in 1999 just before Blanche decided actually to join the UNHCR and the two of us started living in Bangkok. It was born during a car journey undertaken by me and Prof. Pieter Boeles, the driver, on our way back to Amsterdam from a meeting in Utrecht. It was agreed that I would conduct comprehensive research into the international legal responsibilities of States for the protection of individuals from refoulement. Prof. Boeles and I felt this to be an important topic which could be investigated from just about anywhere in the world. It would not matter where the UNHCR sent us in the years to come; I could do my research. A team was formed comprising of Prof. Pieter Boeles, Prof. Ben Vermeulen and René Bruin. Over the years I regularly travelled back to the Netherlands to meet with this distinguished trio in Ben's office at the Free University in Amsterdam. Since the beginning of 2000 I have taken my work to five different countries before finally finding the time to complete it.

Ever since I graduated from Leiden University I have seen asylum seekers and refugees in a variety of countries and settings, ranging from new arrivals in the *Aanmeldcentrum* at Schiphol airport to Bhutanese refugees residing in camps in Eastern Nepal. All these people had been displaced and had their reasons for seeking protection outside their own country. No matter where they were or why they fled, they were vulnerable and insecure; in dire need of knowing and understanding their rights. The reasons for writing this book are obvious – at least to me. As Stephen Legomsky once wrote, we do not live in a utopian world where there are no refugees, no armed conflicts and no human rights abuses; we do not even live in a modified utopian world where refugees are welcomed with open arms. Unfortunately, we live in a world that 'consists of sovereign States that jealously guard their territories, their wealth, and their economic composition' (Legomsky 2000, p. 620). It is therefore important to analyse and clearly state the various legal obligations States have *vis-à-vis* individuals who are seeking and are in need of international asylum protection.

This book would not have been possible without the support of many. First and foremost, I thank Blanche for opening the world to me in so many different ways, loving me and allowing me to do my research for all these years. I have to thank my colleagues at the Institute of Immigration Law, Gerrie, Suzanne, Maarten, Marcelle, Brigitte, Ciara, Elisabeth and the numerous student assistants, for their continuous support and interest in my life and work. It never mattered how long I had been away from the Institute. I always felt very welcome when I returned to Leiden. In particular, I want to thank Maarten and Marcelle for providing me with crucial information and insights, for reading various drafts and letting me interrupt them on numerous occa-

sions and discuss with them a long list of arguments that I had thought of; some valuable and others ridiculous.

I am also grateful to Sam and Amy's nannies: Manana in Tbilisi, Soma in Colombo and Irene in Brussels. They took very good care of my daughters and kept them away from my 'office room', as Sam would call it, when I was working. I am grateful to my friends, colleagues and former students in Thailand who kept bugging me about this research. I am grateful too to those who have given me shelter during my stays in the Netherlands, in particular Wolf and Maria, Bas and Nico, and Petra and Willem, who gave me the keys to their home and always welcomed me with discussions, tea, wine and calvados (or spirits of a similar kind).

Putting this book together and discovering the reality of the law would have been impossible without the experience I gained at the various organisations I have worked for since I graduated: the refugee department of Amnesty International in Amsterdam, FORUM, the Dutch Institute for Multicultural Development in the Netherlands, the Dutch Refugee Council, the editorial board of *Jurisprudentie Vreemdelingenrecht (JV)*, the Office of Human Rights Studies and Social Development at Mahidol University in Thailand, and finally the Centre on Housing Rights and Evictions (COHRE), which entrusted me with setting up its office in Sri Lanka and doing interesting work on the issue of housing, land and property restitution for refugees and displaced persons in Asia.

Finally, I like to thank the one person who gave me the passion for asylum and refugee law; who shared his knowledge and experience, was my teacher and who kept guiding me until the last letter of this book was set in print. I thank René Bruin for all those years of true friendship.

Kees Wouters
Bangkok / Tbilisi / Colombo / Brussels / Phnom Penh / Amsterdam / Leiden,
2000-2009

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List of Abbreviations and Acronyms

AI	Amnesty International
AJIL	*American Journal of International Law*
BYBIL	*British Yearbook of International Law*
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCPR	see ICCPR
ComAT	Committee against Torture
ComEDAW	Committee on the Elimination of Discrimination against Women
ComESCR	Committee on Economic, Social and Cultural Rights
DRC	Democratic Republic of Congo
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EComHR	European Commission of Human Rights
UN ECOSOC	United Nations Economic Social Council
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EJIL	*European Journal of International Law*
ETS	European Treaty Series
EU	European Union
EU Dublin Regulation	Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national
EU Procedures Directive	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status
EU Qualification Directive	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
EVRM	see ECHR
EXCOM	Executive Committee of the High Commissioner's Programme
GAOR	General Assembly Official Record
GYIL	*German Yearbook of International Law*
HRC	Human Rights Committee
HRQ	*Human Rights Quarterly*
IARLJ	International Association of Refugee Law Judges
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICRC	International Committee for the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Person
IJRL	*International Journal of Refugee Law*
ILC	International Law Commission
JICJ	*Journal of International Criminal Justice*
JV	*Jurisprudentie Vreemdelingenrecht*
KDP	Kurdistan Democratic Party
LTTE	Liberation Tigers of Tamil Eelam
MoU	Memorandum of Understanding
NAV	*Nieuwsbrief Asiel- en Vluchtelingenrecht*
NCB	Nederlands Centrum Buitenlanders
NILR	*Netherlands International Law Review*
NJCM-Bulletin	*Nederlands Juristen Comité voor de Mensenrechten-Bulletin*
OAU	Organisation of African Unity
PKK	*Partiya Karkerên Kurdistan* (Kurdistan Workers' Party)
PUK	Patriotic Union of Kurdistan
Refugee Convention	Convention relating to the Status of Refugees
Refugee Protocol	Protocol relating to the Status of Refugees
Res.	Resolution
UDHR	Universal Declaration of Human Rights
UN GA	United Nations General Assembly
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
UNHCR Handbook	UNHCR Handbook on Procedures and Criteria for Determining Refugee Status
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNTS	United Nations Treaty Series
UN SC	United Nations Security Council

1 Introduction

1.1 Introduction to the study

The prohibition of refoulement is the cornerstone of international refugee and asylum law. People who are at risk of persecution, torture, inhuman treatment, degrading treatment or any other human rights violation in their own country may wish to seek protection elsewhere. States may have the responsibility to provide such people with protection in accordance with a prohibition on refoulement. In the broadest and most general terms the prohibition on refoulement proscribes the forced removal of an individual to a country where he runs a risk of being subjected to human rights violations.[1] In international law the prohibition on refoulement has been developed in various legal instruments, on both a global and a regional level.

Initially, the prohibition on refoulement was developed in relation to the protection of refugees. Traditionally, refoulement refers to the obligation of States under Article 33(1) of the 1951 Convention relating to the Status of Refugees (hereafter referred to as the Refugee Convention) and the 1967 Protocol relating to the Status of Refugees (hereafter referred to as the Refugee Protocol), according to which no State party to the Convention:

> 'shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.

The prohibition on refoulement has also been developed under other – more general – human rights treaties. In Article 3(1) of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter the Convention Against Torture or CAT) an explicit prohibition of refoulement is formulated to protect any individual from being returned to a country where there is a risk of his being subjected to torture. Furthermore, the prohibitions on torture and other forms of cruel, inhuman or degrading treatment or punishment laid down in Article 7 of the International Covenant on Civil and Political Rights (hereafter the ICCPR) and Article 3 of the European Convention on Human Rights and Fundamental Freedoms (hereafter the European Convention or ECHR) do not explicitly protect from refoulement but the supervising bodies have interpreted these articles to provide protection from refoulement. It remains uncertain to what extent other human rights contained in the

1 When referring to an individual in general I will use the male form.

investigated treaties also entail a prohibition on refoulement. These treaties and their respective prohibitions on refoulement are the focus of this study. In addition, other international legal instruments also contain prohibitions on refoulement, both in the field of refugee law and general human rights law.[2] Prohibitions on refoulement have also been developed and adopted in the field of international humanitarian law and international criminal law, i.e. in treaties concerning the protection of victims of armed conflicts and in extradition treaties.[3] These treaties and their respective prohibitions on refoulement are not the topic of this study.

1.1.1 Objective of the study

While the idea of protecting people from being removed to a country where they run a risk of being subjected to human rights violations seems firmly accepted by States in international law, the exact content and scope of such protection is far from clear. Though various prohibitions on refoulement exist in international law there is no common definition. The main objective of this book is to find the international meaning of the prohibition of refoulement as contained in four human rights treaties and to identify, analyze and compare in a systematic way the common features contained in these prohibitions of refoulement. These features provide the framework for the analysis of each of the investigated treaties (see section 1.1.2). These features are: the scope of the prohibitions, the content of the prohibitions, and the character and contents of State obligations deriving from these prohibitions. They include such topical issues as the extra-territorial scope, protection from the country of origin including through diplomatic assurances, and the various negative and positive obligations for States to effectively protect people from refoulement. I believe that the comprehensive analysis and comparison of these features and issues adds to existing legal studies regarding the investigated treaties and the prohibition of refoulement and will contribute to a better understanding of the right to be protected from refoulement.

This book provides a legal analysis of prohibitions on refoulement contained in four human rights treaties, i.e. the Refugee Convention, the ECHR, the ICCPR and the Convention Against Torture. Thorough legal research from the perspective of the individual right to be protected from refoulement will hopefully result in further

2 These prohibitions on refoulement include: Article 2(3) of the OAU Convention governing specific aspects of Refugee Problems in Africa, Article 22(8) of the American Convention on Human Rights, Article 5(2) of the American Convention and Article 5 of the African Charter on Human and Peoples' Rights.

3 For example, Article 45 of the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War protects civilians from being 'transferred to a country where [they] may have reason to fear persecution for [their] political opinions or religious beliefs'. Article 3(2) of the European Convention on Extradition and Article 4 (5) of the Inter-American Convention on Extradition protect people from being extradited when fearing persecution for reasons such as race, religion, nationality or political opinion.

acknowledgement and improvement of effective individual protection from human rights violations. This book is a comprehensive legal study of existing prohibitions on refoulement in international law which can be useful for legal scholars and practitioners in asylum cases throughout the world. It is also a reminder for States which have obliged themselves to protect individuals from becoming victims of unspeakable atrocities. The emphasis of this study will be on:

1. an analysis of the scope and content of the international meaning of the prohibitions of refoulement contained in the Refugee Convention, the ECHR, the ICCPR and the CAT,
2. an analysis of the scope and content of the responsibilities of States deriving from these prohibitions on refoulement, and on
3. a comparison of the prohibitions on refoulement contained in the Refugee Convention, the ECHR, the ICCPR and the CAT.

1.1.2 Research questions

The prohibitions on refoulement contained in the four Conventions will be analysed in four separate chapters. Each of these chapters will follow a similar structure which corresponds to the following three main issues:

1. What is the personal and territorial scope of the Convention and the prohibition on refoulement it contains?
2. What is the content or substance of the prohibition on refoulement?
3. What obligations or responsibilities for States derive from the prohibition on refoulement?

The first question concerns to whom a State has the responsibility of ensuring and respecting human rights; and concerns the personal and geographical scope of the Convention in general and the prohibition on refoulement in particular. Personal scope refers to the beneficiaries of the right to be protected from refoulement. Geographical or territorial scope refers – in principle – to the territory over which a State is responsible for ensuring protection from refoulement. Primarily, States are responsible for those who are within their territory. However, the responsibility of the State can also be engaged outside its territory, because an individual is under the control of the State.

The second question deals with the substance of the various prohibitions on refoulement. It answers questions such as, from what harm is a person protected, what level of severity is required, to what extent is it relevant that the harm will be committed by agents of the State or can non-State agents also subject a person to harm of such gravity that it falls within the scope of refoulement protection. An important element is also the risk involved. How is it defined? How is it determined? Can the risk be minimised or avoided? When is national protection warranted rather than international protection? And is the prohibition on refoulement absolute or are exceptions allowed?

The third question relates to the various obligations or responsibilities for States which follow from the scope and content of the prohibitions on refoulement. These obligations can be negative, i.e. the State has to refrain from certain actions, such as forcibly returning a person to a country where he runs the risk of prohibited treatment. These obligations can, however, also be positive, i.e. the State has a duty to act, for example, to admit a person to its territory or even to grant a person a residence permit. Another relevant sub-question is to what extent States have to ensure certain procedural safeguards in order to ensure protection from refoulement.

In the final chapter of this book I will compare the prohibitions on refoulement contained in the four treaties investigated.

1.1.3 Methodology of and sources for the study

This research is a legal study aimed at finding the international meaning of the prohibition on refoulement as contained in four human rights treaties. This study is mainly based on international sources. In general, these sources include the views of international monitoring or supervisory bodies and relevant literature. In my research I have not included a comprehensive and comparative analysis of the national laws and practices of States parties with regard to the treaties investigated. In part this is because I am looking for the international meaning of the treaty provisions investigated (see section 1.1.1) and in part because a comprehensive and comparative analysis of national laws and practices of State parties would be impractical. I acknowledge the limitations my study thus entails and recognise that as a result of excluding national laws and practices from my study the conclusions will not result in a definite interpretation of the investigated treaty provisions. However, the conclusions will indicate the legal interpretation provided by authoritative international sources and will as a result provide essential and powerful guidelines for the interpretation and application of the investigated treaty provisions.

With regard to the Refugee Convention UNHCR documentation, Conclusions of the Executive Committee and the writings of eminent scholars will be the main sources. In addition, I will use legislation developed by the European Union, in particular the Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereafter the EU Qualification Directive)[4] and the Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereafter

4 European Union Council Directive on minimum standards for the qualification and status of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 2004/83/EC of 29 April 2004, Official Journal of the European Union L304/12.

the EU Procedures Directive).[5] Although geographically limited, the Qualification Directive provides for minimum common standards accepted by the EU Member States based, in part, on the Refugee Convention. Similarly, with regard to the ECHR occasional reference will be made to the EU Qualification Directive, albeit that the key sources will be the decisions and judgments of the European Court of Human Rights. And with regard to the ICCPR and CAT the views of the relevant treaty bodies, the Human Rights Committee and the Committee Against Torture respectively, will be prime sources.

The study tries to provide concrete answers to the legal questions referred to in section 1.1.2. The level of abstraction and theorisation is limited as much as possible. In particular with regard to the ECHR, the ICCPR and the CAT I will refer on many occasions to individual cases which have been brought before the Convention's monitoring bodies. In that regard, the chapter concerning the Refugee Convention will include a limited number of individual cases, and will therefore be more abstract in its analysis. There is no international case law in the context of the Refugee Convention and the UNHCR, as the Convention's primary monitoring body, has had only limited legal involvement in individual cases.

1.1.4 Scope and limitations of the study

This study includes prohibitions on refoulement contained in three global and one regional treaty. The choice to incorporate the ECHR is justified by the fact that reference to the ECHR has been made by the monitoring bodies of the other Conventions. The study is limited to those prohibitions which have clearly been developed and acknowledged under various treaty provisions. It will not discuss other existing prohibitions on refoulement or the possibility of the future development of other such prohibitions. This study will also not include research into the existence of a prohibition on refoulement under international customary law or prohibitions existing in national law. This research was concluded on 1 August 2008. Only in exceptional cases have I been able to include later developments.

1.1.5 Structure of the book

This book consists of three parts. The first will introduce the book. Section 1.1 introduces the study and includes the objectives and research questions of the study, a brief explanation of the research methodology, the scope and limitations as well as the structure of the book. Section 1.2 analyses relevant general issues of international human rights treaty law. This section deals with issues of a general nature,

5 European Union Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, 2005/85/EC of 1 December 2005, Official Journal of the European Union L326/13.

relevant to the analysis of the prohibitions on refoulement. The issues discussed are rules of treaty interpretation, in particular the interpretation of human rights treaties, the personal and territorial scope of human rights and the obligations of States to ensure the protection of human rights. Finally, Section 1.3 introduces the prohibition on refoulement, by outlining the right to asylum in international law, the historical development of the prohibition on refoulement in international law and referring to the common elements contained in such prohibitions.

In the second part, chapters 2 to 5, the four human treaties and their prohibitions on refoulement which are the subject of this study will be analysed. Each treaty will be introduced, its personal and territorial scope will be discussed, followed by an analysis of the scope and content of the prohibition on refoulement contained in it and an analysis of the various obligations which derive from the prohibition.

The third and final part of this book, chapter 6, will compare the various prohibitions on refoulement analysed in chapters 2 to 5, with a particular focus on the three main research questions.

1.2 Relevant general principles of human rights treaties

Treaties come in all kinds of forms, shapes and sizes and represent all fields of law. According to the Vienna Convention on the Law of Treaties (Article 2(1)(a)) a 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'.

This study concerns treaties containing human rights. Human rights treaties are 'law-making treaties'. They create imprecise, general norms for the protection of human beings. It is characteristic of human rights treaties that the States parties to them do not have a subjective interest of their own, but a common, objective, interest and non-reciprocal obligations to protect the rights of people.[6] The International Court of Justice (ICJ) made this clear in its Advisory Opinion on Reservations to the Genocide Convention; a view that can equally be applied to other human rights treaties.[7] According to the ICJ the Genocide Convention was adopted for a humanitarian and civilised purpose, whereby the State parties do not have an interest of their own, but a common interest to accomplish the purposes of the convention.[8]

6 Orakhelashvili 2001, p. 264. Orakhelashvili 2003, pp. 532-533.

7 Lauterpacht & Bethlehem 2003, p. 104 (para. 41). Orakhelashvili 2003, p. 532.

8 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), 28 May 1951, ICJ Reports 1951, p. 51 at 23.

Human rights treaties contain rights for people as well as legal obligations, primarily for States, to guarantee these rights.[9] With the development of human rights treaty law individuals have become clear beneficiaries of rights for which States are the duty bearers.[10]

1.2.1 The interpretation of human rights treaties

1.2.1.1 General rules of treaty interpretation

This study involves research in the field of human rights treaty law. In order to understand the scope and content of the responsibilities of States for the protection of individuals from refoulement under the various treaties analysed in chapters 2 to 5 of this study, and to be able to compare the analysed treaties in chapter 6, this chapter will discuss some of the relevant general principles of treaty law, in particular of human rights treaties.

The purpose of interpreting a treaty is to establish the meaning of the text of the treaty and thereby its application in a certain situation. It is obvious that the States parties to a treaty have the competence to interpret it. In addition, the treaty itself may confer the competence to interpret the treaty on a specified body or court or on the International Court of Justice.[11]

A general expression of the principles of treaty interpretation can be found in the Vienna Convention on the Law of Treaties.[12] The general rule of treaty interpretation is provided by Article 31 of the Vienna Convention on the Law of Treaties, 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 light of its object and purpose'. In addition to the text, which includes the preamble and annexes to the treaty, the context of a treaty consists of any agreement relating to the treaty and made by all parties in connection with the conclusion of the treaty as well as any

9 Brownlie 1998, pp. 12, 558.

10 Friedmann 1964, pp. 234-235. Jennings & Watts 1992, p. 847. Orakhelashvili 2001, p. 245. Arguably individuals have also become – to some extent – subjects of international law, i.e. they have acquired rights without the intervention of municipal legislation and they can enforce these rights in their own name before international judicial or quasi-judicial bodies. The issue of individuals as subjects of international law is beyond the scope of this study.

11 Brownlie 1998, p. 632.

12 Sinclair 1984, p. 153. 1969 Vienna Convention on the Law of Treaties, 115 U.N.T.S. 331, entry into force 27 January 1980. Technically speaking the Vienna Convention on the Law of Treaties does not apply to three of the four treaties investigated in this book because they predate the Vienna Convention on the Law of Treaties (the European Convention on Human Rights which entered into force on 3 September 1953, the Refugee Convention which entered into force on 22 April 1954 and the International Covenant on Civil and Political Rights which entered into force on 23 March 1976). Nevertheless, it is generally accepted that the Vienna Convention contains rules of international customary law in relation to treaty interpretation and is therefore applicable and authoritative: see for example ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, 1994, ICJ Rep. 6 at 21.

instrument made by one or more parties in the same connection and accepted by the other parties as related to the treaty. These agreements or instruments must be concerned with the substance or application of the treaty and are usually made on or soon after its conclusion. They may include agreed minutes of the drafting negotiations or the exchange of letters regarding the detailed application of terms used in a treaty.[13] These documents should be distinguished from the travaux préparatoires, or preparatory works, as well as from official commentaries produced later.[14] In addition, together with the context, shall further be taken into account any subsequent agreement between parties regarding the interpretation or application of the treaty,[15] any subsequent practice in the application of the treaty establishing an agreement between the parties regarding the treaty's interpretation[16] and any relevant rules of international law applicable in the relations between the parties.[17] A subsequent agreement refers to an agreement made by the States parties after the conclusion of the treaty regarding its interpretation or application.[18] The agreement can take a variety of forms provided the purpose is clear and all States parties agree.[19] Subsequent practice can also be relevant provided it is consistent and is common to, or accepted by, all the States parties.[20] Finally, relevant rules of international law applicable in the relations between the parties are to be taken into account together with the context.

The general or primary rule of treaty interpretation identifies four main sources for interpretation, all of which have to be taken into account: good faith, the text of the treaty, the context of the treaty and its object and purpose.[21] Good faith indicates a moral element in interpreting a treaty, prohibiting manifestly absurd or unreasonable interpretations.[22] Reference to the text indicates a textual or literal approach as a treaty is to be interpreted in accordance with the 'ordinary meaning' to be given to its terms.[23] Reference to the context is to a systematic approach, indicating that the treaty as a whole must be taken into account, including the preamble and any annexes. Determination of the ordinary meaning cannot be made in the abstract, but only by considering the context in which it is employed.[24] Finally, reference to the object

13 Aust 2004, p. 191.
14 Sinclair 1984, pp. 190-191.
15 Article 31(3)(a) Vienna Convention on the Law of Treaties.
16 Ibid., Article 31(3)(b).
17 Ibid., Article 31(3)(c).
18 Aust 2004, p. 191.
19 Ibid., pp. 191-193, including examples of subsequent agreements.
20 Ibid., pp. 194-195, including examples.
21 Ibid., p. 187; Jennings & Watts 1992, pp. 1272-1274; Nowak 1993, p. XXIII.
22 Aust 2004, p. 187. The principle of good faith or *pacta sunt servanda* underlies the most fundamental of all norms of treaty law, laid down in Article 26 of the Vienna Convention on the Law of Treaties: see Sinclair 1984, p. 119.
23 This is different when the treaty establishes a special meaning.
24 Sinclair 2004, p. 188.

and purpose of the treaty indicates a teleological interpretation.[25] According to Sinclair, the ordinary meaning of a treaty provision should in principle be the meaning which would be attributed to it at the time of the conclusion of the treaty. This is termed the 'principle of contemporaneity', requiring that the terms of a treaty must be interpreted according to the meaning attributed to the treaty at the time of its conclusion, and in the light of linguistic usage at that time.[26] Sinclair refers here to Fitzmaurice and emphasises the intention of the drafters, limiting a dynamic method of interpretation.[27] Fitzmaurice, however, makes clear that such a static interpretation is not always valid, particularly regarding human rights treaties, as he states that the teleological approach is a method of interpretation more particularly connected with the general multilateral convention of the normative, and, particularly, of the sociological or humanitarian type. According to Fitzmaurice, it is particularly with reference to this type of convention that doubts have been felt about the validity, or even practicability, of ascertaining the intentions of the parties.[28]

Time has become an increasingly important element in the interpretation of treaties. Many multilateral treaties concluded over recent decades are intended to be valid and applicable for a long period. The question is to what extent treaties should be interpreted and applied as understood at the time of conclusion or whether the treaty is a *living instrument* the interpretation of which can change over time. A preference exists for the latter, particularly regarding human rights treaties, i.e. the adoption of a dynamic or evolutive interpretation in light of social and political developments.[29] This preference appears to be supported by the text of Article 31(3) of the Vienna Convention on the Law of Treaties because it refers to subsequent agreements and practices. A dynamic interpretation is also supported by the International Court of Justice in its Advisory Opinion in the Namibia case of 1971. In this case the ICJ stated that 'an international instrument has to be interpreted and applied within the entirely legal system prevailing at the time of the interpretation'.[30]

Another principle which plays an important role in the interpretation of treaties is the principle of effectiveness. It is not explicitly referred to in Article 31 of the Vienna Convention on the Law of Treaties but follows implicitly from this Article, subsumed in the reference to 'good faith' and 'the object and purpose of the treaty'. The principle of effectiveness means that in interpreting a treaty the interpretation should have the appropriate effect in accordance with good faith and the object and

25 Sinclair distinguishes three schools of thought: first, the subjective school, based on the intentions of the parties, secondly, the objective approach, based on the text, and, thirdly, the teleological school based on the object and purpose: Sinclair 1984, p. 115.

26 Ibid., p. 124.

27 Fitzmaurice 1957, p. 212.

28 Ibid., p. 207.

29 Bernhardt 1999, pp. 12-16, 21.

30 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion), 21 June 1971, ICJ Reports 1971, p. 16 at para. 53. Bernhardt 1999, pp. 15-16. Lauterpacht & Daniel Bethlehem 2003, p. 105 (para. 43).

purpose of the treaty.[31] The principle of effectiveness should, however, not lead to an excessive departure from or illegitimate extension of the text of the treaty.[32]

In addition to the primary means and methods of treaty interpretation Article 32 of the Vienna Convention introduces supplementary means of interpretation. Accordingly, recourse may be had to other sources, including the preparatory works (travaux préparatoires) to the treaty and the circumstances of its conclusion, including the intentions of its drafters. Supplementary means may be used to confirm the meaning resulting from the primary means of interpretation or to determine the meaning when the primary interpretation leaves it ambiguous or obscure or with a result which is manifestly absurd or unreasonable.[33] The preparatory works generally include such materials as successive drafts, conference records and explanatory statements. The travaux préparatoires, as one of the supplementary means of interpretation, are primarily meant to confirm an established interpretation and only subsidiarily meant to determine an interpretation.[34] The travaux préparatoires and the circumstances of a treaty's conclusion as a source of interpretation must be used with great care.[35] The usefulness of the travaux préparatoires is often marginal and seldom decisive.[36] With regard to many treaties the most important parts of the negotiations took place in secrecy or even informally, with no official record for inclusion in the travaux préparatoires.[37] Moreover, multilateral treaties, including human rights treaties, are often initially adopted by a small number of States, and over the years many other States join, thereby limiting the value of the views and intentions of the original participating States. Finally, recourse to the travaux préparatoires presents the danger of interpreting the preparatory works instead of the treaty itself.[38] The preparatory works to a treaty, and therefore the intention of the drafters, have limited relevance in interpreting the treaty. Limiting the relevance of the past indicates a further preference for a dynamic or evolutive way of interpreting treaties in line with their object and purpose rather than holding on to the spirit of the time of drafting.

Article 32 of the Vienna Convention does not limit the supplementary means of interpretation to the travaux préparatoires, even though they are the only source

31 Brownlie 1998, p. 636. Sinclair 1984, p. 118. M. Nowak 1993, p. XXIV.

32 ILC Reports of the International Law Commission to the General Assembly, Law of Treaties, 1966, 2 Yearbook ILC 169, 219 para. 6, UN doc. A/6309/Rev.1 (1966), as quoted in Young 2002, p. 64 note 161.

33 Article 32 Vienna Convention on the Law of Treaties. See also Aust, p. 197.

34 Aust 2004, p. 197.

35 Bernhardt 1999, p. 14. Orakhelashvili 2003, p. 537.

36 Nowak 1993, p. XXIV. Young 2002, p. 78. Aust 2004, p. 199.

37 Sinclair 1984, p. 142. Aust 2004, pp. 198-199.

38 ICJ, *Case concerning the application of the 1902 Convention governing the guardianship of infants* (*the Netherlands v Sweden*) (Merits), 28 November 1958, ICJ Reports 1958, p. 55 at 129. Judge Spender in a separate opinion stated 'recourse to preparatory work of treaties or conventions may, in certain cases, be necessary. But whenever it is permissible it should, I think, be done with caution and restraint. For there is always the danger that, instead of interpreting the relevant treaty or convention, one will find oneself tending to interpret the preparatory work and then transferring that interpretation across to the treaty or convention which is the sole subject of interpretation'.

explicitly mentioned. Important other supplementary means of interpretation, helpful in confirming or providing clarity as to the primary interpretation, may include other treaties on the same subject matter and rules of international customary law as well as various techniques of interpretation.[39] These techniques include, amongst others, (1) *a contrario* reasoning. For example, the ICCPR has no denunciation clause, but its Optional Protocol does; therefore, one might argue that it was not intended that a State party to the ICCPR would have the right to withdraw from the Covenant. Secondly, Article 16 of the Convention against Torture contains a prohibition on other cruel, inhuman or degrading treatment or punishment without an explicit prohibition on refoulement, contrary to Article 3 of the Convention which contains a prohibition on torture. One might therefore argue that it was not intended to have Article 16 contain a prohibition on refoulement. Other techniques include (2) the *expressio unius est exclusio alterius*, i.e. explicit mention of a circumstance or condition excludes other circumstances or conditions, (3) *lex posterior derogat legi priori*, i.e. when two rules apply to the same matter, the latter in time prevails, (4) *lex specialis derogat legi generali*, i.e. a specific rule prevails over a general one. These techniques must be applied with caution and may not be the decisive tools in interpreting a treaty provision.[40]

No mention is made in the Vienna Convention regarding the principle that treaties should be interpreted restrictively and in favour of State sovereignty. The absence of this principle in the Convention leaves it ambiguous to what extent this principle is – in general – applicable in interpreting treaties.[41] However, as will be outlined below, this principle plays no role in interpreting human rights treaties.

It can be concluded that in general a treaty should be interpreted in good faith, in accordance with the ordinary meaning of the terms used in the treaty, in its context and in light of the treaty's object and purpose. Indicating that the primary method of treaty interpretation is textual, contextual and teleological. The intention of the drafters of the treaty is only supplementary; to confirm an interpretation made rather than to form one.[42] Furthermore, a treaty should have its appropriate effect and should be interpreted dynamically or evolutively.

1.2.1.2 Interpretation of human rights treaties

In interpreting human rights treaties the special character of such treaties, i.e. the protection of individual human rights, should be kept in mind. Any ambiguity in the terms of the treaty must be resolved in favour of an interpretation which is consistent

39 Aust 2004, p. 200.
40 McNair, p. 400.
41 Brownlie 1998, p. 636. Bernhardt 1999, p. 14.
42 Jennings & Watts 1992, pp. 1275-1276.

with the treaty's humanitarian character.[43] The interpretation should promote the practical and effective application of human rights.[44]

Furthermore, in clarifying the meaning of a human rights treaty any subsequent practice in the treaty's application which establishes the agreement of the parties regarding its interpretation is relevant.[45] It refers not only to the practice and attitudes of States parties, which is only of minimal relevance to this study (see section 1.1.1), but also to the case law of international monitoring or judicial bodies.[46] Besides subsequent practice any relevant rules of international law may also be taken into account when clarifying the interpretation of a treaty.[47] Many human rights treaties cover the same rights and freedoms or cover one specific right. Reference to other human rights treaties is therefore an important method of interpretation.[48] Reference to relevant rules of international law leads to the mutual influence of human rights treaties and their respective subject related provisions. The use of subsequent practice and relevant rules of international law may, however, not limit the scope or effect of the rights listed in the treaty. These methods can be relevant only to the extent that they facilitate the treaty's effective application and may never lead to a departure from the text, context or object and purpose of the treaty.[49]

The interpretation of human rights treaties in particular has two main characteristics. First, such treaties call for a dynamic or evolutive interpretation and, secondly, they call for a liberal interpretation of rights and a narrow interpretation of restrictions. Human rights treaties are constitutional in character and intrinsically allow an evolutive interpretation, in light of social and political developments.[50] They are phrased in broad and general terms, allowing for different interpretations which may vary and develop over time. The principle of evolutive interpretation was acknowledged, for example, in the separate opinion of Judge Weeramantry of the International Court of Justice in the 1997 Gabcikovo-Nagymaros case in respect of human rights treaties:

> 'treaties that effect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A Court cannot endorse actions which are a violation of human rights by the standards of the time merely because

43 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), 28 May 1951, ICJ Reports 1951, p. 51 at 23. Lauterpacht & Bethlehem 2003, p. 104 (para. 41). Orakhelashvili 2003, p. 535.

44 Bernhardt 1999, p. 23.

45 Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

46 Aust 2004, p. 191. Orakhelashvili 2003, p. 535. Van Boven, pp. 107-109.

47 Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

48 Lauterpacht & Bethlehem 2003, p. 106 (para. 46). Orakhelashvili 2003, pp. 536-537. See Ghandhi 1990, p. 761, in which it is argued that this method is not without controversy, as various human rights treaties may represent different legal and political systems and ideologies. For example, the ICCPR represents many diverse systems of law and politics, contrary to, for example, the ECHR representing a much more homogeneous group of States parties. This argument is, however, relative, given the universal character of human rights.

49 Orakhelashvili 2003, pp. 536-537.

50 Bernhardt 1999, p. 16. Jennings & Watts 1992, pp. 1268 and 1882.

> they are taken under a treaty which dates back to a period when such action was not a violation of human rights'.[51]

An evolutive interpretation is supported by the case law of various international supervisory bodies, as will become clear from the analysis in chapters 2 to 5 below. Of equal importance is the notion of a liberal interpretation of rights and a narrow interpretation of restrictions. Even though the Vienna Convention on the Law of Treaties is silent on this matter, the object and purpose of human rights treaties imply a liberal interpretation of rights. The object and purpose of human rights treaties are to create long term and solid legal protection for individuals. Therefore, human rights treaties should be interpreted liberally or progressively in view of individual human rights protection. A restrictive interpretation of treaties is not, as such, supported by the Vienna Convention.[52] Judge Bernhardt, a former President of the European Court on Human Rights, suggested that:

> 'treaty obligations are in case of doubt and in principle not to be interpreted in favour of State sovereignty. It is obvious that this conclusion can have considerable consequences for human rights conventions. Every effective protection of individual freedoms restricts State sovereignty, and it is by no means State sovereignty which in case of doubt has priority. Quite to the contrary, the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights on the one hand and restrictions on State activities on the other'.[53]

An evolutive interpretation of a human rights treaty can conflict with a liberal interpretation of the rights included in the treaty. An evolutive interpretation is based on social and political changes in a country. What if these changes call for a more restrictive interpretation of rights? The primary rule of treaty interpretation indicates that a treaty should be interpreted in good faith, in accordance with the ordinary meaning of the terms used in it, in its context and in light of its object and purpose. The specific object and purpose of human rights treaties, i.e. the protection of human rights, calls for a liberal interpretation of rights rather than a restrictive interpretation based on social or political changes.

1.2.1.3 The role of international monitoring or supervisory bodies

International monitoring or supervisory bodies established by human rights treaties are common and their role in interpreting these treaties very significant. While these bodies are bound by the means and methods of treaty interpretation discussed above,

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51 ICJ, *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary/Slovakia*) (Merits), 25 September 1997, ICJ Reports 1997, at 114. Lauterpacht & Bethlehem 2003, p. 105 (para. 44).

52 Brownlie 1998, p. 636. Bernhardt 1999, p. 14. Orakhelashvili 2003, p. 530.

53 Bernhardt 1999, p. 14.

their views are separate sources of interpretation, by virtue of an arrangement to that effect set out in a human rights treaty.[54]

Several specialist treaty bodies have been established under the United Nations human rights treaties system and are specifically charged with overseeing the treaty performance of States parties, each body being concerned with a specific treaty. Under the ICCPR this is the Human Rights Committee and under the Convention against Torture this is the Committee against Torture. In general, treaty bodies have the competence to monitor in various ways the implementation and enforcement of their respective treaties, including giving their views on the interpretation of treaty provisions. However, they lack decision-making power and the power to give legally binding views. Ultimately, the States parties have the decisive responsibility in interpreting the treaty.

This monitoring and supervisory system is different from the regional human rights system adopted under the European Convention on Human Rights (ECHR). Under the ECHR a European Court of Human Rights (ECtHR) has been established to oversee the performance of the States parties to the Convention. Contrary to the UN treaty bodies the European Court of Human Rights has the authority to give legally binding decisions. Pursuant to Article 46 of the ECHR the ECtHR, not the States parties, has the ultimate responsibility for interpreting the Convention.[55]

Under the Refugee Convention there is neither a treaty body nor a specific court.[56] While the ultimate responsibility for the interpretation of the Convention lies primarily with the States parties, the international monitoring and supervisory role rests, in many ways, with the United Nations High Commissioner for Refugees (UNHCR) and the Executive Committee of the High Commissioner's Programme (Executive Committee or EXCOM). Both institutions however lack clear mechanisms for carrying out their supervisory roles.[57] However, the fact that they were given a supervisory role presumes the existence of a mandate to fulfil that role and to enable them to work towards a unified implementation and application of the treaty they are intended to supervise. That presumption provides the UNHCR and the Executive Committee with a certain authority regarding the interpretation of the Convention provisions.

1.2.2 Individual human rights and the obligations of States

The individual right to be protected from refoulement forms the basis of this study. This right is either formulated in direct proscriptive terms or developed in the context

54 Battjes 2006, p. 19.

55 Ibid., p. 23.

56 In accordance with Article 38 of the Refugee Convention any dispute between the States parties relating to the interpretation or application of the Convention may be referred to the International Court of Justice. However, to date no such reference has been made.

57 Türk 2002, p. 5. See section 2.1.3.

of a general proscriptive human right, most importantly the prohibition on torture and other forms of cruel, inhuman or degrading treatment or punishment. The explicitly formulated prohibitions on refoulement investigated in this study, i.e. Article 33 of the Refugee Convention and Article 3 of CAT, address the State rather than the individual. These two provisions describe, in proscriptive terms, obligations on States. This is different from the two prohibitions on refoulement developed as part of a general prohibition on ill-treatment. They describe rights of individuals and not obligations of States. Whatever the formulation of the specific treaty provision and the addressee of that provision, what matters is that all four treaties investigated contain prohibitions on refoulement. As such these provisions create individual rights and corresponding obligations of States, or vice versa, under which the individual has a right to be protected from refoulement and the State has a general obligation to ensure that right.[58] The exact nature and content of the States' obligations to protect the individual right of non-refoulement depends on the specific formulation and interpretation of the right and the specific context in which the right is being invoked. In general, States have an obligation to respect individual human rights, but may also have an obligation to protect and fulfil such a right, implying obligations to take action rather than to refrain from acting. As such, the right to be protected from refoulement may be proscriptive as well as prescriptive in nature and may entail both positive and negative obligations for States depending on how they can best guarantee effective protection from refoulement. Thus in general States have an obligation to guarantee such effective protection, which in turn may involve the performance of multiple duties, including both actions and inactions.[59] In the context of the right to be protected from refoulement States will primarily have an obligation to refrain from removing or returning an individual to a country where he may be at risk of being subjected to serious harm. However, depending on the situation, in order to provide effective protection States may also have the obligation to take action by, for example, allowing an individual to enter its territory. For the purpose of this study it is important to assess three issues: first, does the individual have a right to be protected from refoulement; secondly, what State is responsible for his protection; and, thirdly, what concrete obligations does the State responsible have as regards the individual to ensure effective protection.

58 Orakhelashvili 2001, p. 268.

59 Shue has sought to rebut the distinction between positive and negative rights based upon the former imposing positive duties and the latter negative duties. The distinction between positive and negative in the context of human rights is not a distinction between rights, but a distinction among duties. According to Shue there are no one-to-one pairings between kinds of duties and kinds of rights: see for a more in-depth analysis of positive obligations Shue 1980, pp. 52-53. See also Mowbray 2004, pp. 222-224. For a theoretical analysis of rights and obligations see De Hoogh 1995. For an in-depth analysis of the nature of States' obligations in terms of obligations of result, means or conduct see Orakhelashvili 2001.

1.2.3 The personal, territorial and extra-territorial scope of human rights treaties

1.2.3.1 Personal scope

Individuals are the beneficiaries of human rights and States the main actors, or duty bearers, in protecting these rights.[60] In general, human rights treaties create rights for individuals and impose obligations on States.[61] States which are party to a human rights convention have engaged in a general responsibility under that convention to ensure the rights listed in the treaty for individuals who are the beneficiaries of those rights.[62] This general responsibility is often enshrined in a specific treaty provision, for example, in Article 1 of the ECHR and Article 2(1) of the ICCPR.

In general, human rights treaties protect individuals – and not corporations or juridical persons – irrespective of their legal or social status and prohibiting any form of discrimination.[63] Nevertheless, some human rights are granted only to citizens, i.e. individuals who have the nationality of the State, or to those who are lawfully residing in the State.[64] In general, everyone has a right to be protected from refoulement irrespective of his nationality or legal or social status.

1.2.3.2 Territorial scope

In general, States are responsible for ensuring human rights protection to those who are within their territory. For the purpose of this study it is important to understand that under general international law the territory of a State consists of its land, including the subsoil beneath and airspace above and internal waters, the territorial sea appurtenant to the land, including the seabed and subsoil of the territorial sea, and the airspace above.[65] Areas within a State's territory which have been declared an international zone,[66] outside the State's territory and the realm of the law to circumvent human rights obligations,[67] or territories which are not under the control of central State authorities (failed States) are all territories which under international law remain part of the State. Also, diplomatic missions do not alter the territorial integrity

60 Friedmann 1964, pp. 234-235. Jennings & Watts 1992, p. 847. Orakhelashvili 2001, p. 245.
61 Orakhelashvili 2001, p. 265.
62 Jennings & Watts 1992, p. 847. Orakhelashvili 2001, p. 245.
63 Nowak 1993, pp. 39-40.
64 For example, under Article 25 of the ICCPR only citizens have a right to vote and to be elected, and under Article 12(1) of the ICCPR only people who are lawfully within the territory of a State shall have the right to liberty of movement.
65 Brownlie 1998, pp. 105 and 116-118.
66 ECtHR, *Amuur v France*, 25 June 1996, App. No. 19776/92, para. 52: 'The Court notes that even though the applicants were not in France within the meaning of the Ordinance of 2 November 1945, holding them in the international zone of Paris-Orly Airport made them subject to French law'. See also Hathaway 2005, p. 321 (note 200) and Goodwin-Gill & McAdam 2007, p. 253.
67 As Australia did when it refused to consider the refugee status of persons present in, for example, Christmas Island: see Marr & Wilkinson 2003, pp. 140 and 141. Hathaway 2005, p. 321. See also Goodwin-Gill & McAdam 2007, pp. 255-256.

of the State. Diplomatic missions, while inviolable, are located within the territory of their host countries and do not belong to the territory of the State they represent.[68] Also, the presence of agents of a foreign State does not alter the territorial jurisdiction of the country of origin. Territories may of course change hands and switch from one State to another. In general, five methods of acquiring territory are discerned: occupation, accretion, cession, conquest and prescription.[69] Not all territory belongs to a State. International law does recognise territory that does not belong to a State.[70] First, there are areas which cannot be put under the control of a State (territory *res communis*).[71] Such areas include the high seas, including the non-land areas of the Polar Regions,[72] and outer space. Secondly, there are territories over which there is no sovereign (*terra nullius*). Such territories are open for acquisition. People who may find themselves within such areas cannot be deprived of the protection of the law merely by reason of the absence of State sovereignty.[73] Thirdly, there are territories which are not controlled by a sovereign State but by another entity, such as mandated and trust territories, non-self-governing territories and territorial entities, other than States, enjoying legal personality.[74] Mandated and trust territories can be ignored, as no such territories currently exist, but, like non-self-governing territories, they were susceptible to international human rights protection.[75] Human rights protection in areas controlled by entities other than States which enjoy legal personality is less clear, but will, presumably, according to Brownlie have rights and duties similar to those of States.[76]

The territorial scope or application of human rights treaties refers – in principle – to the territory in which a State is responsible for the protection of human rights. The responsibility to protect human rights is primarily territorial, i.e. it is based on the sovereignty of States and limited by the sovereign territorial rights of other States. This also follows from Article 29 of the Vienna Convention on the Law of Treaties according to which a treaty is binding upon each party in respect of its entire territory unless a different intention appears from the treaty or is otherwise established. This Article concerns only the possibility of restricting the application of the treaty to parts of the territory and does not deal with its application beyond a State's territory.[77] A State is responsible for protecting the human rights of all individuals present within its territory.

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68 Kooijmans 2000, p. 66. Inviolability of diplomatic agents and missions is regulated in the Vienna Convention on Diplomatic Relations, Articles 29-39.
69 Brownlie 1998, p. 129. Shaw 1997, pp. 338-354.
70 Shaw 1997, p. 335. Brownlie 1998, p. 173.
71 Shaw 1997, p. 362. Brownlie 1998, pp. 174 and 175.
72 Shaw 1997, p. 363 (note 188).
73 Brownlie 1998, p. 174.
74 Ibid., pp. 175 and 176.
75 Ibid., pp. 571 and 572. Mandated territories refer to the mandate system of the former League of Nations. Trust territories refer to the trusteeship system of the United Nations.
76 Ibid., p. 176.
77 Gondek 2005, p. 352.

1.2.3.3 Extra-territorial scope

The responsibility to protect human rights is not exclusively territorial. States can be responsible for ensuring human rights protection to people outside their territory, because the individual involved is either a national of the State or is within the jurisdiction of that State. The former situation falls outside the scope of this study. The latter is an important situation with regard to protection from refoulement and will be discussed in more detail in chapters 2 to 5. In accordance with most human rights treaties the key in analysing to whom a State party is responsible is determined by the word jurisdiction that features in many treaties.

In general public international law the notion of jurisdiction determines the lawfulness of State conduct, i.e. it determines the legal authority or lawful power of a State to affect people, property and circumstances and is reflected in the basic principles of State sovereignty, equality of States and non-interference in the domestic affairs of States.[78] This is often different in the context of international human rights law, where jurisdiction is often used to indicate the responsibility of States for ensuring human rights protection rather than determining the lawfulness of a State's conduct.[79] This notion of jurisdiction is a tool for identifying to whom a State is responsible for protecting human rights and whether alleged violations of human rights may be imputable to a State. Orakhelashvili considers this to be a remedial, as opposed to a substantive, notion of jurisdiction.[80] Where the substantive notion of jurisdiction is based on the law giving the State legal competence to act, the remedial notion of jurisdiction is based on the de facto relationship between the individual and the State.[81] The remedial notion of jurisdiction indicates extra-territorial responsibility; the substantive notion extra-territorial competence. The issue in international human rights law is not has a State acted lawfully, but can a State be held responsible for certain conduct, i.e. can conduct be attributed to the State. Whether or not a State possesses substantive jurisdiction would merely serve as evidence for attributing conduct.[82] Human rights exist and operate independently of the principles of general international law governing State jurisdiction, i.e. the legality of State actions.[83] The International Court of Justice acknowledged this remedial notion of jurisdiction in its Advisory Opinion in the Namibia case. The Court considered South Africa to be responsible for acts committed outside its territory, in Namibia, because South Africa had actual control over the territory of Namibia. The substantive jurisdiction of South Africa was non-existent, since its administration in Namibia was illegal. The Court considered that South Africa, irrespective of its illegal presence in Namibia:

78 Shaw 1997, p. 452. Orakhelashvili 2003, p. 540. Lawson 2002, p. 281.
79 Gondek points out that the issue of the extraterritorial application of treaties in general public international law is different from the specific human rights context: see Gondek 2005, p. 351.
80 Orakhelashvili 2003, p. 540.
81 See also Gondek 2005, pp. 364-367.
82 Orakhelashvili 2003, p. 544.
83 Ibid., p. 541.

> 'remains accountable for any violations of its international obligations, or of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of a title, is the basis of State liability for acts affecting other States'.[84]

Although the responsibility of a State to protect human rights is primarily territorial, it is certainly not exclusively so. A State can be responsible for actions committed outside its territory. Whether a State is responsible for the protection of human rights of persons outside its territory is a matter of attribution of conduct and of control over foreign territory or over the person affected, and is irrespective of the legality of the control or conduct.[85] Moreover, according to Meron, 'a narrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights, which is to ensure that a State should respect human rights of persons over whom it exercises jurisdiction'[86]; in other words, for whom a State is responsible or over whom it has control.

1.2.3.3a Effective control over foreign territory

Effective control primarily relates to situations of military occupation. Under rules of international humanitarian law, in particular Article 43 of the Regulations annexed to the Hague Convention IV of 18 October 1907 concerning the Laws and Customs of War on Land and Article 47 of the Fourth Geneva Convention, in situations of military occupation it is the occupying power which has the legal responsibility for the occupied territory and its inhabitants, including for the protection of human rights.[87] The inability of the occupied State to exercise and live up to its legal obligations and being forced to do so is significant for the situation of military occupation. Also under international human rights law States are responsible for the protection of human rights in occupied territories, given the object and purpose of human rights treaties and for reasons of effectiveness.[88] Effective control over a foreign territory as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercising all or some of the public powers normally to be exercised by that government, engages the responsibility of the State.[89] Its responsibility to ensure human rights because it exercises effective overall control

84 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion), 21 June 1971, ICJ Reports 1971, p. 16 at para. 118.

85 See also: L. Henkin 1995/1996, pp. 31-45. Fox 1997, pp. 105-130. Reisman 2000, pp. 239-258. Meron 1995, p. 82. Meron 1986, p. 106. Orakhelashvili 2003, p. 542.

86 Meron 1995, p. 82.

87 Fleck 1999, p. 242. Meron 1978, p. 543.

88 Meron 1978, pp. 542-557.

89 ECtHR, *Bankovic at al v Belgium and 16 Other Contracting States* (admissibility decision), 12 December 2001, App. No. 52207/99, para. 71.

over a foreign territory literally implies overall control to the extent that the territory can be regarded as de facto belonging to the State.

1.2.3.3b Attribution of conduct

A State can also be responsible by reason of certain acts performed, or producing effects, outside its territory if these acts can be attributed to it. As a basis for determining in general when certain acts can be attributed to a State it is useful to look at the Draft Articles on Responsibilities of States for Internationally Wrongful Acts adopted by the International Law Commission of the United Nations on 31 May 2001.[90] The notion that any act of a State's agent performed outside its territory or producing an effect outside its territory engages the responsibility of that State forms part of these Draft Articles. In the Draft Articles, it is outlined that a State is responsible for any conduct of its agents. No mention is made of limitations as regards the territory of the State. Although these Articles are still in draft, they do indicate a certain consensus between States as to the rules of State responsibility in international law, and can therefore be of importance to the issue at hand.[91] According to these Draft Articles, a State is responsible for any conduct that is attributable to it.

First, this means that a State can be responsible for actions as well as omissions.[92] There is no difference between actions and omissions; both can instigate an internationally wrongful act or a violation of a treaty provision. It may, however, be more difficult to isolate an omission from the surrounding circumstances which are relevant to determine the responsibility than if it is an action.[93] Secondly, these Draft Articles indicate when certain conduct – an action or omission – is attributable to the State.[94] In short the following rules are formulated in Articles 4 to 11. The conduct of any State organ can be attributed to the State, provided that the organ was acting in its capacity as a State organ and is considered as such under national law. Reference to a State organ covers all the individual or collective entities which make up the organisation of the State. The position of the organ in the organisation of the State is irrelevant. The organ can exercise executive, legislative, judicial or any other function of the State. Furthermore, it is irrelevant whether the organ belongs to the national government or to a territorial governmental entity.[95] It is not just the conduct of State organs which can be attributed to the State, but also acts of other organs or persons empowered by national law to exercise elements of governmental authority, provided they were acting in that capacity.[96] A State is also responsible if an organ has been placed at the disposal of the State by another State, provided it is acting

90 International Law Commission, 53rd session (2001), UN doc. A/56/10, <via www.un.org/law/ilc>.
91 Lawson 1999-2, p. 204. Lauterpacht & Bethlehem 2003, pp. 108 and 109 (para. 59).
92 Article 2 Draft Articles on Responsibilities of States for Internationally Wrongful Acts.
93 International Law Commission, Commentaries to the draft articles on Responsibilities of States for internationally wrongful acts, 53rd session (2001), UN doc. A/56/10, p. 70.
94 Ibid., p. 71.
95 Article 4 Draft Articles on Responsibilities of States for Internationally Wrongful Acts.
96 Ibid., Article 5.

in the exercise of elements of governmental authority of the State responsible.[97] In all these situations the State remains responsible if the conduct exceeds its authority or contravenes instructions.[98] It is clear that States should always be held responsible for all acts committed by their agents in their official capacity. The responsibility of States in international law is not a question of liability.[99] As a State is an abstract entity it can act only through individuals. A State is responsible for only those acts or omissions which were done on its behalf. Although the Draft Articles are not very clear on when an individual acts in his private capacity and when on behalf of the State, it can be concluded from Articles 4 to 11 that any conduct of a State official or employee of a State organ can presumptively be attributed to the State when the conduct employed or abused comes within the means or the coercive power placed at his disposal or when he has acted within the scope of his actual or apparent authority or function, unless the State can prove otherwise.[100] In its commentaries on the Draft Articles the International Law Commission stated, 'where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State'.[101]

Nevertheless, the responsibility of the State does not go so far as to place all responsibility on the State for all conduct committed by individuals solely by reason of the fact that the individual is part of a State organ.[102] In principle, a State is not responsible for the conduct of private individuals. However, if an individual or group of individuals has acted on the instructions or under the direction or control of the State or is in fact exercising elements of the governmental authority in the absence or default of official authorities and in circumstances such as to call for the exercise of those elements of authority, the State is responsible.[103] Furthermore, a State is responsible for the conduct of an insurrectional movement which becomes the new government of that State, for the conduct of any movement which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under

97 Ibid., Article 6.

98 Ibid., Article 7.

99 International Law Commission, Commentaries to the draft articles on Responsibilities of States for internationally wrongful acts, 53rd session (2001), UN doc. A/56/10, pp. 100-102.

100 Meron 1989, pp. 156-157.

101 International Law Commission, Commentaries to the draft articles on Responsibilities of States for internationally wrongful acts, 53rd session (2001), UN doc. A/56/10, p. 91.

102 Contrary to international humanitarian law. In Article 3 of the Hague Convention No. IV (Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907) it is stated that a belligerent party: 'shall be responsible for all acts committed by persons forming part of its armed forces'. A State is responsible by the mere fact that a person is in practice part of the State's armed forces, even if he has acted as a private person. Article 29 of the Fourth Geneva Convention (Convention (IV) related to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949) does not seem to go that far as it speaks of agents instead of persons: 'The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred'.

103 Articles 8 and 9 Draft Articles on Responsibilities of States for Internationally Wrongful Acts.

its administration and for any conduct it acknowledges and adopts as its own.[104] Finally, even if a person acts as a private individual a State can still be responsible. In general, States are required to prevent private citizens from abusing the rights of others within their jurisdiction.[105] The responsibility of the State is then engaged, not because of the act itself, but because of the lack of due diligence or deficiencies in domestic legislation to prevent the act, to compensate the victim or to punish the perpetrators.[106] For example, a State is not responsible for the acts of private individuals in seizing an embassy as such, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure or to regain control over it.[107]

1.2.4 Reservations and declarations made to international human rights treaty provisions

States are in principle allowed to make reservations to international treaty provisions, including those on human rights. According to Article 2(1)(d) of the Vienna Convention on the Law of Treaties reservations are defined as:

> 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.

The use of reservations is further regulated by Article 19 of the Vienna Convention, according to which:

> 'A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
> a. The reservation is prohibited by the treaty;
> b. The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
> c. In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty'.

The question whether or not reservations made to human rights norms are compatible with the object and purpose of human rights is complex. It cannot be said that reservations to human rights treaties by definition will fail the compatibility test.[108] How-

104 Ibid., Articles 10 and 11.
105 Joseph, Schultz & Castan 2000, p. 62.
106 Meron 1989, p. 171.
107 International Law Commission, Commentaries to the draft articles on Responsibilities of States for internationally wrongful acts, 53rd session (2001), UN doc. A/56/10, p. 81.
108 Aust 2004, p. 111.

ever, reservations to human rights norms will not easily be accepted.[109] The Human Rights Committee has stated that:

> 'it is desirable, in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being'.[110]

Arguably, reservations which aim to exclude or modify peremptory norms of general international law (*jus cogens* norms[111]), rules of customary international law and rights that have an absolute character are incompatible with the object and purpose of such norms.[112]

In addition to reservations a State may also make interpretative declarations. These are formal statements setting out the interpretation favoured by the State.[113] Often a declaration is made to establish an interpretation which is in line with the State's domestic laws. Declarations are important elements in the interpretation of treaties. When a declaration aims to exclude or modify the legal effect of a treaty norm it is in fact a reservation in disguise, and should thus be seen as a reservation rather than a declaration.[114]

1.3 General remarks on the prohibition on refoulement

1.3.1 The concept of asylum

The prohibition on refoulement is the cornerstone of international refugee and asylum law. It is thus important to understand the concept of asylum. The term 'asylum' has no common meaning in international law. In general, it refers to the protection or freedom from seizure or harm provided by a State. More specifically for the purpose of this study the concept of asylum refers to protection of an individual from proscribed harm or human rights violations, the protection being provided by a State other than the individual's own State, i.e. his country of nationality or habitual residence.[115]

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109 According to Flinterman, 'the possibility of making reservations is hard to be reconciled with the character and contents of human rights obligations as a minimum standard': Flinterman 2006, p. 1102.

110 HRC, General Comment No. 24 (1994), para. 4.

111 Article 53 Vienna Convention on the Law of Treaties: 'a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

112 HRC, General Comment No. 24 (1994), paras 8 and 10.

113 Aust 2004, p. 101.

114 Ibid., pp. 104 and 105.

115 The history and development of the term and concept of 'asylum' are extensively discussed by Grahl-Madsen in Grahl-Madsen 1972. See also: Battjes 2006, pp. 5 and 6.

Asylum thus applies to aliens receiving international protection in the absence of national protection.

According to Article 14 of the Universal Declaration of Human Rights (UDHR) everyone has the right to seek and to enjoy in other countries asylum from persecution. Contrary to most of the other rights referred to in the UDHR a right to seek and enjoy asylum has not been formulated in any of the subsequent human rights treaties within the context of the United Nations. In fact, with the exception of Article 22(7) of the Inter-American Human Rights Convention and Article 12(3) of the African Charter on Human and Peoples' Rights, a right to seek and enjoy asylum has not been formulated in any – global or other regional – human rights treaty.[116] Nevertheless, asylum protection has found a basis in international law. The cornerstone of international asylum protection is the prohibition on refoulement by which – in general – States are obliged not to return a person to his country of origin, or any other country for that matter, where he is at risk of being subjected to serious harm or serious human rights violations. The prohibition on refoulement, as defined in a number of international legal instruments, has become the backbone of international asylum protection. In general, this prohibition provides the individual concerned with a protected status allowing him to receive protection from being forced to go, directly or indirectly, to a territory where he may be at risk or in danger of serious harm.

International asylum protection is, however, not limited to the prohibition on refoulement. A person seeking asylum may be a refugee in accordance with the Refugee Convention and is then entitled to the rights set out in that Convention. Furthermore, various asylum protection instruments have been developed on a regional level. In the Middle East the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) provides assistance to Palestinian refugees. In Africa the Organisation of African Unity (OAU) in 1969 adopted the Convention on Refugee Problems in Africa. In Latin America it was acknowledged as early as in 1889 with the adoption of the Montevideo Treaty that political refugees should be accorded inviolable asylum.[117] In 1954 the Caracas Convention on Diplomatic Asylum was adopted together with the Caracas Convention on Territorial Asylum. Within Europe the European Union has adopted various directives and regulations under Title IV of the Treaty establishing the European Community (EC Treaty). Finally, international asylum protection also includes the protection of a variety of international institutions, most notably the United Nations High Commissioner for Refugees (UNHCR).

116 With the development of a Common European Union Asylum System, and in particular the adoption of the EU Qualification Directive a right to seek and enjoy asylum has now been formulated in EU legislation.

117 Article 16 of the Montevideo Treaty on International Penal Law (revised to Article 20 in 1940).

1.3.2 The concept of refoulement

The prohibition on refoulement prohibits, in broad and general terms, the forced direct or indirect removal of an individual to a country or territory where he runs a risk of being subjected to human rights violations. This may be the individual's country of nationality or habitual residence or any other country, territory or area where such a risk exists. On most occasions in this book I refer to the country of origin, but I include in this term any country, territory or destination to which the individual is forced to return.

The object and purpose of the prohibition on refoulement is the prevention of human rights violations; the prohibition is prospective in scope and not intended to right past wrongs.[118] In general, the prohibition is an expression of the preventive approach to human rights violations.[119] A State is responsible for not putting the individual into a situation of risk. The prohibition on refoulement is independent of the risk materialising, i.e. whether or not certain human rights are violated. In that regard the prohibition does not entail the co-responsibility of the removing State for the human rights violation which may or may not occur; it entails an independent responsibility. The prohibition on refoulement is an independent human right.

The prohibition on refoulement has found expression in a number of international legal instruments. Traditionally, the term 'refoulement' refers to the obligation of States under Article 33 of the Refugee Convention not to return a refugee to a country where his life or freedom is threatened. A second explicit prohibition on refoulement was later formulated in Article 3 of the Convention against Torture. Furthermore, such a prohibition has also been developed by the European Court of Human Rights in accordance with the general prohibition on torture and inhuman and degrading treatment and punishment laid down in Article 3 of the ECHR, and by the Human Rights Committee in accordance with a similar prohibition contained in Article 7 of the ICCPR.

To analyse and compare the various prohibitions on refoulement that are part of this research I have identified a number of common features. These features will form the basis for each of the chapters dealing with the various treaties and refoulement prohibitions as well as for the concluding chapter in which the four treaties discussed and their refoulement prohibitions will be compared. These features are:

1. The harm from which a person is protected by the prohibition on refoulement;
2. The element of risk;
3. The absolute or non-absolute character of the prohibition;
4. The character and content of the States' obligations deriving from the prohibition.

118 Miller 2003, p. 303.
119 Suntinger 1995, p. 204.

1.3.2.1 The harm from which a person is protected

As has been said, in general the prohibition on refoulement aims to prevent individuals from being subjected to human rights violations; it protects people from future harm. The prohibition does not apply to every human right. Looking at the treaties which are the subject of this study such harm is defined by such concepts as persecution, torture, inhuman or degrading treatment or punishment. A common feature of the harm from which humans are protected by all prohibitions on refoulement is that they must attain a certain level of severity. In addition, it is relevant to look at such issues as the intention behind the threatened harm and who will perpetrate the harm.

1.3.2.2 The element of risk

The prohibition on refoulement protects an individual from a risk of being subjected to serious harm. The probability that subjection to proscribed harm will occur forms the essence of the right to be protected from refoulement. The element of risk is difficult to define. It involves not so much a probability calculus as an assessment of the relevant facts and circumstances based on issues such as prospectivity, objectivity, individualisation and credibility. In addition, it will be important to take into account factors which may minimise or negate the risk, such as the availability of national protection.

1.3.2.3 National protection

The right to be protected from refoulement is conditional upon the absence of national protection. National protection refers to protection which is available in the individual's own country. This can be his country of nationality or, where he is stateless, his country of habitual residence. Relevant questions are: who has the ability to provide protection and what criteria must be applied in order for such protection to be effective?

1.3.2.3a Internal protection alternative

The concept of an internal protection alternative may be regarded as a specific model of national protection. In general, the concept refers to a specific geographical area inside the individual's country of origin where he is able to obtain effective protection which is unavailable in other parts of the country.

1.3.2.3b Diplomatic assurances to guarantee safety

The practice of diplomatic assurances to guarantee the safety of people after their removal is another method used to allow the removal of aliens without violating the

prohibition on refoulement.[120] Diplomatic assurances are meant to reassure the removing State that the individual concerned will not be subjected to torture, other forms of proscribed ill-treatment or persecution upon return; in other words, to ascertain that it is safe to remove the individual without breaching the prohibition on refoulement. Diplomatic assurances are used in this book in the context of the transfer from one State, the State in which an individual is seeking protection, to another State, the country of origin, of a person who may otherwise be found at risk of torture, inhuman or degrading treatment or punishment or any form of persecution. The assurances aim to minimise or negate the risk of proscribed harm and are provided by the country of origin, most commonly at the request of the removing State.

Reliance on diplomatic assurances is a longstanding practice in extradition relations between States.[121] Diplomatic assurances are requested and received in the context of bilateral extradition proceedings; a clear legal context involving readily identifiable and verifiable assurances. However, diplomatic assurances are increasingly used in the context of asylum, which does not provide a clear legal context.

Usually, diplomatic assurances are sought on an individual basis and relate directly to the individual concerned. There is however a recent development of using them as general clauses concerning the treatment of deportees in bilateral agreements.[122] For example, in August 2005 the United Kingdom signed a Memorandum of Understanding (MoU) with Jordan regulating the deportation of people which contains a general remark that the United Kingdom and Jordan will comply with their human rights obligations under international law regarding people who are returned under this MoU.[123]

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120 The extent of the use of diplomatic assurances is difficult to quantify. There tends to be a general secrecy surrounding the use of diplomatic assurances: see Jones 2006, p. 12, note 17. See for a study on diplomatic assurances in expulsion cases, in particular within the UN system, North America and Europe, a report by Human Rights Watch 2004. Larsaeus 2006. Schimmel 2007, pp. 18 and 19, and notes 147 and 152.

121 UNHCR 2006, p. 2.

122 Ibid., p. 3.

123 Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan regulating the provision of undertakings in respect of specified persons prior to deportation, Amman, 10 August 2005. See also a similar Memorandum of Understanding between the United Kingdom and Libya, signed in Tripoli on 18 October 2005. According to these MoUs several rules apply. These rules are: (1) if arrested, detained or imprisoned following his return, a returned person will be afforded adequate accommodation, nourishment and medical treatment, and will be treated in a humane and proper manner, in accordance with internationally accepted standards; (2) a returned person who is arrested or detained will be brought promptly before a judge or other officer authorised by law to exercise judicial power in order that the lawfulness of his detention may be decided; (3) a returned person who is arrested or detained will be informed promptly by the authorities of the receiving state of the reasons for his arrest or detention, and of any charge against him; (4) if the returned person is arrested, detained or imprisoned within 3 years of the date of his return, he will be entitled to contact, and then have prompt and regular visits from the representative of an independent body nominated jointly by the UK and Jordanian authorities. Such visits will be permitted at least once a fortnight and whether or not the returned person has been convicted, and will include the opportunity for private interviews with the returned person. The nominated body will give a report of its

Normally, diplomatic assurances are not legally binding; they do not provide a mechanism of enforcement or the possibility of obtaining redress in the event of non-compliance. In practice, some form of monitoring mechanism is usually agreed, but its effectiveness is questionable.

1.3.2.4 The absolute or non-absolute character of the prohibition on refoulement

Some human rights are formulated in absolute terms. This means, first, that the text of the treaty provision does not allow States parties to make any exceptions, for example, for reasons of public interest or national security. Secondly, no derogations from these rights are permitted in times of war or for reasons of public emergency. This category of human rights is easily identified by looking at the various human rights treaties studied in this book. The text of, for example, the prohibition on torture and other cruel, inhuman or degrading treatment or punishment is laid down in Article 3 of the ECHR, and Article 7 of the ICCPR does not allow any exceptions to this prohibition for reasons such as national security, public order, public health or morals or the rights and freedoms of others. These provisions contain no limitation clause. Furthermore, Articles 15(2) of the ECHR and 4(2) of the ICCPR respectively do not allow for derogations from these provisions in times of war or public emergency.

Though the existence of a category of absolute human rights is widely accepted, the scope and content are still open for debate.[124] This debate can be confusing as it is not about the hierarchy of human rights and the fundamental nature of certain human rights, but about (1) permitting exceptions to or derogations from certain human rights in order to balance individual rights with the interests of States, for example,

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visits to the authorities of the sending state; (5) except where the returned person is arrested, detained or imprisoned; the receiving state will not impede, limit, restrict or otherwise prevent access by a returned person to the consular posts of the sending state during normal working hours. However, the receiving state is not obliged to facilitate such access by providing transport free of charge or at discounted rates; (6) a returned person will be allowed to follow his religious observance following his return, including while under arrest or while detained or imprisoned; (7) a returned person who is charged with an offence following his return will receive a fair and public hearing without undue delay by a competent, independent and impartial tribunal established by law. Judgment will be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; (8) a returned person who is charged with an offence following his return will be allowed adequate time and facilities to prepare his defence, and will be permitted to examine or have examined the witnesses against him and to call and have examined witnesses on his behalf. He will be allowed to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

124 Meron 1986, pp. 1-23. Tiburcio 2001, pp. 75 and 78. For example, the European Convention on Human Rights, in Article 15(2), possesses a smaller list of non-derogable rights than that listed in Article 4(2) of the ICCPR.

issues of national security, and (2) differentiating between prohibiting in absolute terms such conduct as torture and inhuman treatment when a State is directly responsible for it, and allowing a State to remove an individual to a situation in which he is at risk of being subjected to such conduct for which the removing State is not directly responsible. The question whether or not a distinction can be made between prohibiting such acts as torture and inhuman or degrading treatment conducted or tolerated by a State directly and such acts conducted or tolerated by other States to which the individual concerned may be exposed after removal; i.e. in the context of refoulement, is relevant to this study.

1.3.2.5 The character and content of the States' obligations deriving from the prohibition on refoulement

The prohibition on refoulement proscribes the removal of a person. This primarily entails an obligation on States to refrain from returning a person to another country or taking any other measure whereby a person is forced to return or go to a country where he is at risk of being subjected to serious harm. This obligation is primarily negative in its nature. The obligation includes all forms of measures by which a person is removed or forced to go and is irrespective of the legal context in which the removal takes place. For example, it includes the deportation or expulsion of an alien as well as the extradition of a criminal. Moreover, it includes methods of forced removal which have more recently become known as ordinary and extraordinary rendition.[125] An interesting question is whether the obligation can also include less direct actions of a State, for example, deprivation of basic rights and needs as a result of which it will be virtually impossible for an individual to stay, resulting in him being forced to return to another country, or measures such as visa requirements, airline sanctions or even measures against human trafficking.

Besides creating negative obligations, the prohibition on refoulement also creates positive obligations for the State. States may be required to take certain actions which prevent people from being forcibly removed to a country where they are at risk. For example, States may be obliged to allow the individual to enter their territory, or to organise and allow people access to a protection status determination procedure.

In general, the right to be protected from refoulement correlates with the general obligation on States to ensure effective protection. Such duty may comprise a single duty to refrain from acting (negative obligation) or to act (positive obligation), or it may comprise multiple duties, including both negative and positive obligations.

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125 Nowak & McArthur 2008, p. 196, according to which ordinary rendition is usually used for the forcible abduction and removal of a suspect, by military or intelligence agents, from the territory of another State for the purpose of bringing him to justice, whereas extraordinary rendition is used for the forced removal of suspected terrorists to countries with harsher interrogation techniques.

1.3.2.6 Extradition and a conflict of treaty obligations

The prohibition on refoulement contained in various treaty provisions may be in conflict with other provisions, in particular those dealing with extradition. Extradition is frequently covered by a bilateral or multilateral extradition treaty. A conflict may arise when a State has an obligation to extradite an individual under such a treaty while at the same time extradition is prohibited under provisions of non-refoulement contained in human rights treaties. In principle, a conflict of treaty obligations raises questions of priority and responsibility, not of validity, except when there is a conflict between a treaty obligation and a rule of *jus cogens*.[126] In such a case the treaty is void.[127] The prohibition on torture has evolved into a rule of *jus cogens*.[128] Arguably, a prohibition on refoulement which is aimed at preventing subjection to torture must prevail over any legal obligation to extradite a person to a State in which he is likely to be tortured.[129] This leaves unresolved a possible conflict between an obligation to extradite and a prohibition on refoulement which prohibits removal to territories where there is a risk of subjection to other forms of serious harm. It is beyond the scope of this study to investigate whether or not prohibitions on cruel, inhuman or degrading treatment or punishment may also be qualified as *jus cogens* norms.[130] If they can, these prohibitions on refoulement prevail over extradition obligations. If such norms cannot be qualified as *jus cogens* norms it remains interesting to outline possible ways of resolving conflicts between legal obligations to extradite and prohibitions on refoulement. Ways of resolving a conflict of treaty obligations have been comprehensively analysed by Mus.[131] In short, treaty conflicts

126 Mus 1996, pp. 63 and 64.

127 Article 53 of the Vienna Convention on the Law of Treaties, according to which a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (i.e. a rule of *jus cogens*).

128 ICTY, *Prosecutor v Furundžija* (Judgment of the Trial Chamber), 10 December 1998, IT-95-17/1-T, para. 153; Dugard & Van den Wyngaert 1998, pp. 197 and 198.

129 Dugard and Van de Wyngaert have stated that because of the *jus cogens* character of the prohibition on torture, 'no requested state should have difficulty in justifying a refusal to extradite a person to a state in which he is likely to be subjected to torture – a course approved by the 1984 Convention against Torture and the UN Model Treaty on Extradition': Dugard & Van den Wyngaert 1998, p. 198.

130 Allain has argued that the principle of non–refoulement has acquired the status of *jus cogens:* Allain 2002. Lauterpacht and Bethlehem as well as Goodwin-Gill and McAdam have argued that non-refoulement on the basis of torture is part of customary international law: see Lauterpacht & Daniel Bethlehem 2003, p. 163 (para. 253) and Goodwin-Gill & McAdam 2007, p. 348. Non-refoulement on the basis of other forms of cruel, inhuman or degrading treatment or punishment or on the basis of persecution is more contentious. However, Goodwin-Gill and McAdam have argued that even those prohibitions amount to rules of international customary law: Goodwin-Gill & McAdam 2007, p. 354. Notably, neither Lauterpacht and Bethlehem nor Goodwin-Gill and McAdam qualified the prohibition on refoulement, whether based on the prohibition of torture or other forms of ill-treatment, as a rule of *jus cogens*. Bruin and Wouters raised the issue of justiciability of the prohibition of refoulement as a norm of international customary law or of *jus cogens*: see Bruin & Wouters 2003, p. 26.

131 Mus 1996.

can be resolved if one of the treaties contains a conflict clause. In the absence of such a clause a conflict may be resolved by way of treaty interpretation in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties,[132] or by applying the rule of *lex posterior derogate legi priori*. According to this rule the later obligation in time prevails, but only when both treaties include the same States parties.[133] Again, it is beyond the scope of this study to investigate the applicability of this rule. What is relevant though is questioning the possible preference for the prohibition on refoulement as part of international human rights treaty law and extradition treaties in the context of resolving treaty conflicts. The Vienna Convention does not prioritise any type of treaty over another, except for the Charter of the United Nations.[134] According to Articles 55(c) and 56 of the UN Charter Member States shall promote universal respect for and observance of human rights and fundamental freedoms for all without discrimination, and pledge themselves to take joint and separate action in co-operation with the United Nations for the achievement of this purpose. In addition, Article 103 states:

> 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

According to the Article 30 of the Vienna Convention on the Law of Treaties the criteria for the application of successive treaties relating to the same subject-matter are subject to Article 103 of the UN Charter. Furthermore, the preamble to the Vienna Convention affirms the principles of international law embodied in the UN Charter and universal respect for, and observance of, human rights and fundamental freedoms for all. Kapferer therefore argues that extradition is prohibited when it is in breach of human rights obligations, including the prohibition on refoulement.[135] Mus on the other hand argues, and I agree, that Articles 55(c) and 56 of the UN Charter and the preamble to the Vienna Convention do not create clear identifiable obligations for States, but rather generate generic aims which States must pledge to carry out and promote.[136] According to Mus, arguing that an extradition treaty is in breach of Article 56 of the UN Charter and therefore that extradition is prohibited under Article 103 of the UN Charter does not have a real chance of success.[137] In international law there is no hierarchy of treaties. Human rights treaties, therefore, should be treated no differently from other treaties as regards to priority.[138]

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132 See section 1.2.1.1.
133 Article 30(3) Vienna Convention on the Law of Treaties.
134 Ibid., Article 30(1).
135 Kapferer 2003, p. 13 (para. 41) and p. 80 (para. 231).
136 Mus 1996, pp. 41 and 79.
137 Ibid., p. 41.
138 Ibid., p. 217. Vermeulen 1990, p. 431 (para. 3.4).

2 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees

2.1 Introduction

2.1.1 Prohibition on refoulement under the Refugee Convention

This chapter covers the prohibition on refoulement as contained in the 1951 Convention relating to the Status of Refugees (hereafter referred to as the Refugee Convention) and the 1967 Protocol relating to the Status of Refugees (hereafter referred to as the Refugee Protocol).[1] According to Article 33, paragraph 1, of the Refugee Convention:

> 'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.

The second paragraph provides a limitation to this prohibition on refoulement by stating that:

> 'the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.

Article 33 of the Refugee Convention provides for the explicit prohibition of refoulement for refugees whose life or freedom would be threatened and who are no danger to the country in which they seek refuge or its community (hereafter referred to as the country of refuge or host country). Article 33 of the Refugee Convention 'embodies the humanitarian essence of the Convention'.[2] It is the backbone of refugee protection.

In this chapter I will analyse the scope and content of the prohibition on refoulement contained in Article 33 of the Refugee Convention as it has been developed in international law, as well as the character of the obligations of the States parties derived therefrom. This chapter is divided into four sections. The first is an introduction to the Refugee Convention, including its object and purpose and its content

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1 The Convention relating to the Status of Refugees was adopted on 25 July 1951 in Geneva and entered into force on 22 April 1954 (189 UNTS 150). The additional Protocol relating to the Status of Refugees was adopted on 31 January 1967 in New York and entered into force on 4 October 1967 (606 UNTS 267).

2 Lauterpacht & Daniel Bethlehem 2003, p. 107.

and structure. This section also discusses the specific rules of and international sources for interpreting and applying the Convention. In the second section the personal and territorial scope, including the extraterritorial reach, of Article 33(1) of the Refugee Convention will be discussed. The third section deals with the content or substance of the prohibition on refoulement contained in Article 33 and discusses the various elements of the prohibition as well as exceptions to the right to be protected from refoulement. In the fourth section I discuss the character and contents of a State's obligations which derive from the prohibition on refoulement. Finally, this chapter will end with a brief conclusion.

2.1.2 A brief introduction to the Refugee Convention[3]

In the aftermath of the Second World War the United Nations General Assembly decided, in 1950, to convene a Conference of Plenipotentiaries to discuss and sign a convention on refugees and stateless persons.[4] The Conference, held in Geneva from 2 to 25 July 1951, was attended by the delegates of 26 States.[5] At the end of the Conference the text of a convention on refugees was agreed upon.[6] The Refugee Convention entered into force on 22 April 1954. In 1967 it was followed by a Protocol relating to the Status of Refugees. This Refugee Protocol is an independent legal instrument but very much related to the Refugee Convention.[7] The Protocol entered into force on 4 October 1967.[8] States parties to the Refugee Protocol undertake to apply Articles 2 to 34 of the Refugee Convention without the temporal and optional geographical limitation contained in (Article 1A(2) and Article 1B of the Refugee

3 For a comprehensive analysis of the various provisions contained in the Refugee Convention I would like to refer to Grahl-Madsen 1966 (re Article 1). Hathaway 1991 (re Article 1). Hathaway 2005 (re Articles 2 to 34). Lauterpacht & Bethlehem 2003, pp. 87 to 177 (re Article 33). In addition on a comprehensive analysis of international refugee law, see Grahl-Madsen 1972. Goodwin-Gill & Jane McAdam 2007.

4 UN GA res. 429(V), 14 December 1950.

5 The 26 participating States were: Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Egypt, Federal Republic of Germany, France, Greece, Holy See, Iraq, Israel, Italy, Luxembourg, Monaco, Netherlands, Norway, Sweden, Switzerland (also representing Liechtenstein), Turkey, United Kingdom, United States of America, Venezuela, Yugoslavia. Two States, Cuba and Iran, were represented by observers.

6 The Conference was unable to complete its work on a convention relating to the status of stateless persons. A proposed Refugee Protocol formed the basis of the 1954 Convention relating to the status of Stateless Persons, 360 UNTS 117.

7 Goodwin-Gill 1996, p. 297. Hathaway 2005, p. 111.

8 For more background information on the drafting and adoption of the 1967 Protocol see Bem 2004, pp. 609-627.

Convention.[9] States which had already opted for a geographical limitation in accordance with the Refugee Convention may however continue to use that limitation.[10]

2.1.2.1 Object and purpose

The preamble to the Refugee Convention affirms how important it is that human beings enjoy fundamental rights and freedoms without discrimination, and contains a specific reference to the Universal Declaration of Human Rights (UDHR). The preamble stresses the social and humanitarian nature of the problems with which refugees are faced. The Refugee Convention has a clear humanitarian character[11] and must be regarded as a human rights treaty.[12] The human rights purpose[13] of the Refugee Convention was reaffirmed by its States parties in a Declaration adopted at the Ministerial Meeting of States Parties to mark the fiftieth anniversary of the Refugee Convention in 2001.[14] The object and purpose of the Convention is the protection of the fundamental (human) rights of people who are no longer protected by their own country and have a right to enjoy protection elsewhere. Refugee protection, as a form of so-called 'international protection', is a substitute, surrogate or alternative form of protection where national protection is failing.[15]

The Convention establishes a variety of rights, including the right to be protected from refoulement. It regulates the legal status of refugees and prescribes certain standards of treatment for refugees.[16]

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9 According to Article 1A of the Refugee Convention, the term refugee shall apply, inter alia, to any person who fulfils the criteria of the refugee definition contained in Article 1A(2), but only as a result of events occurring before 1 January 1951. Article I(2) of the Refugee Protocol removes this time limitation.

10 On 1 December 2006 four States parties to the Refugee Convention still apply the geographical limitation: the Democratic Republic of Congo, Madagascar, Monaco and Turkey. Three States, Cape Verde, the United States of America and Venezuela, are party to only the Refugee Protocol. Three States, Madagascar, Monaco and St Kitts and Nevis, are party to only the Refugee Convention. Finally, as of 1 December 2006 a total of 141 States are party to both the Refugee Convention and the Refugee Protocol.

11 Lauterpacht & Daniel Bethlehem 2003, pp. 106 and 107.

12 EXCOM Conclusion No. 85 (XLIX), 1998. Hathaway 2005, p. 5: 'refugee law is a remedial or palliative branch of human rights law', and p. 53: 'the first two operative paragraphs of the Preamble to the Refugee Convention unequivocally establish the human rights purposes of the treaty'. See also Türk 2002, p. 2: 'the failure or inability by the country of origin to fulfil the responsibility for safeguarding human rights became a matter of international concern and responsibility. Filing this protection vacuum required the creation of a specific regime of right for refugees', and paragraph 23 of the Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23.

13 Hathaway 2005, p. 53.

14 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Geneva: Ministerial Meeting of States Parties 12-13 December 2001, 16 January 2002, UN doc. HCR/MMSP/2001/09, para. 2 (preamble) and para. 2 (operative paragraphs).

15 Hathaway 1991, p. 124. See also the UNHCR Handbook paras 90 and 106: 'wherever available, national protection takes precedence of international protection'.

16 Goodwin-Gill 1996, pp. 296 and 298. Türk & Nicholson 2003, p. 3. Hathaway 2005, pp. 4 and 5.

2.1.2.2 Content and structure

The Refugee Convention starts by providing a definition of the term 'refugee' in Article 1. Article 1 is divided into six paragraphs, numbered 1A to 1F. Paragraphs A and B contain the so-called inclusion clauses. Paragraph C contains the cessation clauses and paragraphs D, E and F contain the exclusion clauses.

Paragraphs A and B stipulate when a person is a refugee (inclusion). Paragraph A defines a refugee in two ways. The first sub-paragraph defines a refugee as a person who was considered a refugee in accordance with legal instruments preceding the Refugee Convention (often referred to as a statutory refugee[17]). Given the lapse of time this provision is no longer relevant.[18] The second sub-paragraph of paragraph A contains the general definition of a refugee. This definition is important in understanding the prohibition of refoulement and will be discussed in more detail in section 2.3 below. Paragraph B contains a geographical limitation by providing the possibility for States parties to limit the Convention to events occurring in Europe. Most States which originally opted for such a limitation have since revoked this option, with the exception of four States parties.[19] Furthermore, as already mentioned above, with the adoption of the Refugee Protocol such a limitation was no longer permitted, with the exception of States which had already opted for the limitation.

Paragraph C contains the cessation clauses, which set out when a refugee ceases to be one. This involves situations where the refugee has voluntarily re-availed himself of the protection of his country of origin, or has acquired a new nationality and enjoys the protection of his new country of nationality. It also refers to situations in which the refugee can no longer continue to refuse to avail himself of the protection of the country of his nationality, because the circumstances in connection with which he was recognised as a refugee have ceased to exist. Paragraph C will not be further discussed.

Paragraphs D, E and F contain the exclusion clauses, according to which a person is excluded from refugee status. Paragraphs D and E will be briefly discussed in section 2.3.3.2. Paragraph F will be discussed in detail in section 2.3.3.3.

If a person is a refugee in accordance with Article 1 of the Refugee Convention he has a number of rights in accordance with Articles 3 to 34 of the Convention. The Refugee Convention, however, does not grant all rights immediately to all refugees, but distinguishes between refugees in general, refugees who are present in the country of refuge, refugees whose presence in the country of refuge is lawful, and refugees who are lawfully residing in the country of refuge. The right to be protected from refoulement in accordance with Article 33 of the Refugee Convention is granted to all refugees. Finally, a refugee has the obligation to conform to the laws and regulations as well as to measures taken for the maintenance of public order in the country of refuge (Article 2).

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17 UNHCR Handbook para. 32.

18 Ibid. para. 33.

19 These four States parties are: Congo, Madagascar, Monaco and Turkey.

2.1.2.3 Reservations and declarations

According to Article 42(1) of the Refugee Convention a State may, at the time of signature, ratification or accession, make reservations to Articles of the Convention, but with the exception of Articles 1, 3, 4, 16(1), 33 and 36 to 46.[20] Therefore, no reservation to the prohibition on refoulement is allowed. States parties have made various declarations of a political nature which do not alter the legal relationship between the parties as established under the Convention and therefore do not amount to reservations.[21] None of these declarations have an effect on the prohibition on refoulement contained in Article 33 of the Refugee Convention.

2.1.3 International sources for the interpretation of the Refugee Convention

This part of the research contains an analysis of the international meaning of the prohibition on refoulement contained in Article 33 of the Refugee Convention.[22] Unfortunately, there are no international legally binding sources available for interpreting the Refugee Convention, making the search for an international meaning difficult. In accordance with Article 38 of the Convention any dispute between the States parties relating to the interpretation or application of the Convention may be referred to the International Court of Justice (ICJ).[23] However, to date no such referral has been made. Apart from the ICJ no bodies are identified or created under the Refugee Convention with the competence to provide legally binding statements on the interpretation and application of the Convention.

Notwithstanding the difficulty in finding the international meaning of the Refugee Convention there are sources and methods available that make the finding of such meaning possible. Primarily, I rely on the United Nations High Commissioner for

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20 This is reiterated by Article VII(1) of the Refugee Protocol.

21 The Netherlands, for example, declared on ratification that Ambionese transported to that country after 17 December 1949 (Indonesia's independence) were not considered eligible for refugee status: see Goodwin-Gill 1996, p. 300. See also Blay & Tsamenyi 1990, pp. 527-559.

22 See Hathaway 2005, p. 2 in which he points out that the States parties to the Convention have a 'legal responsibility to interpret the Refugee Convention in a way that ensures a common understanding across States of the standard of entitlement to protection'. Also Hathaway 2005, p. 2, note 6, in which he quotes *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer*, [2001] 2 WLR 143 (HL): '[A]s in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning … without taking colour from distinctive features of the legal system of any individual contracting State. In principle therefore there can only be one true interpretation of a treaty … In practice it is left to national courts, faced, with the material disagreement on an issue of interpretation, to resolve it. But in doing so, [they] must search, untrammelled by notions of [their] national legal culture, for the true autonomous and international meaning of the treaty'. See also EXCOM, 'Agenda for Protection, Addendum', 26 June 2002, UN doc. A/AC.96/965/Add.1, Goal 1: 'More harmonized approaches to refugee status determination, as well as to the interpretation of the 1951 Convention and to the use of complementary forms of protection, are also called for'.

23 Article IV of the Refugee Protocol contains similar language.

Refugees (UNHCR) and the Executive Committee of the High Commissioner's Programme (Executive Committee or EXCOM). The reasons for this and the relevance of UNHCR and the Executive Committee as international sources will be discussed in sections 2.1.3.1 and 2.1.3.2. In general, these sources are authoritative, have global scope and are accepted as important sources by the States parties.

In addition, I will make use of the EU Qualification Directive[24] and of relevant literature in the field of international refugee law, in particular dealing with the interpretation and application of the Refugee Convention. Although geographically limited, the Qualification Directive provides for minimum common standards accepted by the EU Member States based, in part, on the Refugee Convention. The EU Qualification Directive is not just illustrative of how the EU Member States define and apply international refugee law, but may provide an important basis for a form of authoritative multilateral interpretation of international refugee law.

Furthermore, relevant literature is important, not only in identifying 'the teachings of the most highly qualified publicists of the various nations as a subsidiary means of determining the rules of law',[25] but also because it often makes use of national laws and practice of States parties. Furthermore, occasionally I will rely on the travaux préparatoires[26] to the Refugee Convention.

Sporadically I use national laws and practice, in particular case law, as an example to strengthen my argument. In my research I have not included a comprehensive and comparative analysis of the national laws and practices of States parties. It cannot be ruled out that occasionally States' laws and practices may contrast with the international legal interpretation analysed in this part. Notwithstanding the absence of States' laws and practices, I have deliberately refrained from including such laws and practices in order to focus on the search for an international meaning. This approach is in line with the methodology I have used for the other treaties that are part of this research and will moreover avoid the arbitrary use of national case law because it is impossible to analyse the laws and practice of all States party to the Refugee Convention. Although I acknowledge the limitations that my analysis thus entails I consider my methodology desirable for reasons of equality and consistency.

Guidance on the sources and techniques to be used in order to analyse the international meaning of the Refugee Convention is provided by the Vienna Convention on the Law of Treaties. The interpretation of any treaty, including the Refugee Conven-

24 European Union Council Directive on minimum standards for the qualification and status of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 2004/83/EC of 29 April 2004, Official Journal of the European Union L304/12, 30 September 2004.

25 Article 38(1)(d) of the Statute of the ICJ.

26 The travaux préparatoires as a source of interpretation must be used with great care. According to Lauterpacht and Bethlehem, 'the world of 1950-51 in which the Convention was negotiated was considerably different from the present day circumstances in which the Convention falls to be applied'. Lauterpacht & Bethlehem 2003, p. 106. Hathaway extensively analyses the role of the travaux préparatoires of the Refugee Convention in interpreting the Convention, in: Hathaway 2005, pp. 56-59. See also section 1.2.1.1 on the use of preparatory works of treaties.

tion, is governed by the rules of treaty interpretation contained in the Vienna Convention. For the purpose of this study, these rules were outlined in section 1.2.1.

2.1.3.1 The United Nations High Commissioner for Refugees (UNHCR)

The UNHCR has an important supervisory function when it comes to the interpretation and application of the Refugee Convention. According to the preamble to the Refugee Convention:

> 'the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the cooperation of States with the High Commissioner'.

And in accordance with Article 35(1) of the Refugee Convention the States parties have an obligation to co-operate with the UNHCR 'in the exercise of its [i.e. the UNHCR's] functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention'.[27] In addition, as a subsidiary organ of the United Nations General Assembly,[28] the UNHCR has a clear mandate, laid down in the Statute of the Office of the High Commissioner for Refugees, to provide 'international protection … to refugees who fall within the scope of the present Statute and [to seek] permanent solutions for the problem of refugees by assisting Governments … or private organisations …'.[29] One of the means specified in the UNHCR's Statute of providing for the protection of refugees is supervising the application of international conventions, including the Refugee Convention, for their protection.[30]

The UNHCR's duty to supervise the Refugee Convention is meant to ensure the optimal and harmonised application of the Convention.[31] In essence, the UNHCR's supervisory function is not that different from the supervisory role the United Nations

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27 This is reiterated by Article II(1) of the Refugee Protocol and by the States parties to the Refugee Convention in Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Geneva: Ministerial Meeting of States Parties 12-13 December 2001, 16 January 2002, UN doc. HCR/MMSP/2001/09, para. 8 (operative paras). The UNHCR's supervisory responsibilities under Article 35 Refugee Convention and its role in individual refugee determination procedures has been acknowledged in Article 21 of the EU Procedures Directive.

28 In 1949 the United Nations General Assembly decided to establish a High Commissioner's Office for Refugees, in accordance with Article 22 of the United Nations Charter (UN GA res. 319 (IV), 3 December 1949). A year later the General Assembly adopted the Statute of the Office of the High Commissioner for Refugees (UN GA res. 428 (V), 14 December 1950).

29 UNHCR Statute, Annex, Chapter 1, paragraph 1.

30 Ibid., Chapter II, paragraph 8(a). This was reiterated by the States parties to the Refugee Convention in the Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Geneva: Ministerial Meeting of States Parties 12-13 December 2001, 16 January 2002, UN doc. HCR/MMSP/2001/09, para. 9 (operative paras). See also EXCOM, Agenda for Protection, UN doc. A/AC.96/965/Add.1, 26 June 2002.

31 Kälin 2003, p. 617.

Treaty Bodies have regarding human rights treaties.[32] The problem is, however, that, contrary to UN treaty bodies, the UNHCR in its Statute or in the Refugee Convention is not provided with any specific enforcement power or tool. Neither has it any proper procedure for enforcing its supervisory role,[33] nor has it created a strong role on its own accord. Supervision of treaties by international institutions, such as the UNHCR, should include the following elements: (1) collection of information concerning the application of the Convention by the contracting States, (2) the assessment of this information in light of the applicable norms, and (3) an enforcement mechanism to ensure remedial action and norm compliance by the States parties concerned.[34] The first element is explicitly formulated in the UNHCR's supervisory powers laid down in Articles 35 and 36 of the Refugee Convention. States parties are obliged to provide the UNHCR with relevant information regarding, among other issues, the implementation and enforcement of the Convention.[35] Unfortunately, with regard to the other two elements neither the UNHCR's Statute nor the Refugee Convention contains any provisions. Notwithstanding the lack of any formal tools, the UNHCR's supervisory role does not end with the gathering of information. It is expected to achieve the harmonisation of interpretations of provisions of the Convention, to set in train the development of common standards and to ensure international co-operation.[36] In the absence of clear powers and tools the UNHCR can only use a wide range of advocacy activities covering the whole spectrum of displacement to try to convince States parties of its views. In order for the UNHCR to do that and to live up to its supervisory function it must provide States with clear, well-argued and consistent legal views on the interpretation and application of the Convention. The Executive Committee of the High Commissioner's Programme has, to some extent, conceptualised the UNHCR's supervisory role by identifying some of the necessary tools.[37] These tools include: (a) surveying individual cases with a view to identifying major protection problems,[38] (b) reporting on the application and implementation of the Refugee Convention in various States parties, including on national practice and procedures for the recognition of refugee status,[39] (c) receiving prompt and

32 It should be noted that UNHCR's supervisory role predates the institutional and supervisory developments in the human rights field: Türk 2002, p. 10.

33 Ibid., p. 5.

34 Ibid., pp. 9 and 10.

35 Article 35(2) and 36 of the Refugee Convention. Note that Article 36 of the Refugee Convention requires States parties to communicate to the United Nations Secretary General. In practice such communications are directed to the UNHCR. The Executive Committee of the High Commissioner's Programme has, in numerous Conclusions, reiterated the obligation of States parties to provide the UNHCR with detailed information regarding the implementation of the Convention, including: EXCOM Conclusion No. 16 (XXXI), 1980, para. (h), EXCOM Conclusion No. 57 (XL), 1989, preamble and para. (d), EXCOM Conclusion No. 61 (XLI), 1990, para. (i), EXCOM Conclusion No. 65 (XLII), 1991, para. (l) and (m), EXCOM Conclusion No. 77 (XLVI), 1995, para. (e), EXCOM Conclusion No. 79 (XLVII), 1996, para. (f).

36 Türk 2002, p. 10.

37 Ibid., p. 12.

38 EXCOM Conclusion No. 1 (XXVIII), 1975, para. (g).

39 EXCOM Conclusion No. 2 (XXVII), 1976, para. (c).

unhindered access to asylum applicants, refugees and returnees, including the right of refugees to contact the UNHCR,[40] (d) participating in proceedings to determine refugee status,[41] and (e) providing advice on the application of the provisions of the Refugee Convention.[42] In its efforts to use these tools the UNHCR makes statements and publishes a variety of documents. Unfortunately these documents do not always use the same format, may come from different departments within the UNHCR and are not always regularly updated.[43]

The UNHCR's role in countries which are party to the Refugee Convention and which have a functioning procedure for the determination of refugee status is advisory and consultative. The UNHCR is not only informed about asylum applications, but is entitled to submit its views when it deems necessary.[44] In addition, the UNHCR is often involved in drafting new legislation and commenting on proposed amendments to existing legislation.[45] In Europe, for example, the UNHCR has been, and continues to be, actively involved in the development of EU legislation, jurisprudence and policy in the field of asylum and refugee law.[46] It has been suggested – with all its pros and cons – that the UNHCR's supervisory role, in particular with regard to harmonisation of the interpretation and application of the Refugee Convention, could be improved by its (1) adopting and publishing more formal legal positions, (2) establishing a more structured and formalised state reporting mechanism, and (3) allowing various stakeholders to submit communications to the UNHCR concerning

40 EXCOM Conclusion No. 8 (XXVII) 1977, para. (e)(iv), EXCOM Conclusion No. 22 (XXXII) 1981, para. III, EXCOM Conclusion No. 33 (XXXV) 1984, para. (h), EXCOM Conclusion No. 44 (XXXVII) 1986, para. (g), EXCOM Conclusion No. 72 (XLIV) 1993, para. (b), EXCOM Conclusion No. 73 (XLIV) 1993, para. (b)(iii), EXCOM Conclusion No. 77 (XLVI) 1995, para. (q) and EXCOM Conclusion No. 79 (XLVII) 1996, para. (p).

41 EXCOM Conclusion No. 8 (XXVIII) 1977, para. (d). EXCOM Conclusion No. 28 (XXXIII) 1982, para. (e).

42 EXCOM Conclusion No. 19 (XXXI) 1980, para. (d) and EXCOM Conclusion No. 69 (XLIII) 1992, preamble.

43 For example, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status was last revised in 1992. It is in my view very worrying to see that the UNHCR has not updated this very important document in the light of recent developments in international asylum and refugee law, in particular after the Global Consultations and the adoption of various legal instruments by the European Union.

44 Türk 2002, p. 15. The advisory and consultative role of the UNHCR is explicitly recognised by Paragraph 15 of the Preamble to the EU Qualification Directive, according to which: 'Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention', and Article 21 of the EU Procedures Directive, which enables the UNHCR to present its views regarding individual applications for asylum.

45 Report of the Evaluation Team led by Bryan Deschamp, Consultant, 'Review of the use of UNHCR Executive Committee Conclusions on International Protection', Informal Consultative Meeting, 9 June 2008, para. 62.

46 See for a list of UNHCR Observations on EU policy: <www.unhcr.org/eu>. Report of the Evaluation Team led by Bryan Deschamp, Consultant, 'Review of the use of UNHCR Executive Committee Conclusions on International Protection', Informal Consultative Meeting, 9 June 2008, para. 61.

non-compliance with the Refugee Convention by States parties.[47] It should be no surprise that these suggestions are similar to the existing mechanisms available to the United Nations Treaty Bodies under various human rights treaties. In addition, it would be beneficial for the development of international asylum and refugee law if the UNHCR increased its legal interventions on the international level, for example, in the Human Rights Committee, the Committee against Torture and the European Court of Human Rights.

2.1.3.1a UNHCR Documentation[48]

The large amount of documentation coming from the UNHCR and its varying objectives, formats and discourse leads to confusion about its authority.[49] It is clear though that the UNHCR's statements are evidence neither of subsequent agreements nor of subsequent practice between the States parties to the Refugee Convention as referred to in Article 31(3) of the Vienna Convention on the Law of Treaties.[50] UNHCR documentation can also not be regarded as evidence of subsequent practice between the States parties to the Refugee Convention. The UNHCR is not an organisation made up of States parties to the Refugee Convention, but a subsidiary organ of the United Nations, acting with its own clear mandate. And the UNHCR's statements are not necessarily approved, affirmed or in any other way acknowledged by the States parties as representing an agreement on how to interpret or apply the Refugee Convention.

Notwithstanding the fact that UNHCR statements are not binding and their authority arguably depends on the quality of reasoning,[51] the UNHCR's mandate, activities and supervisory role, and in particular Article 35 of the Refugee Convention, support the authoritative character of UNHCR statements.[52]

The importance of the UNHCR as a source of interpretation for the Refugee Convention is acknowledged by the EU Qualification Directive. In recital 15 of its preamble the Directive notes that

47 Türk 2002, pp. 17-19.

48 The UNHCR's documentation as well as relevant information from other sources is available online at UNHCR's Refworld, which can be accessed on the internet via <www.refworld.org>.

49 According to Hathaway: 'the critical role of UNHCR in providing Art. 35 guidance to State parties is compromised not only by the sheer volume of less-than-fully-consistent advice now emanating from a multiplicity of UNHCR sources, but more fundamentally by recent efforts to draft institutional positions at such a highly detailed level that they simply cannot be reconciled with the binding jurisprudence of State parties': Hathaway 2005, p. 118.

50 Hathaway links UNHCR documentation with Article 31(3) of the Vienna Convention on the Law of Treaties, although he puts his comments in some perspective in a footnote by stating: 'clearly, however, the scope of agreement manifested should not be over stated', Hathaway 2005, p. 54 and note 146. As I outlined in section 1.2.1.1, subsequent agreements or practices refer to any agreement made by all the States parties after the conclusion of the treaty regarding its interpretation or application. Clearly, UNHCR documentation is not evidence of such a subsequent agreement as it is not an agreement made by the States parties to the Refugee Convention.

51 Battjes 2006, p. 20 (para. 31).

52 Kälin 2003, p. 619.

> 'consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention'.[53]

In a wide variety of documents the UNHCR regularly gives its views on interpreting and applying the Refugee Convention. Of particular importance is the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereafter the UNHCR Handbook). The Handbook was drafted at the request of the Executive Committee,[54] first published in 1979 and last updated in 1992.[55] The Handbook contains a clear and comprehensive set of guidelines on how to determine who is a refugee and is based on the UNHCR's experience in the field, the practice of States and the views of scholars.[56] It is difficult to assess what authority should be attributed to the UNHCR Handbook. It is certainly not a legally binding document, but the fact that – according to its preface – the Handbook is partly based on States' practice professes that it is, at least in part, a reflection of international customary law. It is however not clear which parts are based on States' practice.[57] States parties to the Convention differ on the exact level of authority of the UNHCR Handbook to interpret the Refugee Convention. Both Hathaway and Kälin give examples of how various courts in various countries have addressed the authority question.[58] Both scholars conclude that the views have changed over time, but that the current common approach of States parties seems to be that the Handbook is an important source of guidance for interpreting and applying the Convention.

Other important documents include the regularly published guidelines on international protection, drafted by the UNHCR's Department of International Protection Services. These guidelines are meant to supplement the Handbook and to provide interpretive legal guidance. In addition, the UNHCR is sometimes directly involved in status determination proceedings as an observer, advisor or intervener; occasionally producing amicus curiae briefs or advisory opinions in national and international proceedings to influence potential precedent setting cases. Furthermore, the UNHCR uses a variety of political and diplomatic means to engage in a constructive dialogue

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53 Preamble, paragraph 15, EU Qualification Directive. See also Article 21 of the EU Procedures Directive. Other international legal documents that acknowledge the UNHCR's supervisory responsibility include the 1984 Cartagena Declaration (recommendation e) and the 1957 Agreement relating to Refugee Seamen (preamble).

54 EXCOM Conclusion No. 8 (XXVIII), 1977, para. (g).

55 The Executive Committee has requested another update in the form of complementary guidelines to the Handbook, thereby drawing on applicable international legal standards, State practice and jurisprudence and experts' opinions: see EXCOM, Agenda for Protection, UN doc. A/AC.96/965/Add.1, 26 June 2002, para. III.6.

56 The views contained in the Handbook were largely acknowledged by the States parties to the Convention and experts in the field of international asylum law during the process of the UNHCR's Global Consultations on International Protection (2001). Updated views are compiled in Feller, Türk & Nicholson 2003.

57 Spijkerboer & Vermeulen 1995, p. 26.

58 Kälin 2003, pp. 625-627. Hathaway 2005, pp. 114-118.

with various branches of government and other relevant stakeholders. The UNHCR's views are generally communicated in various forms.[59] Importantly, the UNHCR also commissions a variety of research papers. The background or discussion papers commissioned by the UNHCR's Department of International Protection Services under the heading 'legal and protection policy research series' are well known. Other well-known papers include the working papers commissioned by the UNHCR's Evaluation and Policy Analysis Unit under the heading 'new issues in refugee research'. Both series of papers have been used for this research. It should be noted that neither series necessarily represents the views of the UNHCR. Finally, the UNHCR produces a large number of internal memoranda for its staff which are occasionally useful for interpreting the Refugee Convention.

2.1.3.2 The Executive Committee of the High Commissioner's Programme

The Executive Committee was established in 1958 by the United Nations Economic and Social Council[60] at the request of the United Nations General Assembly.[61] The Executive Committee is formally independent of the UNHCR.[62] Officially, the Executive Committee has the competence to advise the High Commissioner, at his request or in the exercise of its statutory functions, on the appropriateness of providing international assistance in order to solve specific refugee problems.[63] The Executive Committee also determines the general policies under which the High Commissioner plans, develops and administers its programmes and projects, has the authority to make changes to them and approves the UNHCR budget.[64]

On 1 August 2008 the Executive Committee consisted of 76 States.[65] For a State to become a member of the Executive Committee it must be a member of the United Nations, but does not have to be a State party to the Refugee Convention or Refugee

59 Türk 2002, pp. 11 and 12.
60 UN ECOSOC res. 672 (XXV), 30 April 1958.
61 UN GA res. 1166 (XII), 26 November 1957, para. 5.
62 Lauterpacht & Bethlehem 2003, p. 98.
63 UN GA res. 1166 (XII), 26 November 1957, para. 5 (b) and (c).
64 UN ECOSOC res. 672 (XXV), 30 April 1958, para. 2 (a) and (c).
65 The, as of April 2008, 76 Member States of the Executive Committee are: Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Benin, Brazil, Canada, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Cyprus, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Germany, Ghana, Greece, Guinea, Holy See, Hungary, India, Iran (Islamic Republic of), Ireland, Israel, Italy, Japan, Jordan, Kenya, Lebanon, Lesotho, Luxembourg, Madagascar, Mexico, Montenegro, Morocco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Serbia, Somalia, South Africa, Spain, Sudan, Sweden, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, Uganda, United Kingdom, United Republic of Tanzania, United States of America, Venezuela, Yemen, Zambia, with the following States acting as Standing Observers between October 2007 and 2008: Afghanistan, Angola, Azerbaijan, Bolivia, Bosnia and Herzegovina, Burundi, Cameroon, Croatia, Czech Republic, Djibouti, Dominican Republic, El Salvador, Guatemala, Honduras, Indonesia, Latvia, Mauritania, Nepal, Niger (the), Panama, Peru, Slovakia, Slovenia, Syrian Arab Republic and Uruguay.

Protocol. Of the 76 Member States six are not party to the Refugee Convention or Protocol.[66] The Executive Committee meets in plenary session on an annual basis, with regular smaller meetings of its Standing Committee in between. In the exercise of its mandate the Committee adopts Conclusions on International Protection by consensus, and addresses particular aspects of the work of the UNHCR. Notwithstanding the abovementioned formal relationship, in reality UNHCR appears to be able to exercise considerable influence over the genesis and direction of the Conclusions in the way it structures the EXCOM agenda.[67] For example, during the Global Consultations some key protection gaps in the field of refugee protection were identified. Since the Global Consultations these gaps have been addressed in EXCOM Conclusions, notably, with the exception of the issue of refugees and rescue at sea.[68]

The EXCOM Conclusions are published and form an important source of information on how to interpret and apply the Refugee Convention. The Executive Committee's Conclusions on International Protection are legally binding neither on the Member States of the Executive Committee nor on the States parties to the Refugee Convention or Refugee Protocol. What authority must then be attributed to the Conclusions? According to the UNHCR the Conclusions 'constitute a clear manifestation of the refugee law in its developing stage'.[69] The Executive Committee was established to advice the UNHCR on its work, including on the UNHCR's supervisory role in the interpretation and application of the Refugee Convention. Many Conclusions directly relate or refer to the Refugee Convention or Refugee Protocol. Conclusions of the Executive Committee not only apply to the UNHCR for the purpose of influencing its work, but also directly address States. When addressing States – both States that are party to the Refugee Convention and/or Refugee Protocol and those that are not – it more often tries to guide them in implementing the Convention rather than to create specific binding norms. The Executive Committee then uses words such as considering, expressing, encouraging, urging or recommending. The conclusions of the Executive Committee to a great extent have normative content. Their purpose is to influence and guide the conduct of States[70] rather than to call upon them to adopt a certain point of view. Therefore, given its primary function of advising the UNHCR and the language it uses in addressing States one should be somewhat cautious about the authoritative character of EXCOM Conclusions. Nevertheless, the Executive Committee is an organ made up of the representatives of States, all but six of which are party to the Refugee Convention and/or Refugee Protocol, and the Conclusions are reached by consensus. This, however, does not lead to the conclusion that the

66 The six Executive Committee member States not party to the Refugee Convention or Refugee Protocol are: Bangladesh, India, Jordan, Lebanon, Pakistan and Thailand (update November 2007).

67 Review of the use of UNHCR Executive Committee Conclusions on International Protection, Report of the Evaluation Team led by Bryan Deschamp, Consultant, Informal Consultative Meeting, 9 June 2008, para. 50, available via <www.unhcr.org>.

68 Ibid., paras 21, 38 and 107, available via <www.unhcr.org>.

69 UNHCR, *Collection of International Instruments Concerning Refugees*, Geneva, 1988, UN doc. HCR/IP/1/Eng, preface, p. III.

70 Sztucki 1989, p. 297.

Executive Committee's Conclusions can be regarded as evidence of a subsequent agreement between States parties in accordance with Article 31(3)(a) of the Vienna Convention on the Law of Treaties. The Conclusions are not an agreement made by States parties to the Refugee Convention and/or Refugee Protocol or agreed upon by them, even though all States parties are invited to observe and to comment upon draft proposals under consideration by the Executive Committee.[71] The Conclusions of the Executive Committee are the only consensus views of a body of State representatives since the adoption of the Refugee Convention, except for the Refugee Protocol and the 2001 Declaration of State Parties to the Refugee Convention and/or Refugee Protocol. Taking all this into account, Conclusions of the Executive Committee can be seen as having a certain political rather than legal authority.[72]

2.2 Personal and (extra-)territorial scope of Article 33 of the Refugee Convention

2.2.1 Personal scope

Article 33 of the Refugee Convention is clear about whom it protects, as protection is afforded to 'a refugee'. A general definition of a refugee can be found in Article 1A(2) of the Convention and includes 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'.

Any person can be a refugee, including a stateless person, as explicitly stated in the definition. There are no limitations on the refugee's nationality or legal status to protect

71 Hathaway 2005, p. 54, note 146.

72 Ibid., p. 113, according to which the EXCOM Conclusions have 'strong political authority as consensus resolutions of a formal body of government representatives expressly responsible for providing guidance and forging consensus on vital protection policies and practices'. Sztucki argues, with regret, that the Conclusions 'fall rather low on the relative scale of de facto values of non-legal instruments'. In comparing them to resolutions of the General Assembly he concludes they 'are hardly on an equal footing with them'. He also presents several reasons for the relatively low status of the Conclusions: see Sztucki 1989, pp. 308-311. Lauterpacht and Bethlehem refer to the Conclusions as 'expressions of opinion which are broadly representative of the views of the international community', in: Lauterpacht & Bethlehem 2003, p. 148. See also Goodwin-Gill 1996, pp. 128 and 129, according to which EXCOM Conclusion may contribute to the formulation of *opinion juris* and that they muct be reviewed in the context of States' expressed opinions, and in the light of what they do in practice. See Noll 2000, p. 31, in which he refers to EXCOM Conclusions as 'soft law' in accordance with Article 32 of the Vienna Convention on the Law of Treaties. See generally, Clark 2004, p. 588.

him from refoulement.[73] The only restrictions result from the cessation clauses referred to in Article 1C and the exclusion clauses mentioned in Article 1D, E and F of the Convention.[74] Furthermore, protection from refoulement is not limited to persons who are formally recognised as refugees. A person is a refugee as soon as he satisfies the criteria contained in the definition.[75] Consequently, Article 33 of the Convention applies unequivocally to refugees who have not been formally recognised as such, but are seeking, claiming or applying for refugee protection from a State party to the Convention.[76] As the UNHCR puts it:

> 'Every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established'.[77]

This interpretation has been confirmed in a variety of EXCOM Conclusions, United Nations General Assembly resolutions and other instruments in the field of refugee protection.[78] In the remainder of this chapter, when using the term refugee I refer to people who meet the definition of a refugee contained in Article 1A(2) of the Refugee Convention irrespective of any formal recognition. Therefore, refugee claimants whose refugee status has not yet been formally recognised are included, unless otherwise indicated. Apart from in quotations I will minimise the use of the term 'asylum seeker'. Neither this word nor the term 'asylum' can be found in the Refugee Convention. Furthermore, although commonly accepted, the term 'asylum seeker' or 'asylum' is somewhat ill-chosen, as the right to seek and enjoy asylum is not directly dealt with in the Refugee Convention. In this chapter I will therefore use the

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73 Hathaway extensively analyses the role of the travaux préparatoires of the Refugee Convention and states that the drafting process on Article 33 proceeded on the assumption that prior permission to reside in the asylum State was not a relevant issue: Hathaway 2005, p. 303.

74 Articles 1D and 1E will be discussed in section 2.3.3.2. Article 1F will be discussed in section 2.3.3.3.

75 UNHCR Handbook, para. 28: 'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee'. See also Grahl-Madsen 1966, p. 340; Lauterpacht & Bethlehem 2003, pp. 116-118. Hathaway 2005, p. 278. Spijkerboer & Vermeulen 1995, p. 70.

76 EXCOM Conclusion No. 79 (XLVII), 1996, para. (j). EXCOM Conclusion No. 81 (XLVII), 1997, para. (i). Hathaway 2005, p. 303.

77 EXCOM, *Note on International Protection*, UN doc. A/AC.96/815, 31 August 1993, para. 11. Also cited by Hathaway in: Hathaway 2005, p. 159.

78 EXCOM Conclusion No. 6 (XXVIII), 1977, para. (c). EXCOM Conclusion No. 79 (XLVII), 1996, para. (j). EXCOM Conclusion No. 81 (XLVIII), 1997, para. (i). UN GA A/RES/52/103, 9 February 1998, para. 5. UN GA A/RES/53/125, 12 February 1999, para. 5. Article II(3) of the OAU Convention governing specific aspects of refugee problems in Africa; Article III(3) of the Asian-African Principles concerning treatment of refugees; Article 22(8) of the American Convention on Human Rights.

term 'refugee claimant' when explicitly referring to a person who formally claims refugee protection.

There are two situations worth mentioning with regard to the personal scope of Articles 33(1) and 1A(2) of the Refugee Convention: first, where the refugee has dual or multiple nationalities, and, secondly, the situation of combatants. A person with dual or multiple nationality will be a refugee only if he is unable or unwilling to avail himself of the protection of any of his countries of nationality.[79] Consequently, a person with more than one nationality will first need to try to obtain protection from any of his countries of nationality before being a refugee. The second interesting situation is that of combatants. The Executive Committee has recommended that States not include combatants in the Refugee Convention. According to EXCOM 'combatants should not be considered as asylum-seekers until the authorities have established within a reasonable timeframe that they have genuinely and permanently renounced military activities'.[80] The Executive Committee formulated this recommendation in view of the many armed attacks on refugee camps, including the infiltration and presence of armed elements in camps. Whatever the pragmatic reasons for such a recommendation may be, it is irreconcilable with the Refugee Convention to exclude combatants prima facie from being refugees. Any person, including a combatant, can have a well-founded fear of persecution and may claim a right to be protected as a refugee. This right can be limited only in accordance with the Refugee Convention, for example, in accordance with Article 9, under which the person concerned may be interned temporarily pending the determination of his status[81] (see section 2.3.3.4), or because the refugee should be excluded from refugee protection under Article 1F (see section 2.3.3.3). The possible application of Article 1F of the Convention may not exclude combatants by default from having their claim to refugee protection being determined.

2.2.2 The territorial and extra-territorial scope of Article 33(1) of the Refugee Convention

A State party to the Refugee Convention is responsible for protecting a refugee, as defined in Article 1A(2), from refoulement in accordance with Article 33. According to Article 33(1) a State is prohibited from 'expel[ling] or return[ing] ("refouler") a refugee "in any manner whatsoever" to the frontiers of territories where he has a risk of persecution'. To understand the territorial scope of Article 33 it is essential to look at Articles 1A(2) and 33, as well as the Convention as a whole.

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79 According to Article 1A(2) of the Refugee Convention: 'in the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not 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 the UNHCR Handbook paras. 106 and 107.

80 EXCOM Conclusion No. 94 (LIII), 2002, para. (c) (vii).

81 Jaquemet 2004, p. 41.

The definition of a refugee in Article 1A(2) of the Convention is limited to persons who are outside their country of nationality or, in the case of stateless persons, the country of their habitual residence, in general referred to as their country of origin. In other words, for a person to be a refugee he must have crossed an international border.[82] Therefore, protection from refoulement can be claimed neither at foreign embassies or diplomatic missions located in the country of origin nor with foreign State agents present within the country of origin.[83] According to the UNHCR Handbook 'international protection cannot come into play as long as a person is within the territorial jurisdiction of his home country'.[84] Consequently, a person is not a refugee when he is still within the territory of his country of nationality or habitual residence, and thus he cannot claim protection from refoulement in accordance with Article 33(1) of the Refugee Convention. To illustrate this issue I refer to *European Roma Rights Centre and Others v Immigration Officer at Prague Airport and the Secretary of State for the Home Department* before the United Kingdom's Court of Appeal (2003), involving a pre-entry clearance procedure operated by British Immigration officials at Prague Airport in the Czech Republic. The UK Court of Appeal determined that such a procedure, aimed principally at stemming the flow of asylum seekers from the Czech Republic, was not in breach of the UK's obligations under Article 33(1) of the Convention. The Court argued:

> 'that Article 33 of the 1951 Convention has no direct application to the Prague operation is plain: (…), it applies in terms only to refugees, and a refugee is defined by Article 1A(2) as someone necessarily "outside the country of his nationality" (or, in the case of a Stateless person, "former habitual residence"). For good measure Article 33 forbids "refoulement" to "frontiers" and, whatever precise meaning is given to the former term, it cannot comprehend action which causes someone to remain on the same side of the frontier as they began; nor indeed could such a person be said to have been returned to any frontier'.[85]

The question remains whether the person concerned is protected from refoulement as soon as he is outside his country of nationality or habitual residence, provided he meets the other criteria for being a refugee.

Article 33 does not contain any geographical limitation, unlike other provisions of the Convention which condition the rights and benefits accorded to refugees to

82 See also Hathaway 1991, pp. 29-33.

83 See section 1.2.3.2.

84 UNHCR Handbook, para. 88.

85 *European Roma Rights Centre and Others v. the Immigration Officer at Prague Airport and the Secretary of State for the Home Department* [2003] EWCA Civ 666, Court of Appeal (Civil Division), 20 May 2003, para. 31. See also Hathaway 2005, p. 308, n. 154, in which he also refers to the House of Lords Judgment in this case in which the Court of Appeal's argument is upheld in para. 16, *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2004] UKHL 55, House of Lords, 9 December 2004.

degrees of physical or lawful presence in the host country.[86] Consequently, it seems that it was not intended that protection from refoulement contained in Article 33(1) include any territorial limitation. The words to expel or to return ("refouler") a refugee in any manner whatsoever indicate that protection from refoulement applies regardless of the State's conduct and where it occurs. The word 'expel' literally meaning 'to force or drive out', and 'forced to leave'[87] has a territorial implication as it refers to the formal method of expulsion of aliens from a State's territory.[88] The alien must be within the territory of the expelling State. The meaning of the word 'return' is more complicated. The ordinary meaning of the word is 'to go, come or send back to a place'[89] and refers, by contrast to expulsion, to the place whence one came and whither one is going, rather than where one is. Furthermore, the word 'return' must be read together with the French word *refouler* which was explicitly inserted into the authentic English text of Article 33(1) of the Convention to clarify the meaning of the word 'return'.[90] The word *refouler* refers to the original French and Belgian legal concept of refoulement which must be interpreted as describing any (police) conduct which results in the summary removal of aliens or the refusal to allow them to enter

86 The Refugee Convention divides the rights contained therein into four categories of beneficiaries. First, some rights granted to all refugees, irrespective of their legal status and by virtue of their being refugees, and irrespective of where they are, provided they are within the jurisdiction of a State party. This includes the right to be protected from refoulement (Article 33), the right not to be discriminated against (Article 3), the right to be accorded the same treatment as is accorded to aliens generally, except when the Convention contains more favourable provisions (Article 7), the right to be treated as favourably as possible regarding the acquisition of movable and immovable property and rights pertaining thereto, at least not less favourable than those accorded to aliens in general (Article 13), the right to have free access to courts of law (Article 16), the right to an equal share when a rationing system exists (Article 20), and the right to elementary education in the same way as is accorded to nationals (Article 22). Second, rights granted to refugees who are physically present in the State party's territory, irrespective of their legal status. This category includes the right to be accorded treatment at least as favourable as that accorded to nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children (Article 4), the right of protection of industrial property and artistic and scientific works (Article 14), the right to administrative assistance (Article 25), the right to be issued with identity papers (Article 27), and the right not to be awarded penalties for illegal entry or stay in the country of refuge (Article 31). Third, rights granted to refugees whose presence in the country of refuge is lawful ('lawful in'). This includes the right to self-employment (Article 18), freedom of movement (Article 26) and the right not to be expelled except in pursuance of a decision reached in accordance with due process of law (Article 32). Fourth, rights granted to refugees who are lawfully residing in the country of refuge ('lawful staying in' or 'residing in' or 'habitual residence').

87 Compact Oxford English Dictionary, available at <www.askoxford.com>.

88 UNHCR 1993, p. 5. Grahl-Madsen 1963, p. 228.

89 Compact Oxford English Dictionary, available at <www.askoxford.com>. UNHCR 1993, p. 5, in which UNHCR argued that interpreting the term 'return' differently would render it meaningless as it would then mean the same as 'to expel'. See also Hathaway 2005, pp. 337 and 338.

90 Statement of the President of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN doc. A/CONF.2/SR.35, 3 December 1951, p. 22. The insertion of the French verb *refouler* in the English text was adopted unanimously by the Conference. The authentic French text simply states: '*Aucun des Etats contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de (...)*'.

the State's territory.[91] The meanings of the terms 'expel', 'return' and 'refouler' combined imply both the territorial and the extra-territorial application of Article 33(1). Such a combined interpretation would be in accordance with the remaining text of Article 33(1) and its object and purpose, which prohibits the return of refugees 'in any manner whatsoever' to a place where their lives or freedom would be endangered. In addition, as already mentioned, it would be in line with other provisions of the Convention which do territorially condition their application.[92] Moreover, a different reading would effectively authorise Governments to deny refugees protection from refoulement by forcing them back home, so long as that occurred before the refugees had reached and entered a State party's territory, for example by sealing their borders.[93] The applicability of Article 33(1) at a State's borders has not been without controversy.[94] Various scholars, in the early days of the Refugee Convention, argued that the words 'expel', 'return' and 'refouler' imply that 'Article 33 concerns refugees who have gained entry into the territory of a Contracting State, legally or illegally, but not to refugees who seek entrance into this territory'.[95] Despite these early comments, there seems to be little support nowadays for such a narrow, territorial interpretation.[96] More recently scholars have interpreted Article 33(1) as including refugees who are at a State's frontier.[97] Furthermore, various Conclusions of the Executive Committee have indicated that Article 33(1) applies to situations of non-admission at a border.[98] In addition, other instruments in the field of refugee protection explicitly

91 Kälin 1982, p. 5. Hathaway 2005, p. 315.

92 UNHCR 1993, p. 11. Hathaway 2005, p. 339.

93 Hathaway 2005, p. 338. See also EXCOM, 'Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach', UN doc. EC/50/SC/CPR.17, 9 June 2000, para. 23. Grahl-Madsen called this a borderline situation: Grahl-Madsen 1963, p. 229. And according to Robinson 'if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck': Robinson 1953, p. 138.

94 See for a comprehensive analysis of the arguments and literature for and against applying Article 33 of the Refugee Convention to the situation of rejection at the frontier Noll 2000, pp. 423-431.

95 Robinson 1953, p. 138, thereby referring to the travaux preparatoires of the Refugee Convention, in particular to inconclusive comments made by the Swiss and Dutch Delegates at the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Sixteenth Meeting, UN doc. A/CONF.2/SR.16. Grahl-Madsen 1963, pp. 227-229. Grahl-Madsen acknowledges that in the original Belgian and French meaning and use the term '*refouler'* describes non-admittance at the frontier, which corresponds, for example, with the Anglo-American concepts of 'reconduction' and 'exclusion', and the German verbs '*Abweisung*' and '*Abschub*'.

96 A noteworthy exception can be found in *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2004] UKHL 55, House of Lords, 9 December 2004, para. 70 (Lord Hope of Craighead), in which it is stated that the prohibition on refoulement may only be invoked in respect of persons who are already present in the territory of the Contracting State.

97 Kälin 1982, pp. 105-109; Lauterpacht & Bethlehem 2003, para. 78, p. 113; Spijkerboer & Vermeulen 2005, p. 71; Goodwin-Gill & McAdam 2007, p. 207; Hathaway 2005, pp. 315-317; Noll 2005, p. 549.

98 This includes: EXCOM Conclusion No. 6 (XXVIII), 1977, para. (c); EXCOM Conclusion No. 14 (XXX), 1979, para. (c); EXCOM Conclusion No. 15 (XXX), 1979, para. (b) and (c); EXCOM Conclusion No. 53 (XXXIX), 1988, para. 1; EXCOM Conclusion No. 85 (XLIX), 1998, para. (q).

include this situation.[99] One may doubt the practical relevance, in many cases, of the discussion whether or not rejection at the frontier is within the ambit of Article 33(1), as in many cases anyone presenting himself at the frontier of a State will already be within the State's territory.[100] For example, people arriving at the State's international airport will be in the territory of the State, irrespective of whether or not they have passed immigration control. It has also been argued that it is necessary for the person concerned to have physical contact with the territory of the State.[101] Even though in my view most border situations will inherently involve some form of physical contact, that cannot be a necessary condition. No doubt physical contact would involve a more advantageous legal position for the refugee,[102] but such an interpretation of Article 33(1) would wrongly imply that it has only a – narrow – territorial application.

Refoulement may take place from within the State's territory, at the State's borders, or outside the State's territory or border area.[103] The creation of international zones at airports[104] or declaring parts of a State's territory to be outside the realm of the law,[105] whatever the legality of such creations may be, will not alter the applicability of Article 33(1),[106] neither will stopping a refugee at the State's borders. Furthermore, stowaway refugees arriving at a State's seaport or who are found on board a ship that is intercepted in the State's internal waters or territorial sea are protected by Article 33(1), because such waters are part of the State's territory. The need to comply with international protection principles, including the Refugee Convention, was acknowledged by the International Maritime Organisation in its Guidelines on the

99 Lauterpacht and Bethlehem mention Article II(3) of the OAU Convention of 1969 governing specific aspects of refugee problems in Africa and Article III(3) of the Principles concerning treatment of Refugees by the Asian-African Legal Consultative Committee in 1966 (non-binding instrument), in: Lauterpacht & Bethlehem 2003, p. 113 (para. 77).

100 Goodwin-Gill & McAdam 2007, p. 207.

101 Spijkerboer & Vermeulen 2005, p. 72.

102 Noll 2000, p. 386.

103 Goodwin-Gill & McAdam 2007, p. 246. What should be considered the territory of a State under international law is outlined in section 1.2.3.2. Note that the territorial application of the Refugee Convention may be limited in accordance with Article 40(1) of the Refugee Convention, according to which 'any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible'. Such declarations have been made by Georgia and the Republic of Moldova, both declaring the Convention only to be applicable to the territory where the jurisdiction is exercised until full restoration of the territorial integrity is established. An overview of States parties' declarations and reservations to the Refugee Convention is available at <www.unhcr.org/cgi-bin/texis/vtx/protect?id=3c0762ea4>.

104 ECtHR, *Amuur v France*, 25 June 1996, App. No. 19776/92, para. 52: 'The Court notes that even though the applicants were not in France within the meaning of the Ordinance of 2 November 1945, holding them in the international zone of Paris-Orly Airport made them subject to French law'. See also Hathaway 2005, p. 321 (note 200) and Goodwin-Gill & McAdam 2007, p. 253.

105 As Australia did when it refused to consider the refugee status of persons present in, for example, Christmas Island: Marr & Wilkinson 2003, p. 140 and 141. Hathaway 2005, p. 321. See also Goodwin-Gill & McAdam 2007, pp. 255 and 256.

106 UNHCR 2002, para. 12.

Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases.[107]

Not all State conduct will come within the scope of Article 33(1) of the Refugee Convention. What is relevant is that, as a consequence of the conduct of the State the refugee is forced to go 'to the frontiers of territories' where there is a threat to the refugee's life or freedom. Therefore, there must be a consequential relationship or causal link between the State's conduct and the fact that the refugee is forced to go to places where he is at risk. A State's responsibility under Article 33(1) is engaged through conduct which can be attributed to the State and which has the consequence or effect of forcing the refugee to go to the frontiers of territories where there is a threat to his life or freedom, irrespective of where this conduct takes place, i.e. within or outside the State's territory (with the exception of the territory of the country of origin because of the geographical limitation contained in Article 1A(2) of the Convention).[108] This follows from the text of Article 33(1) and the humanitarian object and purpose of the Refugee Convention[109] and is confirmed by the Executive Committee in various Conclusions.[110] The extent by which the State party has actual control or authority over the refugee and his right to be protected from refoulement is essential to extra-territorial responsibility.[111] This will be the case when the State party exercises effective control over foreign territory,[112] and when it has (de facto) effective control or authority over the refugee and his right to be protected from refoulement.[113] As I outlined in section 1.2.3.3 a State is responsible for all its organs, whether they be national, regional or local and whether they exercise legislative, executive, judicial or any other functions of the State.[114] This includes immigration officials working at the State's external borders, immigration officials or diplomats in general working outside the State's territory and officials from other States when they are placed at the disposal of the State and when they act in the

107 International Maritime Organisation, *Guidelines on the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases*, res. A.871 (2), 27 November 1997, para. 4 (2), according to which 'stowaway asylum-seekers should be treated in compliance with international protection principles set out in international instruments and relevant national legislation', in which explicit reference is made to the Refugee Convention.

108 UNHCR 2007-2, para. 9; UNHCR 2002, para. 12; Goodwin-Gill & McAdam 2007, p. 248; Lauterpacht & Bethlehem, 2003, p. 110 (para. 62).

109 UNHCR 2007-2, para. 29.

110 EXCOM Conclusion No. 6 (XXVIII), 1977, para. (c); EXCOM Conclusion No. 15 (XXX), 1979, paras. (b) and (c); EXCOM Conclusion No. 22 (XXXII), 1981, para. II(A)(2).

111 Regarding extra-territorial responsibility general rules of international (human rights) law apply, as is discussed in section 1.2.3.3. See also UNHCR 2007-2, para. 34.

112 Hathaway 2005, pp. 169 and 170: 'At a minimum, this [de facto jurisdiction outside a State's own territory] includes both situations in which a State's consular or other agents take control of persons abroad, and where the State exercises some significant public power in territory which it has occupied, or in which it is present by consent, invitation, or acquiescence'. Lauterpacht & Bethlehem 2003, p. 110 (para. 63).

113 Hathaway 2005, p. 340; Lauterpacht & Bethlehem 2003, p. 110 (para. 63).

114 ILC, *Commentaries to the draft articles on Responsibilities of States for internationally wrongful acts*, 53rd session (2001), UN Doc. A/56/10, Article 4.

exercise of elements of governmental authority. Furthermore, a State is responsible for non-state agents, such as private air carrier personnel, acting pursuant to statutory authority.[115] In addition, a State may, in particular circumstances, be responsible for any other person, group of people or entity not being an organ of the State but exercising elements of governmental authority.[116]

The extra-territorial application of Article 33 of the Refugee Convention is not without controversy. I have already discussed the controversy relating to border situations. In addition, the issue of the interdiction of refugees on the high seas and the applicability of Article 33(1) of the Convention is a topic for debate. The 1993 United States Supreme Court decision in *Sale, Acting Commissioner, Immigration and Naturalisation Service, et al v Haitian Centers Council, Inc., et al* (1993) illustrates this.[117] In this, the so-called *Haitian Interdiction case*, the US Supreme Court affirmed the US Government's rejection of the extra-territorial applicability to aliens interdicted on the high seas of Article 33(1) of the Refugee Convention. The Supreme Court referred largely to national legal arguments and paid little attention to international law, referring to the travaux préparatoires to the Refugee Convention only in passing.[118] The judgment was criticised by, among others, Justice Blackmun in a dissenting opinion[119] and Goodwin-Gill.[120] In addition, the judgment was criticised by the Inter-American Commission on Human Rights which found the United States to be in breach of Article 33(1) of the Convention.[121] The Commission concurred with the UNHCR in that Article 33(1) has no geographical limitations. The UNHCR had already submitted its views on the issue of extra-territoriality in an amicus curiae brief in the original case before the US Supreme Court.[122] According to the UNHCR Article 33(1) makes no exceptions for State conduct which takes place outside the State's territory; rather the obligations imposed by Article 33(1) arise wherever a State acts. Hereby the UNHCR refers to the structure of the Convention and the territorial limitations included in other provisions, the broad and overriding humanitarian purpose of the Convention, the extra-territorial application of other comparable international agreements, and, contrary to the US Supreme Court's understanding,

115 Lauterpacht & Bethlehem 2003, pp. 109 and 119 (para. 61).

116 ILC, *Commentaries to the draft articles on Responsibilities of States for internationally wrongful acts*, 53rd session (2001), UN Doc. A/56/10, Articles 5-11. See also Lauterpacht & Bethlehem 2003, pp. 108 and 109 (para. 59 to 60).

117 *Sale, Acting Commissioner, Immigration and Naturalisation Service, et al., Petitioners v Haitian Centers Council, Inc., et al*, 509 US 155, United States Supreme Court, 21 June 1993.

118 Goodwin-Gill & McAdam 2007, p. 247.

119 Dissenting opinion of Mr. Justice Blackmun in *Sale, Acting Commissioner, Immigration and Naturalisation Service, et al., Petitioners v Haitian Centers Council, Inc., et al*, 509 US 155, US Supreme Court, 21 June 1993, pp. 71-84.

120 Goodwin-Gill 1994, pp. 103-109.

121 Inter-American Commission on Human Rights, *Haitian Centre for Human Rights v United States of America*, Decision of the Commission as to the merits of Case 10.675 United States March 13, 1997, para. 157, available via <www.cidh.org>.

122 UNHCR 1993, pp. 85-102.

the intent of the drafters in order to interpret the prohibition of refoulement to proscribe State conduct both within and outside a State's territory.

Another argument for the rejection of the extra-territorial application of Article 33(1) of the Refugee Convention was found in the second paragraph of the Article. The US Supreme Court argued that the extra-territorial application of Article 33(1) would create an absurd anomaly.[123] Article 33(2) applies only to people who pose a danger to the national security of the country in which they are.[124] A strict interpretation of this geographical limitation implies that this limitation does not relate to the country to which the refugee is destined, but to the country where he is and has claimed protection.[125] Consequently, according to the Supreme Court, dangerous refugees who are outside the host country's territory, for example, on the high seas, would be entitled to protection in accordance with Article 33(1), whereas equally dangerous refugees who are within the host country's territory would not.[126] In my opinion, applying Article 33(1) to refugees who are outside the host country's territory will involve the transportation of these refugees to the territory of the host State or the territory of a third country where the refugees will be received and their status assessed. Subsequently the question arises whether or not the refugee then poses a danger to the security of the territory he is in, in accordance with Article 33(2). The phrase 'the country in which he is' must be interpreted to mean the country of refuge or host country or any other country where the refugee is received, and refers to the application of Article 33(2), that is an exception to Article 33(1), rather than a limitation of the scope *ratione loci* of the prohibition of refoulement contained in Article 33(1). Paragraphs (1) and (2) of Article 33 of the Convention refer to different concerns.[127]

Finally, the Supreme Court made a textual argument stating that the words expel or return (refouler) in Article 33(1) of the Refugee Convention cannot be interpreted otherwise than to refer to a refugee already admitted to or arrived in the territory of the host State.[128] As already discussed, this is debatable and not in accordance with the current understanding of Article 33(1). In conclusion, the extra-territorial scope of Article 33(1) implies it is applicable on the high seas.

In section 2.4.2.1a special attention will be given to States' obligations as regards refugees at sea, in particular the complex question of which State is responsible for the protection of refugees on the high seas.

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123 *Sale, Acting Commissioner, Immigration and Naturalisation Service, et al., Petitioners v Haitian Centers Council, Inc., et al*, 509 US 155, US Supreme Court, 21 June 1993, at IV.A.

124 Article 33(2) of the Refugee Convention is further discussed in section 2.3.3.1.

125 Noll 2005, p. 554.

126 *Sale, Acting Commissioner, Immigration and Naturalisation Service, et al., Petitioners v Haitian Centers Council, Inc., et al*, 509 US 155, US Supreme Court, 21 June 1993, referred to by Noll in Noll 2005, p. 554.

127 UNHCR 2007-2, para. 28. Hathaway 2005, p. 336.

128 *Sale, Acting Commissioner, Immigration and Naturalisation Service, et al., Petitioners v Haitian Centers Council, Inc., et al*, 509 US 155, US Supreme Court, 21 June 1993, at IV.A.

Another controversial situation is that whereby refugees are seeking protection from a State while outside their country of origin and within the territory of a third State. For example, a North Korean refugee seeks protection from the German diplomatic mission located in China. Since the refugee is outside his country of origin and both Germany and China are States party to the Refugee Convention, Article 33(1) of that Convention applies. China may be responsible because the refugee finds himself within the territory of China. Germany may be responsible because the refugee is under the effective control or authority of Germany. The controversy does not so much concern the applicability of Article 33(1) of the Convention as the question of which State is responsible, i.e. China or Germany. This will be discussed in section 2.4.2.1.

In conclusion, the scope *ratione loci* of the prohibition on refoulement contained in Article 33(1) of the Refugee Convention depends on Articles 1(A)(2) and 33(1) of the Convention and the Convention as a whole. It is clear that Article 33(1) does not apply to people who are still within their country of origin. It is also clear that it does apply to refugees who are within the host State's territory. In addition, Article 33(1) is applicable in situations where refugees find themselves outside their country of origin as well as outside the territory of a host State. This includes refugees who are at the border of a host State, those intercepted on the high seas and those in the effective extra-territorial control of a State. Responsibility is then determined by the conduct of a State and the effect that conduct has on the refugee's right to be protected from refoulement.

The consequences of the territorial and extra-territorial scope of Article 33(1) of the Refugee Convention in terms of the type and content of State's obligations are discussed in section 2.4.

2.3 The content of the prohibition on refoulement under Article 33 of the Refugee Convention

In this third section I will discuss the substance or content of the prohibition on refoulement contained in Article 33 of the Refugee Convention. Article 33(1) protects a refugee 'where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. There is a close relationship between the definition of a refugee in Article 1A(2) of the Convention and the prohibition on refoulement contained in Article 33. It may be assumed that a person who is a refugee – and therefore has a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion' – has a right to be protected under Article 33(1). Protection from refoulement should inherently be granted to refugees.[129] There is a textual

129 UNHCR 1977, para. 4, according to which the different wording of Article 33 in comparison with Article 1A(2) of the Refugee Convention was introduced to make it clear that the principle of non-refoulement applies not only in respect of the country of origin but to any country where a person has reason to fear: Hathaway 2005, p. 304.

difference between Articles 33(1) and 1A(2) of the Convention. Where Article 33(1) uses the words 'threat to life of freedom on account of race, religion, nationality, membership of a particular social group or political opinion', Article 1A(2) talks of 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'. The textual difference is immaterial for the purposes of the discussion here, and should not be interpreted in such a way as to establish a second barrier for a refugee to overcome in order to obtain protection from refoulement. The object and purpose of the Refugee Convention, and of Article 33(1) in particular, as well as the internal coherence of the Convention, dictate such an interpretation.[130] A different opinion would lead to incomprehensible consequences.

Clearly, a person needs to be a refugee and therefore to meet the criteria listed in Article 1A(2) of the Refugee Convention before having a right to be protected from refoulement. Article 33(1) of the Convention is largely determined and explained by Article 1A(2).[131] Therefore, I choose to refer more to the text of Article 1A(2) than to that of Article 33(1). Furthermore, most sources used in this research do the same.[132]

In section 2.3.1 I will first discuss the harm from which a person is protected by Article 33(1) of the Refugee Convention, using the phrase 'being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' as a starting point for my analysis. In section 2.3.2 I will then discuss the element of risk contained in Articles 33(1) and 1A(2) of the Convention, and, in section 2.3.3 I will discuss the exceptions to and limitations on the right to be protected from refoulement as contained in the Convention.

2.3.1 The harm from which a person is protected: being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion

2.3.1.1 Persecution

Article 33(1) of the Refugee Convention protects a refugee from threats to his life or freedom on account of his race, religion, nationality, membership of a particular social group or political opinion. In contrast, Article 1A(2) of the Convention uses the words 'being persecuted for reasons of'. It was the intention of the drafters that the words 'life and freedom' should be given a broad interpretation and that a risk of any kind of persecution should be considered a threat to life or freedom.[133] The terms 'life and freedom' cannot be used to delineate the term 'persecution'; it is the

130 Lauterpacht & Bethlehem 2003, p. 123.
131 Grahl-Madsen 1966, p. 196; Spijkerboer & Vermeulen 1995, p. 109.
132 A notable exception is Lauterpacht & Bethlehem 2003, pp. 87-177.
133 Grahl-Madsen 1966, p. 196.

other way round.[134] Therefore, in order to understand the harm to which a refugee may not be subjected in accordance with the prohibition on refoulement contained in Article 33(1) of the Refugee Convention one has to look more closely at the term 'persecution'.

Persecution is not defined in the Refugee Convention. It seems that the drafters of the Convention omitted a definition deliberately in order to introduce a flexible concept.[135] Furthermore, persecution will depend on the circumstances of each case.[136] The flexible and factual character of the term 'persecution' makes it unwarranted to give the term a clear definition; it must be open to continuously changing notions of such concepts as ill-treatment, serious harm and discrimination.[137] Notwithstanding the absence of a clear definition the term can be characterised as requiring a certain level of severity or seriousness; a level that is determined by the type, nature and scale of human rights violations. The severity or seriousness may lie in the fact that a specific human right is violated, or that the situation as a whole is severe enough to amount to persecution. Thus, for example, according to the UNHCR, a threat to life or freedom as well as other serious human rights violations may constitute persecution.[138] But also, circumstances which in themselves would not amount to a serious human rights violation may do so when taken together (cumulative grounds).[139] Furthermore, discrimination will constitute persecution only if it leads to consequences of a substantially prejudicial nature for the person concerned making life intolerable.[140] Not all discrimination amounts to persecution only if it is sufficiently serious or severe; a standard which is not easily met.[141] According to the UNHCR Handbook this may, for example, be the case when serious restrictions are placed on the person's right to earn his livelihood, to practise his religion, or to access normally available educational facilities,[142] or where discriminatory measures are, in themselves, not serious, but may cumulatively be severe enough.[143] Racial discrimination is explicitly mentioned by the UNHCR in the Handbook as a form of discrimination which will frequently amount to persecution, but – again – only if it is severe enough. According to the UNHCR Handbook that will be the case:

134 Ibid., p. 196: 'We may look at Article 1 in order to determine the scope of Articles 31 and 33, but not vice versa'. See also the UNHCR Handbook para. 51 which mentions that a threat to life or freedom is always persecution and that persecution may also include other serious human rights violations.

135 Grahl-Madsen 1966, p. 193. See also Anker 1999, p. 171 and Miller 2003, p. 310.

136 UNHCR Handbook para. 52; Spijkerboer & Vermeulen 1995, p. 109.

137 UNHCR 2003-4, para. 3.7 (p. 9).

138 UNHCR Handbook, para. 51.

139 Ibid., para. 53.

140 Ibid., para. 54.

141 Karen Musalo discusses case law from the United States of America, Canada, New Zealand and the United Kingdom and mentions only two cases in which discrimination rose to the level of persecution. Both cases involved the issue of the prohibition on mixed marriages in Malaysia and Iran respectively, which could lead to prosecution and punishment, deprivation of marital rights and the illegitimacy of any children: Musalo 2002, pp. 11-17.

142 UNHCR Handbook, para. 54; UNHCR 2003-4, para. 3.7 (p. 9).

143 UNHCR Handbook, para. 55.

> 'if, as a result of racial discrimination, a person's human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregard of racial barriers is subject to serious consequences'.[144]

Discriminatory measures, either alone or cumulatively, which are accompanied by torture or inhuman treatment may easier amount to persecution. A single action, for example rape, may be serious enough to reach the required level of severity and amount to persecution, but in reality in most cases the situation as a whole and a combination of facts are essential.[145] For example, a person suffering from religious discrimination may be limited in his educational and employment opportunities, may have been fired from work, is the butt of discriminatory remarks and threats to his life and may even, on one occasion, have been physically harassed leading to concussion, without the authorities having taked any action. These discriminatory measures by themselves may not be serious enough to amount to persecution, but together they may be.[146]

It is difficult to determine the exact level of severity required. Hathaway defined persecution as 'the sustained or systemic violation of basic human rights demonstrative of a failure of state protection'.[147] Persecution is determined by the specific facts and circumstances of each case and may result from a single act as well as from an accumulation of acts in the context in which the act or acts take place and the consequences they have in terms of human rights violations.

In determining whether restrictions on, for example, a person's freedoms amount to persecution it is not just the level of severity which is important, but also whether or not these restrictions are perhaps a lawful limitation in accordance with international legal standards. For example, Article 18(3) of the ICCPR allows for limitations on the freedom (publicly) to manifest one's religion or beliefs as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.[148] There are of course rights, for example, the prohibition on torture or the private manifestation of the right to freedom of thought, conscience and religion, which are absolute and permit of no restrictions.[149]

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144 Ibid., para. 69.

145 Ibid., para. 55.

146 This example is taken from *Korablina v INS*, 158 F.3d 1038 (9th Circuit Court of Appeals) as discussed in Musalo 2002, p. 18. Other accepted cases involving an accumulation of acts include (1) withdrawal of ration card, confiscation of property and threats of violence, (2) withdrawal of state benefits in combination with the inability to obtain employment or accommodation, (3) denial of state benefits such as housing, food and clothing benefits and subsidies in a state-controlled economy, described in Foster 2007, pp. 105 and 106.

147 Hathaway 1991, pp. 104-105.

148 For a discussion of limitations on the right to freedom of thought, conscience and religion and their application in refugee law in the United States, Canada, New Zealand and the United Kingdom see Musalo 2002, pp. 20-25.

149 According to Article 4(2) of the ICCPR: 'no derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision'. This includes the following human rights: the right to life (Article 6), the prohibition on torture and other cruel, inhuman or degrading treatment or punishment (Article 7), the prohibition on slavery and servitude (Article 8(1) and (2)), the

The discriminatory nature of the well-founded fear of being persecuted is further determined by the requirement that such fear exists only for reasons of race, religion, nationality, membership of a particular social group or political opinion. Persecution is not a stand-alone condition. Being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion will be further discussed in section 2.3.1.3.

Article 9 of the EU Qualification Directive puts the element of severity back into the centre of the meaning of the term persecution. According to Article 9(1) acts of persecution must either be sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), or it must be an accumulation of various measures, including violations of human rights, which are sufficiently severe to affect an individual in a similar manner as a severe violation of basic human rights do. The second paragraph of Article 9 provides a non-exhaustive list of acts which amount to persecution, and thereby acknowledges the importance of the principle of non-discrimination.[150] The basic premise of Article 9 is that for an act to amount to persecution it must be sufficiently serious or severe, referring to violations of basic human rights, and non-derogable rights in particular. The severity is determined by the nature of the act or its repetition or by an accumulation of acts which are less severe in themselves. Article 9(1)(a) draws a distinction between basic and other human rights. In it basic is defined by using the words 'in particular' and reference is made to the non-derogable rights listed in Article 15(2) of the ECHR. The wording of Article 9(1)(a) may suggest the restrictive scope of human rights the violation of which would constitute persecution.[151] However, the words 'in particular' are intended only to draw special attention to the non-derogable rights listed in the ECHR in order to guarantee that at least violations of those rights will constitute persecution.[152] Moreover, the EU Directive provides minimum norms for EU Member States and therefore allows States to include other rights listed in the ECHR or elsewhere.

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prohibition on imprisonment merely on the ground of inability to fulfil a contractual obligation (Article 11), the principle of legality in the field of criminal law (Article 15), the right to recognition everywhere as a person before the law (Article 16), and the right to freedom of thought, conscience and religion (Article 18).

150 Article 9(2) of the EU Qualification Directive lists the following acts of persecution: (a) acts of physical or mental violence, including acts of sexual violence, (b) legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner, (c) prosecution or punishment which is disproportionate or discriminatory, (d) denial of judicial redress resulting in disproportionate or discriminatory punishment, (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses, and (f) acts of a gender-specific or child-specific nature.

151 Battjes 2006, pp. 233 and 234 (para. 291).

152 Battjes argues that the reference to non-derogable rights serves to place beyond doubt the fact that severe violations of those rights constitute persecution, but that it was not meant to restrict the scope of persecution to violations of those rights only: Battjes 2006, p. 234 (para. 291).

Nevertheless, a distinction between basic – non-derogable – human rights and other – derogable – human rights contained in the ECHR, can be criticised for several reasons. First, Article 9 of the EU Qualification Directive is intended to interpret the term 'persecution' in the manner in which it is referred to in the Refugee Convention. Referring to a regional human rights treaty instead of the principal global human rights treaty, the ICCPR, undermines the global character of the Refugee Convention.[153] Secondly, the list of non-derogable rights contained in the ICCPR is broader than that contained in the ECHR. For example, unlike under the ECHR, under the ICCPR the following rights are also non-derogable: the prohibition on imprisonment merely for the inability to fulfil a contractual obligation (Article 11), the right to recognition as a person before the law (Article 16), and the right to freedom of thought, conscience and religion (Article 18).On the other hand, the ECHR provides broader protection for the right to life as it prohibits the death penalty in times of peace.[154] Thirdly, by referring to basic rights, violations of other human rights will constitute persecution only in combination with other measures.[155]

It is clear that the term 'persecution' is guided by human rights standards.[156] This approach is strongly supported by the UNHCR and legal scholars.[157] The use of international human rights standards enhances the consistent and uniform interpretation of the term.[158] The question remains whether it is possible to identify the applicable human rights standards. There are two important leads to be found in the Convention itself. First, a threat to life and freedom as referred to in Article 33(1) of the Refugee Convention amounts to persecution.[159] Secondly, the preamble refers to the principle that human beings shall enjoy fundamental rights and freedoms without discrimination, and particularly to the UDHR. Therefore, acts which contravene the right to life and other fundamental rights and freedoms, and in particular discriminatory acts, may constitute persecution. Over the years various attempts have been made to describe the human rights framework which forms the basis for persecution. I will focus on the writings of Grahl-Madsen and Hathaway. Later I will also briefly mention the Statute of the International Criminal Court, as it refers to persecution as a crime in international law.

Grahl-Madsen describes two schools of thought when it comes to clarifying the meaning of the term 'persecution'. The first is a restrictive school which holds that

153 As Battjes rightly points out, from a methodological point of view reference to the European Convention on Human Rights in this regard is flawed: Battjes 2006, p. 233 (para. 291).

154 Article 1 read together with Article 3 of Protocol No. 6 to the ECHR concerning the abolition of the death penalty. See also ECtHR, *Öcalan v Turkey*, 12 March 2003, App. No. 46221/99, para. 196, and ECtHR (Grand Chamber), *Öcalan v Turkey*, 12 May 2005, App. No. 46221/99, para. 163.

155 Battjes 2006, p. 233 (para. 291).

156 Foster rightly points to the fact that although the human rights approach is generally agreed to be the dominant view, this does not mean that States explicitly refer to human rights standards or human rights instruments: Foster 2007, pp. 28-31.

157 A comprehensive overview of the strong support for a human rights approach from the UNHCR and most commentators can be found in ibid., pp. 32 (UNHCR) and 33 (commentators).

158 Ibid., p. 36.

159 Grahl-Madsen, 1966, p. 193. UNHCR Handbook para. 51. Goodwin-Gill 1996, pp. 67-68.

only deprivation of life or physical freedom may constitute persecution. This implies that only a small number of human rights and human rights violations apply.[160] This school of thought is rejected by Grahl-Madsen. He points out that this school wrongly delineates persecution by using the terms 'life' and 'freedom' in Article 33(1) of the Refugee Convention.[161] The second school is slightly more liberal and gets more support from Grahl-Madsen. According to this school measures other than a threat to life or freedom in disregard of human dignity may also constitute persecution. Thus, persecution equates with severe measures and sanctions of an arbitrary nature incompatible with the principles of human dignity set out in the UDHR.[162]According to Grahl-Madsen this school implies that severe violations of the following rights mentioned in the UDHR amount to persecution: the right to life, liberty and security (Article 3), the prohibition on slavery and servitude (Article 4), the prohibition on torture and cruel, inhuman or degrading treatment or punishment (Article 5), the prohibition on arbitrary arrest, detention and exile (Article 9), the prohibition on arbitrary interference with privacy, family, home and correspondence and attacks on honour and reputation (Article 12), and – although less obvious – the right to own property and the arbitrary deprivation thereof (Article 17). Without any explanation, according to Grahl-Madsen, the rights to freedom of movement and residence and to leave a country, including one's own (Article 13), to freedom of thought, conscience, and religion (Article 18), to freedom of opinion and expression (Article 19), to freedom of peaceful assembly and association (Article 20) and to take part in the government of one's country (Article 21) are not within the ambit of persecution.[163] It is strange that these rights should fall outside the ambit of persecution as they are fundamental freedom rights. In addition, this categorisation leaves out UDHR rights such as the right to recognition as a person before the law (Article 6), non-discrimination and equality before the law (Article 7), the right to an effective remedy (Article 8), the right to a fair and public hearing (Article 10), the presumption of innocence (Article 11(1)), the prohibition on retroactive criminal laws (Article 11(2)), the right to seek and enjoy asylum (Article 14), the right to nationality (Article 15) and almost all socio-economic rights, including the right to an adequate standard of living (Article 25) and the right to education (Article 26). When looking at State practice, however, Grahl-Madsen concludes that persecution may also include violations of certain economic, social and cultural rights, for example, depriving a person of all means of earning a livelihood (e.g. in cases of systematic denial of employment; generally referred to as economic proscription) and unlawful expropriation or confiscation of property provided it leaves the person concerned without any means of livelihood.[164] The denial of all work that is suitable or commensurate with a person's training and qualifications or the denial of reasonable remuneration

160 Grahl-Madsen 1966, p. 195. See also Hathaway 1991, p. 107.
161 Hathaway 1991, p. 107.
162 Grahl-Madsen referring to Vernant: Grahl-Madsen 1966, p. 193.
163 Grahl-Madsen 1966, p. 195.
164 Ibid., pp. 208 and 209.

for work can also be considered as persecution. However, according to Grahl-Madsen, 'economic disadvantages, which term implies low or reduced pay, is not sufficient to constitute persecution'.[165] Furthermore, relegation to sub-standard dwelling places, the exclusion from all education, denationalisation, constant surveillance, inducement to become a police informer, and measures aimed at preventing a person from educating his children according to his own religious or political beliefs may all amount to persecution.[166]

Hathaway takes a broader human rights-based approach in clarifying the term 'persecution'. He draws a distinction between non-derogable and derogable human rights, as well as between civil and political and social, economic and cultural human rights. He uses the UDHR, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as the basis for these distinctions.[167] Finally he categorises four groups of rights. The first group, according to Hathaway, consists of the non-derogable human rights identified in Article 4(2) ICCPR. These rights include the right to life, the prohibition on torture and other cruel, inhuman or degrading treatment or punishment, the prohibition on slavery and servitude, the prohibition on imprisonment merely on the ground of inability to fulfil a contractual obligation, the prohibition on retroactive criminal laws, the right to recognition as a person before the law and the right to freedom of thought, conscience and religion. According to Hathaway, failure to ensure these rights under any circumstances constitutes persecution.[168] The second group of rights consists of the derogable rights listed in the UDHR and codified in the ICCPR. These rights include the right to liberty and security of a person, including the prohibition on arbitrary arrest or detention, the right of persons deprived of their liberty to be treated humanely and with dignity, the presumption of innocence and the right to a fair and public hearing in criminal proceedings, the right to the protection of personal and family privacy and integrity, the right to internal movement and choice of residence, the freedom to leave and return to one's country, the right to freedom of opinion, expression, assembly and association, the right to form and join trade unions, the right to participate in one's government, including the right to vote, and the right to have access to public employment without discrimination. Restrictions on these rights will generally amount to persecution unless these restrictions are legitimate derogations.[169] The third group consists of those rights contained in the UDHR and codified in the ICESCR. These rights include, inter alia, the right to work, including rights at work; the right to adequate standards of living, including the right to food, water, clothing, housing and medical care; the right to education; the right to family life; and the right to cultural, scientific, literary and artistic expression. The failure to ensure these rights will constitute persecution when these rights are not realised despite the ability to do so, core elements of these rights

165 Ibid., p. 208.
166 Ibid., p. 215.
167 Hathaway 1991, pp. 105 to 124; Spijkerboer & Vermeulen 2005, pp. 33 and 34.
168 Hathaway 1991, pp. 109 and 112.
169 Ibid., pp. 110 and 113.

are breached, or these rights are realised on a discriminatory basis.[170] Hathaway notes that at an extreme level some of these rights, such as the right to adequate standards of living, may amount to inhuman treatment and therefore unquestionably constitute persecution by falling into the first group of rights (for example cases of economic proscription).[171] The fourth and final category of rights includes rights which are recognised in the UDHR, but are not codified in either of the two principal human rights covenants. This includes, inter alia, the right to own property and to be free from arbitrary deprivation thereof and the right to be protected against unemployment. Failure to ensure these rights will, according to Hathaway, 'not ordinarily suffice' to constitute persecution.[172] With this type of formulation Hathaway leaves room for extraordinary situations, for example, when a certain level of severity is reached, when the rights are implemented in a discriminatory way or when an accumulation of violations occurs.

Both Grahl-Madsen and Hathaway use the UDHR, the ICCPR and the ICESCR as their guiding human rights treaties. One should however be careful when focussing on only these three documents.[173] That would do justice neither to the evolutive nature of human rights or of the term persecution[174] nor to the adoption of other global human rights treaties as well as important regional human rights treaties.[175] Drawing a distinction between human rights is not without its problems. Although by distinguishing between non-derogable and derogable human rights the absolute character of non-derogable human rights is maintained as well as the possibility for States to derogate from derogable rights in times of public emergencies,[176] such a distinction remains somewhat artificial. First, as already mentioned, the list of derogable rights in Article 4(2) of the ICCPR is, for example, different from the list contained in Article 15(2) of the ECHR. Secondly, the reason certain rights are non-derogable and others are not is not to establish a hierarchy of rights but to allow States to take action when the survival of their nation is at stake; it does not give States a licence to persecute.[177] Thirdly, that certain rights may be non-derogable does not mean they are absolute, and they may still be limited provided such limitations are

170 Ibid., pp. 111 and 119.

171 Ibid., pp. 111 and 121. Hathaway notes that – at least in 1991 – cases of economic proscription largely related to the right to work and earn a living and that economic proscription in relation to the right to education or health care was more ambiguous: ibid., pp. 123 and 124.

172 Ibid., p. 111.

173 Concerns about the legitimacy and workability of a human rights approach have been analysed comprehensively by Foster in Foster 2007, pp. 75-86.

174 Goodwin-Gill 1996, p. 69. According to the UNHCR, the Refugee Convention is not limited to construing persecution on the basis of violations of agreed norms of international human rights law: see UNHCR 2003-4, para. 3.6 (p. 9).

175 In addition, in a technical sense looking at specific treaties would be in breach of the sovereign right of States not to be party to a specific treaty and not to be bound by its obligations.

176 Consequently, a threat to life or freedom will not automatically amount to persecution as States may legitimately derogate from certain rights in times of public emergencies. This fits with the statement that the phrase 'life or freedom' cannot delineate the term 'persecution'. See also Hathaway 1991, p. 114.

177 Den Heijer 2008, pp. 296-297.

prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.[178] What is open to more criticism is the distinction between rights contained in the ICCPR on the one hand and rights contained in the ICESCR on the other, as well as rights formulated in the UDHR but not codified in subsequent human rights instruments. It is an understandable distinction from an historical and textual point of view. However, it should be adopted with great care and must not lead to the misunderstanding of some important social, economic and cultural rights or to the increasing importance of economic, social and cultural rights in general.[179] As Hathaway himself says, there are socio-economic rights which ought reasonably to be considered central to a State's basic duty of protection.[180] And, as Grahl-Madsen points out, deprivation of certain economic, social and cultural rights may leave a person without any means of livelihood.[181] In addition, one may argue that the right to education, in particular for a child, is of a fundamental nature.[182] In other cases, the right to health, in particular equal access to medical treatment, has gained importance.[183] Allowing violations of economic, social and cultural rights has also wrongly led to the imposition of an erroneously high severity test and an automatic requirement of accumulation.[184] The inferior treatment is best explained by Hathaway's arguments for categorising the rights contained in the ICESCR as a separate – third – group, in particular that these rights are subject to progressive realisation in a non-discriminatory way.[185] Contrary to civil and political rights, economic, social and cultural rights do not impose absolute and immediately binding standards of attainment, he argues.[186] In my view, the principle of progressive realisation to the maximum of a country's available resources contained in Article 2(1) of the ICESCR does not mean there is no obligation on States to respect or to protect economic, social and cultural rights. Nor does it fully exclude the obliga-

178 See in this regard for example Article 18(3) of the ICCPR regarding the right to manifest one's religion or belief.

179 The importance of economic, social and cultural rights in the context of a well-founded fear of being persecuted in accordance with Article 1A (2) of the Refugee Convention is the topic of Foster's book: Foster 2007.

180 Hathaway 1991, p. 116.

181 See for examples of national case law in which the inability to obtain employment or to earn a livelihood was recognised as persecution: Foster 2007, pp. 94 and 95 (footnotes 23 and 24).

182 Ibid., p. 103, in which reference is made to Canadian case law (footnotes 65 and 67) and to Article 28 of the Convention on the Rights of the Child.

183 Foster 2007, p. 104, referring to Canadian and American case law (footnotes 70 and 71).

184 Ibid., pp. 123-136. One of the consequences mentioned by Foster of an erroneously high test is the tendency to exclude harm that violates human dignity and potentially has significant long-term consequences (p. 130), and the requirement that socio-economic harm must be accompanied by physical violence (p. 135): see in this regard the specific problems of refugee claims of women: Foster 2007, pp. 135 and 136; Spijkerboer 1999, p. 109.

185 It is important to note that it was not Hathaway's intention to treat economic, social and cultural rights inferior to civil and political rights: Hathaway 1991, p. 117. See also Foster 2007, p. 125.

186 Hathaway 1991, p. 110.

tion to fulfil these rights, at least in part.[187] In general, economic, social and cultural rights impose on States immediate obligations,[188] in particular negative obligations prohibiting a State from (actively) withdrawing a person's economic, social and cultural rights.[189] For example, irrespective of the 'progressive realization clause', the right to adequate housing entailed in Article 11 of the ICESCR includes the right to have one's house respected as well as protected. To respect corresponds to a clear obligation on the State to refrain from interfering with that right and forcibly evict persons from the house. To protect refers to the protection from interference by others and to ensure, for example, security of tenure.[190] Furthermore, a State is obliged to do what it can to secure adequate housing for everyone, including requesting international support.[191] This does not mean that a State is required, even if it had sufficient resources, to ensure the full range of desirable commodities and services,[192] but it does again mean that a State cannot arbitrarily withdraw a person's right to adequate housing and, for example, forcibly evict people from their homes.

There is a second basic principle contained in the ICESCR which it is important to take note of. According to Article 2(2) of the ICESCR, States have an obligation to 'guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind'.[193] In other words, any type of obligation must be implemented and enforced in a non-discriminatory way, irrespective of the progres-

187 According to Article 2(1) of the ICESCR: 'Each State party … undertakes to take steps … to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised …'. The obligation to respect requires governments to refrain from interfering with people's existing rights. The obligation to protect requires governments to protect people's rights from violation by others and the obligation to fulfil requires governments to work towards ensuring that the rights are guaranteed on a certain substantive level.

188 ComESCR, General Comment No. 3 (1990), para. 1; Foster 2007, p. 137.

189 ComESCR, General Comment No. 3 (1990), para. 9; Foster 2007, p. 138.

190 Hathaway uses the example of (total) economic proscription, a fundamental breach of the right to work (Article 23 UDHR read together with Articles 6 and 7 ICESCR), and states that even the most conservative theorists agree that the sustained or systematic denial of the right to earn one's living is a form of persecution, which can coerce or abuse as effectively as imprisonment or torture: Hathaway 1991, pp. 121 and 122.

191 ComESCR, General Comment No. 4 (1991). According to the Committee any State has several immediate obligations. This includes that in any particular context certain aspects of the right to adequate housing must be taken into account. These are legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy (para. 8). Furthermore, the ComESCR has explicitly acknowledged that 'regardless of the State of development of any country, there are certain steps which must be taken immediately', such as 'the abstention by the Government from certain practices and a commitment to facilitating "self-help" by affected groups', and in addition 'to the extent that any such steps are considered to be beyond the maximum resources available to a State party, it is appropriate that a request be made as soon as possible for international cooperation' (para. 10). Finally, the Committee has identified the following obligations as obligations of immediate effect: the adoption of a national housing strategy (para. 12) and effective monitoring of the housing situation (para. 13). See also ComESCR, General Comment No. 7, The Right to Adequate Housing (art. 11.1): forced evictions, 20 May 1997 dealing with the prohibition on forced evictions.

192 Hathaway 1991, p. 121.

193 Article 2(2) of the ICESCR.

sive realisation clause and the State's resources.[194] This means that, for example, basic education, access to health care or adopted housing schemes cannot unjustly be limited to certain members of society.[195] Economic deprivation on the basis of discrimination may amount to persecution and warrant refugee protection.[196] One has to be careful though, as not all discriminatory economic deprivation necessarily amounts to persecution. It is essential to look at the consequences of the discriminatory actions for the person concerned. Hathaway uses the example of a Polish refugee claimant during the communist era who was denied promotion and employment benefits, a form of discrimination short of persecution,[197] unless as a result of such denial he were deprived of any livelihood. It has to be understood that acknowledging the failure to ensure social, economic and cultural rights may amount to persecution does not imply that everyone who is poor, has financial worries or comes from a developing country may claim refugee protection.[198] This would do justice neither to the nature of economic, social and cultural rights[199] nor to the object and purpose of the Refugee Convention.[200]

2.3.1.1a Persecution as a crime contained in the ICC Statute and ICTY Jurisprudence

Persecution is not just conduct prohibited in the context of refugee law, but also a crime under international criminal law. The Rome Statute of the International Criminal Court (ICC Statute) lists persecution as an act which under certain circumstances may amount to a crime against humanity. The ICC Statute defines persecution as the 'intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.[201] And the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) has defined persecution as a crime against humanity which involves an act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law, and was carried

194 With regard, for example, to the right to education the ComESCR has stated that 'the prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination': ComESCR,Comment No. 13, The Right to Education (Article 13 of the Covenant), 8 December 1999, para. 31. See also Foster 2007, p. 142.

195 Note that Article 2(3) of the ICESCR makes an exception for non-nationals in developing countries.

196 Hathaway 1991, p. 118. See also UNHCR Handbook, para. 54.

197 Hathaway 1991, p. 120.

198 Ibid., pp. 116, 117 and 119.

199 Ibid., p. 116.

200 A person who voluntarily leaves his country of origin for purely economic reasons is not a refugee but an economic migrant (UNHCR Handbook para. 62). This may be different when his reasons for leaving are not voluntary but he was forced to leave, perhaps indirectly, because of economic measures seriously affecting his livelihood, provided there is a link with one or more Convention grounds (UNHCR Handbook para. 63).

201 Article 7(1)(h) read together with Article 7(2)(g) of the Rome Statute of the International Criminal Court (UN doc. 2187 U.N.T.S. 90, which entered into force on 1 July 2002).

out deliberately with the intention of discriminating on one of the listed grounds, specifically race, religion or politics.[202] It is beyond the scope of this research to provide an in-depth analysis of persecution as a crime against humanity because of the different contexts in which the term is used. Nevertheless, it is interesting to note that persecution as a crime must have a certain level of severity and that the discriminatory nature of the act is an essential element, but not sufficient on its own.[203] In addition, a distinction is drawn between fundamental rights and other human rights. No reference is made in the ICC Statute or the ICTY jurisprudence to a particular legal instrument, only to 'international law' in general.

2.3.1.1b Prosecution and punishment amounting to persecution

In principle, a person fearing prosecution and subsequent punishment is not a refugee.[204] However, under certain circumstances prosecution and punishment for a common law offence may amount to persecution.[205] First, a person guilty of a common law offence may be liable to excessive punishment.[206] The application of the law may be discriminatory because the person concerned receives more severe punishment than others in a similar situation. Secondly, prosecution may take place for reasons of race, religion, nationality, membership of a particular group or political opinion,[207] for example, the prosecution of people of a certain religion in respect of their gatherings. In such a case, the law itself is discriminatory. The question is: when is a law, or the application thereof, discriminatory in such a way that it amounts to persecution? Every State has a sovereign right to enact, implement and enforce its own legislation. Such right is limited by international law, in particular in this respect by international human rights law[208] indicating which rights are derogable and which are not, and by making it a condition of the implementation of restrictions that they must be prescribed by law and reasonably necessary in a democratic society.[209]

An example of a law which may lead to persecution is the Clothing Code in Iran. The Code is not of general application as it requires only women to wear a chador and the punishment is disproportionate (74 strokes of the whip). Furthermore, the implementation and enforcement of the law have religious or political reasons;

202 ICTY, *Prosecutor v Tihomir Blaškić*, Case IT-95-14-A, 29 July 2004, Appeals Chamber, paras 131, 135 and 138. See Goodwin-Gill & Adam 2007, p. 95, note 216 for further ICTY Judgments.

203 ICTY, *Prosecutor v Tihomir Blaškić*, Case IT-95-14-A, 29 July 2004, Appeals Chamber, para. 138.

204 UNHCR Handbook para. 56.

205 See also Article 9 (2)(b), (c) and (d) EU Qualification Directive, according to which, 'Acts of persecution as qualified in paragraph 1, can, *inter alia,* take the form of … (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; (c) prosecution or punishment, which is disproportionate or discriminatory; (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment'.

206 UNHCR Handbook, para. 57.

207 Ibid., para. 57.

208 Ibid., para. 60.

209 Goodwin-Gill & McAdam, 2007, p. 103.

consequently, failure to observe the law could be regarded as a religious or political act.[210]

A classical example of an offence that in itself amounts to persecution is the so-called *Republikflucht*. This prohibits, under the threat of severe penal sanctions, nationals from leaving their own country and travelling abroad. Such a situation may lead to persecution and recognition as a refugee if the unlawful departure and/or prosecution is for one of the reasons listed in the refugee definition. In most cases, the unlawful departure will either be for one of those reasons or will be perceived by the State as a political act. The offence of *Republikflucht* is not in accordance with international human rights law as it is recognised that everyone has a right to leave any country, including his own, and to return to his country (Article 12(2) of the ICCPR). This right is not to be subject to any restrictions unless they are provided by law, are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others, and are consistent with the other rights recognised in the ICCPR (Article 12(3)). Of particular importance is the last condition, i.e. restrictions must be consistent with other human rights. Consequently, in the context of refugee protection the prohibition on refoulement and the principle of non-discrimination are significant obstacles for restricting the right to leave any country. In many former communist countries the right to leave the country was seriously restricted as only certain privileged people were ever allowed to leave; these restrictions were clearly discriminatory.

Another situation in which the application of a common law offence may lead to persecution is the situation of refusing to perform military service by way of draft evasion or desertion.[211] In principle, failure to perform normal military service, which is frequently punishable by law, does not come within the scope of persecution.[212] There are however two ways in which draft evasion or desertion from the military may amount to persecution. The first is when the person concerned is at risk of being subjected to disproportionately severe punishment for his action for reasons of race, religion, nationality, membership of a particular group or political opinion.[213] Secondly, military service would be contrary to the person's genuine political, religious or moral convictions, or valid reasons of conscience,[214] provided there is no opportunity to perform alternative (civilian) service.[215] According to the UNHCR not every conviction will constitute persecution. Whether or not it does will depend on the specific individual circumstances and the type of military action in which the person concerned may be involved. If, for example, a person objects to military service based on genuine political convictions, punishment for desertion or avoidance may constitute persecution only if it involves military action which is condemned by the international community

210 Musalo 2002, p. 45. See also UNHCR 2002-2, para. 26 (p. 7).
211 See extensively on this issue Goodwin-Gill & McAdam 2007, pp. 104-115.
212 UNHCR Handbook, para. 167.
213 Ibid., para. 169.
214 Ibid., paras 170 and 172.
215 Ibid., para. 173.

as contrary to basic rules of human conduct.[216] Another example involves a situation where the individual would be required to perform military service in a conflict directed at his own ethnic group,[217] or when military force is used against fellow citizens in times of internal conflict in a discriminatory manner.[218] In addition, Article 9(2)(e) of the EU Qualification Directive refers to military action which would lead to participation in the crimes referred to in Article 1F of the Refugee Convention. In all situations of genuine objection to perform military service described above the requirement to perform the service may be the sole ground for a claim to refugee status, according to the UNHCR Handbook.[219] In other words, the need for refugee protection is irrespective of the severity of the punishment to which the individual may be subjected. It is relevant that the person concerned has genuine objections as recognised by the UNHCR, that there is no chance of performing an alternative service, and that he has a risk of being harmed for avoiding or deserting from military service. After all, every person has the non-derogable right to freedom of thought, conscience and religion.[220]

It can be concluded that the harm from which a refugee is protected by Article 33(1) of the Refugee Convention is determined by the term 'persecution' in the definition of a refugee in Article 1A(2) of the Refugee Convention. Persecution is and remains undefined. Nevertheless, it is commonly accepted that persecution involves serious discriminatory harm. Persecution is not a stand-alone criterion but must be read in conjunction with the reasons for being persecuted referred to in both Articles 1A(2) and 33(1) of the Convention. The current predominant view seems to be that persecution concerns any conduct, singularly or cumulatively, which denies – on a discriminatory basis – physical integrity or human dignity in any serious or repetitive way, and that the severe, sustained or systematic denial of human rights is the appropriate standard.[221] The focus should thus be on the whole range of human rights, taking into account the non-derogability of certain human rights, the possibility of legitimate limitations on other human rights and the limited meaning of the progressive realisation of economic, social and cultural rights. Moreover, it is not necessary, for a situation to amount to persecution, to identify what human right is violated or to categorise that right. Persecution can take many forms. It would be inappropriate and impossible to mention all possible forms of persecution. Each case needs to be assessed independently and depends on its specific facts and circumstances as well as on the dynamic and evolutive character of the Refugee Convention and international

216 Ibid., para. 171.
217 UNHCR 2001, para. 18 (p. 6).
218 UNHCR 2003-4 para. 3.46 and 3.47 (p. 27) in which the UNHCR refers to a case involving the internal use of military force in South Africa during the apartheid era.
219 UNHCR Handbook, para. 170.
220 Article 18(1) of the ICCPR.
221 I have taken this standard from Hathaway, but have removed the work 'basic'. I prefer to refer to human rights in general than to basic human rights: Hathaway 1991, p. 108, note 59. Goodwin-Gill & McAdam 2007, p. 94.

human rights law. It would be wrong to link persecution strictly with specific human rights treaties or norms.[222]

2.3.1.2 Persecution reasons

Protection from refoulement will be granted only if the life or freedom of the refugee is threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion. Indeed, even for a person to qualify as a refugee, as is stipulated in the definition in Article 1A(2) of the Refugee Convention, his fear of being persecuted must be for one or more of those five reasons.[223] Clearly, there must be a relationship between the fear of being persecuted and the person's race, religion, nationality, membership of a particular opinion or political opinion.

The reasons for persecution add another quality to the harm feared; they refer to norms of non-discrimination.[224] And, as Goodwin-Gill puts it, these reasons 'illustrate briefly the characteristics of individuals and groups which are considered worthy of special protection'.[225] Being at risk of becoming the victim of serious harm or, in terms of the Refugee Convention, persecution is insufficient for one to become a refugee; it is necessary to be at risk of serious discriminatory harm or persecution. For example, a person who is at risk of being sentenced to death and being executed may face inhuman treatment amounting to persecution but will not be a refugee. He may be a refugee only if he is discriminated against and at risk of being sentenced to death for one or more reasons listed in the Convention. Furthermore, a person who is at risk of losing his life because of indiscriminate or random violence will not be a refugee. Only when the violence is directed at a particular group can a member of that group be a refugee, because the violence is discriminatory. Discrimination is a decisive element in determining refugee status and the right to be protected from refoulement.

The relationship between being persecuted and the grounds for persecution will be further explained in section 2.3.1.3. I will first briefly explain the five reasons listed in Articles 1A(2) and 33(1) of the Refugee Convention respectively.

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222 'In the UNHCR's view, the interpretation of what constitutes persecution needs to be flexible, adaptable and sufficiently open to accommodate its changing forms. Furthermore, it will depend on the circumstances of each case whether prejudicial actions or threats would amount to persecution. While international and regional human rights treaties and the corresponding jurisprudence and decisions of the respective supervisory bodies influence the interpretation of the 1951 Convention, persecution cannot and should not be defined solely on the basis of serious or severe human rights violations': UNHCR 2005-2, comment on Article 9(1), p. 20.

223 UNHCR Handbook, para. 66.

224 Hathaway 1991, p. 136; Goodwin-Gill 1996, pp. 43 and 68.

225 Goodwin-Gill & McAdam 2007, p. 92.

2.3.1.2a Race

Race has to be understood in its widest sense and includes all kinds of ethnic or minority groups.[226] Reference can be made to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and Article 10(1)(a) of the EU Qualification Directive to include considerations of colour, descent, nationality and ethnicity.

2.3.1.2b Religion

The term 'religion' refers not only to well-known global religions such as Judaism, Christianity, Islam, Hinduism and Buddhism, but to any kind of religious community, belief, identity or way of life. In general, it refers to a person's right to freedom of thought, conscience and religion, including the freedom to change religion, to manifest religion, in public or in private, to teach, practise, worship and observe religion. It even refers to a person's right to have no religion.[227] It is not necessary that the person concerned has complete knowledge of his particular religion. For example, a person who has acquired a particular religion by birth and who has not widely practised it may have less knowledge of it but may nevertheless be persecuted for that reason.[228]

2.3.1.2c Nationality

Nationality refers not only to a person's nationality in the strict legal sense, but also more broadly to membership of an ethnic, religious, cultural or linguistic group.[229] It may also refer to a group with a common geographical background, political origin or a relationship with the population of another State.[230] Clearly, there may be an overlap with the other reasons listed in Article 1A(2) of the Refugee Convention. Persecution for reasons of nationality may involve a majority dominating a minority group, or a majority fearing a dominant minority.[231]

2.3.1.2d Membership of a particular social group

In essence, a social group can be defined in two ways: either as a group united by a common characteristic, other than their risk of being persecuted, by which members

226 UNHCR Handbook, para. 68. See also Goodwin-Gill 1996, p. 43.

227 The right to freedom of thought, conscience and religion is formulated, inter alia, in Article 18 of the ICCPR and Article 9 of the ECHR. See further the UNHCR Handbook, paras 71-73. On 'religion' as one of the reasons mentioned in Article 1A(2) of the Refugee Convention see also UNHCR 2004 and Goodwin-Gill & McAdam 2007, pp. 71 and 72. All of this is in conformity with Article 10(1)(b) EU Qualification Directive according to which the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief.

228 UNHCR 2004, para. 31 (p. 11).

229 UNHCR Handbook, para. 74; Goodwin-Gill & McAdam 2007, pp. 72 and 73.

230 Article 10(1)(c) of the EU Qualification Directive.

231 UNHCR Handbook, para. 76.

identify themselves (protected characteristics approach)[232] or as a group which is externally identified as such by the authorities or society (social perception approach).[233] Whatever approach is chosen, the group's characteristics or perceived characteristics must be innate, unchangeable or otherwise fundamental.[234] It is not necessary for the individual members of the group to know each other or voluntarily associate together.[235] Also, it is not relevant for the group to be visible or easily recognisable to the general public or society at large.[236] For example, while a family may not be well-known to, or visible or recognisable by, the general public, they may constitute a social group.[237] Not all members of the social group must be at risk of being persecuted, and the size of the group is irrelevant.[238] References to social group or origin can be found in various non-discrimination provisions, inter alia, Article 2 of the UDHR, Articles 2(1) and 26 of the ICCPR and Article 2(2) of the ICESCR. Little is known about why the drafters of the Refugee Convention included social group in the definition, except to protect then recognised groups from harm.[239] It is commonly accepted, though, that the category refers to a broad spectrum of groups of which no specific list exists, may change over time and can differ from one society to another.[240] The UNHCR Handbook defines a particular social group as a group comprising people with a similar background, habits or social status.[241] In academic literature the following elements are most commonly used to define a particular social group. It includes:

1. groups defined by an innate, unalterable characteristic, for example, by gender,[242] ethnicity, culture, language, family background or sexual orientation;
2. groups defined by their former voluntary status, unalterable due to the group's historic permanence, for example, by their education or economic activities; or

232 UNHCR 2002-3, para. 6. See also, UNHCR 2006-4, para. 13 (5); UNHCR 2004-2, p. 8. Examples of common characteristics by which members may identify themselves may be innate ones such as sex, colour or kinship ties, or such characteristics may result from past experiences such as dictatorship or land ownership: see Hathaway 1991, p. 160.

233 UNHCR 2002-3, para. 7; Goodwin-Gill & McAdam 2007, p. 85. See also UNHCR 2006-4, para. 13 (6); UNHCR 2004-2, p. 8.

234 UNHCR 2002-3, para. 11. For a comprehensive analysis of both approaches and their role in various State party jurisdictions see Foster 2007, pp. 295-303.

235 Aleinikoff 2003, p. 310; UNHCR 2002-3, para. 15.

236 UNHCR 2007-3, p. 8.

237 Ibid., p. 13.

238 UNHCR 2002-3, paras 17 and 18.

239 Goodwin-Gill & McAdam 2007, p. 74, in which it is mentioned that such groups may have included land owners, capitalists and others persecuted by the Communist authorities in the former Soviet Union.

240 UNHCR 2002-3, para. 3.

241 UNHCR Handbook, para. 77.

242 EXCOM Conclusion No. 105 (LVI) 2006, para. (n)(iv): 'gender-related forms of persecution in the context of Article 1A (2) of the 1951 Convention relating to the Status of Refugees may constitute grounds for refugee status'.

3. groups formed and defined by choice, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it, for example, because of shared values, outlook or aspirations.[243]

Furthermore, social groups can also be defined by the system that divides society. For example, certain societies have a caste system, a feudal system or other strong class division which may include a landlord class, working class, urban class, rural class, ruling class, middle class, bourgeoisie or criminal class.[244]

The social group must exist independently of the persecution and cannot be solely based on the common victimisation of its members.[245] Nevertheless, the fact that they fear persecution can be an element in determining the existence of a social group. For example, Chinese women fearing sterilisation because of the one-child policy are not a social group merely because they share a fear of being sterilised. They are a social group based on a variety of factors such as their factual circumstances of having one or more children, because they have a shared value or aspiration in that they want to have more children, and because they are treated differently by the government because they have 'transgressed the social mores of society in which they live'.[246] Another example is women in Sierra Leone who fear female genital mutilation which is condoned by the State. These women are a social group because the rite of female genital mutilation is societally embedded so as to apply to women in that society. They share the common characteristic of their gender and consequently have a fear of persecution.[247] The example of homosexuals is similar. They share a common characteristic, i.e. their sexual orientation, and therefore constitute a particular social group.[248] Less clear are perhaps groups which are defined by their economic class or occupation.[249] What is relevant is what their innate or unalterable characteristic is and how their status is viewed by them and by the society of which they are a part. In other words, is it a realistic option for members of the group to dissociate themselves from the group or to have the ability to change and no longer be part of the group. For example, an economic or social class which is clearly unalterable is that of a low caste in countries such as India. Belonging to a low cast is unalterable and is clearly identifiable both by the members of the caste themselves and by society as a whole; it is inherently not possible to leave or change. Situations where the unalterable characteristic is less obvious are more ambiguous, for example, situations where the poor or the rich are perceived as an economic class. The question

243 Hathaway 1991, p. 161; Goodwin-Gill 1996, p. 360; Spijkerboer & Vermeulen 2005, p. 51; Article 10 (1)(d) of the EU Qualification Directive contains similar language: UNHCR 2002-3, paras 6-9.

244 Goodwin-Gill & McAdam 2007, p. 85. Foster analysis the national law and practice of various States parties regarding particular social groups based on economic class, occupation, disability and illness, women and children: Foster 2007, pp. 304-340.

245 UNHCR 2002-3, paras 2 and 14; UNHCR 2006-4, para. 13 (3).

246 EXCOM Conclusion No. 39 (XXXVI), 1985, para. k. See also Aleinikoff 2003, p. 268.

247 UNHCR 2006-4, para. 21.

248 UNHCR 2004-3, para. 8.

249 See for a detailed discussion of these groups and others Foster 2007, pp. 304-338.

is to what extent being rich or poor in such societies is unchangeable. Yet another example is that of white farmers in Zimbabwe. Their characteristic of being white and being perceived as belonging to the former colonial rule is unalterable, leading to the conclusion that they can be seen as a particular social group. The above examples show the difficulty of categorising a group as a particular social group within the meaning of Article 1A(2) of the Refugee Convention. Clearly, one cannot dismiss a group as not being a particular social group on general legal grounds. It is necessary to understand the situation in the country of origin.

2.3.1.2e Political opinion

Persecution may be based on the fact that a person holds a certain political opinion which differs from those of his persecutors. The term 'political' must be interpreted broadly and may refer to any type of opinion on the State, society or public cause,[250] and include non-conformist behaviour.[251] To fear being persecuted for reasons of a political opinion presupposes that the opinion has come to the attention of the persecutors by reason of which the individual has a well-founded fear. There is a variety of ways in which the persecutor may become aware of a person's political opinion, such as a publication, speech, conversation or participation in a demonstration or even wearing certain clothes. There may, however, also be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can be reasonably assumed, the applicant can be considered to have a well-founded fear of being persecuted for reasons of political opinion.[252]

2.3.1.2f Perceived or attributed persecution grounds

There may also be situations in which the individual concerned does not have a certain religious conviction[253] or political opinion, but may be perceived as having one or one is attributed to him; or where the individual does not belong to a certain race or a particular social group, but is perceived as so belonging. Non-conformist behaviour may not always be the result of a political opinion, but it may lead the persecutor to impute such an opinion to the person concerned. For example, in a State in which male domination over female is condoned a woman's attempt to leave her husband may be perceived as a political opinion.[254] Similarly, in a State which adheres to strict conservative, often religious, principles and norms, having a different sexual orientation may be perceived as political.[255] In such situations, the behaviour

250 Goodwin-Gill & McAdam 2007, p. 87.

251 UNHCR 2002-2, para. 32. According to Article 10 (1)(e) EU Qualification Directive: 'the concept of political opinion shall in particular include the holding of an opinion, thought or belief'.

252 UNHCR Handbook, para. 82.

253 According to the UNHCR no knowledge is required in situations where a particular religious belief, practice, identity etc. is imputed or attributed to a person: UNHCR 2004, p. 11 (para. 31).

254 This example is taken from UNHCR 2004-2, pp. 11 and 12.

255 UNHCR 2004-3, para. 6.

of the persecutors is often more relevant than that of the refugee,[256] and the person concerned may qualify as a refugee.[257]

2.3.1.3 Being persecuted for reasons of

A refugee must have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. The meaning of the phrase 'for reasons of', indicating a relationship between the well-founded fear of being persecuted and one or more of the five reasons mentioned, will be analysed below.

One may argue that one of the five reasons mentioned in the definition must be the main reason for the persecution. However, this is supported neither by the text of Article 1A(2) of the Refugee Convention nor by the UNHCR.[258] Furthermore, such an interpretation would imply a standard of proof too high for the process of determining refugee status (see section 2.3.2.2). Therefore, it would be more appropriate to assume that a specific Convention reason must be a relevant factor contributing to the well-founded fear of being persecuted; it is not necessary for it to be the sole, primary or even dominant reason.[259] The specific Convention reason may be just one of the perhaps many reasons why a person has a well-founded fear of being persecuted. However, if the Convention reason is so remote from the fear of being persecuted as to be irrelevant it cannot be concluded that there is a well-founded fear of being persecuted for that reason. Notwithstanding this very liberal test, the reality is often more stubborn. This is, for example, illustrated by a series of cases in New Zealand described by Foster and relating to the situation of the Bihari in Bangladesh.[260] In these cases claims for refugee protection, based mainly on socio-economic deprivation, were denied on the basis that, while facing discrimination on ethnic grounds the (socio-economic) harm to the Bihari was part of the general economic difficulties of one of the world's poorest countries, and not predominantly because of their ethnicity. Foster concludes that States are sceptical about claims based on socio-economic deprivation, and that it appears that they impose a much stricter test for people coming from poorer countries.[261]

It is necessary objectively to establish the reason for persecution. The reason may be evident because there is a certain enmity, malignity or animosity against the refugee. For example, the person concerned is at risk for reasons of his political opinion because he has openly criticised government policy. The reason may be less evident, but one or more grounds may contribute to the refugee's exposure to the risk of being persecuted.[262] For example, the person concerned belongs to a vulnerable group

256 Grahl-Madsen 1966, pp. 175, n. 54, 250-252.
257 UNHCR Handbook, para. 80 ; Article 10(2) of the EU Qualification Directive.
258 UNHCR Handbook, para. 81.
259 UNHCR 2002-2, para. 20; UNHCR 2007-3, p. 14; Foster 2007, p. 247.
260 Foster 2007, pp. 260-261.
261 Ibid., p. 261. See also Hathaway 1991, p. 123.
262 Hathaway 2002, p. 215 (paras 9 and 10).

in society which easily becomes the victim of condoned ill-treatment (for example women in conservative Islamic societies). Another example can be found in situations of armed conflict. People fleeing conflict situations can be refugees when either the reason for the armed conflict or the way in which the conflict is conducted indicates the existence of a reason. In that regard it is important to understand the origins and purposes of the armed conflict or violence.[263] Furthermore, in many wars it is conceivable that certain ethnic, religious or political factors are part of the motivation of the warring factions, and may therefore be a relevant factor contributing to the well-founded fear of being persecuted.[264]

Then there is the question of motive or intent on the part of the persecutor. The intent of the persecutor to persecute the refugee because of one or more of the reasons for persecution is a relevant factor, and can even be the conclusive one for qualification as a refugee.[265] For example, the persecutor may intend to harm the individual concerned by reason of his ethnicity or because he has expressed an opposite political opinion. However, intent is not a necessary condition, in the sense that it must entail an element of conscious, individualised direction on the part of the persecutor.[266] For example, in situations of group persecution there may be intent on the part of the persecutor, but this is not necessarily individualised. Furthermore, in situations where a vulnerable social group is likely to be subject to persecution on a purely statistical basis, members of that group may have a well-founded fear of being persecuted for reasons of belonging to a particular social group, without there being a conscious, individualised intent. Another example is the situation in which women become the victim of human trafficking. This is a serious crime committed with the economic motive of making a profit and, initially, not amounting to persecution for reasons of, for example, membership of a particular social group. However, the possibility of existing Convention reasons cannot be ruled out. According to the UNHCR, 'scenarios in which trafficking can flourish coincide with situations where potential victims may be vulnerable to trafficking precisely as a result of characteristics contained in the 1951 Convention refugee definition'.[267] Such scenarios may occur during times of social upheaval, economic transition or armed conflict, in which cases there may be a breakdown in law and order resulting in increasing opportunities for

263 See for example Musalo 2002, p. 47 in which reference is made to a case involving the persecution of a black Christian from the South of Sudan and in which the New Zealand Refugee Status Appeals Authority found that, because the Sudanese civil war was grounded primarily in issues of race and religion, simplistically put, between the fair Muslims from the north and the black Christians and animists of the south, the applicant had established a well-founded fear of being persecuted for reasons of both race and religion (Refugee Status Appeals Authority, New Zealand, Refugee Appeal No. 71271/99 (1999)).

264 UNHCR 2004-3, para. 5; Hathaway 2002, p. 219 (para. 17).

265 According to Foster the intention requirement is made most explicit in US case law and also occurs in decisions in Australia, Canada and the United Kingdom: Foster 2007, p. 264.

266 Goodwin-Gill & Jane McAdam 2007, pp. 100-101. See also Spijkerboer & Vermeulen 2005, pp. 52-54.

267 UNHCR 2006-2, para. 31, referred to in Foster, pp. 267-268.

criminals to exploit vulnerable people.[268] In general, there may be situations in which the persecutor may well have a certain intent, but this intent is not immediately related to one of the reasons. Nevertheless, the persecutor's conduct has the effect of people being persecuted for, for example, religious reasons. Another example in this regard is when a State prosecutes people who have a genuine religious conviction regarding military service because it wants to raise and maintain an army, and not because it wants to persecute certain people for their religious beliefs.[269] Thus, while religious reasons played no part in the persecutor's decision, they were core to why the person concerned refused military service. In this example, the reason for persecution does not stem from the persecutor, but from the predicament of the person fearing persecution.[270] In other words, the person finds himself in a dilemma. He is legally obliged to perform military service, but his religious beliefs prevent him from doing so. He thus risks punishment; not because the government wants to persecute him for religious reasons, but because refusal to perform military service is punishable by law; a refusal which is based on his own religious beliefs. The passive wording of the refugee definition underlines the significance of the predicament of the refugee and his fear, rather than the assessment of the situation from the perspective or intent of the persecutor.[271] Finally, the reason for having a well-founded fear of being persecuted may also result from the country of origin as possible protector.[272] A person may become the victim of persecution by private individuals who may have no particular reason for the persecution other than to persecute. In such a situation the well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion may be found in the absence of effective protection by the country of nationality or habitual residence. For example, in certain societies women fear ill-treatment from their husbands or partners, i.e. domestic violence, without receiving protection from their government. The connection between the woman's well-founded fear of being persecuted and, for example, membership of a particular social group is not established by the persecutor. The husband may harm his wife for no specific reason. The connection can be established by the country of origin as the possible protector in two ways: first, when the domestic violence is knowingly tolerated or condoned by the State or when the State refuses to offer

268 UNHCR 2006-2, para. 31.

269 This example is not without controversy. In the United States it is required to establish 'proof of intent'. US courts have therefore ruled that if the State's intent was to raise an army and not to persecute the applicant for his religious beliefs there would be no link between the well-founded fear of being persecuted and the reason of religion. New Zealand and the United Kingdom have adopted a similar approach, whereas Canada has a different interpretation: see Musalo 2002, pp. 39-43. In addition, the highest court in the Netherlands dealing with asylum cases also requires 'intent' on the part of the persecutor: Spijkerboer & Vermeulen 2005, p. 53. Foster describes a changing interpretation of national courts in which they are beginning to consider the wider context of societal discrimination against a particular group: Foster 2007 p. 282.

270 Foster refers to this as the predicament approach: Foster 2007, pp. 270-271 and pp. 280-286.

271 Ibid., p. 273.

272 UNHCR 2002-2, para. 20; UNHCR 2007-3, pp. 16 and 17.

protection because, for example, it believes husbands have a right to harm their wives;[273] Or, secondly, the connection may be less obvious when, for example, the State is largely inactive in dealing with cases of domestic violence because it is an established part of the country's culture and is not perceived as a problem. In such a situation it may be more difficult to objectify the reasons for there being a risk of being persecuted.

It can be concluded that, when it comes to the issue of motive or intent on the part of the persecutor, the refugee definition should not be interpreted as requiring that the persecutor has the conscious, individualised intention to persecute because of one of the five reasons. Such an interpretation is not in accordance with the text of the Convention, as the requirement is formulated in a passive way, and not actively so as to imply an intention of the persecutor. Furthermore, to require that the persecutor must have the intention to persecute for one of the five reasons would not be in conformity with the object and purpose of the Convention, which is to protect individuals against serious harm and not to hold actors of persecution responsible for their conduct. Moreover, to require an intention would impose too high a standard of proof on the refugee. In fact, it cannot be expected of the refugee that he specify the reason or reasons for persecution,[274] let alone show intent or motive on the part of the persecutor. According to the UNHCR Handbook, 'often the applicant himself may not be aware of the reasons for the persecution feared'.[275] What in the end is relevant is that there is some form of connection between the well-founded fear of being persecuted and one of the reasons listed in the refugee definition. This connection can be established by the refugee as the reason for his fear or his predicament, by the country of origin as a possible protector, or by the persecutor as his intention.[276]

Finally, the fact that one member of a race, religion, nationality, particular social group or political organisation is involved in the persecution of another member does not of itself prevent the existence of a well-founded fear of being persecuted for one of the reasons listed in the definition. Collaborators belonging to the same group and acting for personal gain are common.[277]

In conclusion, the phrases 'for reasons of' in Article 1A(2) of the Refugee Convention, and 'on account of' in Article 33(1), presuppose a relationship between the risk of being persecuted and one or more of the five reasons or accounts listed in Articles

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273 This example is taken from UNHCR 2004-2. See also UNHCR 2002-3, para. 22; UNHCR Handbook, para. 65.

274 Hathaway 1991, p. 137.

275 UNHCR Handbook, para 66.

276 This approach is broader than is required in the EU Qualification Directive. According to Article 9(3) EU Qualification Directive there must be a connection 'between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1'. Consequently, according to Battjes, under Article 9 (3) it is required that the persecution act be committed for the reasons set out in the refugee definition, thus denying the relevance of those reasons for the absence of protection: Battjes 2006, pp. 254, 258-259 (paras 330 and 331)

277 UNHCR 2006-4, para. 25.

1A(2) and 33(1) respectively. This relationship may stem from the intention of the persecutor, or from the unwillingness or inability, not necessarily intentional, of the country of origin to provide protection, or it may stem from the fear or the predicament of the individual concerned.

2.3.1.4 Actors of persecution[278]

According to the definition a refugee must have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and must be unable or, owing to such fear, unwilling to avail himself of the protection of his country of nationality or habitual residence. The risk of being persecuted for a reason must be linked to verifiable human activity or inactivity. Persecution is due to actions or inactions of people, as a result of the country's failure to provide protection. Though the Refugee Convention implies the existence of a persecutor the Convention is silent as to the conceivable actors of persecution.[279] The ordinary meaning of the term 'persecution' includes all persecutory acts and is neutral as to the source of the persecution. The Convention aims to help potential victims of persecution who cannot obtain protection from their own country and are therefore in need of international protection. That need exists when the country of nationality or habitual residence is unable or unwilling to provide protection. The decisive criterion, as stated in the refugee definition, is that the refugee 'is unable or, owing to such fear, unwilling to avail himself of the protection' of his country of origin. Thus the essential element is the absence of national protection rather than the source of persecution or the type of persecutor.[280] Of course, the issue of the agent of persecution is a relevant one in the context of national protection. The issue of protection by a person's own country ('protection clause') and internal protection alternatives will be discussed in section 2.3.2.4.

Obviously the State can be an actor in persecution, either through direct action or indirectly by instigating, condoning or knowingly tolerating the actions of

278 Generally see: Hathaway 1991, pp. 125-133; Goodwin-Gill 1996, pp. 70-74; Spijkerboer & Vermeulen 2005, pp. 35-40.

279 It is important to note that the EU Qualification Directive is not silent on the matter of the persecutor, and in Article 6 lists the potential actors of persecution, thereby ending a discussion and deviation in the law and practice of the EU Member States. According to Article 6 EU Qualification Directive actors of persecution can include the State, parties or organizations controlling the State or a substantial part of the territory of the State, and non-State actors.

280 This is often referred to as the 'protection view'. See *R v Secretary of State for the Home Department, ex parte Adan and Aitseguer* [2001] 2 WLR 143 (HL) 19 December 2000; Vermeulen et al 1998, p. 11; Kälin 2001, pp. 423-425. See also Goodwin-Gill 1996, p. 71. UNHCR 1995, pp. 28-29.

others.[281] In addition, a State can be the perpetrator of persecution by reason of conduct which can be attributed to the State.[282]

Apart from States, non-State entities can also be responsible for the (fear of) persecution in accordance with the Refugee Convention.[283] Non-State actors can include everyone from private individuals to organised groups which may even control a part of the State's territory. Private individuals who commit acts of persecution may also include State agents who act in a private capacity.[284] Again, the question should then not be who is the persecutor, but is the individual concerned able and willing to avail himself of the protection from his own government, as will be discussed in section 2.3.2.4?

In principle, anyone can commit acts of persecution within the meaning of the Refugee Convention. It is not decisive whether or not a State apparatus is functioning. For example, in situations of civil war or where no government or State authority exists (failed States), people can have a well-founded fear of being persecuted. In situations of civil war it may be difficult to rise above the presumably large scale indiscriminate violence and conclude that there is a risk of being persecuted for reasons of race, religion, nationality, membership of a political group or political opinion. However, a civil war or indiscriminate violence is not an obstacle to meeting the requirements of refugee protection, as the refugee claimant may still have a well-founded fear of being persecuted based on discriminate violence as described in section 2.3.1.3.[285]

In general, a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion requires human conduct. Victims of hunger or natural disasters will normally not qualify as refugees, even though the circumstances in which they find themselves may be extreme.[286] The problem is that they are not put into such a severe situation by anyone for one of the reasons listed in the definition. This may be different when people are intentionally starved, for example, because they belong to a certain ethnic group. Even victims of natural disasters (or environmentally induced forced displacement) may be refugees, provided they are victimised for reasons of race, religion, nationality, membership of a particular social group or political opinion. For example, logging may intentionally take place in an area in which a certain ethnic minority lives. As a consequence there is a risk of mudslides, potentially resulting in human casualties and causing severe destruction of housing, land and property belonging to the ethnic minority. More realistic is a situation where there is no protection, for example, a

281 UNHCR Handbook, para. 65.

282 See section 1.2.3.3 and Articles 4 to 11 of the Draft Articles on Responsibilities of States for Internationally Wrongful Acts outline for what and whose conduct a State can be held responsible: Draft Articles on Responsibilities of States for Internationally Wrongful Acts, International Law Commission, 53rd session (2001), UN Doc. A/56/10, <www.un.org/law/ilc>.

283 UNHCR Handbook, para. 65.

284 Kälin 1982, p. 150; Spijkerboer 1999, p. 113.

285 Goodwin-Gill 1996, p. 75.

286 UNHCR Handbook para. 39.

situation in which the country of origin deliberately refrains from providing assistance to people for reasons of race in the aftermath of an earthquake.[287] Another situation arises as a result of developmentally induced forced displacement, whereby people are forced to leave their places of habitual residence and even their own country by reason of large-scale construction projects, for example, highways or dams. Because of these construction projects people may be forcibly evicted from their homes and may be deprived of their livelihood. The people concerned are the victims of human activity. No doubt these types of human rights violations and their severity may constitute persecution. However, the relevant question is whether or not the people claiming refugee status run a risk of being subjected to these types of actions for one of the reasons listed in the refugee definition. Arguably, such a risk exists because they have been persecuted and will continue to be discriminated against. For example, a State is planning to construct a dam in particular in an area in which an ethnic minority group lives. The construction may lead to forced eviction, perhaps carried out violently, and inadequate compensation or no new housing is provided. In such a situation members of the ethnic group residing in the area in question may have a well-founded fear of being persecuted for reason of race. They have been and will continue to be the victims of human rights violations.

A final situation worth mentioning in this regard is that whereby the person concerned runs a risk of becoming the victim of a lack of medical and social care. Such a lack may amount to persecution provided a certain level of severity is met and the necessary care is lacking for reasons of race, religion, nationality, membership of a particular social group or political opinion. In reality it will not be easy to argue a case involving natural disasters, environmentally induced forced displacement, developmentally induced forced displacement or the lack of medical and social care in favour of protection under the Refugee Convention. Notwithstanding the above examples, it will be very difficult to show that the victims are subjected to differential victimisation based on race, religion, nationality, membership of a particular group or political opinion, except perhaps in situations where protection, i.e. assistance, by the country of origin deliberately does not exist.[288]

2.3.2 The element of risk

According to Article 33(1) of the Refugee Convention a refugee may not be expelled to a country where his life or freedom is threatened. The word ‘threat’ presupposes a certain risk to the refugee’s life or freedom. Similarly, the definition of a refugee in Article 1A(2) of the Refugee Convention also includes an element of risk, indicated by the words ‘well-founded fear’. Furthermore, according to the definition of a refugee

287 Example taken from Spijkerboer & Vermeulen 1995, p. 115.

288 See for the issue of environmentally and developmentally induced displacement in the context of the Refugee Convention Castles 2002, pp. 8-10; Consibee & Simms 2003, pp. 25-35; Turton 2003, pp. 14-16.

in Article 1A(2), a person must not be able or, owing to such fear, willing to avail himself of the protection of his country of origin. The evident correlation between Article 33 and Article 1A(2) implies, as already stated in the introduction to section 2.3 above, that when a person is a refugee, he has a well-founded fear and will not receive national protection, there is a threat.

The element of risk contained in Article 33(1) of the Refugee Convention is determined by a person (1) having a well-founded fear, and (2) not being able or willing to obtain protection from his own country. The concept of well-founded fear will be discussed in sections 2.3.2.1 and 2.3.2.2. This will be followed in section 2.3.2.3 by an analysis of the point in time at which the risk must be determined. Finally, in section 2.3.2.4 the issue of national protection will be discussed.

2.3.2.1 Defining the risk: a well-founded fear

2.3.2.1a Objectivity and prospectivity

The element of risk stipulated by the words 'well-founded fear' is the backbone of the refugee definition as well as the prohibition on refoulement. It implies that there needs to be a present or prospective risk of persecution which can objectively be established. I will focus first on the element of objectivity, after which I will analyse that of prospectivity.

The word 'fear' is somewhat unfortunate as it implies that the definition contains a decisive subjective component. While fear is a subjective emotion, for purposes of refugee status determination it must be well-founded; that is, it must have an objective basis. Fear as a subjective element refers to the individual's specific circumstances and personal conditions. It is not the frame of mind of the person concerned or his fright as such which is decisive for his claim, but the objective yardstick by which it is measured.[289] There may be instances where objective circumstances in themselves do not appear to be compelling, but, taking into account the individual's own background, belief system and activities, these – objective – circumstances may indeed be considered as substantiating a well-founded fear for that individual, although the same objective circumstances might not be so considered for another individual.[290] For example, the rite of female genital mutilation may be a common practice in a particular country, and as such condoned by the State. Consequently,

289 Grahl-Madsen eloquently formulated the objective character of the 'well founded fear' concept as follows: 'that it is not the frame of mind of the person concerned which is decisive for his claim to refugeehood, but that his claim should be measured with a more objective yardstick … In fact … the frame of mind of the individual hardly matters at all. Every person claiming or being claimed (as in the case of minors) to be a refugee has 'fear' ('well founded' or otherwise) of being persecuted in the sense of the present provision, irrespective whether he jitters at the very thought of his return to his home country, is prepared to brave all hazards, or is simply apathetic or even unconscious of the possible dangers. … just as the nervous, the brave and the foolhardy should be subject to the same gauge, 'well founded fear' may exist, irrespective of whether the individual in question is a babe in arms, a lunatic, ignorant or well informed, naïve or cunning': Grahl-Madsen 1966, p. 174.

290 UNHCR Handbook, paras 37-40.

all women in that State are, in principle, at risk of being subjected to female genital mutilation. Nevertheless, some women may be fearless, i.e. they may undergo the mutilation in order to be accepted in society. Even then, the fact that some individuals may accept persecution would not prevent the need for refugee protection arising where a person has an objective well-founded fear of such extreme conduct.[291] Fear as a purely emotional state of mind is neither decisive nor sufficient for claiming refugee protection.[292] To allow fear as an emotional state of mind to be part of the determination of refugee status would lead to a distortion of refugee protection and inequality. Why would a fearful person have more right to refugee protection than a hero who knows no fear, or why would a baby or mentally handicapped person who may not truly understand the concept of fear have no right to refugee protection?[293] Furthermore, it would be inconsistent with the Refugee Convention, for example, with the protection from refoulement under Article 33(1) of the Refugee Convention where reference is made to an objective, genuine risk to a refugee's life or freedom and not to a person's trepidation.[294]

Rather than referring to an emotional state of mind, the word 'fear' in Article 1A(2) of the Refugee Convention refers to 'the likelihood of something unwelcome happening'.[295] The term was employed to mandate a forward-looking assessment of a risk of being persecuted.[296] This is further indicated by the more neutral term 'threat' used in Article 33(1) of the Convention. There is no clear and independent international legal interpretation of the risk criterion contained in Articles 1A(2) and 33(1) of the Convention. This is unfortunate because the risk is essential in determining a person's right to be protected from refoulement. Academic research suggests that States draw a distinction between the stricter balance of probabilities test and the more commonly used reasonable chance or serious possibility test. The balance of probabilities test requires the refugee claimant to establish that persecution

291 UNHCR 2006-4, para. 23. Other examples mentioned by the UNHCR are: a person of religious faith who faces religious persecution or martyrdom without fear; a married woman found in an adulterous relationship may face beatings with acceptance, believing that she needs to be punished.

292 According to the UNHCR the term well-founded fear contains both a subjective and an objective element (UNHCR Handbook, paras 38, 40 and 41). Although a textual interpretation of the word 'fear' implies the existence of both elements, this cannot be the correct interpretation of the refugee definition. See: Hathaway 1991, pp. 65-75; Third Colloquium on Challenges in International Refugee Law, *The Michigan Guidelines on Well-Founded Fear*, The Program in Refugee and Asylum Law, University of Michigan Law School, 28 March 2004, introduction and paras 3 and 4; Spijkerboer & Vermeulen 2005, pp. 28 and 29.

293 Grahl-Madsen Leiden, 1966, p. 174; Spijkerboer & Vermeulen 2005, p. 28; Note that the UNHCR has considered the potential absence of the subjective element of 'fear' in the UNHCR Handbook, paras 211 (for mentally disturbed persons) and 217 (for unaccompanied minors) and then considers that greater emphasis should be put on the objective situation.

294 Third Colloquium on Challenges in International Refugee Law, *The Michigan Guidelines on Well-Founded Fear*, The Program in Refugee and Asylum Law, University of Michigan Law School, 28 March 2004, para. 5.

295 According to a definition of fear in the Compact Oxford English Dictionary, available at <www.askoxford.com>.

296 Hathaway 1991, p. 66.

will probably take place, or is reasonable likely or more likely than not to occur. The reasonable chance or serious possibility test requires the refugee claimant to show that the chances of becoming the victim of persecution are reasonable. According to the UNHCR a well-founded fear exists when it can be established to a reasonable degree that the refugee claimant's continued presence in his country of origin has become intolerable.[297] In other words, the refugee claimant must have good reasons for having left his country.[298] This seems to come close to the serious possibility test, a test which seems to be the common standard adopted by the developed countries party to the Refugee Convention.[299] It is impossible to couch the risk criterion in objective and measurable terms, for example, in the form of a probability calculus or in clear tests of probabilities or chances. What matters more is the credibility of a claim and the required evidentiary standards. These will be discussed in section 2.3.2.2.

In light of the above it is relevant to analyse the importance of past experiences of persecution and other forms of serious harm and their potential traumatising effects on the victim. It is not necessary for a person to have been persecuted in the past, but past experiences of persecution may be a serious indication of a future risk. According to the UNHCR Handbook 'it may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention'.[300] And according to Grahl-Madsen, 'if a person has experienced persecution, that may be considered *prima facie* proof to the effect that he may again become a victim of persecution (…). But this is not an irrefutable presumption'.[301] Care must be taken in assuming that past persecution will not be repeated or may not lead to a well-founded fear of being persecuted again. According to Grahl-Madsen:

> 'if a person has really experienced persecution, one should be rather reluctant with respect to ruling out the possibility or even likelihood of future persecution, so long as the same regime prevails in the person's country of origin'.[302]

In the context of the European Union, Article 4(4) of the EU Qualification Directive has created a refutable presumption in this regard.[303] Clearly, past experiences of

297 UNHCR Handbook, paras 41 and 42; UNHCR 1998, para. 16.
298 Gorlick 2003, p. 369.
299 See for relevant national jurisprudence of various countries Hathaway 1991, pp. 75-80; UNHCR 1998; Gorlick 2003, pp. 367-370; UNHCR 1995, p. 35; UNHCR 2004-4, para. 11; UNHCR 2005-3, para. 17 (p. 6).
300 UNHCR Handbook, para. 45.
301 Grahl-Madsen 1966, p. 176.
302 Grahl-Madsen 1966, p. 177.
303 Article 4(4) of the EU Qualification Directive states: 'The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be

persecution are a significant factor in establishing, or a serious indication for, the existence of a future risk as long as the situation in the country of origin does not change. For example, opposition members who have been the victims of acts of persecution in the past will continue to be at risk as long as the regime in their country of origin has not changed. The fact that such acts may have had a traumatising effect leading to post-traumatic stress is in itself not relevant. Such atrocities, however traumatising, cannot in themselves lead to the conclusion that a well-founded fear of persecution exists. They can merely be a strong indicator of a risk of persecution. Less clear are situations involving a inherently non-recurring past experience of persecution; for example, those of women who have been subjected to female genital mutilation. They are no longer at risk of such treatment. Nevertheless, they may be severely traumatised; their presence in the country of origin may cause them significant psychological harm. However, that fact alone will not be sufficient. What is relevant is to assess what future risk of being persecuted the women concerned may have as a result of their past experience, e.g. will they be further victimised? Could it be that past experiences of extreme atrocity result in persecution becoming permanent in the sense that, upon the claimants' return, the past persecution may create new, damaging effects, even though the women concerned will not be subjected to new forms of direct harm? In the case of female genital mutilation that will be difficult to decide because victims of female genital mutilation will be returned to their country of origin where the practice is accepted. It is very unlikely that they will be further abused, harassed or discriminated against. Perhaps it can be argued that in cases where it can objectively be determined that, because of past experiences, the person concerned will be likely to experience severe mental harm she may have a well-founded fear of being persecuted. In reality, however, that will arguably almost always coincide with new forms of direct harm, such as serious restrictions on earning a living.[304] In addition, the attitude of the population may lead to new direct threats. Because of past subjection to serious harm, she may still be discriminated against.[305] In the specific case of female genital mutilation that will be unlikely. This will be different only when the

repeated'. Equally in the United States it is held that past persecution creates a presumption of future persecution: see Anker 1998, p. 42 and Musalo 2002, p. 29.

304 Problematic in this regard may be the reason for having a well-founded fear of being persecuted. However, I would argue that the predicament of the person involved, i.e. a woman who was the victim of a traumatising experience because she was a woman, may be sufficient to establish the reason for the well-founded fear (see section 2.3.1.3). In other words the reason from the past experience of persecution remains applicable.

305 According to Grahl-Madsen the drafters of the Refugee Convention had in mind the situation of German and Austrian refugees after the Second World War, 'who were unwilling to return to the scene of the atrocities which they and their kin had experienced, or to avail themselves of the protection of a country which had treated them so badly. The fact was appreciated that the persons in question might have developed a certain distrust of the country itself and a disinclination to be associated with it as a national. Although they need not have any fear of being persecuted by the democratic government of the country in question, there may still be elements of the population which have not changed their attitude. As a consequence there may be discrimination, or fear of discrimination, or other forms of discomfort': Grahl-Madsen 1966, p. 410.

woman concerned is subjected to renewed mutilation, for example, in order to reverse medical surgery she underwent in the country of refuge itself to reverse as far as possible her initial genital mutilation. Female genital mutilation and the example of women free from future mutilation was discussed by the UNHCR. It acknowledged that 'it cannot be assumed that FGM [female genital mutilation] is to be treated as a one-off act involving no continuing cruelty'.[306]

2.3.2.1b Individualisation, mass influx and 'group persecution'

The definition of a refugee refers to an individual person. The likelihood of becoming a victim of persecution may vary from person to person and depends on facts and circumstances which directly relate to the individual.[307] The well-founded fear may be based on a variety of personal facts as well as on general facts and circumstances which somehow relate to the individual concerned.[308] The risk need not necessarily be based on personal experiences. The experiences of others who are related or in a similar situation, such as family members or fellow political activists, may well indicate the existence of a risk of being persecuted for the person concerned.[309] In this regard the person concerned need not be singled out.[310] The refugee definition is individualistic in the sense that the person concerned must have a well-founded fear. But this does not mean that the Refugee Convention is not applicable in situations of mass influx as a result of entire groups being displaced. Even in such situations the individual members of the displaced group may well be refugees.[311] In paragraph 44 of the Handbook the UNHCR stated:

> 'while refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees'.

It seems that paragraph 44 was written only for mass influx situations as the paragraph continues:

> 'in such situations the need to provide assistance is often extremely urgent and it may not be possible for purely practical reasons to carry out individual determination of refugee

306 UNHCR 2006-4, para. 24.

307 Grahl-Madsen 1966, p. 175; UNHCR Handbook, para. 45 ('an applicant for refugee status must normally show good reason why he individually fears persecution').

308 UNHCR Handbook, paras. 41 and 42 according to which the personal and family background of the applicant must be taken into account as well as his membership of a particular group and the conditions in his country of origin.

309 UNHCR Handbook, para. 43.

310 Illustrative in this regard is the case law of the US Court of Appeals for the Ninth Circuit accor ding to which the more members of a group are targeted, the less important it is to be singled out: stated in, inter alia, *Ashok Chand, Premila Mudaliar Chand v. Immigration and Naturalization Service*, US Court of Appeals for the Ninth Circuit, 2 August 2000, Opinion of Circuit Judge Reinhardt, para. IV.6. See also Foster 2007, p. 288.

311 Durieux & McAdam 2004, p. 9.

> status for each member of the group. Recourse has therefore 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'.[312]

The UNHCR's use of the concepts of group determination and prima facie recognition as a refugee seems to be reserved for situations of mass displacement under circumstances indicating that each displaced person could be a refugee. In such situations States have the ability either prima facie to recognise each individual as a refugee without individually determining their status[313] or to provide temporary protection and put the determination of refugee status on hold (see section 2.4.2.2).

Mass influx or not, it is not necessary for individuals belonging to a group that is targeted as a whole to be further singled out for them to be considered as having a well-founded fear of being persecuted.[314] Membership of a persecuted group is as much a personal factor or circumstance capable of creating a well-founded fear as any other single or multiple factors related to the person concerned. The question is: when is a group targeted on such a scale sufficient for a prima facie determination that each individual member has a well-founded fear of being persecuted without any additional factors being required? The UNHCR seems to think that such a situation will not easily emerge. In paragraphs 70, 73 and 79 of the Handbook the UNHCR states that mere membership of a certain racial group, particular religious community or particular social group will normally not be enough to substantiate a claim to refugee status. On the contrary, however, regarding national, ethnic or linguistic minority groups the UNHCR has stated that 'in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution'.[315] In reality there have of course been situations in which all members of a particular group might be found to have a well-founded fear of being persecuted by reason merely of membership of that group; the Jews in Europe during World War II are the most obvious example. More recently, in August 2007 the UNHCR stated that the armed conflict in large parts of Iraq, which was rooted in ethnic, religious and political differences, was victimising specific groups. According to the UNHCR there is no need for members of such groups to be singled out or individually targeted, nor is there a requirement that members sustain a risk or impact which is different from that relating to others.[316] The UNHCR concludes that Iraqis from Central or Southern Iraq should be regarded as refugees.[317] Although the UNHCR does not

312 UNHCR Handbook, para. 44.

313 UNHCR 2001-2. For an example see UNHCR 2007 assessing the international protection need s of Iraqi asylum-seekers.

314 Goodwin-Gill 1996, pp. 76 and 77. According to Grahl-Madsen: 'once a person is subjected to a measure of such gravity that we consider it 'persecution', that person is 'persecuted' in the sense of the Convention, irrespective of how many others are subjected to the same or similar measures': Grahl-Madsen 1966, p. 213.

315 UNHCR Handbook, para. 74.

316 UNHCR 2007, p. 134.

317 Ibid., p. 15.

explicitly call for prima facie recognition, except in cases of mass influx,[318] de facto the UNHCR qualifies individual members of the identified groups because of their membership as (prima facie) refugees, based on the scale of the violence and its roots in ethnic, religious or political differences.[319]

2.3.2.1c Required facts and circumstances to meet the necessary level of risk

Essential to determine if a person has a well-founded fear of being persecuted are the facts and circumstances of the case. Except for some general remarks regarding the individualisation requirement discussed above and the situation of refugees *sur place* which will be discussed below, in the absence of international case law it is not possible to analyse the facts and circumstances that are necessary to conclude that a well-founded fear exists.

2.3.2.1d Refugees sur place

The prospective nature of the refugee definition and the prohibition on refoulement imply that the risk of persecution may be established even after the person concerned has left his country of origin and that he has not left his country of origin on account of a well-founded fear; a concept which is called refugees *sur place*.[320] Basically, there are two ways in which a refugee *sur place* situation occurs: first, due to circumstances arising in the refugee's country of origin during his absence, and, secondly, as a result of his own conduct after he has left his country of origin.[321] The latter situation has been cause for some discussions whether or not the person is a refugee when such conduct is not the continuation of actions, convictions or orientations already held in the country of origin, arguing that it is otherwise a form of misuse of refugee protection.[322] Three categories can be distinguished: (1) his actions after having left his country of origin were genuinely motivated (for example, a convert who has changed his religion after his departure from his country of origin),[323] (2) his actions are done unwittingly or unwillingly (for example as a result of provocation the individual publicly opposes policies in his country of origin, or he falls victim to trafficking[324]), and (3) the conduct is undertaken for the sole purpose of creating a well-founded fear of being persecuted (so-called opportunistic claim).[325] It may

318 Ibid., p. 15: 'In those countries where the numbers of Iraqis are such that individual refugee status determination is not feasible, UNHCR encourages the adoption of a prima facie approach'.

319 In contrast, in December 2006 according to the UNHCR the situation for Tamils in Sri Lanka was not severe enough for refugee status to be prima facie accepted for all Tamils coming from the North or East of Sri Lanka. Nevertheless, the UNHCR stated that their claims should be favourably considered and that those who were found to be targeted by the State, LTTE or other non-State agents should be recognised as refugees: UNHCR 2006-3, para. 34 (a)(i). Similar language is used for Tamils from Colombo (para. 34 (b)(i)) and Muslims (para. 34 (c)(i)).

320 UNHCR Handbook, para. 94.

321 UNHCR Handbook, paras 95 and 96. See also EU Qualification Directive Article 5(1) and (2).

322 Spijkerboer & Vermeulen 2005, pp. 63-64.

323 UNHCR 2004, para. 34 (p. 12).

324 UNHCR 2006-2, para. 25.

325 Grahl-Madsen 1966, p. 247.

be possible that conduct in categories 1 and 2 is a continuation of actions, convictions, orientations or circumstances from the past. At least there is some link with a past life in the country of origin and there seems to be nothing morally wrong with such conduct. It is in particular category 3 which has created some debate, as it may imply misuse of the Refugee Convention. The wording of Article 1A(2) of the Refugee Convention does not give much ground for forming a continuation requirement or making a distinction between the three categories mentioned above. What is relevant is that there is a risk of persecution, irrespective of when or how this risk developed.[326] Though one may morally object to providing refugee protection to a person who has intentionally created a well-founded fear of being persecuted, he still runs a risk of persecution and may be in need of protection. There is neither a requirement to examine the 'motive' of a person lodging a claim for refugee protection nor can a person be excluded from refugee protection because he intentionally created a well-founded fear. Whatever the motive, once the refugee criteria are satisfied, the individual is eligible for refugee protection.[327] The EU Qualification Directive contains, in Article 5, the possibility of being a refugee *sur place*. Article 5(2) does not exclude refugee *sur place* when there is no continuation, but wants to prevent abuse of refugee protection. Nevertheless, the EU Qualification Directive gives a preference to refugees *sur place* who do meet the requirement of continuation and is even more hesitant to allow for refugee *sur place* when there is no continuation of activities in regard to subsequent applications for refugee status.[328] According to Noll:

> 'it must be emphasized here that the 1951 Refugee Convention does not deny its protection to persons whose reasons for flight have resulted from sur place activities, irrespective of intent. This means the principle of non-refoulement and the applicable rights also apply to persons judged to have "manufactured" their reasons for seeking asylum in the destination country'.[329]

2.3.2.2 Standard and burden of proof

2.3.2.2a Issues of credibility

The question whether or not a person has a right to be protected from refoulement is primarily determined by the question whether or not he is a refugee.[330] The assessment or determination thereof will above all require an evaluation of the refugee

326 Hathaway 1991, pp. 33 to 39; Goodwin-Gill & McAdam 2007, p. 65.

327 UNHCR, *In the High Court of Appeal, On Appeal From the Seoul Administrative Court. Between Messaoud Bennacer (Appellant) and Minister of Justice (Respondent): Written Submission on Behalf of the United Nations High Commissioner for Refugees*, 31 May 2005, para. 19 (p. 8). UNHCR 2004, para. 36 (p. 12). State practice regarding an opportunistic sur place claim is more stubborn than the UNHCR's point of view: see case law from New Zealand and the United Kingdom analysed in Musalo 2002, pp. 53 and 54, and case law from the Netherlands analysed in Spijkerboer & Vermeulen 2005, pp. 63 and 64.

328 Article 5(3) of the EU Qualification Directive.

329 Noll 2005-2, p. 10.

330 Apart from the exceptions mentioned in Article 33, paragraph 2, of the Refugee Convention.

claimant's statements.[331] The outcome of that assessment largely depends on the credibility of the claimant and his statements.[332] This in turn depends on three factors:

1. internal credibility,
2. plausibility, and
3. supporting evidence.

These three factors depend on relevant personal as well as general facts and circumstances regarding the country of origin which have been presented to the country of refuge or are otherwise known. Personal facts and circumstances include the refugee claimant's identity, age, place of birth, place(s) of previous residence, nationality, travel route and – of course – the reasons for claiming refugee protection.[333] Furthermore, personal facts include past experiences, in particular of persecution,[334] as well as the experiences of friends, relatives or others in similar circumstances or persons belonging to the same racial or social group.[335] In addition, a medical report on the refugee claimant's physical and mental state of health may be relevant.[336] General facts and circumstances regarding the country of origin include a vast array of information including the laws and regulations of the country of origin and their application,[337] as well as the social and political situation, the country's human rights record and its security situation.[338]

The internal credibility of the refugee claimant and his statements is perhaps the most important factor in determining the refugee's claim for protection. Internal credibility is determined by the statements' consistency, coherence and relevant details. Certain factors may undermine credibility. The UNHCR has identified the following factors in the decision-making process in Western European countries in this regard: withholding of information, the submission of personal data or new information in a second interview, unwillingness to provide information, manifesting inappropriate behaviour, deliberate destruction of documentation and a professed inability to name transit countries through which the refugee claimant has travelled.[339] Though these factors may undermine the internal credibility, there may be good reasons for these

331 UNHCR Handbook, para. 37.
332 Thomas 2006, p. 79.
333 See also Article 4(2) EU Qualification Directive as well as Article 4(3) (b), (c) and (d) EU Qualification Directive.
334 UNHCR Handbook, para. 45; Grahl-Madsen 1966, p. 176. According to Article 4(4) EU Qualification Directive 'the fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated'. See also section 2.3.2.1a.
335 UNHCR Handbook, para. 43.
336 See in this regard also Article 4(3)(b) of the EU Qualification Directive.
337 UNHCR Handbook, para. 43. See in this regard also Article 4(3)(a) of the EU Qualification Directive.
338 UNHCR 1998, para. 19.
339 UNHCR 1995, p. 35.

factors to occur.[340] The refugee claimant may be traumatised, confused, scared, nervous, tired, embarrassed, depressed, suffer memory loss, he may be uneducated or simply have forgotten things.[341] For example, it is quite common for victims of trafficking or sexual harassment to be traumatised and fearful of revealing the real extent of their experiences and suffering.[342] Furthermore, the refugee claimant may be traumatised and therefore unable to give a consistent and coherent account of his experiences. It may also be that the refugee claimant is less familiar with or knowledgeable about the reasons for his fear. For example, the refugee claimant may have a well-founded fear of being persecuted for reasons of religion where a certain religious belief is imputed to the claimant, leaving him ignorant of his predicament.[343] Moreover, a person's knowledge of a particular belief does not necessarily correlate to the sincerity of conviction.[344] In addition, a person may feel apprehensive towards any authority and may therefore be afraid to speak freely and give a full and accurate account of his case.[345] The opportunity should be provided to the refugee claimant to explain himself as regards any inconsistencies or contradictions.[346] The host State must be open to the fact that an untruthful refugee claimant may still be a refugee.[347] It should again be mentioned that refugee status is not a right, but a de facto status. False statements do not necessarily mean that the person concerned is not a refugee. Furthermore, the inability to provide certain dates or details and giving some inconsistencies cannot be decisive factors.[348] It is important for the refugee claimant to feel that he can speak freely, that he is given the time to do so, that the State is on his side and that a climate of confidence is created.[349] In all cases it is necessary to draw a distinction between matters which are directly relevant to the claim and other, more minor, aspects.[350] Inconsistencies and contradictions to irrelevant facts and circumstances as well as the lack of trivial details must be disregarded.[351]

Besides internal credibility it is also important that the facts and circumstances presented are plausible, i.e. that they correspond with what is known about the country

340 Gorlick 2003, p. 371; Cohen 2001, pp. 293-309 in which the author defends – from a psychological point of view – the statement that the assumption that discrepancies and omissions undermine credibility cannot be justified (p. 294); Bloemen, Vloeberghs & Smit 2006.

341 For more information on these issues: Cohen 2001, pp. 293-309.

342 UNHCR 2006-2, para. 46; UNHCR Handbook para. 198.

343 UNHCR 2004, paras 29-31 (p. 11).

344 Musalo 2002, pp. 49-52.

345 UNHCR Handbook, para. 198; UNHCR 2006-2, para. 46.

346 UNHCR Handbook, para. 199; Gorlick 2003, p. 372; UNHCR 2006-2, para. 46 in which the UNHCR states that it is of the utmost importance that a supportive environment is provided.

347 See Gorlick 2003, p. 360 (footnote 7), in which he quotes Hathaway who originally floated the idea that an untruthful individual can still be a refugee, if, for example, the decision maker is satisfied of the identity of the claimant, and has adequate documentary evidence that persons of the claimant's description face a well-founded fear of being persecuted. Further evidence is not required and a false asylum story will not negate the reality of the risk faced.

348 UNHCR 1998, para. 9.

349 UNHCR Handbook, para. 200.

350 UNHCR 2004-4, para. 17.

351 UNHCR 1995, p. 37.

of origin and the refugee claimant's background and situation.[352] Information may not be or may be less plausible when it does not correspond to what is known about the country of origin. In this regard what matters is relevant or essential elements of the story and not minor details. Furthermore, what may be known about the country of origin largely depends on the decision maker's knowledge and research (see section 2.3.2.2c).

Finally, the statements must be supported by evidence as much as possible. In most cases it will be difficult for the refugee claimant to provide such evidence. Consequently, internal credibility and plausibility become increasingly important elements. Full proof is not required, and when there is doubt the refugee claimant, if he has presented credible statements, should be given the benefit of that doubt.[353] Although no explicit benefit of doubt is provided in the EU Qualification Directive, its Article 4(5) states that the statements made by the claimant which are not supported by evidence shall not need confirmation when: (1) the claimant has made a genuine effort to substantiate his claim, (2) all relevant elements at the claimant's disposal have been submitted and a satisfactory explanation regarding any lack of other relevant elements has been given, (3) the claimant's statements are coherent and plausible, (4) the claimant applied for international protection at the earliest possible time, unless there were good reasons for not having done so, and (5) the general credibility of the evidence has been established.[354] The issue of evidence will be further discussed in the next section (2.3.2.2b).

2.3.2.2b Issues of evidence

The question of evidence relates to the issue of what elements of the claim must and can be proven or supported. In principle, the refugee claimant must provide all relevant documentation that is at his disposal.[355] In addition, the State will have to take into

352 UNHCR Handbook, para. 204 (see also para. 42 regarding country of origin information); UNHCR 1998, para. 11.

353 UNHCR Handbook, paras 196 and 203. See also UNHCR 1998, para. 12: 'given that in refugee claims, there is no necessity for the applicant to prove all facts to such a standard that the adjudicator is fully convinced that all factual assertions are true, there would normally be an element of doubt in the mind of the adjudicator as regards the facts asserted by the applicant. Where the adjudicator considers that the applicant's story is on the whole coherent and plausible, any element of doubt should not prejudice the applicant's claim; that is, the applicant should be given the benefit of the doubt'. Hathaway 1991, pp. 75-80. Gorlick 2003, pp. 367-370. Further see Gorlick 2003, p. 370. Gorlick compares the different standards of proof required in refugee law (serious possibility), civil law (balance of probabilities) and criminal law (beyond reasonable doubt) and concludes that in comparison to other fields of law the standard of proof in refugee law is relatively low. See also Thomas 2006, p. 81.

354 Article 4(5) EU Qualification Directive implies a benefit of doubt. See also Thomas 2006, p. 91.

355 According to Article 4(1) EU Qualification Directive: 'Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection', and according to Article 4(2) EU Qualification Directive these 'elements' consist of: 'the applicant's statements and all documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies),

account relevant personal facts as well as relevant facts relating to the country of origin. Importantly, according to the EU Procedures Directive, States shall ensure that 'precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR)'.[356] In many cases, a refugee will not be able to support his claim with any documentary or other evidence for reasons relating to his flight.[357] He may have had to leave his country of origin in a hurry and/or with only the barest necessities in his possession. It may also be possible that the refugee, for his own safety and freedom, had to dispose of or destroy documentary evidence, including travel documents. Finally, it may be possible that the refugee was told by people who helped him flee to hand over, dispose of or destroy documents.[358] Therefore, what is relevant in the absence of any documentary evidence, including travel documents, is the specific facts and circumstances of the case, and in particular the reason for the absence of documentation. If understandable and plausible reasons exist for the refugee having no documentation his claim for protection will not be undermined. If, however, no such compelling reasons exist the absence of documentation may be unjustified and weaken the refugee's credibility.[359] The same argument applies to refugees using false or falsified documentation. The destruction or disposal of documentation and papers upon arrival in the country of refuge in order to mislead the authorities is unacceptable, according to the Executive Committee,[360] but is no justification for the automatic denial of refugee protection.[361]

Finally, the evidentiary requirements, in the sense of providing proof, are secondary to the credibility of the refugee claimant's statements. Documentation will enhance the claim's credibility, but absence thereof is not necessarily fatal; certainly when good reasons exist for the absence of true evidence, as indicated, for example, by Article 4(5) of the EU Qualification Directive. Having said this, States often hold the refugee claimant accountable for lack of documentary evidence which may easily lead to the conclusion that the sincerity and credibility of the claim are seriously affected.[362]

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country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection'.

356 Article 8(2)(b) EU Procedures Directive.

357 UNHCR Handbook, paras 196, 197 and 203; UNHCR 1998, para. 10; Gorlick 2003, p. 363; Thomas 2006, p. 82.

358 Note in this regard that the EU Procedures Directive in Article 11(2)(b) stipulates that Member States may provide that applicants for asylum only hand over documents in their possession.

359 EXCOM Conclusion No. 58 (XL), 1989, paras (h) and (i).

360 Ibid., para. (j).

361 UNHCR 2005-3, para. 19 (p. 7).

362 UNHCR 2005-4, paras 14-16.

2.3.2.2c Burden of proof

The burden of proof rests in the first instance on the refugee claimant.[363] It is his duty to make a genuine effort to substantiate his story, to provide relevant facts, and to give a truthful and credible account.[364] The objective is to show that he has a well-founded fear of persecution and that he is unable or unwilling to avail himself of the protection of his country of nationality or habitual residence. In principle, the refugee claimant should provide evidence in support of his story, or at least make an effort to do so.[365] It is then however the State which shares the duty to evaluate the facts put forward by the refugee claimant and to determine whether or not he is a refugee.[366] Thus, the focus should be on the whole account and not on a single or just a few elements of it.[367] The burden of proof is a responsibility shared between the refugee claimant and the country of refuge.[368] In fact, the determination of refugee status is a cooperative effort between both the refugee claimant and the country of refuge,[369] creating a duty to communicate with one another[370] and governed by the principle of equality of arms. Consequently, both the refugee claimant and the State must be able to participate in the determination process,[371] must be open and truthful, and must share as far as possible all relevant information and its sources.[372] Thus, it is important for both the refugee claimant and the State to have access to sufficiently objective and accurate information about the country of origin in order to facilitate informed decision-making.[373] In fact, the EU Procedures Directive obliges Member States to obtain precise and up-to-date information from various

363 UNHCR Handbook, para. 196. See also UNHCR Handbook para. 42 ('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') and 66 ('In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons Stated above'). See also UNHCR 1998, para. 6 and Gorlick 2003, p. 361. See also Article 4(1) EU Qualification Directive.

364 UNHCR Handbook, para. 195; UNHCR Handbook, para. 205 (a) (i); UNHCR 2005-4, para. 19.

365 UNHCR Handbook, para. 205 (a) (ii) and (iii).

366 UNHCR Handbook, paras 195 and 205 (b); UNHCR 1998, para. 6; Gorlick 2003, p. 362. See also Article 4(1) EU Qualification Directive according to which it may be the duty of the applicant to submit all elements needed to substantiate the claim and the duty of the State to assess these elements. According to Thomas this would appear implicitly to confirm the guidance contained in the UNHCR Handbook: Thomas 2006, pp. 87 and 88.

367 UNHCR Handbook, para. 201.

368 UNHCR Handbook, para. 196; UNHCR 2004-4, para. 9. See also Article 4(1) EU Qualification Directive.

369 See also Article 4(1) EU Qualification Directive according to which: 'In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.'. See further Costello 2006, p. 14.

370 Noll 2005-2, p. 4.

371 Costello 2006, p. 14.

372 UNHCR 2005-5, p. 5 (para. 8).

373 EXCOM Conclusion No. 71 (XLIV), 1993, para. (ff). The Executive Committee supported in this regard UNHCR's efforts to develop an appropriate information strategy and to maintain relevant information databases.

sources.[374] It is therefore problematic when States use country of origin information from sources which are not available to the refugee claimant. This may include (classified) information from diplomatic missions, other governments and security intelligence agencies. Using information from such sources will sit uneasily with the shared responsibility referred to above[375] and may prejudice the refugee claimant if the information is not made known, as the refugee claimant will be unable to refute the evidence or provide a full and informed explanation of any inconsistencies or contradictions.[376] Nevertheless, a State may have legitimate reasons for protecting its security. Such reasons must be balanced against the obligation and the need to share information and sources with the refugee claimant. According to the UNHCR information and its sources may be withheld only under clearly defined conditions, where disclosure of sources would seriously jeopardise national security or the security of the organisations or people providing information.[377] Such a limitation requires clearly defined conditions for its application and a responsibility on the State to obtain similar information from other sources the security of which is not jeopardised. If no other sources are available review of the information and/or its sources before a judicial authority should be possible.[378] It must also be mentioned that national security exemptions in accordance with the Refugee Convention should be applied with great caution both in a substantive context (see section 2.3.3.1 regarding the application of Article 33(2) of the Refugee Convention) as well as in a procedural context.

It may also be problematic if the decision maker is not capable of sharing or equipped to share this responsibility and make a fair and just decision.[379] For a decision maker to make a fair and just decision he must have the organisational and

374 Article 8(2)(b) EU Procedures Directive, which explicitly mentions UNHCR as a source of country of origin information.

375 Noll argues that the use of classified investigative material which cannot be shared with the refugee claimant must be excluded from the basis for a decision as it is in breach of Article 4(1) EU Qualification Directive, in which a clear duty of the EU Member States is formulated to assess relevant information in cooperation with the refugee claimant: Noll 2005-2, p. 7.

376 Gorlick 2003, pp. 362 and 363. See also Spijkerboer & Vermeulen 1995, pp. 246-247.

377 UNHCR 2005, p. 19.

378 According to Article 16 (second paragraph, last sentence) EU Procedures Directive an appeal authority would not be able to review information and sources which cannot be disclosed for reasons of national security. The article does however not preclude – at least explicitly – the use of a special authority that will be allowed to review secret information and its sources.

379 This may be due to organisational constraints or political choices on the part of the country of refuge as well as the individual decision maker's own knowledge and perception: Thomas 2006, pp. 83-85. Note UNHCR's call in the UNHCR Handbook, para. 202 for every examiner to apply the criteria 'in a spirit of justice and understanding and his judgment should not, of course, be influenced by the personal consideration that the applicant may be an "undeserving" case'. According to paragraph 10 of the preamble to the EU Procedures Directive 'it is essential that decisions on all applications for asylum be taken on the basis of the facts and, in the first instance, by authorities whose personnel has the appropriate knowledge and receives the necessary training in the field of asylum and refugee matters': EU Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, 2005/83/EC of 1 December 2005, Official Journal of the European Union L 326/13, 13 December 2005. See also Article 8(2)(c) EU Procedures Directive.

political freedom to do so. In addition, he must have some expertise in three distinct fields – or at least access to such expertise of others – first, in legal issues; secondly, in the knowledge of country situations; and, thirdly, in considering and evaluating medical reports. In some situations it may be necessary to call in independent experts with particular knowledge of a country, region, culture or practice in order fairly to assess a claim.[380]

If no proof can be provided or obtained it all comes down to the question of internal credibility of the asylum story and its plausibility in the light of what is known of the country of origin. It is an essential responsibility of the country of refuge to search for country of origin information and to show some flexibility in assessing the story and evidence.[381] This includes the State's duty to confront the claimant with any inconsistencies and contradictions and to allow for a rebuttal.

The burden of proof is different when it comes to identifying the reason or reasons for the possible persecution. In paragraph 66 of the Handbook the UNHCR starts by stating that the refugee claimant must show a well-founded fear of persecution for one of the reasons mentioned in the refugee defintion. This statement is immediately followed by the assertion that often the refugee claimant is not aware of the reasons for the persecution he fears and that it is not his duty to analyse his case to such an extent as to identify the reasons in detail. Thus, the refugee claimant cannot be expected to have the specific burden of identifying the reasons for which he may be persecuted. That burden is on the host State.[382] The refugee claimant of course continues to have the burden of presenting relevant credible facts which will enable the host State to identify the reason(s). Interestingly, in paragraph 80 of the Handbook the UNHCR states that, when it comes to the reason of political opinion, it is the applicant who must show that he has a fear of persecution for holding political opinions. At the same time however it is possible for the political opinion to be attributed to the refugee claimant by the country of origin.

In addition, it is the State which bears the burden of proof in assessing the availability of an internal protection alternative.[383] According to the UNHCR and others this follows logically from the fact that the State is already satisfied that the refugee claimant has a well-founded fear of being persecuted for Convention reasons before turning to the assessment of a possible internal protection alternative.[384] Such a burden is particularly high when the risk of persecution emanates from the State,

380 Regarding religion-based refugee claims see UNHCR 2004, para. 27 (b) (p. 10).

381 Gorlick 2003, pp. 362 and 370.

382 UNHCR Handbook, para. 67 in which it is stated that 'it is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared'. See also Article 10(1) EU Qualification Directive, according to which 'Member States shall take the following elements into account when assessing the reasons for persecution', i.e. EU Member States have the responsibility to determine the reasons for being persecuted.

383 UNHCR 2003, p. 8 (para. 34); Hathaway & Foster 2003, pp. 413-414. For a contrary, without argument, see De Moffarts 1997, p. 133.

384 Hathaway 1999, p. 137 (para. 14); Hathaway & Foster 2003, p. 414.

making it unlikely that an internal protection alternative exists (see section 2.3.2.4a).[385]

The availability of an internal protection alternative cannot be based on a general assumption of safety, but must be assessed by the country of refuge on an individual basis (see section 2.4.2.7a).[386]

2.3.2.2d Special considerations for children and women

Special consideration should be given to children, in particular when unaccompanied, and people suffering from mental disorder, in particular from post-traumatic stress disorder.[387] The assessment of their claim should be approached with greater care and flexibility and the burden of proof lowered. Specific circumstances such as age, the time which has elapsed since events in the country of origin, the level of education and intelligence, the level of maturity and the ability to comprehend the situation, the capacity to recall events and the capacity to communicate must be taken into account.

Women may also be in need of special considerations, in particular when they have been the victims of sexual violence, but also when their claim depends on their husband's claim. In the first situation, women may feel reluctant to talk, in particular in front of men, so there may be a need for flexibility in time and for them to have their claims assessed by a female decision maker. In the second situation, it may be important to take into account the cultural background of the women concerned. For example, women from certain cultures where men do not share the details of their political, military or social activities with their female partners may find themselves in a difficult situation when questioned about the experiences of their husbands.[388]

385 Hathaway & Foster 2003, p. 398. The opinion that the burden of proof regarding an internal protection alternative rests on the shoulders of the State is not without criticism: see Marx 2002, pp. 213 and 214. Storey 1998, pp. 507-508, thereby relying on the UNHCR Handbook, para. 196, and Storey 2001 pp. 380-381. Storey argues that the general principle that the burden of proof lies on the person submitting a claim for refugee protection is no different regarding an internal protection alternative, albeit that he has a lower standard of proof of showing that no internal protection alternative exists. The availability of protection of or in a person's country of origin ('protection clause') is as much part of the refugee definition as the well-founded fear of being persecuted ('persecution clause'). Marx tries to bridge the gap between the opposing opinions by adopting a rebuttable presumption that if a refugee claimant has established that he has a well-founded fear of being persecuted for Convention reasons it may be expected to find the case proven, unless evidence can be adduced that an internal protection alternative is available.

386 Hathaway & Foster 2003, p. 414.

387 UNHCR Handbook, paras. 206 – 212 (re mentally disturbed persons) and 213 – 219 (re children). See also Gorlick 2003, pp. 364 and 365. According to paragraph 12 of the preamble to the EU Qualification Directive the 'best interest of the child' should be a primary consideration of Member States when implementing the Directive.

388 Gorlick 2003, p. 366.

2.3.2.3 *At what point in time must the risk be assessed?*

Under Article 33(1) of the Refugee Convention a State is prohibited from expelling or returning ('refouler') a refugee in any manner whatsoever to the frontiers of territories in which his life or freedom would be threatened. The premise of protection from refoulement is an evaluation of a future threat to life or freedom. Consequently, every time a State wants to remove a refugee in any manner whatsoever the State must evaluate the risk of his being persecuted after removal, thereby taking into account all relevant information, including new or previously unrecognised facts.[389]

2.3.2.4 *Protection from the country of origin (national protection)*

A person is not a refugee when he is able and willing to avail himself of the protection of his country of origin. It would be contrary to the definition of a refugee as well as to the object and purpose of the Refugee Convention to protect people who are able to receive protection from their own country.[390] The decisive criterion in the refugee definition is that the refugee 'is unable or, owing to such fear [i.e. well-founded fear of being persecuted], unwilling to avail himself of the protection' of his country of origin. This is often referred to as the protection clause in the definition of a refugee.[391] This clause is linked to the element of well-founded fear within the definition, in the sense that the availability of national protection negates or removes the risk or well-founded fear of being persecuted. I will distinguish and discuss separately three situations in which national protection may be available: first, the general situation as directly implied by the protection clause in which the individual concerned may be able and willing to receive protection from his own country and has a responsibility to seek protection from his own country before seeking refuge abroad; secondly, that of an internal protection alternative, in which the individual concerned has a well-founded fear of being persecuted in one area of his country of origin but can reside safely in another part; thirdly and finally, I will discuss the concept of diplomatic assurances, a method used to negate a well-founded fear of being persecuted.

The country of origin's duty to provide protection is engaged through the refugee claimant's ability and willingness to avail himself of protection. Inability implies circumstances that are beyond the individual's will which make it impossible to obtain protection,[392] for example, because protection has already been denied or because

389 Hathaway 2005, p. 320.

390 UNHCR Handbook, para. 106: 'wherever available, national protection takes precedence of international protection'. Hathaway & Foster 2003, p. 381. See also section 2.1.2.1.

391 Hathaway & Michelle Foster 2003, p. 365. It has been argued that the term 'protection' in the refugee definition refers to external or 'diplomatic protection' from the country of origin and not internal protection: see Fortin 2000, pp. 548-576, and Kälin 2001, pp. 425-428. The basis for this argument is a historical one. Hathaway and Foster convincingly show that such an interpretation is not correct: Hathaway & Foster 2003, pp. 373-380.

392 UNHCR Handbook, para. 98.

of war-like situations which may make it impossible for the person concerned to seek protection form his own country. Unwillingness refers to the refusal of the person concerned to seek protection from his own country because he has a well-founded fear of being persecuted, as is implied by the phrase 'owing to such fear' in Article 1A(2) of the Refugee Convention, and can objectively not be required to seek protection from his own country.[393] When the person concerned has a well-founded fear of being persecuted emanating from the State, it is unreasonable to expect him to have the will to find protection from his own State. Phrasing it this way may imply that the individual's state of mind is relevant. However, because of the link with the – objective – standard of well-founded fear I would argue that the unwillingness of the person concerned to seek national protection is determined by objective standards and cannot include his state of mind.[394] The UNHCR has stipulated that 'whenever the protection of the country of nationality [or habitual residence] is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee'.[395] For example, a refugee claimant fearing persecution from a State agent may understandably be unwilling to avail himself of the protection of his government; however, effective legal remedies may be available to challenge the act or omission of the persecutor.[396] Consequently, the refugee claimant may obtain protection and may – no longer – have a well-founded fear of being persecuted. Even in cases where the individual concerned is traumatised an objective ground, based on his fear, must exist for him to refuse protection from his own government.[397]

An important element is the effectiveness of the protection. This depends on both the de jure and de facto capability and willingness to provide protection. The mere existence of a law prohibiting certain persecutory acts will not of itself be sufficient. The law needs to be effectively implemented.[398] In general, its effectiveness is determined by the State's acknowledgement that (the risk of) persecution exists, the adoption of legislation which effectively enables the State to provide redress for the victims of persecution and to prevent future persecution.[399]

To what extent the individual concerned has to seek national protection before being able to claim refugee protection in another country and to what extent a State is able and willing to provide protection depend on the particular facts and circum-

393 Ibid., para. 100.

394 Expressing a contrary view is Third Colloquium on Challenges in International Refugee Law, *The Michigan Guidelines on Well-Founded Fear*, The Program in Refugee and Asylum Law, University of Michigan Law School, 28 March 2004, paras 1 and 2, according to which a State party's duty of protection under the Convention is engaged through an expression by or on behalf of an applicant of inability or unwillingness to avail himself or herself of the protection of the relevant country or countries.

395 UNHCR Handbook, para. 100 (last sentence).

396 UNHCR 2006-2, para. 23.

397 See section 2.3.2.1a on the issue of prospectivity and objectivity.

398 UNHCR 2006-2, para. 23.

399 See in this regard ComEDAW, *A.T. v Hungary*, 26 January 2005, no. 2/2003.

stances of the case[400] as well as on the type of persecutor. In addition, it includes personal factors such as gender, age, ethnicity and religion, and issues such as whether the individual has been able to lodge a formal complaint, how that complaint was dealt with and whether there is a reliable and effective system of legal remedies in place in the country of origin.

If the fear of persecution emanates from non-State actors it may be more likely that the State is willing to provide protection. However, the State may neither always have the ability to do so, in particular when the non-State agents control a certain part of the country, nor always be willing to do so, for example, when the persecution of non-State actors, such as death squads or other organised groups, benefits the State's own – often secret – agenda or when the persecution is condoned by the State. If non-State agents are the persecutors the individual must at least try to seek protection from his government unless it is evident that protection will not be afforded or will not be effective. In 2006, for example, the UNHCR made it clear that individuals who flee targeted violence and human rights abuses by the LTTE in Sri Lanka will not have a realistic internal protection alternative, given the reach of the LTTE and the inability of the Sri Lanka authorities to provide guaranteed protection.[401]

If a country is without a functioning government a person may still be a refugee. What is relevant is that a refugee cannot avail himself of the protection of his country of origin. When a country of origin is without a government it will be clear that the State is unable to provide protection. There may nevertheless be other entities which are willing and have the ability to provide protection, in particular, entities which function on behalf of the State or perform a State's obligations in the absence of a State, as explained below.

The issue of who may provide protection, and in particular whether a refugee can be expected to avail himself of the protection of a non-State entity raises controversy. According to the text of Article 1A(2) of the Refugee Convention protection can be afforded by 'that country'. This refers to the 'the country of his nationality' or, in the context of stateless persons, the country of habitual residence, referred to in the previous phrase in Article 1A(2) of the Refugee Convention. Protection must primarily be provided by the State and its organs.[402] In addition, governmental authority, including protection, may be exercised by persons or entities which are not organs of the State but which are empowered by the laws of that State to do so,[403] or which are acting on the instructions of or under the direction or control of the State.[404] Furthermore, governmental authority may be exercised by organs of another State placed at the disposal of the State.[405] In the absence of a State or alternative persons or entities acting on behalf of the State as mentioned above, a non-State entity

400 UNHCR Handbook, para. 99.
401 UNHCR 2006-3, pp. 13 and 14.
402 Article 4 of the Draft Articles on Responsibilities of States for Internationally Wrongful Acts, International Law Commission, 53rd session (2001), UN Doc. A/56/10, via <www.un.org/law/ilc>.
403 Ibid., Article 5.
404 Ibid., Article 8.
405 Ibid., Article 6.

can perform a State's obligations, thereby absolving the formal State from its responsibilities.[406] Furthermore, a non-State entity may become the new Government of a State or of part of its territory, and consequently take on the responsibilities of the State in all or in part of the State's territory.[407] A formal approach would imply that only a State or its formal substitute could provide protection.[408] Such an approach is also implied by various paragraphs in the UNHCR Handbook, which refers to the authorities or the government of the country of origin.[409] The fundamental question is whether or not effective protection can be found in a person's country of origin, irrespective of who may provide that protection. However, when looking at the object and purpose of the Refugee Convention, refugee protection is a form of alternative protection where national protection is absent, and such protection must be equated with effective State protection. The de jure and de facto effectiveness of the protection is essential to the issue of who may provide protection, i.e. (1) is the protector legally responsible for providing effective protection and can he be held accountable if protection is not guaranteed, and (2) is the protector in reality capable of providing effective protection? Any form of protection from the country of origin will need to have some type of formal, workable and durable system in place which guarantees certain basic human rights and provides for effective remedies if necessary.[410] For example, in the early 1990s it was said that an internal protection alternative was available for Iraqi Kurdish refugee claimants in northern Iraq, in the area controlled by an interim government comprised of the two main Kurdish parties, the Kurdistan Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK). In addition, the area was protected by a no-fly zone under the joint military command of the United States, Britain, France and Turkey. As it turned out, though, the interim government did not survive, fighting broke out between the KDP and the PUK, and

406 Ibid., Article 9, according to which 'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority'.

407 Ibid., Article 10.

408 Spijkerboer & Vermeulen 2005, p. 45. A similar understanding of the terms 'that country' in Article 1A (2) Refugee Convention is provided by Hathaway and Foster concerning the concept of 'internal flight alternative': Hathaway & Foster 2003, pp. 409-411. Kelley 2002, p. 20.

409 Bruin 1995, p. 776. According to the UNHCR Handbook, para. 65, 'where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection'. Paragraph 98 of the UNHCR Handbook states 'Being unable to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution', and, according to para. 166 of the UNHCR Handbook, 'Thus, every case has to be judged on its merits, both in respect of well-founded fear of persecution and of the availability of effective protection on the part of the government of the country of origin'.

410 Hathaway & Foster 2003, pp. 410-411; Spijkerboer & Vermeulen 2005, p. 46.

Turkey conducted raids in the area to wipe out the PKK (*Partiya Karkerên Kurdistan* or Kurdistan Workers' Party).[411] The UNHCR is reluctant to accept non-State entities as protectors.[412] It has called it 'inappropriate' to consider that international organisations, or local clans or militia who are not the recognised authority, may be able to provide effective protection,[413] but it does not categorically rule out that possibility. According to the UNHCR, 'in situations where the proposed internal flight or relocation alternative is under the control of an armed group and/or State-like entity, careful examination must be made of the durability of the situation and the ability of the controlling entity to provide protection and stability'.[414] In the context of Sri Lanka the UNHCR has stated that in relation to individuals who flee targeted violence or abuses by the Government there is no internal flight alternative, given the reach of the authorities. Relocation to LTTE-controlled areas is also not an option, given that these areas are difficult to access and experience violence, forced recruitment and human rights abuses.[415] The UNHCR is even more reluctant when the proposed internal protection alternative is under the control of an international organisation. According to it, it would be 'inappropriate to equate the exercise of a certain administrative authority and control over territory by international organisations on a transitional or temporary basis with national protection provided by States'.[416] Similar reasoning applies, according to the UNHCR, to local clans or militia in an area where they are not the recognised authority or where their control may be only temporary. In both cases protection will, in principle, not be effective, durable and stable.[417] The UNHCR has expressed even more reluctance to accept a non-State entity, in particular an international organisation, as protector in the context of third country protection.[418] The UNHCR's reluctance to accept non-State entities as protectors is understandable as it is very difficult to imagine situations in which non-State actors can realistically afford effective legal protection.

The EU Qualification Directive, referring to a refugee, also speaks of protection from the country of origin.[419] In addition it states that 'parties or organisations, including international organisations' can provide protection, provided they control the State or a substantial part of the State's territory,[420] and, according to its Article 7(2), they take 'reasonable steps to prevent the persecution (…), inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts consti-

411 Kelley 2002, p. 19.
412 UNHCR 2003, paras. 13, 16, 17 and 27.
413 Ibid., paras 16 and 17 (p. 5).
414 Ibid., p. 6 (para. 27).
415 UNHCR 2006-3, p. 13.
416 UNHCR 2003, p. 5 (para. 16). See also the UNHCR's Comment on Article 7(1)(b) EU Qualification Directive in UNHCR 2005-2.
417 UNHCR 2003, p. 5 (para. 17).
418 UNHCR 2003-5: 'An international organisation, such as UNHCR, cannot be equated with a State and cannot be considered to provide "effective protection"'.
419 Article 2(c) EU Qualification Directive.
420 Ibid., Article 7(1)(b).

tuting persecution (…), and the applicant has access to such protection'.[421] At first sight it is not clear whether Article 7(2) of the Directive guarantees effective protection. The term 'reasonable steps' is worrying, because it seems to focus on the willingness rather than the actual ability to provide protection. However the term 'effective legal system', together with the necessary access for the individual to such protection, provides more clarity because it implies that the ability to afford actual protection is a necessary condition.[422] The qualification of non-State entities acting as actors of protection seems to combine the international legal standards contained in the Draft Articles on Responsibilities of States for Internationally Wrongful Acts referred to above and the objective of being able to provide effective protection. The only difference is the discourse between the UNHCR's views and the Draft Articles on non-State entities. The Draft Articles do not consider non-State entities as relevant actors except when acting as a State or becoming the new government of a State. When its Article 2(c) is read together with Article 7(1) and (2) the Directive allows only for States, their agents or formal substitutes to act as actors of protection. Ambiguity remains as to international organisations which can provide protection. Clearly, UNHCR-supervised refugee camps will not qualify as protection actors because they neither control the State or a part thereof nor operate an effective legal system. Less clear are United Nations missions, including administrative and peace-keeping missions, which exercise elements of governmental authority and control and/or administer a State or a part thereof. They most often, however, lack an effective legal system and may therefore not qualify as actors of protection.

2.3.2.4a Internal protection alternative

The possibility of receiving protection from an entity other than the persecutor is closely linked to the availability of an internal flight, relocation or protection alternative, i.e. an area in the country of origin where the refugee is safe from persecution (hereinafter, an internal protection alternative).[423] The premise of an internal protection alternative is that the well-founded fear of persecution is limited to a specific area of the country and absent in another part of it.[424] It is commonly agreed that the concept of an internal protection alternative has its basis in the surrogate nature of international refugee protection.[425] Looking at the object and purpose of the Refu-

421 Article 7, paragraph 1(b) and 2, EU Qualification Directive.

422 Battjes 2006, p.247 (para. 315).

423 Hathaway and Foster provide convincing arguments to term the concept 'internal protection alternative' as the essence is about protection: Hathaway & Foster 2003, p. 382. UNHCR uses the terms internal flight alternative or internal relocation alternative for the same concept: see UNHCR 2003.

424 UNHCR Handbook, para. 91, according to which 'the fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality'. Note that the drafters of the Handbook had never intended to adopt a concept of internal protection alternative in this paragraph. In fact, it was their intention to make clear that well-founded fear of persecution does not have to exist in the whole territory of the country of origin: UNHCR 2005-6, para. 5.2 (p. 13). Bruin 1995, p. 773. See also Article 8(1) EU Qualification Directive.

425 De Moffarts 1997, p. 125; Kelley 2002, p. 7; Marx 2002, p. 182; Hathaway & Foster 2003, pp. 365-381. See also Article 8(1) EU Qualification Directive.

gee Convention it is reasonable to expect the refugee claimant to avail himself of the protection of his own country rather than claiming international protection.[426] This does not mean, though, that the person concerned must seek an internal protection alternative before he flees his country of origin.[427] The question of the ability and willingness of the refugee claimant to avail himself of the protection of his country of origin is retrospective, whereas that of the availability of an internal protection alternative is prospective, i.e. whether the proposed alternative area provides a meaningful alternative after expulsion.[428] In addition, it cannot be expected of the refugee claimant that he will have gone to the proposed internal protection alternative area before seeking international refugee protection.[429]

Primarily an internal protection alternative is determined by the de jure and de facto effectiveness of its protection against persecution in that alternative area, as explained above in the context of protection from the country of origin in general. The level of protection required, and in particular the need to maintain some sort of social and economic existence, remains the subject of discussion.[430] In essence, the effectiveness of protection in the alternative areas is determined by the following (three) questions:[431]

1. Is the alternative area practically, legally and safely accessible to the individual?

The alternative must be practically and legally accessible to the individual.[432] Practical accessibility for example implies that transport to the area must be available. Legal accessibility requires the individual to have the necessary legal documentation to provide him with the right to travel to and enter and remain in the area. In addition, if required to travel through an intermediate State he must be legally permitted to

426 Goodwin-Gill & McAdam 2007, p. 124. UNHCR Handbook para. 90. Fernhout has argued that the concept of internal protection alternative is incompatible with the text of the Refugee Convention and that it is an invention of States to deny genuine refugees refugee status and protection: Fernhout 1990, p. 120. See also Fernhout quoted in De Moffarts 1997, p. 124.

427 Hathaway & Foster 2003, p. 382.

428 UNHCR 2003, p. 3 (para. 8). See also Hathaway 2005, p. 116, note 167; and Kelley 2002, p. 13, in which she also mentions (in footnote 27) that this is the main reason why the term 'internal flight alternative' is criticised, as 'flight' would imply a retrospective character of the concept.

429 Kelley 2002, p. 15.

430 Hathaway 1999; Hathaway & Foster 2003, pp. 357-417; Storey 2001; Goodwin-Gill & McAdam 2007, p. 124.

431 UNHCR 2003, para. 7 (p. 3). The first two questions are referred to by UNHCR as the 'relevance analysis'; the third question is referred to by UNHCR as the 'reasonableness analysis'. According to UNHCR these requirements are the result of the Global Consultations on International Protection in 2001 and seek to consolidate appropriate standards and practice on this issue in light of recent developments in State practice: UNHCR 2003, cover. Hathaway and Foster point out that these requirements are based on best practice of State parties: Hathaway & Foster 2003, p. 390, the four requirements are comprehensively discussed on pp. 389-411. See also on the requirements Marx 2002, pp. 185-212. Kelley 2002, pp. 14 and 22-41. Spijkerboer & Vermeulen 2005, pp. 42-46.

432 UNHCR 2003, paras 10-12 (p. 4); Kelley 2002, p. 14; UNHCR 2002-4, para. 9 (p. 3).

do so, otherwise internal protection may be merely theoretical.[433] The EU Qualification Directive applies a different standard. According to its Article 8(3) EU Member States may apply an internal protection alternative even if there are technical obstacles to returning to the country of origin. Removing a person to an area notwithstanding technical obstacles to going there could make effective internal protection illusory and would therefore be inconsistent with Article 1A(2) of the Refugee Convention.[434] Furthermore, there must be no insurmountable barriers (for example, mine fields) or safety risks (for example, factional fighting) during the whole journey from the country of refuge to the alternative area in the country of origin. Finally, the internal flight alternative will certainly not be accessible if the individual has to pass through the area of persecution.[435]

2. Is the individual safe from persecution and other serious harm in the alternative area?

The answer to this question very much depends on the original predicament of the individual, and in particular the persecutor. The original fear of persecution and the agent thereof must remain localised and outside the alternative protection area.[436] Therefore, it is not sufficient simply to find that the original agent of persecution has not yet established a presence in the alternative area, but also that he is not likely to do so.[437] Normally this will exclude cases in which the feared persecution emanates from State agents or is condoned or tolerated by the State. Only in exceptional cases where the risk of persecution stems from a State agent the authority of which is clearly limited to a specific geographical area may an internal protection alternative exist.[438] Moreover, because the risk emanates from the State the person concerned may be unwilling to avail himself of the protection of his country of origin in accordance with Article 1A(2) of the Refugee Convention.[439] If the feared persecution emanates from non-State actors it is essential to evaluate the ability and willingness of the State to provide protection. If the risk of persecution is limited to a specific geographical area under the control of the non-State actor, protection may be available in another part of the country which is controlled by the State. If, however, the risk emanating from a non-State actor is not limited to a specific area it may be difficult to find an internal protection alternative. For example, a woman fleeing domestic

433 Marx 2002, p. 186.

434 Battjes 2006, p. 252 (para. 321), according to whom removing a person to an area notwithstanding technical obstacles to going there would also be inconsistent with Articles 2(c) and (e) of the EU Qualification Directive.

435 UNHCR 2003, para. 11 (p. 4).

436 Ibid., para. 18 (p. 5).

437 Hathaway & Foster 2003, p. 392, give the example of a Syrian asylum seeker who could not avail himself of an internal protection alternative in Lebanon as Syrian troops, who perceived the asylum seeker to be an opponent of the Ba'ath party in power in Syria, were in the process of expanding their already extensive control over a large part of Lebanon.

438 UNHCR 2003, paras 13 and 14 (p. 4).

439 Bruin 1995, p. 774.

violence perpetrated by her husband which is tolerated by the State may find protection neither in her original area of residence nor in any other part of the country.[440] Of similar importance is the question: how well-known is the individual concerned in the country of origin? The more well-known the individual is, the more likely it will be that the original persecutors will pursue him.[441] Furthermore, while laws and mechanisms may be available for the individual to obtain protection, the relevant question is whether they are given effect to in practice. In addition, the alternative protection area must not create new threats, including a serious risk to life, safety, liberty or health, or serious discrimination, irrespective of whether or not there is a direct link between the new threat and one of the Convention grounds.[442] Moreover, the individual must not be forced to leave the alternative protection area, or expelled from it, and move to an area where he has a well-founded fear of persecution or a risk of other serious harm.[443] Finally, the protection in the alternative area must be durable. The alternative protection area must be able to provide a stable environment for protection.[444]

3. Can the individual, in the context of the country concerned, lead a relatively normal life without undue hardship?

The difference between protection from the country of origin in general and the availability of an internal protection alternative is the fact that the individual concerned is required to stay in an area of his country of origin which was not his habitual place of residence. It is therefore fair to consider whether or not it is objectively reasonable to require the person concerned to reside there. According to the UNHCR the reasonableness analysis[445] depends on the environment of the alternative area, the circumstances of the person concerned, respect for human rights in the area and the possibility of economic survival. The environment of the area is important as uninhabitable deserts, mountains, jungles or any other areas which are inhospitable cannot de designated as internal protection alternatives. In addition, the individual concerned must be able to reside in the proposed alternative area under circumstances which are considered normal in that area without facing undue hardship and without having to go 'underground'.[446] In other words, it is a very case-specific assessment of what form of social and economic existence must be possible for the individual concerned.[447] According to the UNHCR, the individual must not be isolated, discriminated against or susceptible to psychological trauma, a minimum level of respect for

440 This is an example of a Peruvian asylum seeker seeking asylum in Canada and mentioned by Hathaway and Foster in Hathaway & Foster 2003, p. 393.
441 Ibid., p. 394.
442 UNHCR 2003, para. 20 (p. 5); Marx 2002, p. 196; Hathaway & Foster 2003, pp. 401-402.
443 UNHCR 2003, para. 21 (p. 5).
444 Marx 2002, p. 191.
445 UNHCR 2003, paras. 22-30 (p. 5-7). See also Article 8(1) EU Qualification Directive.
446 Hathaway & Foster 2003, p. 384.
447 Goodwin-Gill 1996, p. 74.

basic human rights standards must be expected, and there must be sufficient potential for the individual to survive economically, i.e. he must be able to earn a living, to have access to adequate housing and medical care.[448] Furthermore, while certain factors may not on their own preclude the application of an internal protection alternative, they may do so when taken together and significantly affecting the person's material and psychological wellbeing. This may include factors such as family life or other social links.[449] The relevant question is to what extent, from a practical perspective, are the rights that will not be respected fundamental to the individual, 'such that the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative'?[450] But what does this mean; what parameters can be suggested or what normative framework – if any – can realistically be adopted for concluding that protection in the alternative area meets certain minimum standards of living? It would be in accordance with the object and purpose of the Refugee Convention to use a human rights based perspective. In addition, such a perspective would provide – to a certain extent – an objective test in terms of universally accepted standards.[451] Finally, it would do justice to the fact that an internal protection alternative aims to protect a person who has a well-founded fear of being persecuted and therefore, in principle, has a right to be protected as if he were a refugee. The question remains whether or not a specific human rights framework should and can be adopted.[452] Whether or not an internal protection alternative will provide adequate protection depends on the individual concerned and the specific facts and circumstances of the case. In 1995 the UNHCR's Regional Bureau for Europe stated that 'in addition to security aspects, this [i.e. internal protection] would require that basic civil, political, and socio-economic human rights of the individual would be accepted'.[453] It is

448 According to the UNHCR of relevance in making this assessment are factors such as age, sex, health, disability, family situation and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work background and opportunities and any past persecution and its psychological effects (UNHCR 2003, p. 6 (paras 25 and 26)). The UNHCR's Regional Bureau for Europe had stated that: 'in addition to security aspects, this [i.e. protection] would require that basic civil, political, and socio-economic human rights of the individual would be accepted', immediately to be conditioned by stipulating that 'questions of an economic nature, such as access to suitable employment, are not strictly relevant to the availability of protection, although the inability to survive elsewhere in the country in the country may be another compelling reason to grant international protection': UNHCR 1995, p. 32. Hathaway and Foster, for example, note important divergence in various States parties regarding the relevance of family and social networks, socio-economic status and language skills in the alternative protection area (Hathaway & Foster 2003, pp. 386-387).

449 UNHCR 2003, para. 25 (p. 6)

450 Ibid., para. 28 (p. 6). UNHCR 2005-6, para. 5.18 (p. 20).

451 Storey 1998, p. 530.

452 The so-called 'Michigan Guidelines' suggest the use of the Refugee Convention and the 'endogenous definition of protection' in Articles 2 to 33 of the Convention. They do not argue in favour of a literal application of the Articles but are of the opinion that the internal protection alternative must at least include legal rights of the kind stipulated in the Convention itself: see Hathaway 1999, p. 139 (paras. 20-22); Hathaway & Foster 2003, pp. 408-409.

453 UNHCR 1995, p. 32. See also Hathaway 1991, p. 134.

unclear what is meant by basic civil, political and socio-economic rights.[454] It is certainly important to measure the required standards against what is considered normal in the area. It would be unrealistic to expect that similar standards can and should be upheld in every internal protection alternative, as it would potentially involve measuring the alternative against standards which are possibly unobtainable.[455] Nevertheless, refugee determination is inherently governed by a human rights-based interpretation. For example, when interpreting the term 'persecution' guidance is found in adopting a hierarchy of human rights.[456] The hierarchy of human rights adopted with regard to persecution is that of derogable and non-derogable rights. Translating this distinction into the concept of an internal protection alternative would imply that non-derogable rights must be guaranteed at all times without discrimination. If not, the proposed internal protection alternative would not provide adequate protection. Consequently, with regard to non-derogable rights absolute protection must be guaranteed in the internal protection alternative. Moreover, if they are not guaranteed they will almost certainly result in persecution or any other form of serious harm. With regard to derogable rights, they must be guaranteed to the level at which they can be obtained in the internal protection area without discrimination (i.e. comparative and relative protection). Thus, a factual assessment is relevant, i.e. whether the rights that will not be protected are fundamental to the individual such that deprivation of those rights would be harmful.[457]

A final word of caution is required when it comes to applying the concept of the internal protection alternative. As Marx rightly points out, applying an internal protection alternative should not create or exacerbate situations of internal displacement, or even contribute in any way to ethnic cleansing campaigns.[458] Consequently, States parties while assessing an internal protection alternative must take into account movements of internal displacement. States cannot merely rely on the presence of internally displaced persons who are receiving international assistance.[459]

The concept of the internal protection alternative was not – at least not explicitly – anticipated by the drafters of the Convention and seems to be a relatively new concept which is increasingly being applied by States. The question remains when the concept of an internal protection alternative is most likely applied. Originally, it was primarily applied in cases involving persecution by private (non-State) actors,[460] or in situations where State persecution was perceived to be very localised. The concept is now increasingly used in civil war-like situations in which distinctive groups are fighting

454 Various authors have suggested that it at least includes the rights listed in ICCPR and ICESCR: see Storey 2001 p. 374; Marx 2002, p. 200; Hathaway & Foster 2003, pp. 406-407.
455 Marx 2002, p. 201; Kelley 2002, p. 39; Storey 2001, p. 376.
456 See section 2.3.1.1; Storey 2001, p. 376.
457 UNHCR 2003, p. 6 (para. 28).
458 Marx 2002, p. 211. See also Summary Conclusions: internal protection/relocation/flight alternative, Global Consultations on International Protection, Expert Roundtable, San Remo, 6-8 September 2001, para. 8 (published in: Feller, Türk & Nicholson 2003, pp. 418-419).
459 UNHCR 2003, p. 7 (para. 31).
460 Marx 2002, p. 215.

each other.[461] In such situations, a person belonging to group A but residing in an area controlled by group B may have a well-founded fear of being persecuted by reason of belonging to group A in area B and may be likely to have a protection alternative in the area controlled by group A. In all these situations the essential question is whether adequate protection, as discussed above, can be provided in the internal protection area.[462] In this regard it may be interesting to end with the summary conclusions of the expert roundtable conference organised in the context of the Global Consultations on International Protection by the UNHCR and the San Remo International Institute of Humanitarian Law in September 2001.[463] It is important to note that these conclusions do not represent the individual views of each participant or necessarily those of the UNHCR, but reflect broadly the understandings emerging from a discussion between a long list of experts (38 people). The summary conclusions distinguish between three scenarios. First, where the risk of being persecuted emanates from the State an internal protection alternative is not normally a relevant consideration, as it can be presumed that the State is entitled to act throughout the country. Secondly, where the risk of being persecuted emanates from local or regional governments within the country of origin an internal protection alternative may be relevant in only some cases, as it can generally be presumed that local or regional governments derive their authority from the national government. Thirdly and finally, where the risk of being persecuted emanates from a non-State actor an internal protection alternative may more often be a relevant consideration which has to be determined in the particular circumstances of each individual case.[464] These conclusions are reflected in the UNHCR's Guidelines on an Internal Protection Alternative of 2003.[465]

2.3.2.4b Diplomatic assurances to guarantee safety

There is no explicit basis to be found in the Refugee Convention for the use of diplomatic assurances to guarantee the safety of a refugee or refugee claimant upon return. They are inherently based on the presumption that there is a risk of being persecuted, as a consequence of which the individual concerned claims international refugee protection, and that because of diplomatic pressure that risk can be negated or removed. The use of diplomatic assurances to guarantee a person's safety is difficult to imagine when the well-founded fear of persecution emanates from the State. In such situation, the concept of diplomatic assurances cannot be part of the protection

461 See also the language used in the UNHCR Handbook, para. 91.

462 It is interesting to note that Marx has identified 18 steps in assessing the availability of an internal protection alternative: Marx 2002, pp. 216-218.

463 Summary Conclusions: internal protection/relocation/flight alternative, Global Consultations on International Protection, Expert Roundtable, San Remo, 6-8 September 2001 (published in: Feller, Türk & Nicholson 2003, pp. 418-419).

464 Summary Conclusions: internal protection/relocation/flight alternative, Global Consultations on International Protection, Expert Roundtable, San Remo, 6-8 September 2001, para. 2 (published in: Feller, Türk & Nicholson 2003, pp. 418-419).

465 UNHCR 2003.

clause, because that clause then implies that the person concerned can actually get protection from his own State and is willing to avail himself of the protection of his country, which he is clearly not. Moreover, to allow in such a situation diplomatic assurances to remove the well-founded fear of persecution would nullify the object and purpose of the Refugee Convention, because it would allow 'asylum' States to start negotiating with countries of origin as soon as a person has claimed protection as a refugee. At the same time this raises the issue of the confidentiality of a refugee protection claim, which prohibits a State from requesting diplomatic assurances.[466] According to the UNHCR, this may be in breach of the claimant's right to privacy as well as increase his well-founded fear of being persecuted.[467] Furthermore, in accordance with Article 22 of the EU Procedures Directive EU Member States are prohibited from disclosing or obtaining any information regarding individual claims for refugee protection to or from the alleged actor(s) of persecution.[468] It is not to be excluded that diplomatic assurances can be requested from the country of origin with regard to people persecuted by fellow citizens.

In its Note on Diplomatic Assurances and International Refugee Protection of August 2006 the UNHCR made it clear that diplomatic assurances should be given no weight when a refugee enjoys the protection of Article 33(1) of the Refugee Convention.[469] In such cases the refugee has been recognised as such through a refugee determination procedure. According to the UNHCR, it would then, i.e. concerning formally recognised refugees, be 'fundamentally inconsistent' with the Refugee Convention for the sending State to look to the very agent of persecution for safety assurances.[470] In my view it would be equally inconsistent with the Refugee Convention to allow the use of diplomatic assurances in cases of refugees who have not (yet) been formally recognised as such. The declaratory nature of the refugee definition requires States to protect unrecognised refugees and refugee claimants from refoulement under Article 33(1) of the Refugee Convention as if they were refugees.[471] A distinction between recognised and unrecognised refugees is not in accordance with the Refugee Convention. Nevertheless, in the context of diplomatic assurances the UNHCR makes such a distinction and argues that assurances provided during refugee status determination proceedings are but one of the elements to be considered when

466 See in this regard the Human Rights Committee in its *Concluding Observations on Costa Rica*, 16 November 2007, UN doc. CCPR/C/CRI/CO/5, para. 7, in which the Committee noted with concern that the names of almost 9,000 Colombian refugees were disclosed without authority by the Costa Rican authorities to the Colombian authorities. Accordingly, the Committee considered that 'the State party should take steps to ensure full respect for the principle of confidentiality of the personal files of asylum-seekers and refugees'.

467 UNHCR 2006, p. 16 (para. 39) ; UNHCR 2006-2, para. 46.

468 Article 22(a) of the EU Procedures Directive.

469 UNHCR 2006, p. 13 (para. 30).

470 Ibid., p. 13 (para. 30).

471 Ibid., p. 14 (para. 35 and 36). See also section 2.2.1, in which it is concluded that the personal applicability of Article 33 Refugee Convention does not depend on any kind of formal recognition as a refugee.

examining whether the individual concerned is a refugee.[472] At the same time the UNHCR uses the confidentiality argument, referred to above, to prohibit States from requesting diplomatic assurances. Consequently, it seems that the UNHCR allows the use of diplomatic assurances in cases in which a refugee claim is still undetermined and the assurances were not requested but were provided by the country of origin of its own accord. The UNHCR's Note on Diplomatic Assurances and International Refugee Protection is inconsistent and not in accordance with the Refugee Convention. A consistent and fair approach would be not to allow the use of diplomatic assurances in situations involving refugees, including refugee claimants, protected by Article 33(1) of the Refugee Convention.

Only in situations where the refugee may be deported in accordance with the exceptions listed in Article 33(2) of the Refugee Convention may diplomatic assurances be used, albeit not in the context of the Refugee Convention. Although Article 33(2) would allow the host State to remove the refugee, other – absolute – prohibitions of refoulement may prohibit this. The host State may then use diplomatic assurances if they are in compliance with prohibitions on refoulement contained in and developed under international human rights law. Even though the use of diplomatic assurances is no longer assessed within the context of the Refugee Convention the UNHCR addressed this issue in its Note on Diplomatic Assurances and International Refugee Protection. According to the UNHCR diplomatic assurances can then be used only if they effectively remove the risk of subjection to human rights violations, i.e. if (1) they are a suitable means to eliminate the danger to the individual concerned, and (2) the host or sending State may, in good faith, consider the assurances to be reliable.[473] If there are any doubts about its effectiveness diplomatic assurances should not be used. Importantly, according to the UNHCR, the sending State must consider a number of factors, including the degree and nature of the risk, its source and whether or not the assurances will be effectively implemented. That in turn depends on the binding nature of the assurances for various implementing State agencies, the ability of the central authorities, which have often given them, to ensure the compliance of implementing agencies, and on the general human rights situation in the receiving country. In general, the UNHCR is concerned about the effectiveness of diplomatic assurances in asylum cases.[474]

The Executive Committee has so far accepted diplomatic assurances, without further elaboration, only in the context of the voluntary repatriation of refugees.[475]

472 UNHCR 2006, p. 17 (para. 44).

473 Ibid., p. 9 (para. 20), in which UNHCR refers to the jurisprudence of the ComAT and the ECtHR (footnote no. 32).

474 Ibid., pp. 10-12 (paras 23-26).

475 The EXCOM has 'called upon governments of countries of origin to provide formal guarantees for the safety of returning refugees and stressed the importance of such guarantees being fully respected': EXCOM Conclusion No. 18 (XXXI), 1980, para. (f).

2.3.3 Exceptions to the right to be protected from refoulement

2.3.3.1 Danger to the country of refuge or its community (Article 33(2) of the Refugee Convention)

In general, Article 33(2) of the Refugee Convention provides a limited opportunity for States to withhold protection from refoulement from those refugees who pose a fundamental threat to the country of refuge. According to Article 33(2), protection from refoulement is not granted to those refugees in respect of whom there are reasonable grounds for regarding them as a danger to the security of the country in which they are, or to those refugees who, having been convicted by final judgment of a particular serious crime, constitute a danger to the community of that country. According to the text of Article 33(2), the refugee must be a danger to the security or community of the country in which he is, this being the country of refuge. Article 33(2) is prospective in its application. The danger to the national security or community of the country of refuge must be a present or future danger. Thus, the past conduct of the refugee may be relevant.[476] As with any exception to human rights guarantees,[477] the exceptions contained in Article 33(2) must be interpreted restrictively and applied with great caution.[478] The exceptions apply to refugees, who in principle have a right to be protected from refoulement.[479] The finding of dangerousness does not require strict proof, but must be based on reasonable grounds and therefore supported by credible and reliable evidence and not made arbitrarily.[480] The burden of proof of establishing reasonable grounds is on the State and requires an individual assessment.[481] A State cannot assume that a refugee poses a threat to its national security or community based on the fact that he belongs to a certain group and create a rebuttable presumption of danger.[482] Article 33(2) must be applied in a manner proportionate to its objective.[483] This means that (1) there must be a causal link between the refugee and the danger, (2) it must be shown that the danger posed by the refugee is sufficiently serious and likely to be realised, (3) refoulement

476 Grahl-Madsen 1963, p. 233; Lauterpacht & Bethlehem 2003, p. 135 (para. 164); Hathaway 2005, p. 345.

477 See section 1.2.1.1 regarding general rules of treaty interpretation and of human rights treaties in particular.

478 UNHCR 1977, para. 14; Lauterpacht & Bethlehem 2003, pp. 133-134 (para. 159); UNHCR 2006-5, pp. 3 and 4; Bruin & Wouters 2003, p. 17.

479 During the drafting of the Refugee Convention some countries were reluctant to weaken the obligation of non-refoulement stressed the restrictive scope of Article 33(2): see Grahl-Madsen 1963, p. 234. In addition, Lauterpacht and Bethlehem point out a trend against exceptions to the prohibition on refoulement, evident in other textual formulations of the principle of refoulement: Lauterpacht & Bethlehem 2003, pp. 130-133 (paras. 151-158).

480 Grahl-Madsen 1963, p. 233. UNHCR 2006-5. Hathaway 2005, p. 345.

481 Hathaway 2005, p. 348. Grahl-Madsen 1963, p. 234. Lauterpacht & Bethlehem 2003, pp. 136-137 (paras 173-176).

482 Hathaway 2005, p. 348.

483 Goodwin-Gill 1996, p. 140.

is a proportionate response to the perceived danger, (4) refoulement alleviates or even eliminates the danger, and (5) refoulement is used as a last possible resort where no other possibilities of alleviating the danger exist.[484] Article 33(2) does not require a balancing act between the danger to the country of refuge and the risk to the refugee upon return. The drafters of the Refugee Convention intended Article 33(2) to apply in clear and very exceptional or extreme circumstances, thereby fully taking into account the person's well-founded fear and the communal rights, interests or even existence of the country of refuge. Consequently, when it is shown that the refugee, notwithstanding his well-founded fear of being persecuted, indeed poses a threat to the national security or community of the country of refuge, no additional proportionality requirement has to be met.[485]

Applying Article 33(2) of the Refugee Convention does not mean that the person concerned is no longer a refugee. The application of Article 33(2) means only that the refugee cannot claim the benefits of the prohibition on refoulement contained in Article 33(1). Consequently, he remains entitled to receive protection from the UNHCR in accordance with its Statute as well as from other States parties to the Refugee Convention for which he does not pose a danger to the national security or community.[486] This has the important implication that whenever the UNHCR or another State is able and willing to provide protection and prevent the refugee from being returned to territories where his life or freedom would be threatened, the refugee must be able to obtain protection there. In addition, the fact that the person concerned remains a refugee means that his removal to his country of origin may result in subjection to torture or other forms of proscribed ill-treatment. In other words, he may have a right to be protected from refoulement in accordance with Article 3 of the ECHR, Article 3 of CAT or Article 7 of the ICCPR. This has potentially two important consequences. First, if the refugee cannot be removed on the grounds of other prohibitions on refoulement he may not be deprived of the benefits of the Refugee Convention at large, in particular those provisions which do not require lawful presence or residence; Article 33(2) of the Refugee Convention is not an exclusion clause.[487] Secondly, if the refugee cannot be removed on the basis of other prohibitions on refoulement, it may have serious consequences for the applicability of Article 33(2). The danger to the country of refuge will then not be alleviated or eliminated. Applying Article 33(2) will then no longer be proportionate to its objective. This leads to the question whether or not it may still be applied, for example as the basis for declaring the person an undesirable alien.

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484 UNHCR 2006-5; Hathaway 2005, p. 352, uses the example of indefinite incarceration in the country of refuge as an alternative to refoulement, a practice apparently applied by some States. Hathaway immediately notes that according to the drafters of the Convention this option was assumed to be no better than refoulement (p. 352, footnote 327): Lauterpacht & Bethlehem 2003, pp. 137-138 (para. 178).

485 Hathaway 2005, p. 353, states that 'by definition, no purely individual risk of persecution can offset a real threat to such critical security interests of the receiving State'.

486 Ibid., pp. 344 and 345.

487 Lambert 2006, p. 178. See also Goodwin-Gill & McAdam 2007, p. 244.

I will discuss below the two exceptions referred to in Article 33(2) of the Refugee Convention separately in more detail.

2.3.3.1a Danger to the national security

Danger to the national security of the country of refuge covers acts of a very serious nature 'threatening directly or indirectly the government, the integrity or the independence of the State on whose territory a refugee stays'.[488] Traditionally, this includes acts aimed at overthrowing the government by force or other illegal means, activities directed against a foreign government which, as a result, threatens the government of the country of refuge with intervention of a serious nature, acts which seriously endanger the country's constitution, its territorial integrity or its peace or independence, as well as acts of terrorism and espionage.[489]

With the growing threat of international terrorism the question arises whether or not the danger to the national security must be interpreted more broadly to include a danger to other countries or the international community in general.[490] According to Lauterpacht and Bethlehem Article 33(2) of the Refugee Convention 'does not address circumstances in which there is a possibility of danger to the security of other countries or to the international community more generally'.[491] Hathaway uses a less strict formulation, as he writes about 'the host State's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions'.[492] Nevertheless, according to Hathaway, it is inappropriate to assert the importance of safeguarding international relations or economic interests as the basis for excluding refugees on national security grounds.[493] The UNHCR adheres to a restrictive interpretation and argues that Article 33(2) makes no reference to the security of other countries.[494] Notwithstanding the growing threat of international terrorism and the margin of appreciation States have in determining the existence of a danger to their national security, Article 33(2) requires a restrictive interpretation and a very high threshold for its application,[495] which, in my view, does not include danger to other countries or the international community in general.

A difficult issue is whether or not the risk of retaliation by the country of origin for accepting its nationals as refugees would permit the invoking of Article 33(2) of

488 Grahl-Madsen 2001, p. 8; Grahl-Madsen 1963, p. 236; UNHCR 2006-5.

489 Kälin 1982, p. 131; Hathaway 2005, pp. 264-266; UNHCR 2006-5, p. 5.

490 *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, 11 January 2002, in which the Canadian Supreme Court concluded that since the terrorist attacks on the USA on 11 September 2001 courts may now conclude that the support of terrorism abroad raises a possibility of adverse repercussions on Canada's security (para. 87).

491 Lauterpacht & Bethlehem 2003, p. 135 (para. 165).

492 According to Hathaway: 'invocation of a national security argument is appropriate where a refugee's presence or actions give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host State's most basic interests': Hathaway 2005, p. 346, in particular footnote 304.

493 Ibid., p. 346.

494 UNHCR 2006-5.

495 Grahl-Madsen 1963, p. 242; Lauterpacht & Bethlehem 2003, p. 136 (para. 169).

the Refugee Convention. During the drafting of the Convention this issue – in a milder version – was tabled by the Danish delegate who asked whether or not the national security exception would be allowed if protecting the refugee would create political tension in inter-State relations between the country of refuge and the country of origin. There was general agreement among the drafters that Article 33(2) was not intended to have that effect.[496] Hathaway argues that when there is genuinely a real chance of retaliation which poses a risk of substantial harm to the country of refuge, the national security exception may legitimately be invoked.[497] While Hathaway may be correct from a strictly legal point of view, to allow the use of the national security exception in circumstances of the real possibility of armed retaliation by the refugee's country of origin would severely undermine the object and purpose of the Refugee Convention. To allow that would imply the denial of international refugee protection, because a State which is opposed to, for example, a person's rightful political opinions, contemplates violence because another State is granting that person protection.[498] Moreover, the national security exception allows States to exempt refugees from protection from refoulement only because the refugee poses a threat and not because the country of origin does so, implying a causal link between the refugee himself and the national security risk.[499]

2.3.3.1b Danger to the community

A second exception to the prohibition on refoulement referred to in Article 33(2) of the Refugee Convention arises when the refugee constitutes a danger to the community of the country of refuge. As discussed above with regard to a danger to national security, the danger posed must be to the community of the country of refuge and not to the community of other countries, or – as already mentioned – the international community in general.[500] The word 'community' refers to the population in general and not the larger interests of the State.[501]

For a refugee to be excluded from protection from refoulement because he poses a danger to the community he must have been convicted by final judgement of a particularly serious crime. The judgment must be final in the sense that no appeal is possible, either because the judgment was pronounced by a court of final appeal

496 UNHCR 2006-5, in which the UNHCR refers to the drafting of the Convention; Grahl-Madsen 1963, p. 235.

497 Hathaway 2005, pp. 347 and 348. Hathaway does note that Article 33 should be read in consonance with Articles 31 and 32 to allow dangerous refugees the opportunity to seek entry into a non-persecutory state, as an alternative to being returned to their home country.

498 This argument is taken from *US Board of Immigration Appeals in the case of In re Anwar Haddam*, 2000 BIA Lexis 20 (US BIA, 1 December 2000) as quoted by Hathaway in Hathaway 2005, p. 347.

499 Hathaway quotes in this regard a decision of the *US Board of Immigration Appeals in the case of In re Anwar Haddam*, 2000 BIA Lexis 20 (US BIA, 1 December 2000): Hathaway 2005, p. 347 (note 308). Hathaway also acknowledges that an element of causation between the refugee and the danger to the national security is implied by Article 33(2) of the Refugee Convention: Hathaway 2005, p. 348.

500 Lauterpacht & Bethlehem 2003, p. 138 (para. 182).

501 Ibid., p. 140 (para. 192).

or because the term of appeal has expired. The possibility of reopening the case in later years, for example because of new evidence, does not alter the finality of the original final judgment for as long as the judgment stands.[502] The text of Article 33(2) of the Refugee Convention is silent on where the crime is committed or where the judgment was passed. It seems that the drafters of the Convention had intended to include crimes committed and for which final judgment was passed in the country of refuge as well as elsewhere.[503]

It has not been clarified what is meant by the term 'particularly serious crime'. It was thought that all States parties would have a general idea about the meaning of this phrase and that it was intended that specific interpretation and application would be carried out according to the individual legal system of each State party.[504] Nevertheless, it remains unanswered what type of crimes are meant to be included. It is important to note the double qualification, i.e. it is not enough for a crime to be serious, but it must be particularly serious, thereby not just relying on the nature of the crime but also taking account of all mitigating and other circumstances surrounding the commission of the offence.[505]

It is also unclear to what extent a link between the crime, the conviction and the danger to the community must exist.[506] It seems only logical to expect some sort of link to exist, otherwise the condition of being convicted by final judgment for a particular serious crime in addition to being a danger to the community would be meaningless. It seems that the danger to the community must somehow emanate from the particularly serious crime for which the refugee has been convicted. In other words, there must be a causal link between the crime and the danger. Consequently, a State cannot just 'search' for a conviction in the past merely to be able to expel a refugee who poses a threat to the country's community.[507]

Although related, the facts that the refugee has been convicted by final judgment for a particularly serious crime and poses a threat to the community are two separate conditions. Therefore, the fact of the conviction alone cannot imply that the refugee poses a threat; a conviction is an essential precondition, but it is the danger the refugee poses which is decisive.[508]

Another unclear element is what is actually meant by the terms 'danger to the community'. From the travaux préparatoires it seems that the 'danger to the community' was meant to include those refugees who incite public disorder or disrupt or upset civil life on a large scale.[509] It must be noted though that not just any form of public

502 Grahl-Madsen 1963, p. 236.
503 Ibid., p. 237.
504 Ibid., p. 238.
505 Hathaway 2005, p. 350.
506 Grahl-Madsen 1963, p. 237.
507 According to Grahl-Madsen: 'such a link may hardly be said to exist if a considerable time has passed between the commission of the crime and the time of decision': ibid., p. 239.
508 Grahl-Madsen 1963, p. 234; Lauterpacht & Bethlehem 2003, pp. 139 (para. 187) and 140 (para. 191).
509 Grahl-Madsen 1963, p. 240.

disorder may be included. As with the word 'danger' in the national security exception, a high threshold applies in the context of danger to the community, i.e. it is only danger of a very serious nature.[510]

2.3.3.2 Exclusion from refugee protection: Article 1D and E of the Refugee Convention

The purpose of Article 33(2) of the Refugee Convention is to allow for countries of refuge to protect their security and community even though the person concerned remains a refugee. By contrast, the purpose of the exclusion clauses contained in Article 1D, E and F of the Refugee Convention is to exclude people from refugee protection and deny them the rights contained in the Convention, including protection from refoulement.

2.3.3.2a Article 1D of the Refugee Convention

According to Article 1D the Refugee Convention does not apply to people who are at present receiving protection or assistance from other organs or agencies of the United Nations, and when such protection or assistance has ceased for any reason without a definite settlement these people are ipso facto entitled to the benefits of the Convention. It is unclear to what the words 'at present' refer. They can refer either to the date the Convention was signed, as advocated by Grahl-Madsen, Hathaway and Takkenberg,[511] or to the date on which the Convention is being applied in a specific case, as advocated by Goodwin-Gill and the UNHCR.[512] The first interpretation would imply that only agencies and organs of the United Nations existing on 28 July 1951 come within the scope of Article 1D. The latter interpretation would imply that Article 1D would also apply to other situations occurring after 28 July 1951. The relevance of these distinct interpretations is minimal as in reality only Palestinian 'refugees' who are protected by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) come within the scope of Article 1D of the Refugee Convention.[513] UNRWA is active in the Middle East, where it provides assistance to Palestinian refugees. UNRWA was set up by the United Nations General Assembly in 1949 to assist those who had left Palestine during and after the first Arab–Israeli conflict in 1948. With the adoption of subsequent resolutions Palestinians who fled later hostilities were also included. UNRWA provides assistance mainly in the field of relief, health and education.[514] The relevance of Article 1D of the Refugee Convention for the prohibition on refoulement is limited. Article 1D

510 Lauterpacht & Bethlehem 2003, p. 140 (para. 191).
511 Grahl-Madsen 1966, p. 264; Hathaway 1991, p. 208 (footnote 117); Takkenberg 1997, p. 98.
512 UNHCR Handbook para. 144; UNHCR 2002-5, paras. 66-68 (pp. 16 and 17).
513 Notably, Article 1D of the Refugee Convention was drafted with the Palestinian refugees in mind: see Takkenberg 1997, pp. 92 and 99.
514 For more information on the protection of the Palestinian refugees see Takkenberg 1997.

applies effectively only to people whose ability to return to their country of origin is denied by the creation of the State of Israel.[515]

Article 1D of the Convention is not so much an exclusion clause as a suspensive one.[516] The Article excludes people from refugee protection in accordance with the Refugee Convention because they receive an alternative form of international protection. The non-applicability of the Refugee Convention is intended to be temporary, until such alternative protection ceases without the person concerned having found a definite solution.[517] Once UNRWA's protection has, for whatever reason, ended for a person falling under UNRWA's mandate and he is unable to return to an area where UNRWA operates, he may claim protection under the Refugee Convention.[518] The words 'for any reason' indicate a broad spectrum of situations and include situations where the person concerned is unable to return, for example because of military occupation or refusal to readmit, as well as situations where he is unwilling to return for reasons other than personal convenience, for example because of threats to his life or freedom.[519] This would include Palestinian refugees who have left the protection of UNRWA for compelling reasons to seek refugee or asylum protection elsewhere.[520] Palestinian 'refugees' for whom UNRWA protection and assistance has ceased are refugees in accordance with the Refugee Convention; no further screening is required,[521] except regarding the actual feasibility for a particular Palestinian 'refugee' to return to UNRWA's area of operations in practice and to avail

515 Ibid., p. 87.

516 Grahl-Madsen 1963, p. 263; Takkenberg1997, pp. 94 and 95.

517 UNHCR 2002-5, para. 47 (p. 12), paras. 54 to 58 (pp. 13-14) and para. 77 (p. 18).

518 For a more extensive discussion of the words 'has ceased' see Takkenberg 1997, pp. 107-113.

519 UNHCR 2002-5, para. 11 (p. 3) and paras. 102 and 103 (p. 23) in which the UNHCR made it clear that when a person is unable to return to an UNWRA area of operation it will be necessary to examine the reason why the person concerned has left and if he is unwilling to return because of threats or other compelling protection-related reasons.

520 Grahl-Madsen 1966, p. 265. See also Takkenberg 1997, pp. 114 and 125. Takkenberg notes that both the Netherlands and Germany have expressed concerns about potential abuse of Article 1D Refugee Convention by refugees preferring Refugee Convention protection over UNWRA protection, and have indicated that only in the case of a person who *for reasons beyond his control* is unable to re-avail himself of UNRWA's help protection may be claimed under the Refugee Convention (pp. 114-116). Takkenberg criticizes this approach to the extent that it does not include situations where the person is leaving for reasons of human rights abuses or even a genuine well-founded fear of persecution (pp. 118-119).

521 Grahl-Madsen 1966, p. 141, argues that Palestinian refugees will become a kind of 'statutory refugees'. See also Takkenberg 1997, p. 96 (and pp. 123 and 125) who refers to a decision of the German Federal Administrative Court (Bundesverwaltungsgericht, Urteil vom 4 Juni 1991 – Bverwg 1 C 42.88, published in Informationsbrief Auslanderrecht 10/91, 305) and Goodwin-Gill 1996, pp. 92 and 93, who notes that in practice many States have resisted providing automatic Convention protection contrary to what appears to be the clear intent of the text of the Refugee Convention. The text of the UNHCR Handbook (para. 143) creates some ambiguity as it stipulates that a Palestinian 'refugee' who finds himself outside UNRWA's protection 'may then be considered for determination of his refugee status under the criteria of the 1951 Convention'. In an intervention in 2002 the UNHCR made it clear that regarding Palestinian 'refugees' regarding whom UNRWA protection and assistance have ceased no new determination of eligibility for Convention protection is required: UNHCR 2002-5, para. 59 (p. 15), para. 83 (p. 20), paras. 94 to 100 (pp. 22 and 23).

himself of UNRWA's assistance,[522] and for a possible application of Article 1C or F of the Convention.[523]

2.3.3.2b Article 1E of the Refugee Convention

Article 1E of the Refugee Convention applies to people who have assumed the rights and obligations which are attached to the possession of the nationality of the country in which they have taken residence, although not formally possessing the country's nationality or citizenship (so-called con-nationals).[524] This exclusion clause makes sense in light of the object and purpose of the Refugee Convention. If a person can avail himself of the protection of his own country, including the country in which he resides, as if he were a national he is not in need of international refugee protection.

2.3.3.3 Exclusion from refugee status: Article 1F of the Refugee Convention

According to Article 1F of the Refugee Convention the Convention:

> 'shall not apply to any person with respect to whom there are serious reasons for considering that:
> a - he has committed a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes,
> b - he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee, or,
> c - he has been guilty of acts contrary to the purposes and principles of the United Nations'.

It is important to note that Articles 1F and 33(2) of the Refugee Convention serve different purposes.[525] Article 1F is not meant to protect the security and safety of the country of refuge and its community; that is the clear objective of Article 33(2) (as discussed in section 2.3.3.1). The objective of Article 1F is to exclude from refugee protection people who are deemed to be unworthy of such protection.[526] They may have committed very serious international crimes characterised as crimes against peace, war crimes and crimes against humanity,[527] they may have committed serious 'ordinary' crimes for which they should be held accountable,[528] or they may have been guilty of acting against the purposes and principles of the United Nations.[529]

Article 1F of the Convention, in particular Article 1F(b), is also meant to exclude people who face prosecution for crimes they may have committed. In other words,

522 UNHCR 2002-5, para. 61 (p. 15).
523 Ibid., para. 101 (p. 23).
524 Grahl-Madsen 1963, p. 266 (and 92). See also Goodwin-Gill 1996, pp. 93-95.
525 UNHCR 2003-3, para. 10; Hathaway & Harvey 2001, pp. 259-261.
526 UNHCR Handbook, para. 147; UNHCR 2003-2, para. 2; Hathaway & Harvey 2001, p. 259.
527 Article 1F(a) of the Refugee Convention.
528 Ibid., Article 1F(b).
529 Ibid., Article 1F(c).

refugee protection must not benefit fugitives from justice.[530] The presumption here is that serious ordinary crimes as meant by Article 1F(b) cannot normally be prosecuted in any country other than the country in which they were committed. Therefore, any response short of exclusion would undermine the fight against impunity.[531] It is questionable whether this presumption, and therefore the objective, still stands. The fact that a person can be excluded from refugee protection is certainly no guarantee whatsoever that he will indeed be held criminally accountable for his crimes in a fair and legitimate manner. Furthermore, since the adoption of the Refugee Convention two important developments may have had a significant impact on the consequences of the application of Article 1F(b).

First, the development of international criminal law, in particular the development of the concept of universal jurisdiction[532] and the introduction of international criminal tribunals, including the International Criminal Court, has led to the ability to hold people who have committed very serious crimes criminally accountable for their crimes in a country or international court outside the country in which these crimes were committed.[533] During the drafting of the Refugee Convention it was mentioned that Article 1F(b) was necessary because in the present state of affairs – i.e. that at the time of drafting – there was no international court of justice competent to try war criminals or violations of common law already dealt with by national legislation. In the current state of affairs that has significantly changed, implying that the need for, in particular, Article 1F(b) of the Refugee Convention is fading.[534] Therefore, the presumption on which Article 1F(b) is based is gradually losing its value. Secondly, the development of the prohibition on refoulement in international human rights law has led to an absolute form of protection in which there is no room for derogations or exceptions.[535] A third argument, albeit not new, can be added. In my opinion, certainly given the described developments, it is questionable to what extend Article 1F as a whole should have a place within the Refugee Convention. Refugee law may not be the right tool to address the issue of impunity and criminal

530 Hathaway 2005, p. 344.

531 Ibid., p. 344.

532 The term 'universal jurisdiction' can best be defined as a form of criminal jurisdiction or authority based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the State exercising such jursidiction. In general, universal jurisdiction may be exercised over serious crimes under international law. Such crimes include: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture. See The Princeton Principles on Universal Jurisdiction 28, Princeton University Program in Law and Public Affairs (2001). Brownlie 1998, pp. 307 and 308.

533 According to the UNHCR this development reduces the role of exclusion as a means of ensuring that fugitives face justice, thus reinforcing the arguments for a restrictive approach: UNHCR 2003-3, para. 4.

534 Reference to this part of the travaux préparatoires (UN doc. A/CONF.2/SR.29 at 21) is made by the UNHCR in UNHCR 2003-3, para. 4 (footnote 1).

535 See sections 3.3.3, 4.3.3 and 5.3.3.

accountability, and that is largely the basis for Article 1F(b). Moreover, international criminal law is far better equipped to deal with questions of criminal accountability.

Finally, excluding people from refugee protection because there are serious reasons for believing that they have committed certain crimes is different from being criminally accountable for these crimes.

Like all exceptions to human rights standards, Article 1F of the Refugee Convention must be applied restrictively and with great caution.[536]

2.3.3.3a Article 1F(a): crimes against peace, war crimes and crimes against humanity

Article 1F(a) refers to crimes against peace, war crimes and crimes against humanity irrespective of where and when they were committed, and as defined by international instruments. Since the adoption of the Refugee Convention a variety of instruments have been developed which are relevant for defining the crimes referred to in Article 1F(a).[537] Perhaps the most important instrument, containing the most recent and comprehensive definition of war crimes as well as of crimes against humanity, is the Rome Statute of the International Criminal Court (ICC Statute).[538] The crime against peace (or crime against aggression) has not (yet) been defined in the ICC Statute, but was earlier defined in the 1945 Charter of the International Military Tribunal (concerning the prosecution of Nazi war criminals).[539] The Charter considered a crime against peace to arise from the 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'. Furthermore, aggression has been defined by the United Nations General Assembly as 'the use of armed force by a State against the

536 UNHCR Handbook, para. 149; UNHCR 2003-2, para. 2.

537 These instruments include: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention); the four 1949 Geneva Conventions for the Protection of Victims of War (the Geneva Conventions); the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid; the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I); the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II); the 1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (the Convention against Torture); The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the ICTY Statute); The Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (the ICTR Statute). In the UNHCR Handbook the UNHCR even refers to an instrument that was adopted before the Refugee Convention, i.e. the 1945 London Agreement and Charter of the International Military Tribunal. These documents are all available via <www.icrc.org>.

538 Rome Statute of the International Criminal Court, UN doc. 2187 UNTS 90, entered into force 1 July 2002.

539 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945.

sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations'.[540] And Article 16 of the ILC's Draft Code of Crimes Against the Peace and Security of Mankind states that 'an individual, who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State, shall be responsible for a crime of aggression'.[541] From these sources it becomes evident that crimes against peace can be committed only in the context of the planning or waging of a war or armed conflict. According to UNHCR wars or armed conflicts are only waged by States or State-like entities in the normal course of events, a crime against peace can be committed only by individuals in a position of great authority representing a State or State-like entity.[542]

War crimes involve grave breaches of international humanitarian law and can be committed by, or perpetrated against, civilian as well as military personnel. Attacks committed in times of armed conflict against any person not or no longer taking part in hostilities, such as wounded or sick combatants, prisoners of war or civilians, are regarded as war crimes. Although war crimes were originally considered to arise only in the context of an international armed conflict, it is now generally accepted that they may be committed in non-international armed conflicts as well. This is reflected in both the jurisprudence of the International Tribunal for the Former Yugoslavia and the ICC Statute.[543] Specific acts considered to be war crimes can be found in Article 8 of the ICC Statute.[544]

Crimes against humanity involve fundamentally inhuman acts, such as murder, extermination, enslavement, deportation of a population and severe deprivation of physical liberty, and committed as part of a widespread or systematic attack directed against any civilian population and with the perpetrator of the crime having knowledge of the attack.[545] Genocide will in many cases, provided the acts of genocide are widespread or systematic, amount to a crime against humanity and include any of the acts set out in Article 2 of the Genocide Convention done with intent to destroy,

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540 GA res. 3312 (XXIX), 1974. Note that this resolution is legally non-binding.

541 ILC Report, A/51/10, 1996, ch. II(2), paras 46-48. See also <www.un.org/law/ilc/texts/dcodefra.htm>.

542 UNHCR 2003-3, para. 28. I wonder whether wars and armed conflicts can only be waged by States or State-like entities. There are many examples in different countries where all sorts of entities have de facto waged war on a State. Such examples include the Baader-Meinhoff group in Germany, ETA in Spain, the IRA in Northern Ireland, and Al-Qeida in the USA.

543 ICTY, *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), 2 October 1995, IT-94-1-AR72, paras. 74 and 137. Article 8(2)(c) of the ICC Statute. See also UNHCR 2003-3, para. 30.

544 According to Article 8 of the ICC Statute war crimes include the wilful killing of protected persons in the context of the Geneva Conventions, torture or other inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury, taking civilians as hostages, extensive destruction and appropriation of property not justified by military necessity and the employment of prohibited weapons.

545 Article 7(1) of the ICC Statute.

in whole or in part, a national, ethnic, racial or religious group.[546] Crimes against humanity may be committed in peacetime as well as in time of war. Therefore, a certain act may constitute both a war crime and a crime against humanity. Crimes against humanity are distinguishable from isolated offences or common crimes as they must form part of a widespread or systematic attack against a civilian population. In some cases, this may be the result of a policy of persecution or serious and systematic discrimination against a particular national, ethnic, racial or religious group. An inhumane act committed against an individual may constitute a crime against humanity if it is part of a coherent system or a series of systematic and repeated acts. Crimes against humanity may be identified from the nature of the acts in question, the extent of their effects, the knowledge of the perpetrator(s) and the context in which such acts take place.

2.3.3.3b Article 1F(b): Serious non-political crimes

Any person with respect to whom there are serious reasons for considering that he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee will be excluded from refugee protection. Unlike the crimes referred to in Article 1F(a) and the acts referred to in Article 1F(c) the scope of Article 1F(b) is limited in place and time. The various elements of Article 1F(b) will be discussed below.

Reference to serious crimes implies that exclusion can take place only when the crime has a certain gravity.[547] The term 'serious' can have different meanings in different countries and settings.[548] Furthermore, the term 'crime' does not refer to a penal act under the national laws of any particular country. Moreover, the gravity of the crime should be judged against international standards, not simply by its characterisation in the country of refuge or country of origin.[549] According to the UNHCR Handbook a 'serious crime' must be a capital crime or a very grave punishable act.[550] Various factors may be relevant in determining the seriousness of a crime, including the nature of the act, the actual harm inflicted, the procedure used to prosecute the crime, the nature of the penalty for such a crime, and how most States would consider the act in question.[551]

546 Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, according to which genocide includes the following acts: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

547 According to the UNHCR the drafters of the Refugee Convention did not intend to exclude individuals in need of international protection simply for committing minor crimes: UNHCR 2003-3, para. 38.

548 UNHCR 2003-3, para. 38.

549 UNHCR 2003-2, para. 14; UNHCR 2003-3, para. 38.

550 UNHCR Handbook, para. 155; UNHCR 2003-3, para. 40.

551 UNHCR 2003-2, para. 14; UNHCR 2003-3, para. 39.

The political or non-political nature of a crime refers to the motives or objectives of the crime, i.e. to what extent the crime is committed to achieve a political goal. According to the UNHCR a serious crime should be considered non-political when other motives – such as personal reasons, causing fear and terror or gain – are the predominant feature of the specific crime committed, i.e. where no clear link exists between the crime and its alleged political objective or when the act in question is disproportionate to that objective.[552] This is referred to as the predominance test. Arguably, egregious acts of violence will almost always fail the predominance test. This most likely includes acts such as the taking of hostages among civilians and torture, or any other acts which are commonly viewed as terrorist acts.[553] Such acts are by definition disproportionate to any political objective. Presumably, if a common definition of acts of terrorism is ever found and laid down in international law, such acts will also almost always fail the predominance test for being disproportionate to their political objective.[554] For a crime to be political it should be in conformity with international human rights standards. Whatever the crime may be, the predominance test, as well as the object and purpose of the Refugee Convention, implies that an assessment of it in the light of its objective should always be made.

For an act to be excludable under Article 1F(b) of the Refugee Convention it must be committed outside the country of refuge and prior to its perpetrator's admission as a refugee in that country. This means that the crime must be committed in any country other than the country of refuge. The drafters of the Refugee Convention made it clear that this refers to a crime committed before the perpetrator enters the country of refuge.[555] The term 'admission' refers to the person's physical presence and not to his formal recognition or claim as a refugee.[556] This is different from the meaning of the term 'admission' in Article 12(2)(b) of the EU Qualification Directive, which refers to Article 1F(b) of the Refugee Convention. According to the EU Directive 'admission' means the time of issuing a residence permit based on the granting of refugee status. Consequently, the EU Directive allows for a broader application of Article 1F(b) of the Convention.

The reason for limiting the scope of Article 1F(b) to crimes outside the country of refuge and prior to admission is that a person who commits a serious non-political crime within the country of refuge will be subjected to the criminal law process of that country. This reason is in conformity with the object of Article 1F(b).

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552 UNHCR Handbook, para. 152; UNHCR 2003-3, para. 41.

553 Bruin & Wouters 2003, p. 14, in particular footnote 10 in which a variety of global and regional treaties are listed which define specific crimes that are viewed as terrorist acts.

554 Currently, no common definition of acts of terrorism exists in international law. Negotiations continue on a draft UN Comprehensive Convention on International Terrorism. Within the European Union terrorist acts are defined in Article 1(3) of Council Common Position of 27 December 2001, 2001/931/CFSP.

555 Goodwin-Gill 1996, p. 102.

556 UNHCR 2003-3, para. 45.

2.3.3.3c Article 1F(c): acts contrary to the purposes and principles of the United Nations

The purposes and principles of the United Nations are laid down in Articles 1 and 2 of the United Nations Charter and are formulated in broad and general terms, providing little guidance on what acts may run counter to them.[557] Furthermore, neither the drafters of the Refugee Convention nor the UNHCR give much guidance on what acts may be contrary to the purposes and principles of the UN. The common interpretation seems to be that Article 1F(c) of the Refugee Convention must be interpreted narrowly so as to include only acts which offend the United Nations in a fundamental way, such as affecting international peace and security. According to the UNHCR, from this it could be inferred that an individual, in order to have committed an act contrary to these principles, must have been in a position of power in a Member State of the UN and instrumental in his State's infringement of these principles.[558] It should not be interpreted so as to include acts which are contrary to subsequent practice and instruments of the UN and its variety of organs and affiliated institutions.[559]

The question whether acts of international terrorism fall within the ambit of Article 1F(c) of the Refugee Convention has become of increasing concern, not least since the Security Council determined in two resolutions in 2001 that acts of international terrorism are a threat to international peace and security and are contrary to the purposes and principles of the United Nations.[560] The main problem is that terrorism is (as yet) without a clear and universally agreed definition. According to the UNHCR, rather than focus on the 'terrorism' label, a more reliable guide to the correct application of Article 1F(c) in cases involving a terrorist act is the extent to which the act impinges on the international plane – in terms of its gravity, international impact, and implications for international peace and security. In the UNHCR's view, only terrorist acts which are distinguished by these larger characteristics, as set out in the aforementioned Security Council resolutions, should qualify for exclusion under Article 1F(c) of the Refugee Convention.[561]

2.3.3.3d Individual responsibility for excludable acts and the standard and burden of proof

A person is excludable under Article 1F of the Refugee Convention when he has committed, or, in the context of Article 1F(c), is guilty of an act referred to in that

557 Goodwin-Gill and McAdam assert that Article 1F (c) Refugee Convention is potentially very wide, but its application in individual cases continues to be infrequent: Goodwin-Gill & McAdam 2007, p. 190.
558 UNHCR Handbook, para. 163; UNHCR 2003-3, para. 48.
559 UNHCR 2003-3, para. 47.
560 UN SC res. 1373 (2001), 28 September 2001 and UN SC res. 1377 (2001), 12 November 2001.
561 UNHCR 2003-3, para. 49.

Article.[562] The verb 'committed' must be interpreted broadly as it refers to the responsibility of the individual for the act. Such responsibility results not only from his having committed the act but also from other conduct. In general, individual responsibility for an excludable act arises when the individual has actually committed the act or substantially contributed to its commission in the knowledge that his conduct would facilitate the act.[563]

In accordance with international criminal law individual responsibility is also engaged by reason of the existence of command or superior responsibility.[564] A military commander is responsible for excludable acts committed by those under his effective control if he knew or, in the circumstances, ought to have known that his subordinates were committing or about to commit such crimes, and he failed to take all necessary and reasonable measures within his power to prevent or repress such acts or to submit the matter to the competent authorities for investigation and prosecution.[565] A similar responsibility is attributed to a superior outside the military context, but only where the crimes fall within his area of effective control and responsibility, and where the superior either knew or consciously ignored information that such crimes were about to take, or were taking, place.[566]

To determine individual responsibility certain States parties to the Refugee Convention, such as Canada and the Netherlands, have adopted the so-called personal knowing and participation test.[567] The outcome of this test is no different from the above-discussed way of establishing individual responsibility. According to this test it must be determined that the individual concerned knew or ought to have known that an excludable act was being committed (knowing participation) and that he was somehow involved in the act, because he had committed it, contributed to it, instigated it, aided or abetted its commission or in any other way participated in it, including facilitating it, or because he, as a military commander or superior, was responsible for it (personal participation).

According to the text of Article 1F of the Refugee Convention the standard of proof of the commission of an excludable act is determined by the question whether or not there are serious reasons for considering that the individual concerned has committed such an act. This is a low standard. A conviction by a (final) judgment in a criminal process is not necessary and the threshold is lower than that commonly applied in criminal law.[568] It is not necessary for States to have established con-

562 Note that the term 'guilty' in Article 1F (c) does not differ from the term 'committed' mentioned in Articles 1F(a) and (b). Furthermore, 'guilty' does not mean being found guilty after criminal proceedings.

563 UNHCR 2003-2, para. 18. Other terms used in this regard are, inter alia, instigation, aiding, abetting, soliciting, attempting and participation. See also UNHCR 2003-3, paras. 51-55.

564 Article 28 of the ICC Statute.

565 UNHCR 2003-3, para. 56.

566 Ibid., para. 56.

567 Dutch Aliens Circular (*Vreemdelingencirculaire*) C1/5.13.3.3.1. Spijkerboer & Vermeulen 2005, p. 101.

568 UNHCR 2003-3, para. 107.

vincing evidence that goes beyond a reasonable doubt. It is sufficient for the facts and circumstances of the case to provide a clear and credible indication that the individual committed the act, or in any other way can be held responsible for it.[569] Finally, it should be noted that, according to the UNHCR, sensitive or secret evidence should in principle not be used to exclude individuals from refugee protection. Anonymous evidence may in exceptional cases be used when absolutely necessary to protect the safety of the witness and it does not substantially undermine the refugee claimant's ability to challenge the evidence. When national security is at stake the evidence used may be kept confidential only if the refugee claimant's due process rights are guaranteed.[570] In general, the individual concerned should be able somehow to challenge the evidence.[571]

The duty to prove the existence of serious reasons lies, in principle, on the State.[572] The burden of proof is reversed in two situations: (1) when the individual concerned is indicted by an international criminal tribunal, and (2) when the criminal responsibility of the individual concerned can be presumed. In both situations a rebuttable presumption of exclusion is created.[573] In the latter context it is created when the individual concerned was a member of a regime or organisation which was clearly involved in excludable acts.[574] This depends on the nature of the regime or organisation the individual concerned was a member of, the character of the organisation's activities and the seniority of the individual concerned within that regime or organisation. Voluntary membership of such a regime or organisation creates the presumption of individual responsibility in the sense that the individual contributed to the acts, even if only by assisting and continuing to function in the regime or organisation or in the sense that the individual concerned knew, or ought to have known, that excludable acts were being committed, and as a senior official he may be held responsible for failing to have prevented or repressed them.[575] Responsibility must be presumed with great care and depends on the specific facts and circumstances of the case. Relevant facts and circumstances are the actual activities of the group, the organisation's place and role in the society in which it operates, its organisational structure (including possible fragmentation and the possible (in)ability to control the conduct of militant wings), the individual's position in it and his ability to influence significantly its activities.[576] Finally, it is important to base the presumption of responsibility on the situation at the moment the individual was part of the organisation

569 UNHCR 2003-2, para. 35; UNHCR 2003-3, paras. 107 and 108.
570 UNHCR 2003-2, para. 36.
571 UNHCR 2003-3, paras. 112 and 113.
572 UNHCR Handbook, para. 149; UNHCR 2003-2, para. 34; UNHCR 2003-3, para. 18.
573 UNHCR, 2003-2, para. 34; UNHCR 2003-3, para. 106. See also UNHCR 2007-4.
574 UNHCR 2003-2, para. 19. An example of such a rebuttable presumption is the exlcusion of officers and NCOs for the Afghan KHaD and WAD during 1978 and 1992 in the Netherlands. This policy is based on a country report of the Dutch Ministry of Foreign Affairs outlining the security services in communist Afghanistan between 1978 and 1992, available at Council of the European Union, Doc. No. 7953/01, 26 April 2001.
575 UNHCR 2003-3, para. 60.
576 Ibid., para. 61.

or regime (ex tunc assessment).[577] The application of a rebuttable presumption of exclusion must be conducted with great care. It requires specific regard for the actual position of the refugee claimant in the organisation; mere association with the organisation will not suffice. Furthermore, the presumption of exclusion must be based on clear and well-sourced country of origin information which is reliable, objective and freely accessible.[578]

There may be grounds for rejecting individual responsibility, based on (1) lack of mental element, (2) defences to criminal liability, and (3) expiation.[579] The lack of mental element refers to the mental capacity of the individual and may include insanity, mental handicap, involuntary intoxication or immaturity.

Defences to criminal liability include superior orders, duress and self-defence. A denial of responsibility by reason of following superior orders will not succeed. According to Article 33 of the ICC Statute the defence of superior orders will apply only if the individual was under a legal obligation to obey the order, was unaware that the order was unlawful and the order itself was not manifestly unlawful such as in the case of ordering war crimes, genocide or crimes against humanity. The defence of duress will apply only if the act is the result of a threat of imminent death or of continuing bodily harm to the individual, and the individual acts necessarily and reasonably to avoid this threat.[580] A very common ground for rejection is self-defence; however, only when the act is reasonable and necessary to defend oneself.[581]

Grounds for rejecting responsibility by reason of expiation concerns the fact that the individual has already served his sentence, has been granted a pardon or has benefited from an amnesty. According to the UNHCR Handbook such grounds are relevant only as regards Article 1F(b) of the Refugee Convention, because, for example, the crimes referred to in Article 1F(a) are so grave that exclusion is still justifiable despite a pardon or amnesty.[582] Whether or not expiation will be acceptable as a ground for rejecting responsibility arguably depends on the specific facts and circumstances of the case.

A final word of caution should be said in terms of holding children responsible for excludable acts, and in particular applying Article 1F of the Refugee Convention to child soldiers.[583] Children are young and vulnerable. Child soldiers are often forcibly conscripted into military service, made to commit heinous acts under duress and may not always have the mental capacity to consent to their actions and understand their consequences.[584] A number of international human rights instruments prohibit the use of children in armed conflict situations and/or criminalise the forcible recruit-

577 UNHCR 2003-2, para. 19; UNHCR 2003-3, para. 61.
578 See for example the UNHCR's critique on the application of a rebuttable presumption of exclusion for officers and NCOs of the Afghan KHaD and Wad, UNHCR, UNHCR 2007-4.
579 UNHCR 2003-2, paras. 21-23; UNHCR 2003-3, paras. 64-75.
580 Article 31(d) of the ICC Statute.
581 Ibid., Article 31(c).
582 UNHCR Handbook, para. 157; UNHCR 2003-2, para. 23.
583 UNHCR 2005-7.
584 Ibid., p. 11.

ment of child soldiers.[585] Article 1F does not distinguish between children and adults committing excludable acts. However, in assessing the application of Article 1F the special status of children in international law must be taken into account. In many instances children cannot be held criminally accountable for their actions.[586] The Convention on the Rights of the Child, for example, obliges States parties to ensure the establishment of a minimum age below which children are presumed not to have the capacity to infringe the penal law.[587] Where such an age has been established in the country of refuge a child below that age cannot be considered as having committed an excludable act.[588] With regard to a child above that age an assessment of his maturity and mental capacity must be made. According to the UNHCR:

> 'it must be determined that the child was sufficiently mature to understand the nature of his or her conduct and the consequences of the actions being undertaken, and thus to commit, or participate in the commission of, the material elements of a crime with the requisite intent and knowledge'.[589]

In addition, potential elements of duress must be taken into account. These include forced conscription and being involuntarily drugged and forced to commit certain acts under the threat of, for example, torture.[590] Finally, the best interests of the child are of central importance when considering the proportionality of exclusion.[591]

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585 These instruments include: the 1977 Additional Protocol (I) to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3, 39, which entered into force on 7 December 1978, Article 77 (2); the 1977 Additional Protocol (II) to the Geneva Conventions of 12 August 1949 and relating to Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609, which entered into force on 7 December 1978, Article 4 (3) (c); the 1989 Convention on the Rights of the Child, UN doc. 1/44/49, which entered into force on 20 September 1990, Article 38; the 1998 Rome Statute of the International Criminal Court, UN doc. A/CONF.183/9, Article 8 (2) (b) (xxvi); the 1999 ILO Worst Forms of Child Labour Convention No. 182, 17 June 1999, which entered into force on 19 November 2000, Article 3 (a); the 2001 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, UN doc. A/RES/54/263, which entered into force on 12 February 2002, Article 2.

586 UNHCR 2005-7, pp. 10 and 11, in which it is mentioned that several international criminal tribunals have no jurisdiction over children, including the International Criminal Court.

587 Article 40(2)(b)(vii)(a) of the Convention on the Rights of the Child.

588 UNHCR 2005-7, p. 11.

589 Ibid., p. 11.

590 Ibid.

591 Article 3(1) of the Convention on the Rights of the Child. UNHCR 2005-7, pp. 4 and 11. Also note the international legal duty of States to assist in the rehabilitation of child victims of, for example, inhuman treatment and armed conflict, and to establish standards for the treatment of children thought to have infringed criminal law: Articles 39 and 40 of the Convention on the Rights of the Child, referred to by UNHCR in UNHCR 2005-7, p. 12.

2.3.3.3e Considerations of proportionality

According to the UNHCR, in applying the exclusion clause of Article 1F of the Refugee Convention considerations of proportionality must be taken into account.[592] To comply with the overriding humanitarian object and purpose of the Convention it is necessary to balance the exclusion of refugee protection and its consequences for the individual concerned. Proportionality considerations have been developed and are especially significant in the context of serious non-political crimes referred to in Article 1F(b).[593] To a lesser extent proportionality considerations may be applied to acts referred to in Article 1F(a) and (c) of the Convention. The reason for this is, as already mentioned above, that exclusion in the context of Article 1F(b) is largely to avoid impunity, whereas exclusion in the context of Article 1F(a) and (c) is based on the inherently egregious nature of the crimes or acts referred to therein.

The question is whether the text of Article 1F of the Refugee Convention allows for proportionality considerations. According to the text 'the provisions of this Convention shall not apply' if there are serious reasons for considering that an excludable act has been committed. The text of the Article provides for a compulsory duty not to apply the provision of the Convention to a person who is excludable under Article 1F. Therefore, if, for example, there are serious reasons for considering that the individual concerned has committed a crime against humanity he shall not receive refugee protection. There is no room for any balancing act. This is different in the context of Article 1F(b) because the words 'serious' and 'non-political' provide for a margin of discretion which allows for considerations of proportionality.[594]

If proportionality considerations are allowed the question remains what issue must be balanced? A narrow approach would be to balance exclusion and the absence of protection in accordance with the Refugee Convention. A broader approach would be to balance exclusion and protection in accordance with the prohibition on refoulement contained in the Refugee Convention as well as in other human rights treaties. In the latter approach exclusion will be more easily accepted because the person concerned may still be protected under the prohibition on refoulement laid down in, for example, Article 3 of the ECHR.[595]

When Article 1F of the Refugee Convention applies, the person concerned will be excluded from refugee protection. Consequently, neither the UNHCR nor any State party to the Refugee Convention will have an obligation to provide protection. The Refugee Convention does not contain an obligation to expel the excludable person. In fact, the person concerned may well have a right to be protected from refoulement in accordance with other human rights treaties, as discussed in this book.[596]

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592 UNHCR 2003-2, para. 24; UNHCR 2003-3, paras. 76-78.
593 UNHCR 2003-3, para. 77.
594 Ibid., para. 77.
595 UNHCR 2003-3, para. 76.
596 Ibid., paras. 21 and 22.

2.3.3.4 Provisional measures under Article 9 of the Refugee Convention

Article 9 of the Refugee Convention is designed to allow States to take provisional measures essential to the country's national security, thereby referring to extreme crises such as a time of war or other grave and exceptional circumstances. The drafters intended to allow States to withhold substantive rights from refugees if faced with a mass influx during wartime or other crises.[597] Provisional measures under Article 9 may be taken only in times of war or other grave and exceptional circumstances, and only with regard to people whose claim for refugee protection is still pending. In other words, the rights of refugee claimants whose refugee status has not yet been formally recognised may be suspended only when this is absolutely necessary for reasons of national security and only in times of war, state of emergency or grave international crisis short of war.[598] Furthermore, measures under Article 9 can be taken only on an individual basis, must be based on the merits of that case, and cannot be taken solely on the basis of nationality.[599] Article 9 can be compared to the derogation clauses laid down in, for example, Article 15(1) of the ECHR, Article 2(2) of CAT and Article 4(1) of the ICCPR.

Article 33 of the Refugee Convention is not explicitly excluded from the working of Article 9. I find it very difficult to imagine Article 9 being applied to the prohibition on refoulement. First, Article 9 applies to refugee claimants and stops applying when a positive determination regarding the person's refugee status is made.[600] Secondly, Article 9 was intended to allow States to take temporary measures during a situation of mass influx, only to be withdrawn when normal procedures could continue.[601] Thirdly, Article 9 allows for only provisional measures. Because a breach of the prohibition on refoulement may involve irreparable harm, it will be difficult, if not impossible, to call any measure in breach of the prohibition on refoulement provisional. Fourthly, if a refugee poses a threat to a country's national security the country can invoke Article 33(2) of the Convention. Finally, it should be noted that the Executive Committee and the United Nations General Assembly have called the prohibition of refoulement non-derogable.[602]

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597 Hathaway 2005, p. 261.

598 Weis 1995, p. 75. See also Robinson 1953, p. 80; Hathaway 2005, p. 262.

599 Article 8 of the Refugee Convention. For more information see Hathaway 2005, pp. 270-277.

600 Note that in exceptional situations the drafters approved an exception to the presumption that a positive determination of refugee status ends the application of provisional measures: see Hathaway 2005, p. 269.

601 Ibid., pp. 269 and 270.

602 UN GA res. 51/75, 12 February 1997, para. 3 and UN GA res. 52/132, 27 February 1998, preamble. EXCOM Conclusion No. 79 (XLVII), 1996, para. (i). Note that EXCOM has on many other occasions referred to the prohibition on refoulement as a fundamental principle: see, for example, EXCOM Conclusion No. 6 (XXVIII) 1977, para. (c); EXCOM Conclusion No. 25 (XXXIII) 1982, para. (b); EXCOM Conclusion No. 81 (XLVII) 1997, para. (i); EXCOM Conclusion No. 99 (LV) 2004, para. (l); EXCOM Conclusion No. 103 (LVI) 2005, para. (m).

2.4 The character and contents of State obligations deriving from the prohibition on refoulement under Article 33 of the Refugee Convention

I discussed in the last two sections the scope and substance of Article 33 of the Refugee Convention. This section will outline the concrete obligations which derive from a State party's responsibility to protect a refugee against refoulement in accordance with Article 33. The Article prohibits the expulsion or return – refouler – of a refugee in any manner whatsoever to the frontiers of territories where there is a threat to his life or freedom. States are responsible for refugees who are within their territory as well as for refugees who are within their extra-territorial responsibility (see section 2.2.2). States are prohibited from taking any measure – judicial or administrative – forcing a refugee to leave and go to 'the frontiers of territories' where there is a threat to his life or freedom.[603] It is not necessary for a refugee to have been in the country where he faces a threat to his life or freedom. In essence, under Article 33(1) a State party has the responsibility to avoid the situation where, as a consequence of its conduct, the refugee is forced to go 'to the frontiers of territories' in which there is a threat to the refugee's life or freedom. The words 'in any manner whatsoever' indicate that a wide range of acts and omissions was intended to be covered by Article 33.[604] Thus, depending on the specific situation of the refugee, the State may have negative or positive obligations. Negative obligations are those obligations by which a State is obliged to refrain from acting. Such negative obligations include the prohibition of expulsion, deportation, transfer, extradition, or, in general, the forced removal of a refugee. The various negative obligations which can be derived from Article 33(1) will be discussed in section 2.4.1.

Positive obligations refer to obligations whereby the State is required to take action in order to prevent the refugee from returning or going to the frontiers of territories in which he is at risk. Various positive obligations will be discussed in section 2.4.2.

2.4.1 Negative obligations

2.4.1.1 Prohibition on removal

The prohibition on removal includes a wide range of actions whereby the refugee is forcibly removed from or forced to leave the territory of a host State. It is irrelevant whether this is labelled expulsion, deportation, repatriation, rejection, informal transfer, rendition or extradition.[605] It is not just deliberate actions which may infringe the prohibition on refoulement. Article 33(1) of the Refugee Convention may also be affected by a wide range of actions (or inactions) without such a deliberate aim being

603 Robinson 1953, pp. 137-138; Goodwin-Gill 1996, p. 122; Hathaway 2005, p. 319.
604 Hathaway 2005, p. 338.
605 Lauterpacht & Bethlehem 2003, para. 69, p. 112.

taken by, or with the acquiescence of, a State party.[606] In this respect a variety of practices can be mentioned, such as practices whereby refugees are coerced into accepting voluntary repatriation without any real options but to leave, and practices such as withholding food, water and other essentials from refugees in order to induce their repatriation.[607]

The prohibition on refoulement prohibits return to 'the frontiers of territories' in which there is a threat to the refugee's life or freedom. The scope of protection from refoulement is not limited to the country of origin of the refugee, but extends to any territory in which there is a threat to the refugee's life or freedom on account of his race, religion, nationality, membership of a particular social group or political opinion.[608] Furthermore, the use of the word 'territories' as opposed to 'countries' or 'States' implies that the legal status of the place to which the refugee may be sent is immaterial.[609] Thus, a refugee may not be removed to any territory; whether or not it belongs to or is under the sovereign control of a State.[610]

Lauterpacht and Bethlehem have argued that the aforementioned interpretation suggests that:

> 'the principle of non-refoulement will apply also in circumstances in which the refugee or asylum seeker is within their country of origin but is nevertheless under the protection of another Contracting State. This may arise, for example, in circumstances in which a refugee or asylum seeker takes refuge in the diplomatic mission of another State or comes under the protection of the armed forces of another State engaged in a peacekeeping or other role in the country of origin. In principle, in such circumstances, the protecting State will be subject to the prohibition on refoulement to territory where the person concerned would be at risk'.[611]

They seem to rely on the argument that the foreign State has effective control over a part of the territory of the refugee's country of origin, or at least over the individual concerned. Hence, the foreign State has the responsibility not to hand the refugee over to the authorities of his country of origin. In my opinion this cannot be derived from Article 33(1) of the Refugee Convention as it is irreconcilable with the requirement stated in Article 1A(2) that a refugee is a person outside his country of origin, as I outlined in section 2.2.2.[612] While in such a situation the person concerned may

606 Hathaway 2005, p. 318.
607 Ibid., pp. 318 and 319.
608 UNHCR 1977, para. 4; Lauterpacht & Bethlehem 2003, p. 122 (para. 113); Goodwin-Gill & McAdam 2007, p. 250.
609 Lauterpacht & Bethlehem 2003, p. 122 (para. 114). See also Goodwin-Gill & McAdam 2007, p. 250. See in this regard Article 3 of the Convention against Torture which explicitly prohibits removal to another State: section 5.4.1.1.
610 See section 1.2.3.2 for a brief overview of territories which, according to international law, do not belong to a State.
611 Lauterpacht & Bethlehem 2003, p. 122 (para. 114).
612 Goodwin-Gill & McAdam 2007, p. 250. See also section 2.4.1.3.

be at risk of being persecuted, the protecting State will have no responsibility under Article 33(1) of the Refugee Convention because the person is not a refugee.[613]

2.4.1.1a Safe countries of origin

In this regard it is relevant to mention the concept of 'safe countries of origin', a concept which assumes that people from countries which can be regarded as safe cannot be refugees. Although there have been many examples in the past,[614] the most 'famous' adoption of the concept of 'safe counties of origin' can be found in the EU Procedures Directive.[615] According to Article 29(1) of the Directive the European Council shall adopt a minimum common list of third countries which are regarded as safe countries of origin.[616] In addition, EU Member States remain free to introduce or retain legislation which allows for the national designation of safe countries of origin.[617]

The Refugee Convention allows any person, irrespective of where he comes from, to be protected as a refugee (see section 2.2.1). As Hathaway puts it, 'even if nearly all persons from a given country cannot qualify for refugee status, this fact ought not to impede recognition of refugee status to the small minority who are in fact Convention refugees'.[618] The complexities and specific circumstances of each individual claim for refugee protection should always be taken into account. Therefore the concept of 'safe countries of origin' should not be rigidly applied or used to deny

613 Note that this is different under the prohibition on refoulement analysed in section 3.4.1.4 (regarding Article 3 ECHR) and section 4.4.1.4 (regarding Article 7 ICCPR).

614 Examples given by Hathaway include, inter alia, Switzerland declaring the whole of India safe, Germany doing the same with Senegal and France with Mali and Ghana: see Hathaway 2005, p. 296 (in particular footnotes 93 to 95).

615 EU Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, 2005/85/EC of 1 December 2005, Official Journal of the European Union, L 326/13, 13 December 2005. On 6 May 2008 the EC Court of Justice annulled Articles 29(1) and (2) and 36(3) of the EU Procedures Directive. These Articles concern the procedure for adopting and amending a minimum common list of third countries, and European countries, regarded as safe countries of origin: EC Court of Justice, *Parliament v Council*, 6 May 2008, Case no. C-133/06.

616 Article 29(1) of the EU Procedures Directive, according to which the designation of countries of origin as safe is subject to substantive criteria laid down in an Annex to the Directive (Annex II) and includes that: 'on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution, ...no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict. persecution or mistreatment by: (a) the relevant laws and regulations of the country and the manner in which they are applied; (b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention; (c) respect of the non-refoulement principle according to the Geneva Convention; (d) provision for a system of effective remedies against violations of these rights and freedoms'.

617 Article 30 of the EU Procedures Directive.

618 Hathaway 2005, pp. 333 and 334; UNHCR 2001-3, paras. 39 and 40.

access to procedures.[619] This does not mean that the concept cannot be used as a procedural device creating the presumption that a claim for refugee protection from a person coming from a safe country of origin is not valid.[620] As a consequence the refugee is required and should be able effectively to rebut this presumption. According to the UNHCR the concept 'can work as an effective decision-making tool', as long as:

> 'the assessment of certain countries of origin as safe is based on reliable, objective and up-to-date information from a range of sources. It needs to take account not simply of international instruments ratified and relevant legislation enacted there, but also of the actual degree of respect for human rights and the rule of law of the country's record of not producing refugees, of its compliance with human rights instruments, and of its accessibility to independent national or international organisations for the purpose of verifying human rights issues'.[621]

In practice, the problem with the application of the concept of safe country of origin is that States tend to treat it as evidence of a weak substantive claim and not allow the refugee claimant to access a proper procedure.[622]

2.4.1.2 Prohibition on extradition

Even though extradition is not explicitly mentioned as one of the prohibited acts of removal laid down in Article 33(1) of the Refugee Convention, it is certainly covered by that Article.[623] The phrase 'in any manner whatsoever' formulated in Article 33(1) leaves no room for doubt that every possible form of expulsion or return, including extradition, is included.[624] Extradition is frequently covered by bilateral or multilateral extradition treaties. This may give rise to a conflict of treaty obligations.[625]

The Executive Committee has explicitly recognised:

> 'that refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution on the grounds enumerated in Article 1(A) (2) of the 1951 United Nations Convention relating to the Status of Refugees'.[626]

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619 UNHCR 2001-3, para. 39.
620 Hathaway 2005, p. 334.
621 UNHCR 2001-3, para. 39. See also UNHCR 1995, p. 14.
622 Costello 2006, pp. 4 and 5; Article 31(2) of the EU Procedures Directive allows EU Member States to consider an application for refugee protection to be unfounded where the country of origin is regarded as safe; safety in this context is determined by a minimum common list of third countries which are regarded as safe countries of origin by the European Council (Article 29 EU Procedures Directive) or by national legislation of countries of origin (Article 30 EU Procedures Directive).
623 Goodwin-Gill & McAdam 2007, p. 257; Lauterpacht & Bethlehem 2003, pp. 112-113; Mus 1996, p. 142, where, in footnote 73, he refers to the views of numerous scholars in this regard.
624 See for an overview of national legislation and jurisprudence on the applicability of the prohibition on refoulement in extradition cases Kapferer 2003, pp. 77 and 78, footnotes 401-406 (paras. 226-228).
625 See section 1.3.2.6 for a general discussion of the conflict of treaty obligations.
626 EXCOM Conclusion No. 17 (XXXI) 1980, para. (c).

Clearly, the Executive Committee is of the opinion that Article 33(1) of the Convention should prevail over obligations to extradite. Some extradition treaties have stipulated mandatory grounds for refusing extradition based on Article 33(1).[627] By including prohibitions on refoulement as grounds for exclusion from extradition in extradition treaties the chances of a conflict of treaty obligations are reduced.[628] Moreover, a conflict will arise only with regard to an extradition treaty which has no conflict clause and is more recent than the Refugee Convention. The question then remains how to resolve a conflict between Article 33(1) and an obligation to extradite based on a younger extradition treaty with no conflict clause. As discussed in section 1.3.2.6, if Article 33(1) prevents the refugee from being subjected to torture it prevails. If Article 33(1) prevents a refugee from being subjected to persecution other than torture it is less clear. From the perception of the Refugee Convention Article 33(1) must prevail.[629] Such a one-sided view, however, does not do justice to the general rules of international treaty law. As dicussed in section 1.3.2.6, in international law there is no hierarchy of treaties. Human rights treaties, therefore, are treated no differently from other treaties as regards priority, except where *jus cogens* norms are concerned.[630] Moreover, the Refugee Convention does not prohibit extradition. In fact, people who are suspected of having committed certain serious crimes are excluded from refugee protection under Article 1F of the Refugee Convention and are therefore not protected by Article 33(1), and may thus be extradited.[631] In addition, other suspected criminals whom there are reasonable grounds to regard as a danger to the security of the country in which they are (Article 33(2)) may also be extradited.

2.4.1.3 Prohibition on rejection at the frontier and beyond

In section 2.2.2 I concluded that Article 33(1) of the Refugee Convention is applicable at the frontier of a potential host State.[632] Consequently, it is prohibited to close borders, to take measures to push refugees back, reject them at the frontier and not

627 According to Article 3(b) of the United Nations Model Treaty on Extradition 'Extradition shall not be granted …, if the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that person's position may be prejudiced for any of those reasons', and Article 3 (f) stipulates that extradition shall not be granted 'If the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment', UN doc. A/RES/45/116, 14 December 1990. See also Mus 1996, pp. 143-146 for other non-refoulement exceptions in exrtradition treaties.

628 Mus 1996, p. 146.

629 Ibid., p. 150, footnote 99.

630 Ibid., p. 217. See also Kälin 1982, pp. 259 and 260.

631 In particular Article 1F(b) of the Refugee Convention is aimed at ensuring that common criminals should not qualify as refugees: see Kapferer 2003, p. 104 (para. 319).

632 EXCOM Conclusion No. 6 (XXVIII) 1977, para. (c), reaffirming 'the fundamental importance of the observance of the principle of non-refoulement – both at the border and within the territory of a State'. Goodwin-Gill & McAdam 2007, p. 208; Lauterpacht & Bethlehem 2003, pp. 113-115 (paras. 76-86); Hathaway 2005, p. 315; Spijkerboer & Vermeulen 2005, p. 71.

allow them access to the host country and its procedures for the determination of refugee status.[633] In fact, some EXCOM Conclusions explicitly state that rejection at the frontier without the individual having access to a procedure for the determination of refugee status is prohibited under Article 33(1) of the Convention.[634] A consequence of a State being responsible for refugees who are at its borders and being prohibited from rejecting them is that the refugees must then be allowed to enter and perhaps remain in the territory. The (positive) obligation to allow refugees to enter and remain and to provide access to a procedure for the determination of refugee status is further discussed in sections 2.4.2.1 and 2.4.2.7.

Related to the prohibition on rejection at the frontier, and in particular taking measures pushing refugees back to their country of origin, is the issue of measures taken by States aimed at preventing potential refugees from leaving their country of origin and reaching a potential host State's frontier and territory. In the strict sense of the Refugee Convention States parties have the freedom to impose such interdiction or interception measures. As outlined in section 2.2.2 protection from refoulement in accordance with Article 33(1) of the Convention can be granted only when the person concerned is outside his country of origin. Neither Article 33(1) nor the Convention as a whole provides for a right to seek asylum in the sense that a State party to the Convention should provide protection or assistance to those who are trying to escape persecution in their own country.[635] Consequently, Article 33(1) does not apply to people remaining within their country of origin because of (in-country) interdiction or interception measures such as visa requirements or the imposition of carrier sanctions, even though they may have a well-founded fear of persecution.[636] On the basis of the wording of the Refugee Convention States are not prohibited from introducing or continuing a system of immigration control, whether by way of a requirement for visas or the operation of a pre-clearance system.[637] According to Hathaway, 'Art. 33 is similarly incapable of invalidating the classic tool of non-entrée:

633 Various Conclusions of the Executive Committee have indicated that Article 33(1) Refugee Convention includes a prohibition on rejecting a refugee at the frontier; EXCOM Conclusion No. 6 (XXVIII), 1977, para. (c); EXCOM Conclusion No. 14 (XXX), 1979, para. (c); EXCOM Conclusion No. 15 (XXX), 1979, paras. (b) and (c); EXCOM Conclusion No. 53 (XXXIX), 1988, para. 1. EXCOM Conclusion No. 85 (XLIX), 1998, para. (q). Hathaway outlines a large number of examples in which States have used a variety of actions whereby refugees were denied access to the territory of a host State. Examples include the closure of borders (p. 281), blunt barriers of electrified razor wire fence (p. 282): Hathaway 2005, pp. 281-282.

634 This includes EXCOM Conclusion No. 6 (XXVIII), 1977, para. (c); EXCOM Conclusion No. 22 (XXXII), 1981, para. II.A.2; EXCOM Conclusion No. 81 (XLVIII), 1997, para. (h); EXCOM Conclusion No. 82 (XLVIII), 1997, para. (d) (iii); EXCOM Conclusion No. 85 (XLIX), 1998, para. (q).

635 This also follows from para. 88 of the UNHCR Handbook in which it is stated that: 'it is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country'. See also Hathaway 1991, p. 29.

636 Hathaway 2005, p. 311.

637 Ibid., p. 312, and note 169.

visa controls imposed on the nationals of refugee-producing States, enforced by carrier sanctions'.[638] One may however question the intentions of such measures,[639] their potential discriminatory enforcement[640] and whether or not they are in accordance with the object and purpose of the Refugee Convention, in particular when such measures concern active in-country interdiction or interception,[641] and people are put at risk of being persecuted. The application of the prohibition on refoulement depends upon the ability to leave one's country or to remain outside it in order to avoid the risk of persecution.[642] The UNHCR has pointed out that measures aiming at combating irregular migration, albeit legitimate, can seriously jeopardise the ability of people at risk of persecution to gain access to safety and asylum. Without such measures being balanced by adequate means to identify genuine cases, they are an infringement of the object and purpose of the prohibition on refoulement, according to UNHCR.[643]

No doubt the conclusion that Article 33(1) of the Refugee Convention does not protect potential refugees inside their country of nationality or habitual residence points to a serious gap in international asylum protection, a gap which to some extent is filled by the development of prohibitions on refoulement under other instruments, and as outlined in other chapters of this book.[644] Hathaway also points to Article 12(2) of the ICCPR to fill this protection gap.[645] According to Article 12(2),

638 Ibid., p. 310.

639 It is not a coincidence that a number of EU Member States have posted immigration and airline liaison officers at major international airports of countries that are major refugee-producing States whose citizens figure high on the list of recognised refugees in the various EU Member States, according to UNHCR 2002, paras. 22 and 23.

640 In the case involving UK Immigration Officials at Prague Airport the House of Lords unequivocally stated that the operation was inherently and systematically discriminatory against Roma on racial grounds: *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2004] UKHL 55, House of Lords, 9 December 2004, para. 38.

641 In a letter to the UK Court of Appeal in *European Roma Rights Centre and Others v. the Immigration Officer at Prague Airport and the Secretary of State for the Home Department* [2003] EWCA Civ 666, Court of Appeal (Civil Division), 20 May 2003, Goodwin-Gill, on behalf of UNHCR, makes a distinction between the active interdiction or interception of people seeking refuge from persecution on the one hand and passive regimes, such as visa and carrier sanctions, on the other, in: UNHCR 2003-6. See also Hathaway 2005, p. 311.

642 UNHCR 2002-4, para. 6 (p. 2).

643 EXCOM, *Note on International Protection*, UN doc. A/AC.96/898, 3 July 1998, para. 16 and EXCOM, *Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, UN doc. EC/50/SC/CPR.17, 9 June 2000, para. 18. UNHCR 2002, para. 17. In a letter sent by the UNHCR Representative in the United Kingdom on 19 July 2002 to the Claimants' Solicitors in the so-called 'Prague Airport' case the UNHCR made it clear that in its view measures aimed at preventing potential refugees from leaving their country of nationality to seek asylum are, although not contrary to the text of the Convention, an infringement of its object and purpose: Letter from the United Nations High Commissioner for Refugees dated 19 July 2002 mentioned in: *European Roma Rights Centre and Others v. the Immigration Officer at Prague Airport and the Secretary of State for the Home Department* [2002] EWHC 1989 (Admin), High Court of Justice, 8 October 2002, para. 42. Also referred to in UNHCR 2003-6, para. 31.

644 Hathaway 2005, pp. 309, 310, 312 to 314.

645 Ibid., pp. 309, 310, 312 to 314.

'everyone shall be free to leave any country, including his own'.[646] This right to leave a country may be limited for a reason deemed legitimate under the ICCPR and may in any event not be limited on a discriminatory basis.[647] Thus, as Hathaway rightly argues, where the prohibition on leaving the country of origin in order to seek protection is unlikely be deemed a legitimate reason for denying the right to leave, and/or where that prohibition is implemented in a discriminatory manner, the country of origin will be in breach of Article 12(2) of the ICCPR.[648] With reference to Article 12 the Human Rights Committee has stated that States parties to the Covenant should abolish the requirement of an exit visa for their nationals as a general rule.[649] In addition, a foreign State may also be in breach of Article 12(2) if it effectively controls the right to depart.[650] However, this neither violates Article 33 of the Refugee Convention nor is it an adequate alternative for protection from refoulement.

2.4.1.4 Prohibition on indirect refoulement and the concept of safe third countries

The prohibition on refoulement, via the words 'in any manner whatsoever', also prohibits removal to a third country in circumstances in which there is a risk that the refugee may be sent from there to the frontiers of territories where there is a threat to his life or freedom.[651] While the third country remains primarily responsible for a direct act of refoulement, the first country, through its act of removal to the third country, is jointly liable for violating the prohibition on refoulement.[652] In general,

646 The right to leave any country, including one's own, was comprehensively discussed in: Higgens 1973, pp. 341-357; Hannum 1987; Harvey & Barnidge Jr. 2005.

647 Article 12(3) of the ICCPR: 'the above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant'; Hathaway 2005, p. 309.

648 Ibid.. Hathaway argues that invoking Article 12(2) of the ICCPR may be the best way, albeit a difficult one, for challenging in-country interdiction measures such as visa controls and carrier sanctions: Hathaway 2005, pp. 312-314; Persuad 2006, p. 14.

649 HRC, *Concluding Observations on Uzbekistan*, 26 April 2005, UN doc. CCPR/CO/83/UZB, para. 19. HRC, *Concluding Observations on Syrian Arab Republic*, 24 April 2001, UN doc. CCPR/CO/71/SYR, para. 21, in which the Committee states that States may adopt an exit visa requirement in individual cases that are justified under the Covenant.

650 Hathaway 2005, p. 310. Hathaway also refers in this regard to the UK House of Lords case involving British immigration officials at Prague international airport in the Czech Republic conducting pre-boarding screening of, in particular, people of Roma ethnicity. That system was declared unlawful on the basis of the right to leave your country: *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2004] UKHL 55, House of Lords, 9 December 2004.

651 Lauterpacht & Bethlehem 2003, p. 122 (para. 115). See also EXCOM Conclusion No. 58 (XL), 1989, para. (f).

652 Goodwin-Gill & McAdam 2007, pp. 252 and 253, in which they refer to Legomsky's paper on the meaning of effective protection in which he introduced the 'complicity principle', according to which no country may return a refugee to a third country knowing that the third country will do anything to that person that the sending country would not have been permitted to do itself, regardless of whether the third country is a party to the Refugee Convention: Legomsky 2003, pp. 619-620.

this prohibition on so-called indirect refoulement will involve the situation where the host, or first, State is trying to remove the refugee from its territory to that of a third country. However, the prohibition on indirect refoulement may also involve a situation where a person seeks refuge in a diplomatic mission in a third country, i.e. outside his country of origin. In the past, for example, North Korean nationals have sought refugee protection at the USA and Canadian diplomatic missions in China.[653] If the removal by the USA or Canada from their diplomatic missions directly exposes the North Koreans to a risk that China will return them to North Korea, the USA or Canada has a responsibility under Article 33(1) of the Refugee Convention.[654]

2.4.1.4a Safe third countries

The prohibition on indirect refoulement does not preclude removal to a third country which can be regarded as safe.[655] In principle, the 'third' country can be either the country where the refugee first arrived after having left his country of origin and where he has already found some form of protection (first country of asylum),[656] or any other country which is not the refugee's country of nationality or habitual residence, as long as that country is willing to accept the refugee and there is a sufficient connection between the individual and that country. The State which is first confronted with the protection claim has and retains the immediate and primary responsibility to protect the refugee against refoulement. Such responsibility includes an assessment of the safety of the third country, if applicable.[657] The condition of safety of the third country concerns not just the sole risk of being returned to the frontiers of territories where there is a threat to his life or freedom in accordance with Article 33(1) of the Refugee Convention, but also the availability of further effective protection in the third country.[658] First, this includes the absence of a direct threat to the refugee's life or freedom. If not, the removal would be a direct violation of the prohibition of refoulement.[659] Secondly, the refugee must have a clear and real ability lawfully to enter and remain in the third country, and as such the third country must expressly agree to admit the refugee to its territory[660] and to consider his claim for

653 See for example Reuters, 'US, Canada Discuss N.Korean Asylum Bids with China', 13 May 2002. See also Owens 2002.

654 Goodwin-Gill & McAdam 2007, p. 252.

655 Lauterpacht & Bethlehem 2003, p. 122 (para. 116). In general regarding the concept of safe third countries see Zwaan 2003.

656 The concept of 'first country of asylum' can have different meanings. For example, in the USA asylum is denied when people have been firmly resettled in another country, whereas in many less developed countries passing through is already sufficient: see Hathaway 2005, p. 294.

657 Lauterpacht & Bethlehem 2003, p. 122 (para. 116).

658 See for a comprehensive analysis of the elements of effective protection Legomsky 2003, pp.567-677. See also UNHCR 2003-7; Goodwin-Gill & McAdam 2007, pp. 393 and 395.

659 EXCOM Conclusion No. 58 (XL) 1989, para. (f) (i). See also section 2.4.1.1 regarding the prohibition on being returned to the frontiers of territories where there is a threat.

660 UNHCR 2003-7, para. 15 (d); Spijkerboer and Vermeulen argue that, under Dutch law, consent from the third country to remove the individual to it must be reasonably assured: Spijkerboer & Vermeulen 1995, pp. 396-399.

protection substantively in fair proceedings.[661] In this regard, situations of 'refugees in orbit' must be avoided.[662] Thirdly, the refugee must be treated in accordance with basic human rights standards, including basic economic, social and cultural rights.[663] Fourthly, an assessment of the safety of the third country and the availability of effective protection must be individual and based on the factual situation.[664] The concept of safety should neither be assessed on formal criteria nor automatically applied. As the UNHCR has put it:

> 'the question whether a country is "safe" is not a generic one which can be answered for any asylum-seeker in any circumstances (i.e. on the basis of a "safe third country list"). A country may be "safe" for asylum-seekers of a certain origin and "unsafe" for others of a different origin (...)'.[665]

The concept of safety does not go so far as to demand that the third country ensure genuine access to all the rights listed in the Refugee Convention, or even that the third country be a party to the Convention. The consequence, however, of not requiring the third country to be a party to the Refugee Convention is that the refugee may effectively be deprived of his rights under the Convention,[666] in particular those rights that are guaranteed to all refugees by virtue of their being refugees and irrespective of where they are and what their legal status is, including his right to be protected from refoulement.[667] According to Legomsky there is no common opinion that would

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661 UNHCR 2005, p. 36. According to Hathaway there must be a 'clear ability lawfully to enter the destination State – not just a practical capacity to bring about a lawful permission to enter and reside legally in the relevant country', in: Hathaway 2005, p. 330. Spijkerboer and Vermeulen argue that as a minimum it must be guaranteed that the refugee claimant is allowed to enter and remain in the third country or is admitted to an adequate refugee status determination procedure: Spijkerboer & Vermeulen 1995, p. 400.

662 UNHCR 2004-4, para. 20; Spijkerboer & Vermeulen 1995, p. 397.

663 EXCOM Conclusion No. 58 (XL) 1989, para. (f) (ii). See also UNHCR 1995, pp. 17, 19 and 20 in which the UNHCR mentions that the refugee must be able to satisfy basic subsistence needs (p. 19) and in which it implies that other basic economic, social and cultural rights must also be guaranteed, such as the right to adequate housing (p. 17). See also Legomsky 2003, p. 646, footnotes 295 to 298 in which reference is made to various UNHCR documents in this regard. For a comprehensive analysis of the applicability of international human rights standards see Legomsky 2003, pp. 645-654.

664 UNHCR 2001-3, p. 4 (para. 14). See for example, Article 27(2)(c) of the EU Procedures Directive and UNHCR 2005, p. 37.

665 EXCOM, *Note on International Protection*, UN doc. A/AC.96/914, 7 July 1999, para. 20.

666 Hathaway 2005, pp. 331-333. Being a party to the Refugee Convention is generally not considered sufficient for effective protection in the third country: Legomsky 2003, p. 658.

667 Legomsky states that if the country in which the asylum application is lodged is a State party to the Refugee Convention, this country may not knowingly send the person to a third country which will deprive the person of any rights guaranteed by the Convention: Legomsky 2003, p. 633. Hathaway mentions in this regard the asylum seekers/refugees rescued by the Norwegian vessel *Tampa* off the coast of Australia in 2001. Although Australia was arguably responsible for the asylum claim of those people, they were not taken to Australia but admitted to the island of Nauru. While their asylum claims were assessed by the UNHCR they were forced to live in a fenced compound under constant guard. As Hathaway puts it, 'whatever protection they enjoyed de facto in Nauru

make a third country's compliance with the entire package of Convention rights a necessary condition for removal to a third country. On the other hand, according to Legomsky, numerous statements have disapproved of removal to a third State which will violate certain specific Convention rights, such as freedom of movement rights, rights regarding family unity and standards on the basic necessities of life.[668] According to Hathaway:

> 'it seems reasonable to insist that, at a minimum, a country be deemed a "safe third country" only if it will respect in practice whatever Convention rights the refugee has already acquired by virtue of having come under the jurisdiction or entered the territory of a State party to the Refugee Convention, as well as any other international legal rights thereby acquired; and further that there be a judicial or comparable mechanism in place to enable the refugee to insist upon real accountability by the host state to implement those rights'.[669]

Legomsky reaches a somewhat similar conclusion:

> 'countries may not knowingly return asylum seekers to third countries that will violate rights recognised in the Convention. For purposes of that rule, the degree of certainty required by the word 'knowingly' should vary inversely with the importance of the individual right'.[670]

According to the UNHCR it is necessary for there to be a connection or meaningful link between the refugee and the third country. A refugee claimant should not be removed to a country with which he lacks a sufficient connection.[671] Mere transit is not sufficient for this purpose. Such concrete facts as the object and duration of the previous stay in the third country, as well as more general facts such as family connections, cultural ties and knowledge of the language, are relevant.[672]

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was entirely vulnerable to the exercise of political discretion in a way that would not be true in a State party to the Convention': Hathaway 2005, p. 331. For more factual information and political analysis on the Tampa refugees situation see Marr & Wilkinson 2003. For more legal analysis see Willheim 2003, pp. 159-191. Bailliet 2003, pp. 741-774. Magner 2004, pp. 53-90. Barnes 2004, pp. 47-77.

668 Legomsky 2003, p. 640, including footnotes 286, 287 and 288, in which he refers to various UNHCR statements in this regard.

669 Hathaway 2005, p. 333.

670 Legomsky 2003, p. 645.

671 UNHCR 2005, p. 35, in which the UNHCR stated that: 'the applicant should have a genuine connection or close links with the third country'. UNHCR 2004-4, para. 20. For more sources see Legomsky 2003, p. 664, footnote 350, in which reference is made to several UNHCR documents. EXCOM Conclusion No. 15 (XXX), 1979, para. (h) (iv). Legomsky strongly endorses the UNHCR's position in this regard but does note that there is no *per se* international legal position on the removal of refugee claimants to third countries with which they lack pre-existing links: Legomsky 2003, p. 667.

672 Legomsky 2003, p. 664, footnote 351. See also Spijkerboer & Vermeulen 1995, pp. 390-393, in particular regarding what should be regarded as mere transit.

In practice, States often apply the concept of 'safe third country' strictly, not allowing the refugee claimant sufficient space to rebut the presumption of safety and treat the existence of a third country as evidence of a weak substantive protection claim.[673]

In 2001 Australia introduced the so-called *Pacific Solution* involving the interception of asylum seekers outside Australian territorial waters by Australian naval vessels.[674] The asylum seekers were not allowed to land on Australian territory and, in the context of extra-territorial processing, they were to be transferred to other – neighbouring – countries, such as Indonesia, Papua New Guinea or Nauru, for further screening.[675] Apparently, Australia regarded Indonesia as safe because of the presence of the UNHCR.[676] Nauru and Papua New Guinea were also regarded as safe. Australia had concluded a Memorandum of Understanding with these countries.[677] The way safety and effectiveness of protection from refoulement in these countries was established may be questioned. First, a general application of the policy disregarded a required individual assessment. Secondly, the presence of the UNHCR did not necessarily mean that the safety and effectiveness of protection were guaranteed. Thirdly, the procedures in Nauru and Papua New Guinea lacked an independent merits review.[678] Fourthly, refugees transferred to Nauru were held in detention.[679] Fifthly, Indonesia and Nauru are not States parties to the Refugee Convention.

In Europe the concept of safe third country has been codified in the EU Procedures Directive.[680] In Article 27(1) of the Directive it is stated that the concept may be applied provided there is no threat to life or freedom on account of race, religion, nationality, membership of a particular social group or political opinion, no risk of indirect refoulement, no risk of being subjected to torture or other forms of proscribed ill-treatment and there is a possibility of asking for refugee status in accordance with the Refugee Convention. Furthermore, if the third State does not allow the person to enter its territory, the Member States are obliged to guarantee him access to proceedings for the determination of refugee status which are in accordance with the EU

673 Costello 2006, p. 4. See for example, Article 27(2)(c) of the EU Procedures Directive and UNHCR 2005, p. 37.

674 Afeef 2006, p. 5.

675 In 2001 approximately 2,390 asylum seekers were refused entry to Australian territory, because of the 'pacific solution': see Merheb & Betts 2006, chapter 2. See for a reflection on the events which led to the 'pacific solution' and its impact and consequences Marr & Wilkinson 2003.

676 Mathew 2002, p. 100 in which the author refers to the 'Principled Observance of Protection Obligations and Purposeful Action to Fight People Smuggling and Organised Crime – Australia's Commitment' 4 (2001).

677 Afeef 2006, p. 5.

678 Mathew 2002, p. 102.

679 Ibid., p. 116.

680 On 6 May 2008 the EC Court of Justice annulled Articles 29(1) and (2) and 36(3) of the EU Procedures Directive. These Articles concern the procedure for adopting and amending a minimum common list of third countries, and European countries, regarded as safe countries of origin: EC Court of Justice, *Parliament v Council*, 6 May 2008, Case no. C-133/06.

Procedures Directive. In addition, Article 27(2) of the Directive allows for the adoption of national rules regarding a connection between the person and the third country, as well as to regulate procedural issues. An application for refugee protection may be considered inadmissible under Article 25(2)(c) of the Directive if a country which is not an EU Member State is considered as a safe third country for the claimant pursuant to Article 27. The way the concept of 'safe third countries' is codified in the Directive corresponds, in principle, to the above-discussed criteria.[681] However, the generic framing of the concept of 'safe third countries' in the Directive is somewhat worrying in spite of the individual assessment implied by both Articles 25 and 27. Though the substantive criteria referred to in Article 27(1) acknowledge the prohibition on direct and indirect refoulement, as well as the right to be protected against subjection to torture and other forms of internationally proscribed ill-treatment, the criteria disregard the right to be treated in accordance with basic human rights standards, including basic economic, social and cultural rights, and do not take into account the fact that the safety of the third country, in terms of effective protection, must be individual and based on the factual situation.

2.4.1.4b Agreements to allocate responsibility and readmission agreements

The concept of a safe third country entails the idea of collective responsibility of (a group of) States to protect refugees,[682] under which another country can be held responsible for providing protection. The concept of a safe third country is often applied as a procedural mechanism, used to shuttle refugees to other States which are considered to be responsible for assessing the merits of a claim for refugee protection.[683]

The UNHCR acknowledges that 'there is no obligation under international law for a person to seek international protection at the first effective opportunity'.[684] However, it also acknowledges that 'asylum-seekers and refugees do not have an unfettered right to choose the country that will determine their asylum claim in substance and provide asylum. Their intentions, however, ought to be taken into account'.[685] The UNHCR nevertheless seems to have a sense of reality when it embraces the concept of safe third countries, by encouraging States 'to ensure that the "safe third country" notion is applied with clear safeguards'.[686] It has stated that 'under certain circumstances and with appropriate guarantees in the individual case, the transfer of responsibility for assessing an asylum claim to another country may be an appropriate measure'.[687] Caution should however be exercised when it is not assessed whether or not there is a foreseeable risk of returning the refugee to his

681 UNHCR 2005, p. 36.
682 Hathaway 2005, p. 293.
683 Goodwin-Gill & McAdam 2007, p. 392.
684 UNHCR 2003-7, para. 11.
685 Ibid., para. 11; EXCOM Conclusion No. 15 (XXX) 1979, para. (h) (iii).
686 UNHCR 2001-3, para. 18; Hathaway argues there is a 'less than unanimous' consensus on this issue: Hathaway 2005, p. 324, footnote 214.
687 EXCOM, *Note on International Protection*, UN doc. EC/53/SC/CRP.9, 3 June 2003, para. 12.

country of origin, but simply (1) an agreement of collective responsibility,[688] or (2) a list of countries deemed to be safe. In this regard the use of a list of safe third countries is in breach of Article 33(1) of the Refugee Convention if no individual assessment is made regarding the safety of that country.[689]

With regard to the use of agreements of collective responsibility, the EU Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (EU Dublin Regulation) is an important example.[690] On the basis of criteria set out in the EU Dublin Regulation it is determined which EU Member State is responsible for assessing an individual claim for refugee protection. If, based on these criteria, another member State is responsible the State may return the asylum seeker to the responsible Member State without having to assess the substance of the claim.[691] The reality of this problem becomes clear when States use different interpretations of the Refugee Convention.[692] In *T.I. v the United Kingdom* (2000) before the ECtHR for example, the asylum seeker was to be returned from the United Kingdom to Germany. He feared subsequent removal from Germany to his country of nationality, Sri Lanka. Unlike the United Kingdom, Germany did not accept a well-founded fear of persecution emanating from non-State actors, whom in this case the asylum seeker feared.[693] In this case the intervention of the ECtHR

688 Hathaway 2005, p. 325. See in this regard, ECtHR, *T.I. v the United Kingdom*, 7 March 2000, App. No. 43844/98 (admissibility decision), in which the European Court of Human Rights emphasised that States parties to the European Convention have an individual responsibility to ensure the rights and freedoms of the Convention, including the prohibition on refoulement developed under Article 3 of the Convention and that States parties may not automatically rely on the responsibility of other States parties to assess a claim for protection from refoulement. See section 3.4.1.3.

689 EXCOM, *Note on International Protection*, UN doc. A/AC.96/914, 7 July 1999, para. 20.

690 EU Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, No. 343/2003, 18 February 2003, Official Journal of the European Union, L50/1, 25 February 2003. Another example of an agreement to allocate responsibility for examining refugee status claims is the bilateral agreement between Canada and the USA, regarding refugee status claims lodged at land borders. The general principle is that the country (Canada or the USA) of last presence is responsible for the claim (Article 4 (1) read together with Article 1(1)). Contrary to the EU Dublin Regulation, once Canada or the United States is determined responsible the claimant cannot again be removed to yet another safe country (Article 3): see Legomsky 2003, p. 582.

691 Note that the EU Member State responsible under the criteria set out in the Regulation must accept the claim (Article 19). Furthermore, States retain their right to examine the claim even though they are not responsible under the criteria set out in the Regulations (Articles 2(2) and 15): EU Council Directive establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, No. 343/2003, 18 February 2003, Official Journal of the European Union, L50/1, 25 February 2003. Hathaway refers to case law of the United Kingdom House of Lords, in which it refused to allow the United Kingdom automatically to rely on the so-called Dublin Convention, a Convention between several EU member States and a predecessor of the aforementioned EU Council Regulation: Hathaway 2005, p. 326.

692 Hathaway 2005, p. 326.

693 ECtHR, *T.I. v United Kingdom*, 7 March 2000, App. No. 43844/98 (admissibility decision). See section 3.4.1.3. See also UNHCR 2000, paras. 15-19.

and the application of a provision in the German Aliens Act[694] prevented the asylum seeker from being returned. Had the asylum seeker to rely only on the Refugee Convention, he would probably have been returned by the United Kingdom to Germany and subsequently to Sri Lanka.

In addition to agreements specifically on the allocation of responsibility for determining protection claims States have resorted to more general readmission agreements. Such agreements will oblige States to readmit their own nationals as well as, under certain circumstances, the nationals of other (third) countries.[695] Traditionally, readmission agreements were used to respond to irregular migration and relate to illegal migrants rather than refugees or refugee claimants.[696] However, readmission agreements have been used to deny asylum claims for refugee claimants who have resided in third countries.[697] Unlike the general application of the concept of safe third countries readmission agreements would legally guarantee the readmission of the refugee into the third country and access to adequate proceedings for the determination of refugee status. In addition, readmission agreements are based on the existence of a connection – in the form of residence – between the refugee and the third country. On the negative side, (1) readmission agreements, when not excluding refugee protection claims, often do not contain specific provisions for refugee claimants other than a general reference to the Refugee Convention, (2) many third countries which are party to readmission agreements have inadequate proceedings for the determination of refugee status, (3) there is a danger and tendency to violate the claimant's right to privacy and confidentiality, and (4) there is a risk of inadequate human rights protection, in particular regarding the detention of refugee claimants.[698]

2.4.2 Positive obligations

Neither Article 33 nor any of the other provisions of the Refugee Convention contains an explicit right to seek or enjoy asylum or to be granted a residence permit.[699] Also, the Convention does not contain an explicit right to enter and remain in the country of asylum. But, even though Article 33(1) of the Convention is formulated in negative terms entailing primarily negative obligations for the States parties, a number of positive obligations can be derived directly from the prohibition on refoulement because they are functional to that prohibition in the sense that a State must adopt a course of action which does not result in removal, directly or indirectly, to the

694 Article 53, paragraph 6, of the German Aliens Act.
695 Landgren 1999, p. 22; Legomsky 2003, pp. 576-578.
696 UNHCR 1994, p. 23; Legomsky 2003, p. 576.
697 Landgren 1999, p. 23; Legomsky 2003, p. 583. See for example Article 30(d) of the Dutch Aliens Act.
698 Legomsky 2003, pp. 583-587.
699 Article 34 of the Refugee Convention only obliges State parties 'as far as possible [to] facilitate the assimilation and naturalisation of refugees'.

frontiers of territories where the refugee has a well-founded fear of persecution.[700] What type of positive obligations may derive from Article 33(1) will be outlined in sections 2.4.2.1 to 2.4.2.7 below.

2.4.2.1 Obligation to admit (a right to enter and remain)

Article 33(1) of the Refugee Convention prohibits States from taking measures whereby a refugee is returned or forced to return to a territory in which he is at risk of being persecuted. I outlined in section 2.4.1 that this includes a prohibition on rejection at the frontier, a prohibition on redefining these frontiers and one on taking measures which force the refugee to return. All of these prohibitions entail negative obligations. The question remains whether they may also entail positive obligations, in particular whether they imply an obligation on the State to allow the refugee to enter.[701] In other words, does Article 33(1) entail an implicit obligation to admit a person to the territory of the State which is functional to the prohibition on refoulement?[702] No such situation exists when, for example, effective protection from refoulement can be found elsewhere, either through a third country which is safe, willing and able to provide effective protection (see in this regard the concept of 'safe third country' discussed in section 2.4.1.4a) or some other solution that does not amount to refoulement, such as providing temporary protection in external centres.[703] In principle, States may provide alternative protection areas outside their own territory as long as protection from refoulement is effectively guaranteed by those States, in particular a full and fair determination of refugee status after which the refugees are guaranteed all rights to which they are entitled in accordance with the Refugee Convention. States however should be careful when adopting such policies, first, because in reality refugees who are denied admission to a country of refuge are likely either to return or be returned to the frontiers of territories where there is a threat to their life or freedom, or find themselves in search of a country willing to accept them.[704] As Hathaway puts it, 'there are many historical cases which illustrate the potentially grave consequences of a failure to recognise this need of refugees to be able to enter another State'.[705] Denials of access, pushback or turn-back policies, non-entry policies, the closing of borders, summary ejections from the country, inappropriate use of the safe third country concept, or the notion of manifestly unfounded claims for refugee

700 UNHCR 2007-2, para. 8.

701 Goodwin-Gill & McAdam 2007, p. 252.

702 As Hathaway puts it: 'the right of entry that flows from the duty of non-refoulement is entirely a function of the existence of a risk of being persecuted': Hathaway 2005, p. 302; EXCOM Conclusion No. 85 (XLIX), 1998, para. (q), in which the Executive Committee reiterated the duty of States to admit refugee to their territories because of the continuing incidence and often tragic humanitarian consequences of refoulement in all its forms.

703 Lauterpacht & Bethlehem 2003, p. 113 (para. 76).

704 Hathaway 2005, p. 279.

705 Ibid., pp. 279 to 300 in which he gives many examples of cases where refugees were denied access to the territory of States, to refugee status determination procedures, where forcibly removed from the territory etc.

protection, and refusal of access to proceedings for the determination of refugee status may lead either to the refugee being returned to his country of origin where he risks being subjected to persecution or to a 'refugee in orbit' situation. Such policies, while legitimate to combat irregular migration, should never result in denying refugees adequate protection (or refugee claimants access to proceedings for the determination of refugee status).[706] Hathaway formulates a stricter duty for States, saying that 'State parties may therefore deny entry to refugees so long as there is no real chance that their refusal will result in the return of the refugee to face the risk of being persecuted'.[707] I would argue that a refugee by the very fact of having a well-founded fear of being persecuted and therefore a threat to his life or freedom where no extra-territorial protection or safe third country is available has a real chance of being pushed back into the territory where he faces a risk of being persecuted. As mentioned in the introduction of section 2.3 Article 33(1) of the Refugee Convention does not set a second standard apart from the well-founded fear criterion in Article 1A of the Refugee Convention.

There is a second problem with States creating alternative protection areas outside their territory. As a consequence of such policy refugees will be granted only the minimum set of rights provided to all refugees. They will be deprived of rights guaranteed to refugees who have a presence in the territory of the host State. Such an approach is not in accordance with the object and purpose of the Refugee Convention.

A functional implicit obligation to allow the entry of a refugee applies not only to refugees who are directly at the State's frontiers, but equally to those who are further removed from the State's territory in spite of practical problems regarding allowing the refugee to enter. I have already mentioned in section 2.4.1.4 the example of North Koreans claiming refugee protection at the German diplomatic mission in China. Not only does Germany have a negative obligation to prevent 'indirect' refoulement; it may also have a positive obligation actively to protect the refugee, for example, by allowing him access to the diplomatic mission and trying to secure his transfer to Germany. In general, Germany is obliged to take any action which is functional to its responsibility to protect the refugee from refoulement. Let me illustrate this further with the question whether or not Germany has an obligation in the given example to issue an entry visa.[708] The relevant question is whether the denial of the entry visa will result in direct exposure to refoulement? Two scenarios must be distinguished. First, China does not intend to remove the North Koreans from its territory. Consequently, there is no question of direct or indirect refoulement. Therefore, neither China nor Germany will have any (further) responsibility under

706 EXCOM, *Note on International Protection*, UN doc. A/AC.96/898, 3 July 1998, para. 16 and EXCOM, *Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, UN doc. EC/50/SC/CPR.17, 9 June 2000, paras. 17 and 18.

707 Hathaway 2005, p. 301.

708 This example is taken from Noll, who does not refer to Germany, China or North Korea, but gives an abstract example involving States A, B and Y, in: Noll 2005, p. 555.

Article 33(1) of the Refugee Convention, including the issuing of an entry visa. Secondly, China is preparing to remove the North Korean refugees to North Korea. Consequently, there is a risk of direct refoulement by China and a risk of indirect refoulement by Germany. It may be argued that in such a situation China is the primary agent of removal, and while Germany may contribute to the risk of refoulement it is not in control of the refugee.[709] According to Noll the verbs 'to expel' or 'to return' used in Article 33(1) of the Convention require more than any causal relationship between the conduct of a country and the exposure of the refugee to persecution; they suggest a direct sovereign relationship between the removing agent (or State) and the territory from which the removal takes place. As I have already explained in section 2.2.2, the verbs 'to expel' or 'to return' do not necessarily require such a direct sovereign relationship. What is relevant is the extent to which Germany has actual control over the refugee to protect him from refoulement. In the second scenario Germany will have a responsibility under Article 33(1). Primarily that responsibility will entail a negative obligation not to hand the refugee over to the Chinese authorities, based on the prohibition on indirect refoulement. In addition, Germany may have positive obligations to secure effective protection from refoulement. Such positive obligations could be to allow the person concerned to enter and/or remain in the German embassy compound and/or to issue an entry visa for Germany. This will be the case, for example, when China is actively trying to arrest the refugee and transport him back to North Korea. The problem in situations of visa requests is not so much the prohibition on refoulement or Germany's responsibility, but rather the fact that with the denial of an entry visa the person concerned will often not be directly exposed to a risk of refoulement as long as he can remain within the embassy's compound. The question then is, of course, how long that will be reasonable. Note that even if an entry visa were issued, many legal, political and practical problems of leaving China would remain. Those problems, however, will not change Germany's responsibilities under Article 33(1) of the Convention.

The right to enter and the corresponding obligation to admit do not necessarily entail a right to remain. The right to enter is part of the prohibition on refoulement for as long as, first, it is needed to determine that the refugee is indeed a refugee, and, secondly, for as long as he is and remains a refugee. Consequently, the right to remain is, in principle, temporary.[710] In due time however, the Refugee Convention may desire a more permanent solution (see section 2.4.2.3).

Finally, the right of a refugee to enter a State party's territory should be free from negative consequences. Article 31(1) of the Refugee Convention prohibits a State from imposing penalties on refugees on account of their illegal entry or presence, provided they come:

> 'directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves

709 Ibid., p.555.
710 Hathaway 2005, p. 302.

without delay to the authorities of the State and show good cause for their illegal entry or presence'.[711]

Having a well-founded fear of persecution is certainly a good enough reason for an unauthorised entry.[712] Often refugees will have no time or little ability to deal with immigration formalities. In that sense Article 31(1) of the Convention provides for a means of refugees entering and temporarily remaining in a country of refuge.[713] In particular, the requirement to have come directly from a territory where there is a threat must be interpreted broadly.[714] The spending of a fortnight or so elsewhere does not preclude the applicability of Article 31.[715] What is a relevant factor when assessing whether or not the refugee has transited through or stayed in another country is the intention of the refugee to reach a particular country.[716]

2.4.2.1a Obligations on refugees at sea: interception and rescue at sea

The situation of refugees at sea deserves special attention. The high seas are open to all States (referred to as the freedom of the high seas),[717] making it difficult to determine which State is responsible for the protection from refoulement in accordance with Article 33(1) of the Refugee Convention. The discussion of State responsibility for refugees at sea is further complicated by the fact that often overcrowded and unseaworthy vessels are used, and that the people on board are therefore in need of rescue irrespective of whether or not they are seeking or are in need of refugee protection. Furthermore, States have increasingly resorted to interception or interdiction measures to prevent refugees at sea from reaching their territory, inter alia to control irregular migration flows[718] rather than to assist them.

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711 Article 31(1) of the Refugee Convention. In accordance with Article 31(1) the UNHCR has called upon States to ensure that refugees benefiting from this provision are promptly identified, that no proceedings or penalties, including administrative penalties, for illegal entry or presence are applied pending the expeditious determination of claims to refugee status and asylum: UNHCR 2007-6, paras. 7 and 12. See also UNHCR 2007-5.

712 Goodwin-Gill 2003, p. 196; UNHCR, *Summary Conclusions: Article 31 of the 1951 Convention*, Expert Roundtable organised by UNHCR and the Graduate Institute of International Studies, Geneva. Switzerland, 8-9 November 2001, para. 10 (e), published in: Feller, Türk & Nicholson 2003, p. 255.

713 Goodwin-Gill & McAdam 2007, p. 264; UNHCR 2000-2; UNHCR 2005, the UNHCR's comment on proposed Article 9A (2)(b)

714 UNHCR, *Summary Conclusions: Article 31 of the 1951 Convention*, Expert Roundtable organised by UNHCR and the Graduate Institute of International Studies, Geneva. Switzerland, 8-9 November 2001, para. 10 (b), published in: Feller, Türk & Nicholson 2003, p. 255.

715 Goodwin-Gill & McAdam 2007, p. 264.

716 UNHCR, *Summary Conclusions: Article 31 of the 1951 Convention*, Expert Roundtable organised by UNHCR and the Graduate Institute of International Studies, Geneva. Switzerland, 8-9 November 2001, para. 10 (d), published in: Feller, Türk & Nicholson 2003, p. 255.

717 Article 87 of the United Nations Convention on the Law of the Sea (UNCLOS 1982). See also Brownlie 1998, pp. 230-234.

718 UNHCR 2002-6. See also Merheb & Betts 2006, Chapter 2 and EXCOM, *Note on International Protection*, UN doc. EC/58/SC/CRP.11, 6 June 2007, para. 30, p. 7.

On the high seas no State other than the flag State has jurisdiction over the vessel, and is therefore primarily responsible for the ship and its passengers. Usually, boats containing refugees will be denied flag State protection, and it may be the flag State that the refugee is trying to flee from. The freedom of the high seas implies that only in limited situations may a ship on the high seas be boarded by any State other than the flag State.[719] It is beyond the scope of this book to analyse in detail the relevant rules of international maritime law in this regard.[720] It is, however, relevant that the Refugee Convention does not confer on any State party any responsibility for refugees on the high seas. The Executive Committee has called upon States to resolve the problem of identifying the country responsible for determining the need for refugee protection,[721] and emphasised that in order for stowaways to be protected from refoulement they must be allowed to disembark at the first port of call, with the opportunity to have their refugee status determined, provided that does not necessarily imply a durable solution in the country of the port of disembarcation.[722] In the context of States taking action against the smuggling of migrants such States are obliged to take into account the relevant rights of refugees contained in the Refugee Convention.[723] In addition, it is relevant for any State boarding another State's ship that elementary considerations of humanity require that account be taken of fundamental human rights.[724] Consequently, a State may be required to take responsibility, for example, to rescue refugees in distress at sea.[725]

719 Goodwin-Gill & McAdam 2007, p. 271, according to which under general international law ships on the high seas may be boarded only in very limited circumstances, namely, suspicion of piracy or slave trading, where the ship has no nationality or has the same nationality as the warship purporting to exercise authority, or where the ship is engaged in unauthorised broadcasting. In addition, the right to board may be granted to a State by way of a (bilateral) agreement with the flag State.

720 Goodwin-Gill & McAdam 2007, pp. 270-272, in which they discuss various rules of international (maritime) law regarding the responsibility of ships on the high seas.

721 EXCOM Conclusion No. 15 (XXX), 1979, para. (h); EXCOM Conclusion No. 29 (XXXIV), 1983, para. (i).

722 EXCOM Conclusion No. 53 (XXXIX), 1988, paras. 1 and 2.

723 According to Article 16(1) of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime (G.A. Res. 55/25, annex III, U.N. GAOR, 55th Sess., Supp. No. 49, at 65, U.N. Doc. A/45/49 (Vol. I) (2001), which entered into force on Jan. 28, 2004): 'each State party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol [i.e. smuggling] as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment'. Furthermore, the Protocol, in Article 19, offers a specific 'saving clause' for refugees in that it states that 'nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein'.

724 Goodwin-Gill & McAdam 2007, p. 272.

725 Pallis 2002, p. 335.

Refugees in distress at sea[726] further complicate matters, given the ambiguity in international law in balancing the obligation to rescue people in distress at sea and the protection of the rights of refugees. In general, coastal States may have a responsibility to allow vessels in distress to seek haven in their waters and to provide refugee protection, at least temporarily.[727] If the vessel is not able to seek a safe haven States have, under international maritime law, a legal obligation to rescue people in distress at sea and provide the necessary assistance,[728] without regulating which State is primarily responsible. There is only a general obligation for coastal States to promote the establishment, operation and maintenance of an adequate and effective search and rescue service, either alone or in cooperation with other States.[729] The responsibility to rescue and provide assistance initially lies with the master of the ship that comes to the rescue,[730] and entails the duty to deliver the people on board to a place of safety.[731] This place of safety is not further defined in international maritime law. Normally, it is either the nearest or next port of call.[732] The nearest port of call, in terms of proximity to the rescue area, is most appropriate when the urgency of the situation demands disembarkation as soon as possible. The next scheduled port of call seems most appropriate when there is no particular urgency or need to go to

726 According to Goodwin-Gill and McAdam 'distress' is not defined but may be linked to the preservation of human life or may result from the weather or other causes affecting the management of the vessel: Goodwin-Gill & McAdam 2007, p. 274.

727 EXCOM Conclusion No. 15 (XXX), 1979, para. (c).

728 Article 98(2) of the United Nations Convention on the Law of the Sea (10 December 1982, 1833 UNTS 3). 1979 International Convention on Maritime Search and Rescue, Annex, Chapter 2.1.10. See for a list of other treaty provisions and rules of international law, Goodwin-Gill & McAdam 2007, p. 278, footnotes 445 and 446.

729 Article 98(2) of the United Nations Convention on the Law of the Sea (10 December 1982, 1833 UNTS 3). UNHCR 2002-6, para. 7 (footnote 4). UNHCR 2002-7, para. 6, according to which the assistance of a coastal State with the facilitation and completion of the rescue may be expected.

730 Article 98(1) of the United Nations Convention on the Law of the Sea (10 December 1982, 1833 UNTS 3). See also Regulation 33 (1), Annex, Chapter V of the International Convention for the Safety of Life at Sea (adopted 1 November 1974, entry into force 22 May 1980, 1184 UNTS 3), according to which: 'The master of a ship at sea which is in a position to be able to provide assistance on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found'. See also EXCOM Conclusion No. 2 (XXVII), 1976, para. (g) and (h) (i); EXCOM Conclusion No. 14 (XXX), 1979, para. (d); UNHCR 1981; EXCOM Conclusion No. 23 (XXXII), 1981, para. (1); EXCOM Conclusion No. 38 (XXXVI), 1985, para. (a); UNHCR 2002-6, paras. 4 and 5; UNHCR 2002-7, para. 3.

731 UNHCR 2002-7, para. 3. 'Rescue' is defined as: 'an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety': Annex, Chapter 1, paragraph 1.3.2 of the International Convention on Maritime Search and Rescue (27 April 1979).

732 UNHCR 2002-6, paras. 30 and 31. In the context of rescue at sea the Executive Committee has on one occasion considered that normally people rescued at sea should be disembarked at the next port of call: see EXCOM Conclusion No. 23 (XXXII), 1981, para. 3. Later, in the context of stowaways and not the rescue of asylum-seekers in distress at sea, the Executive Committee mentions 'first port of call' instead of 'next port of call': see EXCOM Conclusion No. 53 (XXXIX), 1988, para. 2.

the nearest port of call. The ship which has rescued the persons can then continue its normal journey and does not have to deviate from its intended course. It may even be possible for it to be most appropriate to disembark at a port of call which is not necessarily the nearest or next but a port of call best equipped to deal with the needs of the people rescued. The primary objective of international maritime law in this regard is to rescue people and take them to safety as soon as possible, irrespective of who they are or where they came from.[733] Once the people are taken to safety they can avail themselves of the assistance and protection of their country of nationality. That will of course not be the case with refugees. Under international maritime law there is no provision specifically dealing with the plight of refugees. In an Expert Roundtable convened by the UNHCR and consisting of representatives from States, shipping companies, international organisations, non-governmental organisations and academia it was agreed that, on the completion of the rescue, following delivery to a place of safety, other aspects of the matter come to the fore, including screening for protection needs.[734] In general, the duty to rescue refugees and provide them with protection is the responsibility of flag, coastal (via disembarcation) and resettlement States.[735] According to the UNHCR, in general the State where disembarcation or landing occurs, normally the coastal state in the immediate vicinity of the case, will be responsible for admitting the refugees – at least on a temporary basis – and ensuring access to proceedings for the determination of refugee status.[736] In addition, the UNHCR acknowledges that under certain circumstances the flag State of the ship that came to the rescue may also have primary responsibility.[737] This will be the case, according to the UNHCR, when it is clear that those rescued intended to request protection from the flag State,[738] and in the event that the number of people rescued is so small it may be reasonable for them to remain on the vessel until they can be disembarked on the territory of the flag State. Although this is a pragmatic solution, I doubt whether responsibility can simply be engaged solely on the basis of the refugee's intention or the number of people rescued. Moreover, it will be very difficult to prove that the rescued refugees had the intention to seek protection in the State which eventually rescued them. With regard to the second issue, whether or not the ship can disembark the people rescued on the territory of the flag State, depends not

733 UNHCR 2002-7, para. 2.

734 Ibid., para. 8.

735 EXCOM Conclusion No. 23 (XXXII), 1981; UNHCR 2002-7, para. 13, according to which: 'general responsibilities concerning rescue should be accepted as including that: … coastal States have a responsibility to facilitate rescue through ensuring that the necessary enabling arrangements are in place; … flag States are responsible for ensuring that ships' masters come to the assistance of people in distress at sea; … the international community as a whole must cooperate in such a way as to uphold the integrity of the search and rescue regime'.

736 UNHCR 2002-6, para. 25.

737 Ibid., para. 26.

738 According to the Executive Committee, in an effort to resolve the problem of identifying the country responsible for refugee status determination and refugee protection: 'the intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account': EXCOM Conclusion No. 15 (XXX), 1979, para. (h) (iii).

only on the number of people rescued but also on the safety and security of the ship, the ship's route and activities and the location of the ship in proximity to the territory of the flag State. The flag State of the intervening ship will have a much clearer responsibility in the context of (deliberate) enforcement action, i.e. active interception of refugees on the high seas by a State's naval or coastguard vessels.[739] In such situations the flag State and the logical State of disembarcation will be the same.

Whatever State is deemed responsible, the relevant question in terms of responsibility for protection from refoulement is whether the refusal to provide protection directly results in the refugees being returned or forced to return to the territories of frontiers where there is a threat to their life or freedom.[740] Refusal to provide protection, for example, by refusing disembarcation and denying entry, cannot automatically be equated with a violation of the prohibition on refoulement.[741] However, taking the US Haitian interdiction programme as an example, when the denial of disembarcation would result in a reasonable chance of the ship sinking and thus in a threat to the refugee's life on account of his nationality or race, the United States of America would have the responsibility to protect the intercepted Haitians and take them to safety, i.e. to allow them to disembark. Likewise, when the denial of disembarcation would result in a reasonable chance of the ship returning to Haiti, the United States would have a similar responsibility.

The issue of interception at sea and responsibility for refugee protection are further complicated by the fact that often intercepted vessels contain large groups of migrants, many of whom may not be refugees.[742] That situation however does not alter the fact that refugees are a distinct group by virtue of the fact that they are outside their country of origin and are unable or unwilling to return because of a well-founded fear of persecution. Consequently, a potential mix of irregular migrants and refugees does not change the responsibility of States to provide international protection to refugees, even if for example a vessel containing 500 migrants contains only one refugee. In a way such a situation of mixed movements can be compared to a situation of mass influx, whereby a State is obliged to provide at least temporary protection until a determination of the person's refugee status has been made (see section 2.4.2.2).

The reality for refugees at sea is often less positive than the legal theory described above implies. In section 2.2.2 as well as in this section I have already discussed the Haitian interdiction programme of the United States in the 1980s and 1990s, which eventually resulted in the interception of Haitian refugees at sea, during which their vessels were returned to Haiti without any screening.[743] There are more examples

739 UNHCR 2002-6, para. 26.

740 Goodwin-Gill & McAdam 2007, p. 277.

741 Ibid., p. 278. The refusal of disembarkation and entry may result in serious consequences for the refugees. In particular it may create a situation of *refugees-in-orbit*, whereby they may be required to continue to travel on board a ship going from one port to another.

742 UNHCR 2007-7.

743 Initially the Haitian interdiction programme involved a sort of cursory interview of the passengers, its effectiveness being very limited. At a later stage Haitian boat refugees were intercepted and transferred to Guantanamo for a more extensive interview. Still later, however, no interviews took

indicating that the issue of the interception of refugees at sea is recurrent.[744] Another example of the interception of refugees at sea is the incident surrounding the '*Tampa* boat refugees' in August 2001. This incident involved the rescue of 433 asylum-seekers from an Indonesian-flagged ship by the Norwegian vessel *Tampa* in response to an Australian-coordinated search and rescue operation occurring 75 nautical miles off the Australian coast. Norway's view was that Australia was responsible for allowing the rescued asylum-seekers to disembark at the nearest port, i.e. Christmas Island, which is Australian territory. Australia refused and seemed to hold Indonesia responsible. During a long-drawn-out stand-off none of the three countries assumed responsibility and the *Tampa*, including the 433 asylum-seekers, was left stranded. After the humanitarian and medical situation on board the *Tampa* had become very severe, she sailed into Australian waters. Within hours she was boarded by Australian Special Forces. Eventually, the rescued asylum-seekers were transported to Nauru and New Zealand to have their protection claims determined. The *Tampa* incident provoked a lot of criticism and resulted in various attempts to clarify the rules regarding responsibility for refugees at sea, the outcome of which is part of the above legal analysis.[745] Within a European context the interception and rescue of refugees at sea has risen in response to people in transit from North Africa seeking entry to the European Union.[746]

2.4.2.2 Temporary protection in situations of mass influx

In a situation of large-scale or mass influx of refugees it will not, for logistical reasons, be easy for States to provide protection and meet their obligations under Article 33(1) of the Refugee Convention in a similar way to when confronted with individual refugees. However, States remain prohibited from removing refugees, even in large numbers, to the frontiers of territories where they have a risk and may also have the obligation to allow them to enter.

A situation of mass influx refers to a significant number of arrivals in the host country, over a short period of time, of people from the same country of origin who have been displaced under circumstances indicating that members of the group would qualify for international protection, and for whom, by reason of their numbers, indi-

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place and the Haitians were returned to Haiti on their intercepted vessels. Legomsky 2000, p. 625. See generally, Frelick 1993, pp. 675-694; Goodwin-Gill 1996, pp. 142-145; Hathaway 2005, pp. 290 and 336-339.

744 In its agenda for protection the UNHCR has identified the issue of refugees and rescue at sea as part of seeking a better identification of and proper response to the needs of asylum-seekers and refugees; a key objective in improving the protection of refugees within broader migration movements: UNHCR 2003-8.

745 See for a comprehensive legal analysis of the 'Tampa-boat' incident Goodwin-Gill & McAdam 2007, pp. 281 and 282; Willheim 2003, pp. 159-191; Bailliet 2003, pp. 741-774. See for a day-to-day account of the events surrounding the Tampa incident and the political ramifications Marr & Wilkinson 2003.

746 Gil-Bazo 2006, pp. 571-600. See also Betts 2006, pp. 652-676; Den Heijer 2009.

vidual status determination is procedurally impractical.[747] Traditionally, States responded to a mass influx of displaced persons via so-called group determination of refugee status, whereby each member of the group is prima facie regarded as a refugee, provided the displacement took place under circumstances indicating that members of the group could individually be considered refugees (see section 2.3.2.1b).[748] Increasingly States seem however to prefer to provide temporary protection when faced with a mass influx without an (immediate) refugee status determination.[749] Temporary protection in this regard is a concept used to describe a specific provisional protection response to situations of large-scale influx of displaced persons without prejudicing the formal determination of their refugee status.[750] Providing temporary protection basically puts a refugee status determination 'on hold', creating a status-quo whereby the people protected are not returned to their country of origin. In that sense, temporary protection is in accordance with the prohibition on refoulement contained in Article 33(1) of the Refugee Convention. However, providing temporary protection inevitably poses the question about its duration and long-term compliance with the Refugee Convention and the prohibition on refoulement in particular.[751] As temporary protection is an interim measure, in time access to proceedings for the determination of refugee status must be implemented. As soon as the practical or logistical constraints on conducting an individual refugee status determination have eased the State has the obligation to start conducting such a determination. In addition,

747 UNHCR 2003-9, comment on Article 2(d). So far, this EU Directive on temporary protection has not been applied.

748 UNHCR Handbook, para. 44.

749 UNHCR 2001-2, para. 4. In the context of the European Union a Council Directive has been adopted, EU Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 2001/55/EC, 20 July 2001, OJ L212/12, 7 August 2001. How States may deal with situations of mass influx of displaced persons and what status and standard of treatment they should acquire are discussed in Rutinwa 2002. Regarding the treatment of refugees in large-scale refugee situations, the de facto suspension of many of their Convention rights is discussed in Durieux & McAdam 2004, pp. 4-24.

750 EXCOM Conclusion No. 103 (LVI), 2005, para. (l). See also UNHCR 2001-2, para. 4. Article 2(a) read together with Article 3(1) of the EU Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 2001/55/EC, 20 July 2001, OJ L212/12, 7 August 2001 (EU Temporary Protection Directive).

751 According to Article 6 of the EU Temporary Protection Directive temporary protection shall come to an end (a) when the maximum duration has been reached (in principle one year: article 4); or (b) at any time, by Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council. The Council Decision shall be based on the establishment of the fact that the situation in the country of origin is such as to permit the safe and long-term return of those granted temporary protection with due respect for human rights and fundamental freedoms and Member States' obligations regarding non-refoulement: EU Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 2001/55/EC, 20 July 2001, OJ L212/12, 7 August 2001.

States have the ability to seek the cooperation of other States in easing the practical or logistical constraints and assuming part of the responsibility for refugees in a mass influx situation. Temporary protection will in no case be a satisfactory solution; one will have to search for the chance to repatriate, resettle or integrate locally.[752]

2.4.2.3 Obligation to grant a residence permit

Article 33(1) of the Refugee Convention does not oblige a State to grant a refugee a residence permit. In fact, when a person meets the criteria of the definition of a refugee laid down in Article 1A of the Convention, and is therefore recognised as a refugee, there is no explicit obligation on the State to grant or corresponding right for the refugee to be granted legal status in any form, including a residence permit. The country of refuge has the sovereign authority to decide on the legal status of the refugee and the rights attached to such status.[753] The absence of an obligation on the country of refuge to issue a residence permit also means that there is no obligation in the Refugee Convention for States parties to issue travel documents to the refugee. Such obligation exists only for refugees who are lawfully residing in the country of refuge. Article 28(1) of the Convention stipulates only that States parties 'may' issue travel documents to any other, i.e. not lawfully residing, refugees in their territory and that they shall give particular sympathetic consideration to refugees who are unable to obtain travel documents from another country as well as to refugee seamen.[754] States parties to the Refugee Convention are, however, obliged to issue identity papers to refugees in their territory who do not posses any valid travel documents.[755] In this regard it must be noted that the EU Qualification Directive does contain an obligation on EU Member States to provide residence permits to refugees in accordance with its Article 24(1). The Executive Committee has recommended that recognised refugees should be issued with documentation certifying their refugee status.[756]

While all of the above is true, this does not mean that States do not have long-term responsibility towards refugees. When a State is prohibited from removing a refugee and must allow him to enter and remain in the State's territory in accordance with Article 33 of the Refugee Convention the State may have to do more than preserve the status quo and seek a satisfactory, lasting solution. Article 33 is not a stand-alone provision, but must be read in the context of the Refugee Convention. Refugee or international protection is a form of alternative and temporary protection with voluntary repatriation to the country of origin as the preferred durable solution when appropriate

752 Goodwin-Gill 1996, pp. 199-202.

753 Article 12 of the Refugee Convention. Note that this Article refers to the country of domicile or residence and not the country of asylum or refuge. And while ordinarily this may be the same country it doesn't necessarily have to be, for example, when the refugee is in a transit camp: see Hathaway 2005, p. 217.

754 Article 11 of the Refugee Convention.

755 Ibid., Article 27.

756 EXCOM Conclusion No. 35 (XXXV), 1984, para. (b).

and feasible or, alternatively, resettlement in a third country or local integration in the country of refuge.[757] Therefore, when voluntary repatriation or resettlement is not an option, only local integration is left as a durable solution and should therefore be pursued by States.[758] In fact, Article 34 of the Convention obliges States parties as far as possible to facilitate the assimilation and naturalisation of refugees. Refugees may not be kept illegal indefinitely. The Executive Committee calls upon States to continue supporting refugees' ability to integrate locally through the timely grant of a secure legal status and residency rights, including basic civil, economic and social rights, and to facilitate active participation in the economy and naturalisation, all in accordance with the Refugee Convention, among other human rights instruments.[759]

Another argument for an obligation on States to regularise a refugee's legal status, albeit for refugees who are present within the territory of the host State, can be derived from Article 31(2) of the Refugee Convention. According to that Article a refugee's freedom of movement can be restricted only when necessary and 'until their status in the country is regularised or they obtain admission into another country', for which the host State is to allow a reasonable period and provide the necessary facilities. Consequently, there are two options: either the refugee, with the assistance of the host State, within a reasonable period of time[760] finds a third country which is willing to admit the refugee, or the host State will need to regularise the refugee's presence in its territory.[761] While in a strict legal sense Article 31(2) does not mean that a State is obliged to regularise a refugee's legal status, in combination with a continued prohibition on refoulement, the absence of a third country willing to admit him, the need to find a durable solution and the systematics and object and purpose of the Refugee Convention, the refusal to regularise would after a reasonable period of time amount to a violation of Article 31(2).[762]

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757 EXCOM Conclusion No. 29 (XXXIV), 1983, para. (l); EXCOM Conclusion No. 90 (LII), 2001, para. (j); EXCOM Conclusion No. 104 (LVI) 2005.

758 EXCOM Conclusion No. 104 (LVI) 2005 in which the Executive Committee notes that local integration may be the preferred long-term solution in circumstances where the refugee is born in the country of refuge; where the refugee, due to personal circumstances including the reasons prompting his flight, is unlikely to be able to repatriate to his country of origin in the foreseeable future; and where the refugee has established close family, social, cultural, economic links with the country of refuge (para. (i)).

759 Ibid., paras. (j), (l) and (m).

760 According to Robinson: 'a reasonable period is one which, under existing circumstances, is sufficient for a person without a nationality and possessing given qualifications (skills, age etc.), who earnestly makes all possble efforts': Robinson 1953, p. 131.

761 Fernhout 1990, p. 151. Vermeulen in his comment on *Sison v Minister of Justice,* Rechtbank 's-Gravenhage (Rechtseenheidskamer), 11 September 1997, no. AWB 97/4707 (the Netherlands), published in 'Rechtspraak Vreemdelingenrecht' 1997, no. 9, p. 30; Spijkerboer & Vermeulen 1995, p. 225; Grahl-Madsen 1963, p. 183; Goodwin-Gill & McAdam 2007, p. 267.

762 According to Grahl-Madsen Article 31 of the Refugee Convention appears not to provide a refugee with a claim to have his status in a territory regularized at such an early time that he would become 'lawfully' present without necessarily 'lawfully staying' there. Whether a refugee may, after some time, have a claim to the regularization of his status remains an open question: Grahl-Madsen 1972, pp. 365 and 373.

In addition, keeping refugees illegal indefinitely will deprive them of ever being able to claim most of the substantive rights listed in the Refugee Convention. That would not be in accordance with the object and purpose of the Convention. In section 2.4.2.4 I will briefly discuss the various substantive rights listed in the Convention.

2.4.2.4 Substantive rights granted to refugees

So far in this chapter I have concluded that the prohibition on refoulement primarily entails negative obligations on a State and, when functional to the prohibition, may in certain circumstances entail positive obligations, in particular the obligation to admit. In principle, a refugee has no concrete or explicit legal ground for claiming any particular substantive right under Article 33(1) of the Refugee Convention. Although in a strict legal sense this is true, one can question the validity of such a strictly legal approach. In the last section (2.4.2.3), I addressed the moral obligation on States to seek a durable solution for refugees and, over time, to regularise refugees status. In addition, it is relevant to point to the object and purpose of the Refugee Convention and to the text of the Convention as a whole, which is to provide refugees with protection that is humane. Refugees are at risk of facing serious harm and deprivation of one or more human rights in their own country. They have a need and a right to be safe in the host country, and may expect to be able to reside in that country and to lead a relatively normal life without undue hardship. I acknowledge that transposing the guarantees existing in the context of national protection into international refugee protection is not without controversy, as international refugee protection is not to be equated with national protection. Nevertheless, I believe it is important to look at the prohibition on refoulement contained in the Refugee Convention in a more contextual way rather than in a strictly legal and independent way.

Even though the prohibition on refoulement contained in Article 33 of the Refugee Convention entails only a limited number of rights, refugees are entitled to considerably more rights as laid down in Articles 3 to 32 of the Refugee Convention. Because this study is not meant to be a comprehensive analysis of all provisions contained in the Convention, I will briefly outline the substantive rights granted to refugees only for reasons of completeness.[763]

As I have already said in the introduction and in section 2.2.2, not all rights laid down in the Convention are granted to all refugees. The Convention divides the rights it contains between four categories of beneficiaries: first, rights granted to all refugees irrespective of their legal status and by virtue of their being refugees, and irrespective of where they are, provided they are within the jurisdiction of a State party; secondly, rights granted to refugees who are physically present in the State party's territory, irrespective of their legal status;[764] thirdly, rights granted to refugees whose presence in the country of refuge is lawful ('lawful in'); and, fourthly, rights granted to refugees who are lawfully residing in the country of refuge ('lawful staying in' or 'residing

763 For a comprehensive and detailed analysis of the substantive rights of refugees see Hathaway 2005.
764 Ibid., p. 171.

in' or 'habitual residence').[765] The first category of beneficiaries is granted the right to be protected from refoulement (Article 33), but also the rights not to be discriminated against (Article 3); to be accorded the same treatment as is accorded to aliens generally, except when the Convention contains more favourable provisions (Article 7); to be treated as favourably as possible regarding the acquisition of movable and immovable property and rights pertaining thereto, or at least not less favourably than aliens in general (Article 13); to have free access to courts of law (Article 16); to an equal share when a rationing system exists (Article 20); and to elementary education in the same way as is accorded to nationals (Article 22).

Refugees who are physically present within the territory of a State party form the second category of beneficiaries and are awarded the following rights: that to be treated at least as favourably as nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children (Article 4); that to the protection of industrial property and artistic and scientific works (Article 14); the right to administrative assistance (Article 25); the right to be issued with identity papers (Article 27); and that not to be penalised for illegal entry into or stay in the country of refuge (Article 31).

The third category of beneficiaries includes refugees whose presence in the country of refuge is lawful. Lawful presence is primarily determined by national legal standards.[766] It is unclear to what extent international law sets standards in this regard. Hathaway argues that deference to domestic law cannot be absolute, in particular where it would be at odds with the normative requirements of the Refugee Convention. As an example Hathaway states:

> 'where persons seeking recognition of refugee status meet the requirements of Art. 31 – that is, they "present themselves without delay to the authorities and show good cause for their illegal entry or presence" – their presence must be deemed lawful, even if they fail to claim refugee status immediately, or to meet some other domestic requirement at odds with Art. 31'.[767]

According to Hathaway 'lawfully present' includes refugees in any of three situations: (1) a person who is admitted to a State party's territory for a fixed period of time,

765 Goodwin-Gill 1996, pp. 307-309; Hathaway 2005, pp. 12 and 154-192, in which Hathaway even distinguishes five categories of beneficiaries, in which he divides the last group of beneficiaries into, first, refugees who are lawfully staying in the country of refugee without any reference to the length of stay, and, secondly, refugees who reside long-term in the country of refuge, for example, Articles 7(2) and 17(2) of the Refugee Convention require a period of three years' residence.

766 Goodwin-Gill 1996, p. 307: lawful presence implies: 'admission in accordance with the applicable immigration law', and Hathaway 2005, p. 175: 'presence is lawful in the case of "a person … not yet in possession of a residence permit but who had applied for it and had the receipt for that application. Only those persons who had not applied, or whose applications had been refused, were in an irregular position"'.

767 Hathaway 2005, p. 178. See also Clark 2004, p. 597, lawful presence: 'should include a person in a refugee status determination procedure who is at least lawfully present for the purpose of seeking refugee status'.

even if that is for only a few hours; (2) a person whose status has not (yet) been regularised, but who has applied for refugee status; and (3) a person whose claim for refugee status the host State has opted not to assess, for example, because no mechanism is available or because of a mass influx of people.[768] Rights granted under the Convention to refugees who are lawfully in the country of refuge include: the right to self-employment (Article 18), freedom of movement (Article 26) and the right not to be expelled except in pursuance of a decision reached in accordance with due process of law (Article 32).

The fourth category of beneficiaries includes refugees who are lawfully staying or residing in the country of refuge in the sense of having long-term residence permits. Rights granted to refugees who are lawfully residing in the country of refuge include: the rights to be exempted from legislative reciprocity (Article 7(2)), to association (Article 15), to be treated as nationals in matters pertaining to access to courts, including legal assistance and exemption from *cautio judicatum solvi* (Article 16(2)), to paid employment (Article 17), to practise a liberal profession (Article 19), to housing, at least not of poorer quality than accorded to aliens in general (Article 21), to public relief (Article 23), to be treated in the same way as nationals concerning labour legislation and social security (Article 24), and to obtain travel documents (Article 28).[769] It should be noted that for some of these rights a period of three years' residence is required.[770]

Beyond the rights granted to refugees under the Refugee Convention, the Executive Committee stated that refugees 'should enjoy the fundamental civil rights internationally recognised, in particular those set out in the Universal Declaration of Human Rights'.[771] Furthermore, according to the Executive Committee refugees should 'receive all necessary assistance and be provided with the basic necessities of life including food, shelter and basic sanitary and health facilities'.[772] Also, according to the Executive Committee, refugees 'should not be subjected to cruel, inhuman or degrading treatment', 'there should be no discrimination', 'they should be considered as persons before the law', and, 'family unity should be respected'.[773] In addition, irrespective of a refugee's legal status in the country of refuge the Executive Committee has urged States to issue travel documents[774] and to recognise the importance of enhancing basic economic, social and cultural rights, including that to gainful employment.[775]

768 Hathaway 2005, pp. 174-175 and 183-185.
769 For an in-depth analysis of the rights granted to refugees see: Hathaway 2005.
770 This includes: Article 7(2) of the Refugee Convention regarding exemption of legislative reciprocity, and Article 17(2) of the Refugee Convention regarding restrictive measures imposed on the employment of aliens.
771 EXCOM Conclusion No. 22 (XXXII), 1981, para. B (2) (b).
772 Ibid., para. B (2) (c).
773 Ibid., para. B (2) (d) to (h).
774 EXCOM Conclusion No. 49 (XXXVIII), 1987.
775 EXCOM Conclusion No. 50 (XXXIX), 1988, paras. (j) and (k).

This is in line with the object and purpose of the Refugee Convention and particularly the specific reference to the UDHR in the preamble to the Convention. Furthermore, such an interpretion of the Refugee Convention corresponds with the Convention's contemporary juridical context alongside international human rights law.[776] International human rights law protects the rights of individuals irrespective of who they are, and States are obliged to ensure those rights to anyone who is within their jurisdiction.[777] Moreover, in accordance with Article 7(1) of the Refugee Convention refugees shall be accorded the same treatment as is accorded to aliens generally, which includes treatment in accordance with international human rights law.[778] And even though the abovementioned Statements of the Executive Committee were made in a Conclusion entitled 'Protection of Asylum-Seekers in situations of Large Scale Influx', the fundamental rights of refugees should be irrespective of the context in which they sought refuge.[779]

Special attention should be given to refugee children, and in particular their right to education, health and adequate standards of living, such as food.[780] Countries of refuge have a particular responsibility to ensure these basic rights and needs of refugee children, irrespective of their legal status.

2.4.2.5 Obligations in the context of voluntary repatriation

A refugee may decide voluntarily – for whatever reason – to return to his country of origin. Such a decision is not in breach of Article 33 of the Refugee Convention if made freely and fairly by the individual refugee who is well informed. The host country should take all requisite steps to assist him to make the decision and should provide him with the necessary information regarding the conditions in the country of origin. The Executive Committee does not confer any responsibility on the host country, beyond assisting the refugee to make a well-informed decision and communicating any guarantees made by the country of origin to him and providing him with complete, objective and accurate information, including on physical, material and legal safety issues prior to the return.[781]

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776 Clark 2004, p. 594.

777 See for example, sections 3.2 and 4.2 on the scope of the European Convention on Human Rights and the International Covenant on Civil and Political Rights respectively.

778 Hathaway 2005, p. 228.

779 Clark argues that because the Executive Committee made its Statements on the basic rights of refugees in the context of large-scale influx, the minimum content of refuge beyond the mass influx is less clear: Clark 2004, p. 594.

780 EXCOM Conclusion No. 47 (XXXVIII), 1987; EXCOM Conclusion No. 59 (XL), 1989; EXCOM Conclusion No. 84 (XLVIII), 1997.

781 EXCOM Conclusion No. 101 (LV), 2004. According to the Executive Committee, monitoring of compliance with the guarantees provided could be done by the UNHCR if called upon and with the agreement of the parties concerned, EXCOM Conclusion No. 18 (XXXI), 1980, para. (h).

2.4.2.6 Obligations after removal

The Refugee Convention does not contain any explicit obligations on States once a refugee is removed in breach of Article 33 of the Refugee Convention. There is also no international authoritative source available which has discussed this issue. Nevertheless, not having any responsibility would de facto nullify effective protection from refoulement. States could then easily evade their responsibility simply by removing all individuals seeking international refugee protection. Therefore, the obligations after removal, in breach of Article 33 of the Refugee Convention, must at least include an acknowledgment that Article 33 has been violated. Whether or not it may also include any obligation to take further action, for example in regard to compensation, is speculation.[782]

2.4.2.7 Procedural safeguards

2.4.2.7a The initial determination procedure

The implementation of the prohibition on refoulement requires an assessment of the facts and circumstances of each individual case.[783] The assessment whether or not a refugee is in need of protection from refoulement is primarily determined by the assessment of the person's refugee status. Even though the Convention does not contain an explicit obligation on States parties to determine a person's refugee status,[784] recognising a person's de facto refugee status is in reality essential for guaranteeing his right to protection from refoulement.[785] Strictly speaking, determining a person's refugee status and formally recognising him as a refugee is not a necessary requirement for protection from refoulement, as the duty to protect against refoulement does not come into play until the actual moment the State acts or refrains from acting, as a result of which the refugee is forced to go to the frontiers of territories where he is at risk. However, such an argument and approach would deny the reality for many refugees and would be contrary to the object and purpose of the Refugee Convention. The Convention is meant to provide people with an alternative form of protection that enables them to live in safety and dignity in the absence of national protection. Furthermore, protection from refoulement in accordance with Article 33(1) of the Refugee Convention is guaranteed only to people who are refugees. As such, protection is only legally secured if indeed it is determined that the person concerned is a refugee, even though this is a de facto and not a de jure status, and unless and until a negative determination of his refugee status is made. Notably, in accordance with Article 3(1) of the EU Dublin Regulation, Member States of the EU

782 The obligation to provide compensation when removal is in breach of a prohibition on refoulement contained in Article 3 ECHR, Article 7 ICCPR and Article 3 CAT is discussed in sections 3.4.2.2, 4.4.2.2 and 5.4.2.2 respectively.

783 Lauterpacht & Bethlehem 2003, p. 118.

784 See generally Zwaan 2003, pp. 14-17. Notably, Article 9 of the Refugee Convention assumes that States parties conduct a refugee status determination procedure.

785 See generally Boeles 1997, pp. 66-69. See also Zwaan 2003, p. 21.

are obliged to examine the application of any third-country national who applies at their border or in their territory to any one of them for asylum.

The Refugee Convention itself does not contain any provisions regarding the procedure for the determination of refugee status.[786] The absence of rules of procedure in the Refugee Convention has led to controversy and discrepancies in procedures in various States parties and leaves room for States to 'manipulate' asylum protection systems.[787] What should be kept in mind when looking for procedural safeguards is the humanitarian and human rights[788] character of the Refugee Convention, and the vulnerable position refugee claimants normally find themselves in.[789] Consequently, an assessment must be made by means of a special and liberal procedure by qualified people or decision makers who are able and willing to understand the vulnerable situation of the refugee claimant.[790] Furthermore, given the fundamental and humanitarian character of the prohibition of refoulement and the – often – irreversible consequences of a failure to protect against refoulement, any assessment in this regard must be carried out with rigorous scrutiny. In addition, it would be wrong to assess any claim for refugee and/or refoulement protection within the framework of general procedures for the admission of aliens. That would undermine the humanitarian and human rights character of refugee and/or refoulement protection. Finally, it is important to note that determining refugee status and the right to be protected from refoulement is a shared responsibility and objective of the refugee claimant and the 'host country (see section 2.3.2.2c). Such a determination procedure is not – and should not be – adversarial.[791]

The Executive Committee has reiterated on many occasions that any refugee protection assessment or refugee status determination procedure must be accessible, fair and efficient, without, unfortunately, explaining the meaning of these terms in much detail except for some basic requirements cited below.[792] The Executive

786 UNHCR Handbook, para. 189. UNHCR 2005-4, para. 4. It is rather unfortunate that the Refugee Convention does not contain any rules of procedure as it is procedural issues that trigger most of the discussions and debates within the field of international refugee law: see Legomsky 2000, p. 621.

787 Costello 2006, p. 3.

788 In his Working Paper for the UNHCR, Gorlick recalls that at the time the Refugee Convention was adopted the idea was that the States parties to the Convention would establish appropriate procedures in accordance with their own laws and legal traditions, and that various aspects of administrative law and practice were not very well developed. Over time, according to Gorlick, that has changed, and of particular relevance in this regard is the development of international human rights law in the refugee context: Gorlick 2003, p. 357.

789 UNHCR Handbook, para. 190: 'he finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own'.

790 UNHCR Handbook, para. 190. See also Gorlick 2003 p. 360.

791 Costello 2006, p. 2.

792 EXCOM Conclusion No. 65 (XLII), 1991, para. (o); EXCOM Conclusion No. 71 (XLIV), 1993, para. (i); EXCOM Conclusion No. 74 (XLV), 1994, para. (i); EXCOM Conclusion No. 81 (XLVIII), 1997, para. (h); EXCOM Conclusion No. 82 (XLVIII), 1997, para. (d) (iii); EXCOM Conclusion No. 103 (LVI) 2005, para. (r); UNHCR 2005, p. 28; UNHCR 2005-4, para. 5. The EU Procedures

Committee has recommended that procedures for the determination of refugee status should satisfy the following basic requirements:

> '(i) the competent official (e.g. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments.[793] He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority;
> (ii) The applicant should receive the necessary guidance as to the procedure to be followed;[794]
> (iii) There should be a clearly identified authority – wherever possible a single central authority – with responsibility for examining requests for refugee status and taking a decision in the first place[795];
> (iv) The applicant should be given the necessary facilities, including the services of a competent interpreter,[796] for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR;[797]
> (v) If the applicant is recognised as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status;[798]
> (…)
> (vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. (…).'[799]

In a later Conclusion the Executive Committee added the following requirements in fear of the grave consequences of an erroneous determination:

Directive acknowledges the right for refugee claimants to have effective access to procedures: para. 13 Preamble EU Procedures Directive.

793 According to Article 8(2)(c) of the EU Procedures Directive EU Member States shall ensure that: 'the personnel examining applications and taking decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law'.

794 See also para. 13 Preamble EU Procedures Directive.

795 See also the UNHCR in its comments on the EU Procedures Directive regarding exceptions to the responsible authority for deciding on asylum claims (Article 4 (2) EU Procedures Directive, UNHCR 2005, p. 7 (UNHCR Comment on Article 3A (2)).

796 See also para. 13 Preamble EU Procedures Directive.

797 In para. 13 of the Preamble to the EU Procedures Directive it is stated that refugee claimants should have the opportunity to communicate with a representative of the United Nations High Commissioner for Refugees (UNHCR) or with any organisation working on its behalf. The UNHCR's role in refugee status determination procedures is further governed by Articles 8(2)(b) and 21 EU Procedures Directive.

798 In para. 13 of the Preamble to the EU Procedures Directive it is stated that refugee claimants should have the right to appropriate notification of a decision, have a motivation of that decision in fact and in law, have the opportunity to consult a legal adviser or other counsel, and have the right to be informed of his/her legal position at decisive moments in the course of the procedure, in a language he/she can reasonably be supposed to understand.

799 EXCOM Conclusion No. 8 (XXVIII), 1977, para. (e). This quotation is also published in the UNHCR Handbook, para. 192.

> '(i) as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official, and, whenever possible, by an official of the authority competent to determine refugee status'.[800]

It must be noted that a single interview may not always be sufficient. According to the UNHCR:

> 'it may be necessary (…) to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts'.[801]

States are also encouraged by the Executive Committee to:

> 'consider whether it may be appropriate to establish a comprehensive procedure before a central expert authority making a single decision which allows the assessment of refugee status followed by other international protection needs'.[802]

In addition, the refugee claimant should receive free legal assistance and representation from the start of the asylum procedure as he is unfamiliar with the legal system of the country of refuge.[803]

States may adopt formal requirements regarding asylum claims and their assessment. This may include designating places where a claim must be lodged as long as it does not hinder access to the procedure for the determination of refugee status.[804] Formal requirements may also include the setting of certain time limits within which a refugee claimant must submit his claim. The failure, however, to fulfil any formal requirement, including time limits, should not lead to an asylum request not being considered.[805]

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800 EXCOM Conclusion No. 30 (XXXIV), 1983, para. (e) (i).

801 UNHCR Handbook, para. 199; UNHCR 2005-4, para. 20 (p. 5).

802 EXCOM Conclusion No. 103 (LVI) 2005, para. (q). According to Article 12(1), (2), (3) of the EU Procedures Directive a refugee claimant must be given the opportunity of a personal interview, unless a – for the claimant – positive decision can already be taken, a meeting covering the essentials of the claim has already taken place, the claim is unfounded in circumstances stipulated in Article 23 (4)(a), (c), (g), (h),and (j), or the interview is not reasonably practicable.

803 UNHCR 2005-5, p. 3 (para. 5); UNHCR 2005, p. 19. See also para. 13 Preamble EU Procedures Directive. The EU Procedures Directive also provides for a right to legal assistance and representation, albeit conditional. First, in principle, the opportunity to consult legal counsel is at the claimant's own cost, except in the event of a negative decision, so only in appeal, and only for certain specified procedures (Chapter V EU Procedures Directive), only to those who lack sufficient resources, and/or only if the appeal is likely to succeed: Article 15 (1), (2), (3) EU Procedures Directive.

804 UNHCR 2005, p. 8.

805 EXCOM Conclusion No. 15 (XXX), 1979, para. (i); UNHCR 2001-3, p. 5 (para. 20); UNHCR 2005, p. 11. According to Article 8(1) of the EU Procedures Directive: 'Member States shall ensure that applications for asylum are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible', except when the claimant 'has failed without reasonable cause to make his/her application earlier, having had opportunity to do so' (Article 23(4)(i)).

Specific claims may involve specific procedures. This concerns claims involving a safe third country, claims where the refugee claimant has already found effective protection in another country (first country of asylum), and claims which are fraudulent or without any foundation.

When applying the concept of a safe third country, procedures which qualify as best practice, according to the UNHCR:

> 'are those which provide for an individualized assessment that the third country is "safe" in the case of each asylum-seeker (…). Such best practice procedures include an examination of the individual's own circumstances so as to give the asylumseeker the opportunity to rebut a general presumption of safety'.[806]

In cases where the refugee claimant has already found effective protection in another country (first country of asylum) a procedure to determine the admissibility of a claim may be the best practice, according to the UNHCR.[807] The existence of a first country of asylum must be assessed on an individual basis and depends on the specific facts and circumstances of the case.[808] Notwithstanding the existence of a third country, in the context either of first country of asylum or of safe third countries, the State which is presented with an asylum request has and retains the immediate and primary responsibility for refugee protection.[809] An automatic application of the concept of first country of asylum or safe third country would be in breach of the Refugee Convention.[810] The application of both concepts may not lead to an inferior form of refugee status determination, for example, leading to the denial of an interview.[811] The concept of first country of asylum and safe third country is, for the purposes of this research, further explained in section 2.4.1.4 and 2.4.1.4a in the context of indirect refoulement.

According to the Executive Committee fraudulent claims or claims without any foundation may be declared manifestly unfounded or abusive.[812] This involves claims made by people who are without a shadow of a doubt not in need of refugee protection (no substantive issue under the Refugee Convention is raised) or claims which are abusive and involve deception or the intention to mislead the country of refuge in order to claim protection.[813] Clearly, cases which have some credibility or involve one or more issues of substance cannot be declared manifestly unfounded. For

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UNHCR has proposed a general but not absolute time limit of three months in which to reach a decision on an asylum application at the first instance: UNHCR 2003-10, p. 7.

806 UNHCR 2001-3, p. 4 (para. 13). Further criteria for applying the concept of a safe third country are outlined by the UNHCR in this document in paras. 12 to 18. Within the European Union the EU Member States have opted for an admissibility procedure: Article 25(2)(c).

807 UNHCR 2001-3, p. 3 (paras. 10 and 11). See also Article 25(2)(b) EU Procedures Directive.

808 Ibid., p. 4 (paras. 13 to 16).

809 UNHCR 2004-4, para. 19.

810 UNHCR 1995, p. 13.

811 Costello 2006, p. 4.

812 EXCOM Conclusion No. 28 (XXXIII), 1982, para. (d); EXCOM Conclusion No. 30 (XXXIV), 1983.

813 UNHCR 2001-3, p. 7 (para. 30); UNHCR 1995, p. 1 and 9.

example, cases involving questions of indirect refoulement, the internal protection alternative[814] and exclusion all involve complex substantive issues, and therefore require a substantive assessment.[815] Equally, cases where insufficient or false information or documentation is submitted by the claimant cannot for that reason alone be declared abusive.[816] Even wilful destruction or dispossession of documentation may not necessarily be abusive, as the claimant may have acted out of fear, exhaustion or distress. Wilful destruction nevertheless minimises the claim's credibility.[817] The substantive character of a decision to declare a claim manifestly unfounded must be recognised, resulting in the need for such a decision to be accompanied by appropriate procedural guarantees. Therefore, the Executive Committee has recommended, inter alia, that:

> '(i) (…) the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status; (ii) the manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status'.[818]

A refugee claimant who has applied for recognition as a refugee and has been given refugee status or subjected to the asylum determination procedure must be regarded as lawfully present within the territory of the country of refuge (see section 2.4.2.4).[819] This includes a procedure designed to identify the country which is to examine his or her claim under a responsibility sharing agreement,[820] for example, in accordance with the EU Dublin Regulation.[821] Lawful presence ends with a final decision not to recognise the refugee claimant as a refugee, to revoke such a decision, to decide that refugee status ceases to exist in accordance with Article 1C of the Refugee Convention, to exclude a person from refugee status in accordance with Article 1D, E and F of the Refugee Convention, to declare the claim manifestly unfounded, abusive or fraudulent or to decide that another State is responsible for assessing the claim.[822]

As I have already mentioned in section 2.4.1.3 rejection at the frontier without having access to the procedure for the determination of refugee status is prohibited

814 The applicability of an internal protection alternative must be assessment in a full refugee status determination procedure and may not be used to deny access to such procedures: UNHCR 2003, pp. 2 (para. 4) and 8 (para. 36).
815 UNHCR 2001-3, p. 7 (paras. 28 and 29).
816 UNHCR Handbook, para. 196; UNHCR 2001-3, p. 8 (para. 35); UNHCR 2005, p. 29.
817 UNHCR Handbook, para. 196; UNHCR 2001-3, p. 8 (para. 36).
818 EXCOM Conclusion No. 30 (XXXIV), 1983, para. (e). See also UNHCR 2001-3, pp. 6-8 (paras. 25 to 33).
819 Hathaway 2005, p. 185.
820 Ibid.
821 EU Council Regulation No. 343/2003 of 18 February 2003, published in the Official Journal of the European Union, L50/1, 25 February 2003.
822 Hathaway 2005, pp. 185 and 186.

under Article 33(1) of the Refugee Convention.[823] Applications for refugee protection made at the border raise particular issues. Border guards must have clear instructions on how to handle such claims and, unless they are manifestly unfounded or abusive, the refugee claimants must be admitted to the substantive procedure for the determination of refugee status.[824]

Any assessment for the purpose of refugee protection or protection from refoulement should be individual. A State can therefore never rely on a general assumption that refugee claimants in certain facts and circumstances have no well-founded fear of persecution. Similarly, a State cannot apply an internal protection alternative based on a general assumption of the safety of a certain area.[825]

It should be noted that an obligatory individual assessment does not preclude the application of protection from refoulement in cases of a mass influx of refugees, at least on a temporary basis, without an individual assessment having taken place.[826] See section 2.4.2.2 regarding temporary protection in situations of mass influx.

In the absence of a situation of mass influx the prohibition on refoulement may be breached when a claim for refugee protection is not considered and a risk of removal exists.[827] Equally, a procedure for the determination of refugee status which is weak, unsound or discriminatory may breach Article 33(1) of the Refugee Convention.[828]

In determining refugee status special guarantees must be in place to ensure the needs of refugee women, including providing them with the opportunity to make an independent request for refugee protection,[829] skilled female interviewers, professional

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823 This includes EXCOM Conclusion No. 6 (XXVIII), 1977, para. (c); EXCOM Conclusion No. 22 (XXXII), 1981, para. II.A.2; EXCOM Conclusion No. 81 (XLVIII), 1997, para. (h); EXCOM Conclusion No. 82 (XLVIII), 1997, para. (d) (iii); EXCOM Conclusion No. 85 (XLIX), 1998, para. (q).

824 UNHCR 2001-3, pp. 5 and 6 (paras. 21 to 23).

825 Hathaway & Foster 2003, p. 412; Marx 2002, p. 212; Kelley 2002, p. 12.

826 Lauterpacht & Bethlehem 2003, p. 119. See also EXCOM Conclusion No. 15 (XXX), 1979, para. (f); EXCOM Conclusion No. 22 (XXXII), 1981, para. I.3 and para. II.A.1 and 2; EXCOM Conclusion No. 100 (LV), 2004. See also other instruments on refugee or asylum protection, for example, Article II(4) of the OAU Convention governing specific aspects of refugee problems in Africa, and Article 3(2) of the EU Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof, 20 July 2001, published in Official Journal L212/12, 7 August 2001.

827 Hathaway 2005, p. 319.

828 Ibid., p. 287.

829 This does not mean that a State cannot deal jointly with the protection claims of one family (see, for example, Article 6(3) EU Procedures Directive), as long as this is done after the explicit consent of all dependent adults who they understand the implications of their consent. Even so, when a claim is jointly dealt with, all dependants should be interviewed separately from the original applicant so that they can talk freely, and the possibility should remain for a claim to be assessed separately at a later stage if so required: see the UNHCR's comment on Article 6(3) of the EU Procedures Directive, UNHCR 2005, p. 8 (comment on Article 5(2) and (3)).

and culturally appropriate gender-based counselling, as well as other related services to refugee women who are victims of abuse.[830]

Special consideration should also be given to children, in particular when unaccompanied, and people suffering from mental disorder.[831] In order to serve their best interests children, for example, should be designated a guardian,[832] and with regard to mentally disturbed people[833] expert medical advice should be obtained.[834]

The structure of Article 1 of the Refugee Convention requires that inclusion be considered before exclusion. In particular in regard to the applicability of Article 1F this is a point of discussion. According to the UNHCR the exceptional nature of Article 1F of the Refugee Convention implies that, generally, exclusion considerations should follow inclusion.[835] The UNHCR is of the opinion, though, that this is not a rigid formula.[836] It seems logical first to consider possible inclusion because it may make exclusion considerations unnecessary. Furthermore, when wanting to apply proportionality considerations, in particular in the context of Article 1F(b) of the Refugee Convention as discussed in section 2.3.3.3b, it will be necessary first to consider inclusion. Moreover, inclusion considerations will shed an important light on the possible applicability of other prohibitions on refoulement. The UNHCR distinguishes three situations in which exclusion considerations may take precedence over inclusion: (1) where there is an indictment by an international criminal tribunal, (2) in cases where there is apparent and readily available evidence pointing firmly towards exclusion, notably in prominent Article 1F(c) cases, and (3) at the appeal stage in cases where exclusion is the question at issue.[837] The first and third situations are understandable. In the first situation it may be presumed that, with an indictment by an international criminal tribunal, serious reasons to consider that the refugee claimant has committed excludable acts in accordance with Article 1F(a) of the Convention exist. With regard to the third situation inclusion considerations were part of the initial determination procedure and are unchallenged in the appeal procedure. The second situation is far less understandable, as inclusion considerations may still be called for, as explained above.

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830 EXCOM Conclusion No. 64 (XLI), 1990, para. (a) (iii) and (vi); EXCOM Conclusion No. 73 (XLIV), 1993, para. (g); UNHCR 2001-3, p. 10 (para. 45).

831 UNHCR Handbook, paras. 206-212 (re mentally disturbed persons) and 213 – 219 (re children). See also EU Procedures Directive, Article 17 re guarantees for unaccompanied minors.

832 UNHCR Handbook, para. 214.

833 The terminology 'mentally disturbed persons' comes from the UNHCR Handbook.

834 UNHCR Handbook, para. 208.

835 UNHCR Handbook, paras. 176 and 177; UNHCR 2003-3, para. 100.

836 UNHCR 2003-3, para. 100.

837 Ibid.

2.4.2.7b Accelerated procedures

A manifestly unfounded or abusive claim may be dealt with in an accelerated procedure.[838] It is necessary, though, for the refugee claimant to be given counselling in the appropriate language, a complete personal interview by a fully competent official and an unsuccessful claimant should be able to have his negative decision reviewed.[839] In addition to manifestly unfounded or abusive claims, an accelerated procedure may also be used in cases involving a safe country of origin or a safe third country, provided the application of these concepts is thoroughly assessed (as mentioned in sections 2.4.1.1a and 2.4.1.4a respectively) and the abovementioned procedural safeguards are met.[840] Furthermore, it must be noted that an internal protection alternative assessment should not be part of an accelerated procedure, because such an assessment can only follow a positive decision on the well-founded fear

838 UNHCR 2001-3, p. 6 (paras. 25 and 26). According to the Executive Committee this includes claims 'which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure'; EXCOM Conclusion No. 30 (XXXIV), 1983, para. (d). Goodwin-Gill and McAdam point out that accelerated procedures were initially introduced as a means of dealing quickly with manifestly unfounded claims, but in some States, such as the Netherlands, they are also employed for matters deemed not to require time-consuming investigation: Goodwin-Gill & McAdam 2007, p. 392 (note 206).

839 EXCOM Conclusion No. 30 (XXXIV), 1983, para. (e) (i); UNHCR 2001-3, p. 7 (para. 32). See also UNHCR 1995, p. 11.

840 UNHCR 1995, p. 10. Note that article 23(3) and (4) EU Procedures Directive stipulateS in which cases Member States may use an accelerated procedure. A total of 16 situations are mentioned and include: (1) cases that are likely to be well-founded or where the applicant had special needs (article 23(3)); (2) no or only minimal relevant issues have been raised (article 23(4)(a)); (3) the applicant clearly does not qualify for protection (article 34(4)(b)); (4) the claim is unfounded because the applicant comes form a safe country of origin or one which is regarded as a safe third country (Article 23(4)(c)); (5) the applicant has misled the authorities (Article 23(4)(d)); (6) the applicant has filed another application for asylum giving other personal data (Article 23(4)(e)); (7) no information establishing with a reasonable degree of certainty the identity or nationality has been provided or the applicant has destroyed such information in bad faith (Article 23(4)(f)); (8) inconsistent, contradictory, improbable or insufficient representations have been made making the claim clearly unconvincing (Article 23(4)(g)); (9) a subsequent application has been submitted with no new relevant elements (Article 23(4)(h)); (10) the applicant has failed without reasonable cause to make the application earlier, having had the opportunity to do so (Article 23(4)(i)); (11) the application is made to frustrate or delay an earlier decision (Article 23(4)(j)); (12) without good reason the applicant has not complied with certain provisions mentioned in the Procedures and Qualification Directives (Article 23(4)(k)); (13) the applicant has entered and prolonged his stay in the Member State unlawfully without good reason and has not presented himself or applied for asylum as soon as possible (Article 23(4)(l)); (14) the applicant is a danger to the national security or public order of the Member State (Article 23(4)(m)); (15) the applicant refuses to have his fingerprints taken (Article 23(4)(n)); (16) the application was made by an unmarried minor after the application of the parents has been rejected and no new relevant facts were raised (Article 23(4)(o)). UNHCR has formulated an extensive critique on these situations as many of them do not necessarily mean that no well-founded fear of persecution exists and that an accelerated procedure may undermine a proper assessment, in particular in these situations: see UNHCR 2005, pp. 27-32.

assessment, as explained in section 2.3.2.4a.[841] Neither should the applicability of the Article 1F exclusion be part of an accelerated procedure.[842] In any case, if major substantive issues arise in an accelerated procedure, the claim is best further assessed in regular proceedings.[843] It should be noted that accelerated procedures may also be used for cases where a positive decision is expected.[844]

Thus far, it remains undetermined what kind of procedure would qualify as accelerated. Clearly, an accelerated procedure implies a hastened procedure. In general, however, it remains unclear what time-limits must be set. Within the EU the former proposal for a Council Directive on minimum standards for procedures in Member States for granting and withdrawing refugee status two time-limits were introduced. The first required a personal interview to be conducted within 40 working days of the application being made, and the second required a decision on a personal interview within 25 working days.[845] No such time-limits can be found in the final text of the EU Procedures Directive. In Article 23(2) of the Directive there is only a general time indication of six months for the initial decision. However, these timeframes concern the regular first instance proceedings and do not indicate the minimum time necessary for conducting accelerated proceedings.

2.4.2.7c Appeal procedures

The Refugee Convention does not contain an explicit provision regarding a legal remedy against a negative first decision. Importantly, the Convention does contain a non-discrimination clause regarding access to courts. According to Article 16 of the Convention:

> '1- A refugee shall have free access to the courts of law on the territory of all Contracting States.
> 2- A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi.
> 3- A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.'

Article 16 allows refugees free access to the courts of law of the country of refuge. In addition, they shall be granted the same treatment in matters pertaining to such access, including legal assistance, as nationals of the host State. Article 16 applies

841 Hathaway & Foster 2003, p. 411. Marx 2002, p. 212. Summary Conclusions: internal protection/ relocation/flight alternative, Global Consultations on International Protection, Expert Roundtable, San Remo, 6-8 September 2001, para. 6, in: Feller, Türk & Nicholson 2003, p. 419.
842 UNHCR 2003-3, para. 99.
843 UNHCR 2001-3, p. 7 (para. 30).
844 Ibid., p. 8 (para. 33).
845 Article 29(1) and (2) Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, Brussels, 20 September 2000, COM (2000)578 final, 2000/0238 (CNS).

to all refugees, including refugee claimants.[846] Boeles raises the question whether States are required to give access to courts to adjudicate on disputes on the determination of refugee status and the threat of removal.[847] The text of Article 16 is inconclusive. It does not stipulate the subject-matter jurisdiction, 'but requires simply that whenever the courts have competence over a given matter, refugees must have unimpeded access to the courts to enforce relevant claims'.[848] Boeles, however, argues that it follows from the context of the Convention that Article 16 is applicable to matters of inclusion and refoulement. Such matters affect the refugee's juridical status, and Article 16 is part of the second chapter of the Refugee Convention outlining the juridical status of a refugee.[849] In addition, Hathaway states:

> 'the efforts of an increasing number of countries to deny access to their courts to refugees seeking the review or appeal of a negative assessment of refugee status are *prima facie* in compatible with Art. 16(1) of the Convention'.[850]

According to Hathaway this is, however, subject to the issue of subject-matter jurisdiction in cases where national courts lack the authority to determine refugee status or issues concerning refoulement.[851] Hathaway tries to resolve this issue by applying Article 14(1) of the ICCPR, i.e. the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.[852] The view that Article 16 of the Refugee Convention does apply to appeal procedures is not set out in the UNHCR Handbook. According to paragraph 12(ii) the 'provisions of the 1951 Convention … that define the legal status of refugees and their rights and duties in their country of refuge … have no influence on the process of determination of refugee status …'.[853] However, this leaves undecided whether or not this is also relevant once it is found that the person is not a refugee: in other words, whether or not the right to free access to a court also applies in the appeal stage. It appears that neither the Executive Committee nor the UNHCR has concluded that it does. The Executive Committee has recommended States parties to allow the right to appeal before either the same or a different – administrative or judicial – authority.[854] The UNHCR is of the opinion that it is essential to the concept of effective remedy that the appeal must be considered by an authority different from and independent of that making the initial decision.[855] The UNHCR has not explicitly stated that the appeal authority must be a court of law. Even in its comments on the EU Procedures Directive it merely

846 Boeles 1997, p. 71. As Boeles points out reference to habitual residence in Article 16(2) of the Refugee Convention is no indication of the legality of the person's presence.
847 Boeles 1997, p. 71.
848 Hathaway 2005, p. 647.
849 Boeles 1997, pp. 72 and 74.
850 Hathaway 2005, p. 645.
851 Ibid., pp. 645 and 647.
852 Ibid., pp. 647 to 656.
853 UNHCR Handbook, para. 12 (ii).
854 EXCOM Conclusion No. 8 (XXVIII), 1977, para. (e) (vi).
855 UNHCR 2001-3, p. 10 (para. 43).

noted with satisfaction that within the EU refugees have 'the right to an effective remedy before an independent and impartial tribunal or body'.[856]

The Executive Committee and the UNHCR have stipulated other criteria for an appeal procedure to be effective. According to the Executive Committee any applicant who is not recognised as a refugee in proceedings for the determination of refugee status and any applicant whose claim for refugee status was declared manifestly unfounded or abusive must be given the right to appeal such a decision within a reasonable time.[857]Furthermore, it is essential according to the UNHCR for the appeal authority to be able to obtain a personal impression of the appellant,[858] and for the appeal or review proceedings to involve considerations of both fact and law.[859] Given the fundamental importance of refugee protection and the (often) irreversible nature of a failure to provide protection, the appeal authority must have the power to conduct a rigorous scrutiny of the case and conclude that the State has, in the initial determination procedure, misinterpreted the facts.[860] It can then order the State to redo its assessment taking into account the findings of the appeal authority. This way an effective remedy is guaranteed without the appeal authority taking over the role of the initial assessment and decision making body.

Applicants whose claim was declared manifestly unfounded or abusive should also be able to have the decision reviewed before being rejected at the frontier or being forcibly removed from the territory. Such a review, however, can be more simplified than in the case of rejected applications which are not manifestly unfounded or abusive.[861]

2.4.2.7d Suspensive effective of proceedings to determine refugee status

Finally, an essential safeguard for an effective remedy is that any appeal should have suspensive effect.[862] The declaratory nature of the refugee definition implies that, from the moment a refugee is subject to the responsibility of a State, he has the right to be protected from refoulement unless or until it is determined that he does not qualify as a refugee in accordance with Article 1 or he is not eligible for protection

856 According to Article 39 of the EU Procedures Directive, applicants for asylum have a right to an effective remedy before a court or tribunal against a decision taken on their asylum application.

857 EXCOM Conclusion No. 8 (XXVIII), 1977, para. (e) (vi). The right to an effective remedy is acknowledged in para. 27 of the Preamble to the EU Procedures Directive, according to which: 'It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole'.

858 UNHCR 2001-3, p. 10 (para. 43).

859 Ibid., p. 9 (para. 41); UNHCR 2005, p. 50.

860 UNHCR 2005-4, para. 38 (p. 8) and para. 40 (p. 9).

861 EXCOM Conclusion No. 30 (XXXIV), 1983, para. (e) (iii).

862 EXCOM Conclusion No. 8 (XXVIII), 1977, para. (e) (vii); UNHCR 2001-3, p. 10 (para. 43). See also the UNHCR's commentary on the EU Procedures Directive in which the suspensive effect of appeal procedures is *not* regulated: UNHCR 2005, pp. 10 and 51.

from refoulement in accordance with Article 33(2) of the Refugee Convention. Consequently, an application for refugee protection must have suspensive effect until such application is determined by a final judgment.[863]

2.4.2.7e Additional procedural safeguards for the expulsion of lawful refugees (Article 32 of the Refugee Convention)

Article 32(2) of the Refugee Convention provides additional procedural safeguards for the expulsion of lawful refugees.[864] In general, and in addition to the prohibition on refoulement contained in Article 33 of the Refugee Convention, Article 32(1) prohibits the expulsion of refugees who are lawfully in the territory of the host State. It allows for the expulsion of lawful refugees only when national security or public order grounds exist. If such exceptions apply, Article 32(2) prescribes that expulsion shall take place only in pursuance of a decision reached in accordance with due process of law. The refugee will then be allowed to submit evidence to clear his name, i.e. to show that he is no risk to the State's national security or public order, and he has a right to appeal the expulsion decision and be represented. Where compelling reasons of national security require otherwise lawful refugees are exempted from these rights. In addition, according to Article 32(3) a refugee who is to be expelled must be allowed to seek legal admission into another country within a reasonable time.

The applicability of Article 32 of the Refugee Convention is limited to lawful refugees. This refers to refugees who are lawfully within the territory of a State party. As already stated in section 2.4.2.4 this includes (1) a person who is admitted to a State party's territory; (2) a person whose status has not (yet) been regularised but who has applied for a refugee status; and (3) a person whose claim for refugee status the host State has opted not to assess.[865]

There are several differences between Articles 32 and 33 of the Refugee Convention. First, Article 33 protects all refugees, including lawfully present refugees, from being removed to territories where there is a threat to their life or freedom. Article 32 in this regard provides additional protection to lawful refugees in the sense that it prohibits the removal to any territory, including safe countries. Secondly, both provisions allow the expulsion of refugees for reasons of national security or public order. Article 33(2) uses more detailed and conditioned language than Article 32(1). Where Article 33(2) refers to reasonable grounds which must exist in order for the exception

863 The EU Procedures Directive acknowledges the suspensive effect of the initial application, pending a decision: para. 13 Preamble EU Procedures Directive.

864 Article 32 of the Refugee Convention: '1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order. 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.'

865 Hathaway 2005, pp. 174-175 and 183-185.

to be accepted, Article 32(1) is silent as to the reasonableness of the exception. This apparently wider scope is negated in Article 32(2), where it is required that an exception shall be applied only in pursuance of a decision reached in accordance with due process of law. One may presume that such a decision will be made only when there are reasonable grounds for believing that the refugee poses a danger. Thirdly, in addition to a national security exception Article 33(2) also allows the removal of refugees who are a danger to the community of the host country, provided that they have been convicted by a final judgment of a particularly serious crime. The language of Article 32 is different; it refers to grounds of public order. It can be presumed that 'public order' is similar to 'danger to the community'. Contrary to Article 32, Article 33(2) is subject to further conditions as it requires that the refugee be convicted by a final judgment of a particularly serious crime. There are more differences. Fourthly, unlike Article 33(1), Article 32(2) does provide explicit procedural safeguards. The decision to expel a lawful refugee must be reached in accordance with due process of law. The refugee has a right to submit evidence to the contrary, he has a right to appeal and he has a right to (legal) representation. However, these rights may be revoked when compelling reasons of national security require. This is a different threshold from the initial one set by the exception which allows a State to expel a lawful refugee. I wonder, though, what the added value of these explicit procedural safeguards is. Although Article 33(2) contains no explicit safeguards, it does implicitly, given the character of the prohibition on refoulement, the very restricted use of exceptions to that prohibition and procedural rights which refugees may have under other human rights instruments. Fifthly and finally, Article 32, in its third paragraph, states that States must allow a refugee before he is expelled to seek legal admission to another country within a reasonable period. This raises two questions: (1) what should be regarded as a reasonable period, and (2) what happens when the refugee does not find legal admission to another country? This is one of the problems surrounding the implementation and enforcement of Article 32 of the Convention; refugees subject to expulsion generally have nowhere to go.[866] Return to the refugee's country of origin is ruled out because of Article 33 (or other prohibitions on refoulement) and no other State has a legal obligation to admit the refugee. For this reason, the Executive Committee has recommended that a refugee should be expelled only in very exceptional cases, that where expulsion is impractical refugee delinquents should be given the same treatment as national delinquents, and that they should be detained only if absolutely necessary for reasons of national security or public order.[867]

To conclude, in spite of various differences the additional value of Article 32 over Article 33 of the Refugee Convention is limited, except for explicitly formulated procedural safeguards, including the right to present evidence, the right to appeal and the right to be represented. Also, Article 32 prohibits the expulsion to any territory, including safe third countries.

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866 Hathaway 2005, p. 659.
867 EXCOM Conclusion No. 7 (XXVIII), 1977.

2.5 Conclusion

The Refugee Convention is a human rights treaty. The object and purpose are to protect the fundamental human rights of people who can no longer avail themselves of the protection of their own country. International refugee protection in accordance with the Refugee Convention is a substitute or alternative form of protection where national protection is failing and allows a refugee to live in a host State, or country of refuge, in safety and dignity.

In trying to find the international meaning of the prohibition on refoulement contained in the Refugee Convention the focus has been on relevant doctrine and on various documents produced by the UNHCR and EXCOM. Though not legally binding, both the UNHCR's and EXCOM's documents have global reach and are accepted by States parties to the Refugee Convention as important sources for the interpretation of the Convention. Of particular importance are the UNHCR Handbook and its guidelines on international protection as well as the conclusions of EXCOM. In addition, I have made use of the EU Directives and Regulations, in particular the EU Qualification Directive.[868] Notwithstanding its limited regional scope the Directive is the first legal document providing a binding multilateral interpretation of international refugee and asylum law.

Protection from refoulement is provided by Article 33 of the Refugee Convention. This Article protects refugees whose life and freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion and who are no danger to the country in which they have sought refuge or its community. A refugee is in essence defined as any person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of origin and is unable, or owing to such fear unwilling, to avail himself of the protection of that country (Article 1A(2) of the Refugee Convention). A person is a refugee as soon as he meets the criteria set out in the definition. Thus, protection from refoulement applies unequivocally to people who have not been formally recognised as refugees, but who are seeking, claiming or applying for protection, unless and until it is determined they do not meet the criteria. Furthermore, a person ceases to be a refugee on grounds set out in Article 1C of the Refugee Convention and is excluded from being a refugee on the grounds mentioned in Article 1D, E and F of the Convention. To understand the meaning of the prohibition on refoulement contained in Article 33 of the Convention it is essential to understand the meaning of Article 1.

The definition of a refugee in Article 1A(2) of the Refugee Convention contains an important limitation on the territorial scope of the Convention and the prohibition on refoulement. A person can be a refugee only when he is outside his country of nationality or habitual residence. Thus, the prohibition on refoulement contained in Article 33 of the Refugee Convention is not applicable in a person's own country.

868 In addition, I have made use of the EU Procedures Directive, the EU Temporary Protection Directive and the EU Dublin Regulation.

Protection can therefore not be claimed at embassies or foreign diplomatic missions in a person's country of origin. As soon as the person has crossed an international border and is outside his country of origin the Refugee Convention, including Article 33, will apply. This requirement includes refugees who are within the territory of the State as well as those who are outside it, but are forced by it to return to their country of origin. Refoulement may take place from within the State's territory, at the State's borders, or outside the State's territory or border area. In this regard the conduct of the State is essential because it will determine whether or not the refugee is forced to leave or to return to the frontiers of territories where there is a threat. In other words, there must be a consequential relationship between the conduct of the State, or conduct that can be attributed to the State, and the fact that the refugee is forced to leave or return to a territory where he is at risk. It is irrelevant where that conduct takes place, provided it is not within the refugee's country of origin, and as long as that conduct implies factual control or authority over the refugee and his right to be protected from refoulement.

The substance of the prohibition on refoulement is basically determined by three issues: (1) the harm from which a person is protected, (2) the element of risk, and (3) the possibility of exempting a person from refoulement protection.

The harm from which a person is protected by Article 33 of the Refugee Convention is best formulated by the phrase used in Article 1A(2) of the Convention: 'being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'. This phrase is not further defined in the Convention but can be characterised as requiring the attainment of a level of severity guided by international human rights standards and involving an element of discrimination. The severity may stem from the specific human right which has been or may be breached, for example the prohibition on torture and other forms of proscribed ill-treatment, or from the situation as a whole which includes measures which in themselves may either not breach a human right, or not be serious enough, but, taken together, lead to a serious infringement, for example regarding a person's livelihood. Importantly, discriminatory conduct may also amount to persecution, where it is either severe enough by itself or when taken together with other measures. While interpreting the term 'persecution' by human rights standards is the most appropriate way of understanding the concept, care should be taken with pinpointing the term to specific human rights or specific human rights treaties. As mentioned, no doubt acts of torture and proscribed ill-treatment may easily amount to persecution, but so may other human rights violations, including violations of economic, social and cultural rights. It all depends on the situation as a whole. For example, a situation of denationalisation of an ethnic group followed by intimidation, following which eventually people feel forced to flee may be severe enough to amount to persecution. Draft evasion or desertion from military service because of genuine objections, for example, to serving in an armed conflict directed at one's own ethnic group may amount to persecution when such draft evasion or desertion is punished simply because that would be in breach of a person's right to freedom of thought, conscience and religion and is largely

irrespective of the severity of the punishment. It is not necessarily relevant to categorise which human rights specifically have been violated.

An important element of the harm from which a person is protected is discrimination. Persecution is linked to the so-called persecution reasons, i.e. a person must have a risk of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Thus, to fear persecution is not enough; one must fear persecution for one of the stipulated reasons. The reason a person fears persecution must be a relevant factor contributing to the person's well-founded fear of being persecuted; it is not necessary that it be the sole, primary or even dominant reason. However, if the reason is remote from the fear to the point of irrelevance it cannot be concluded that the person has a well-founded fear of persecution for that reason. The reason for a person for fearing persecution must be objectively established. The reason may be evident, for example because the person has expressed his opposing political opinions, or may be less evident, for example because he belongs to a vulnerable group which as a whole is the target of violence. The intent or motive of the persecutor to persecute a person is a relevant factor and cannot be completely dismissed. However, it is not necessary for the intent to be individualised. In other words, it is not necessary for the persecutor to have a conscious intention to persecute a particular individual. For example, the persecutor may have the general intention to persecute a certain ethnic group as a whole. Furthermore, the reason a person fears persecution does not necessarily stem from the persecutor, but may also stem from the person himself: for example, a person refusing to serve in the military for religious reasons. His fear of being persecuted – through prosecution by the State – is linked to his religious beliefs and arises not necessarily because the State has the intent to persecute him for that reason. Finally, the reason for having a well-founded fear of persecution may also stem from the inability or unwillingness of the country of origin to provide protection, for example in situations where a husband harms his wife for no particular reason, but the State refuses to offer protection because it condones such domestic violence. Persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion is due either to the actions of persons, or State or non-State actors, or to inaction as a result of the country's failure to provide protection. It is essential that persecution be derived from verifiable human activity or inactivity, while the Refugee Convention is silent about the conceivable actors of persecution.

In order for a refugee claimant to be protected from refoulement there must be a threat, or, in terms of Article 1A(2) of the Refugee Convention, the person concerned must have a well-founded fear of persecution, and be unable or unwilling to obtain protection from his own country. In other words, there must be a risk that the person concerned will be persecuted without the chance of receiving national protection. Clearly, there must be a future possibility of being persecuted. This is termed a probability test: a reasonable chance or a serious possibility. Whatever terminology or test is used, it is impossible to couch the risk in objective and measurable terms. It is relevant that there is an objective and real possibility that the person concerned will be subjected to persecution. Whether or not that is the case depends on the facts

and circumstances presented. In general, such facts can relate to experiences in the past including human rights violations, to the general situation in the country of origin, to personal conditions or characteristics, to membership of a vulnerable group, and to activities conducted by the person in his country of refuge. The credibility of the facts and circumstances presented depends on their internal credibility, their plausibility, and on supporting evidence. Internal credibility refers to the consistency, coherence and relevant detail of the facts and circumstances presented. Plausibility refers to what is known about the country of origin and the person's background and situation. Finally, it is important that the facts and circumstances presented are supported as much as possible by relevant evidence. Full proof is not required, and the benefit of the doubt lies with the individual.

When it comes to the burden of proof it is the individual's responsibility to present relevant facts and circumstances and to give a truthful and credible account of his situation in order for the State to determine whether he is a refugee. In addition, it is the individual's responsibility to present supporting evidence. In this regard it is important to acknowledge that refugees often have no or limited opportunities to gather evidence. It is then the State's responsibility to evaluate the facts and circumstances and determine whether or not the person concerned is a refugee. Overall, refugee status determination is a responsibility shared between the individual and the State, calling for a cooperative effort. Consequently, the individual and the State must be able equally to participate in the determination process. Thus, both must be open, truthful and share all relevant information. In that regard the use of confidential information is problematic; it requires a balance between the reasons for confidentiality, such as the protection of sources or national security reasons, and the need to share information with the individual.

The risk of being subjected to persecution is also determined by the ability or willingness of the refugee to avail himself of the protection of his own country. The starting point for this national protection clause is the individual; he must not be able or, because of his fear, willing to obtain national protection. His inability to obtain protection refers to situations beyond his control, making it impossible for him to obtain protection, for example because protection has already been denied or because of a continuing armed conflict. The unwillingness of the individual to obtain protection is linked to the risk of being persecuted. Thus, when the risk stems from the State it is unwarranted to expect the individual to be willing to try to obtain protection from that same State unless it can objectively be determined that the State can provide protection, for example because effective legal remedies are available to counter the risk. What is relevant is the question whether there is an objective ground for not expecting the individual to be willing to avail himself of national protection. The availability of national protection depends not just on the ability and willingness of the individual to obtain such protection, but also on whether or not the protection is effective. That is a question of both law and fact. For example, adopting relevant legislation is not sufficient; the implementation and enforcement of the legislation are decisive. A State may be a party to all the relevant human rights treaties but may nevertheless have a poor human rights record.

Where States are the principal and perhaps only entities for providing protection, the issue has been raised as to the ability of non-State entities to provide national protection. Not only is there significant reluctance among the UNHCR and academics to accept this; in reality it seems highly unlikely for non-State entities to be able to provide effective national protection unless they can be regarded as the new Government or formal substitutes for the State in accordance with international law.

A specific concept which has been developed in the context of national protection is the concept of an internal protection alternative. This implies that a refugee, while having a well-founded fear of being persecuted and initially not being able or willing to avail himself of the protection of his country of origin, may now have the chance of living safely in a part of his country of origin in which he did not originally live. Such an area must be practically, legally and safely accessible to the individual; the individual must be safe from persecution and other serious harm; and he must, in the context of the country concerned, be able to lead a relatively normal life without undue hardship. In general, where the risk of being persecuted emanates from the State an internal protection alternative is not normally a relevant consideration, as it can be presumed that the State is able to act throughout the country. Where the risk of being persecuted emanates from local or regional governments within the country of origin an internal protection alternative may be relevant in only some cases, as it can generally be presumed that local or regional governments derive their authority from the national government. Finally, where the risk of being persecuted emanates from a non-State actor an internal protection alternative may more often be a relevant consideration. The availability has to be determined on the basis of the particular circumstances of each individual case.

Another concept which has been developed and emerged in the context of national protection is that of diplomatic assurances. The presumption here is that the requesting and receiving of diplomatic assurances from the country of origin regarding a person's safety will guarantee that the person will not have a well-founded fear of being persecuted upon his return and is therefore not a refugee. Diplomatic assurances are based on the presumption that a risk of being persecuted exists and that the person concerned is unable and unwilling to avail himself of the protection of his country of origin. Requesting diplomatic assurances may not sideline the requirement that it is the refugee who must be willing to avail himself of his country's protection. Notably, requesting diplomatic assurances in individual cases would raise serious issues of privacy and confidentiality. Thus, diplomatic assurances will be relevant only in situations the well-founded fear of persecution emanates from non-State agents and the State authorities are requested to guarantee the safety of the person concerned.

When it is determined that a risk of being persecuted exists and no national protection is effectively ensured, the refugee has a right to be protected from refoulement, but not in all circumstances. The prohibition on refoulement under the Refugee Convention is not absolute. In accordance with Article 33(2) of the Convention a refugee may be deprived of his right to be protected from refoulement if there are reasonable grounds for regarding him as a danger to the security of the country of refuge, or when he has been convicted by a final judgment of a particularly serious

crime and constitutes a danger to the community of the country of refuge. These exceptions must be applied restrictively, with great caution, and must be proportionate to their objective. Importantly, the refugee may be deprived of his right to be protected from refoulement; he remains a refugee. Thus, he remains entitled to protection from the UNHCR or from another State to which he poses no danger. Moreover, while he may be deprived of his right to be protected from refoulement under the Refugee Convention, he may still have a right to be protected from refoulement under other prohibitions on refoulement which do not allow exceptions. Consequently, he may not be removed and remains entitled to the rights and benefits of the Refugee Convention at large, in particular those provisions which do not require lawful presence or residence. Not only does Article 33 allow for exceptions to the prohibition on refoulement, but Article 1D, E and F of the Refugee Convention allows for the overall exclusion of refugee protection, including the prohibition on refoulement. Of particular relevance is exclusion in accordance with Article 1F of the Convention, according to which a person is excluded from being a refugee because there are serious reasons for considering that he has committed very serious crimes.

The final issue concerns the State's obligations which derive from the prohibition on refoulement contained in Article 33(1) of the Refugee Convention. In general, a State is to avoid any conduct whereby the refugee is forced to go to the frontiers of territories in which there is a threat to his life or freedom. This can imply that a State is obliged to refrain from any action which would force the refugee to go to his country of origin (negative obligations), or that the State is obliged to take action in order to prevent the refugee from returning (positive obligations). Whatever steps a State must take or not take, it is obliged to do so only when it is functional to the prohibition on refoulement. For example, a State is prohibited from expelling a refugee from its territory only when such expulsion forces the refugee to go to the frontiers of territories in which there is a threat and when he cannot travel to a safe third country. As another example, a State will be obliged to allow the refugee to enter its territory when non-entry will force the refugee to go the frontiers of territories in which there is a threat. The prohibition on refoulement primarily entails the negative obligation of non-removal whereby a State is obliged to refrain from any action leading to a refugee's forcible removal or forced leaving or transit, either directly or indirectly, through a third country (indirect refoulement) to the frontiers of territories in which there is a threat to his life or freedom. This negative obligation includes refraining from such actions as expulsion and deportation, as well as extradition. Furthermore, it includes the prohibition on rejection at borders; on closing borders, or any other measure whereby refugees are rejected from, not allowed access to and pushed back from a territory. Article 33(1) of the Refugee Convention does not prohibit States from adopting non-entry policies within the refugee's country of origin: for example, the imposition of visa requirements on nationals of refugee-producing countries. Notwithstanding the apparent legality of such measures they may be imposed for the wrong reasons, lead to discrimination, be contrary to the object and purpose of the Refugee Convention and seriously affect a person's ability to obtain (international) protection. In other words, States must be careful when applying such measures.

Depending on the circumstances of the situation a State may be obliged to take action in order to prevent a refugee from going to the frontiers of territories in which there is a threat to his life or freedom. Such positive obligations may include obligations: to allow the refugee to enter and remain in the territory of the State (obligation to admit); to provide temporary protection in cases of a mass influx of refugees; and to allow refugees and refugee claimants to enter into proceedings for the determination of refugee status containing effective procedural safeguards. The Refugee Convention, and Article 33(1) in particular, does not contain an obligation to be granted a residence permit or legal status in any form, but it does question the long-term responsibility of States to find a durable solution to the situation of refugees, including the responsibility to regularise their presence in the host State. The obligation to admit a refugee will exist only when non-admission will force the refugee to return to the frontiers of territories in which there is a risk to his life or freedom. This applies to refugees who find themselves at the borders of a host State as well as to refugees who are further removed from a State's territory and are, for example, claiming protection at a diplomatic mission of the host State in a third country. An obligation to admit a refugee also applies to refugees rescued at sea. Which State is responsible for these refugees is not always easy to determine. It may be the flag State of the ship the refugees were rescued from; it may be the flag State of the ship which came to the rescue; or it may be the State of disembarcation. What is relevant, when it comes to the rescuing of refugees at sea, is whether the refusal to provide protection will result in the refugees being forced to return to the frontiers of territories in which they are at risk. In general, when non-admission results in the refugee going to a third safe country or when the refugee is protected in an area outside the territory of the State, he may not be forced to return to his country of origin and protection from refoulement may be effectively guaranteed. Thus, the State is not obliged to allow the refugee to enter and remain on its territory. In reality, States must be careful in not allowing a refugee to do so, as the results of non-admission are often unclear. There should not be a real chance of the refugee returning to the frontiers of territories in which he is at risk. Moreover, not allowing a refugee to enter and remain may prevent the refugee from obtaining the other substantive rights listed in the Refugee Convention.

As has been said, Article 33 of the Refugee Convention does not oblige States to grant refugees residence permits or any other legal status. However, determining a person to be a refugee; not being allowed to remove a refugee and even being obliged to admit the refugee to your territory does pose the question what the long-term responsibility of States is as regards these refugees. In principle, refugee protection and protection from refoulement are temporary and continue as long as there is a well-founded fear of persecution. In the long term, when well-founded fear persists States may have to do more and may have a responsibility to find a more satisfactory lasting solution, including allowing the refugees to integrate locally. Refugees cannot be kept illegal indefinitely; their status must at some point be regularised or they must be able to resettle in a third country or be voluntarily repatriated to their country of

origin. In regard to the option of voluntary repatriation the host State has the obligation to assist the refugee in making a well-informed decision.

Even though the Convention neither entails an explicit obligation on States parties to determine a person's refugee status nor contains any provisions regarding such a procedure, recognising a person's de facto refugee status with sufficient procedural safeguards is in reality essential to guarantee a person's right to protection from refoulement.

3 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms

3.1 Introduction

3.1.1 Prohibition(s) on refoulement under the European Convention on Human Rights

This chapter covers the prohibition(s) on refoulement contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: the European Convention on Human Rights or ECHR).[1] While Article 4 of Protocol No. 4 prohibits the collective expulsion of aliens and Article 1 of Protocol No. 7 contains some procedural safeguards relating to the expulsion of lawfully residing aliens, the Convention does not contain an explicit prohibition on refoulement. However, in particular under Article 3 of the Convention a refoulement prohibition has been developed through the case law of the European Court on Human Rights (ECtHR) and the former European Commission on Human Rights. Furthermore, indissociable with the prohibition on refoulement under Article 3 of the Convention is the existence of a prohibition on refoulement under Article 2 (the right to live) and Article 1 of Protocols Nos. 6 and 13 (the abolition of the death penalty) to the Convention. The Court has also acknowledged the existence, in exceptional cases, of a prohibition on refoulement under Article 6 (the right to a fair trial). The existence of other prohibitions on refoulement, for example under Articles 5 (the right to liberty and security), 8 (the right to private and family life) and 9 (the freedom of thought, conscience and religion), is far less clear, as I wil discuss in section 3.5.3 below.

Article 3 ECHR contains by far the best developed prohibition on refoulement in the Convention. The focus of this chapter will therefore be on Article 3. According

1 Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 and including Protocols Nos. 1, 4, 6, 7, 12, 13 and 14. Protocol No. 14 (adopted on 13 May 2004 has not yet entered into force (June 2004). The text of the Convention was amended in accordance with the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and also comprised the text of Protocol No. 2 (ETS No. 44) which, in accordance with its Article 5, paragraph 3, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which were amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155) as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed. For a complete full text list of the Convention and all Protocols see <conventions.coe.int>.

to this Article, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. And even though States parties to the Convention have a right to control the entry, residence and expulsion of aliens, the removal of an individual by a State party to any country may give rise to an issue under Article 3 where substantial grounds have been shown for believing that the person in question, if removed, would face a real risk of being subjected to treatment proscribed by the Article in the receiving country. The responsibility of a State party is then engaged because of the act of removal or, in general, any act exposing the individual to such a risk.[2] As Vermeulen has stated: 'the reasoning behind it is based on the idea that a State is violating Article 3 if its act of [removal] constitutes a crucial link in the chain of events leading to torture or inhuman treatment or punishment'.[3] The material scope of the responsibility for protection from refoulement is determined by the existence of a real risk and the treatment prohibited under Article 3, i.e. torture, inhuman and degrading treatment or punishment.

As early as 1965 the Parliamentary Assembly of the Council of Europe acknowledged the existence of a prohibition on refoulement under Article 3 ECHR, considering that this Article binds States parties not to return refugees to a country where their life or freedom would be threatened.[4] The obligation on States parties to protect an individual against refoulement was accepted for the first time by the Court in *Soering v the United Kingdom* (1989). This case involved an extradition request by the United States of America to the United Kingdom.[5] In the context of asylum a prohibition on refoulement was accepted by the Court for the first time in *Cruz Varas and Others v Sweden* (1991).[6] At the close of this research (1 August 2008) the Court has delivered a judgment on a complaint under Article 3 of the Convention, involving

2 ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 76. In *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 91 the Court formulated this as follows: 'by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment'. See also Lawson 1999-2, p. 242

3 Vermeulen 2006, p. 429. In *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 88 the ECtHR explicitly referred to Article 3 CAT and considered: 'It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intent of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would in the receiving State be faced by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3)'.

4 Council of Europe, Parliamentary Assembly, Recommendation 434 (1965) *on the granting of the right of asylum to European refugees*, para. 3.

5 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88.

6 ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89.

a situation of refoulement, in only 29 cases.[7] Seven of those cases involved extradition, three involved the expulsion of an alien in dire need of medical care and the rest involved the expulsion of aliens in the context of asylum. In 17 of the 29 cases the Court concluded that the removal of the applicant(s) was or would be in breach of Article 3.[8] The vast majority of refoulement complaints are declared inadmissible by the Court for a variety of reasons, on both procedural and substantive grounds.

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7 In chronological order the Court considered the merits of a complaint under Article 3 in the following refoulement cases: ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88 (extradition; violation); ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89 (expulsion; no violation); ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87 (expulsion; no violation); ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93 (expulsion; violation); ECtHR, *Nsona v Netherlands*, 28 November 1996, Appl. No. 23366/94 (expulsion; no violation); ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94 (expulsion; violation); ECtHR, *H.L.R. v France*, 29 April 1997, Appl. No. 24573/94 (expulsion; no violation); ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96 (expulsion; violation); ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98 (expulsion; violation); ECtHR, *Bensaid v United Kingdom*, 6 February 2001, Appl. No. 44599/98 (expulsion; no violation); ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99 (expulsion; violation); ECtHR, *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. Nos. 46827/99 and 46951/99 (Grand Chamber Judgment 4 February 2005) (extradition; no violation); ECtHR, *Thampibillai v Netherlands*, 17 February 2004, Appl. No. 61350/00 (expulsion; no violation); ECtHR, *Venkadajalasarma v Netherlands*, 17 February 2004, Appl. No. 58510/00 (expulsion; no violation); ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02 (expulsion; violation); ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02 (expulsion; violation); ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 October 2005, Appl. No. 36378/02 (extradition; violation); ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04 (expulsion; violation); ECtHR, *Aoulmi v France*, 17 January 2006, Appl. No. 50278/99 (expulsion; no violation); ECtHR, *D and Others v Turkey*, 22 June 2006, Appl. No. 24245/03 (expulsion; violation); ECtHR, *Olaechea Cahuas v Spain*, 10 August 2006, Appl. No. 24668/03 (extradition; no violation); ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04 (expulsion; violation); ECtHR, *Garabayev v Russia*, 7 June 2007, Appl. No. 38411/02 (extradition; violation); ECtHR, *Sultani v France*, 20 September 2007, Appl. No. 45223/05 (expulsion; no violation); ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06 (expulsion; violation); ECtHR, *Ismoilov and Others v Russia*, 24 April 2008, Appl. No. 2947/06 (extradition; violation); ECtHR, *N. v United Kingdom*, 27 May 2008, Appl. No. 26565/05 (expulsion; no violation); ECtHR, *Ryabikin v Russia*, 19 June 2008, Appl. No. 8320/04 (extradition; violation); ECtHR, *NA. v United Kingdom*, 17 July 2008, Appl. No. 25904/07 (expulsion; violation).

8 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88; ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93; ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94; ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96; ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98; ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99; ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02; ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02; ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 October 2005, Appl. No. 36378/02; ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04; ECtHR, *D and Others v Turkey*, 22 June 2006, Appl. No. 24245/03; ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04; ECtHR, *Garabayev v Russia*, 7 June 2007, Appl. No. 38411/02; ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06; ECtHR, *Ismoilov and Others v Russia*, 24 April 2008, Appl. No. 2947/06 (extradition; violation); ECtHR, *Ryabikin v Russia*, 19 June 2008, Appl. No. 8320/04 (extradition; violation); ECtHR, *NA. v United Kingdom*, 17 July 2008, Appl. No. 25904/07 (expulsion; violation).

Unfortunately, no statistics are available on the number of cases that have been declared inadmissible.

In this chapter I will analyse the scope and content of the prohibition on refoulement as it has been developed under Article 3 ECHR and the character of the obligations on States parties derived therefrom. The analysis will focus on the case law of the ECtHR, including its judgments on the merits and decisions on admissibility. I will distinguish between cases in which the main issue is whether or not the forced removal of a person involves a risk of being subjected to ill-treatment proscribed by Article 3, i.e. refoulement cases, and cases under Article 3 not involving a claim for protection from refoulement. The first section of this chapter will be an introduction to the ECHR itself and the role of the European Court and other bodies of the Council of Europe in its implementation and enforcement. Section 2 will outline to whom the States parties to the Convention have an obligation to afford protection from refoulement. Particular attention will be devoted to the extra-territorial scope of the Convention. In section 3 the material content and scope of the prohibition of refoulement under Article 3 of the Convention will be analysed. The key elements of this analysis will be the prohibited conduct (torture and other forms of inhuman or degrading treatment or punishment), the element of risk involved in the prohibition on refoulement and the absolute character of the prohibition. In section 4 the character of the obligations on States parties deriving from the prohibition on refoulement under Article 3 of the Convention will be analysed. Finally, in section 5, I will discuss the extent to which other provisions of the Convention also entail a prohibition on refoulement.

3.1.2 Brief introduction to the European Convention on Human Rights[9]

3.1.2.1 Object and purpose

The ECHR was adopted by the Council of Europe on 4 November 1950 in Rome and entered into force on 3 September 1953. According to the preamble, the Convention was a first step towards collective enforcement of certain rights set out in the Universal Declaration of Human Rights (UDHR). The preamble reaffirms the profound belief of the Member States of the Council of Europe in fundamental freedoms and the common understanding and observance of human rights. The Convention was signed over half a century ago, adopted by only a small number – ten – of the current 47 States parties (August 2008), establishing human rights in broad and general terms and with the object and purpose of protecting human rights. The Convention contains clear individual human rights and correlative obligations on States parties which are

9 For a comprehensive analysis of the ECHR see: Van Dijk & Van Hoof et al 2006, Jacobs & White 1996, Harris, O'Boyle & Warbrick 1995, and, in Dutch: Lanotte & Haeck 2004, Lanotte & Haeck 2004-2 and Lanotte & Haeck 2005.

of an objective nature and protect the fundamental rights of individuals rather than the interests of Contracting States.[10] According to the ECtHR:

> 'unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement"'.[11]

All Member States of the Council of Europe are parties to the Convention. Given the large number of States parties, the long history of the Convention, the impressive case law and the binding nature of the judgments of the ECtHR, the Convention is a very, if not the most, important human rights instrument in Europe. According to the ECtHR the Convention is the 'constitutional instrument of the European public order'.[12]

3.1.2.2 Content and structure

The ECHR initially contained a limited number of civil and political rights: the right to life (Article 2), the prohibition on torture and other forms of ill-treatment (Article 3), the prohibition on slavery and forced labour (Article 4), the right to liberty and security (Article 5), the right to a fair trial (Article 6), the prohibition on punishment without law (Article 7), the right to respect for private and family life (Article 8), the freedom of thought, conscience and religion (Article 9), the freedom of expression (Article 10), the freedom of assembly and association (Article 11), the right to marry (Article 12), the right to an effective remedy (Article 13) and the right to enjoy the rights and freedoms of the Convention without discrimination (Article 14). In later years additional Protocols extending the number of rights protected under the Convention were adopted. The First Protocol, adopted in 1952, includes the protection of property (Article 1), the right to education (Article 2) and the right to free elections (Article 3). The Fourth, adopted in 1963, includes the prohibition on imprisonment for debt (Article 1), the freedom of movement (Article 2), the prohibition on the expulsion of nationals (Article 3) and the prohibition on the collective expulsion of aliens (Article 4). The Sixth Protocol, adopted in 1983, provides for the abolition of the death penalty, except for crimes committed in times of war or an imminent threat thereof. The Seventh Protocol, adopted in 1984, includes procedural safeguards for the expulsion of lawful aliens (Article 1), the right to appeal in criminal matters (Article 2), the right of compensation for wrongful conviction (Article 3), the right not to be tried or punished twice (Article 4) and equality between spouses (Article 5). The Twelfth Protocol, adopted in 2000, provides for a general prohibition on discrimination. And, finally, the Thirteenth Protocol, adopted in 2002, provides for an absolute abolition

10 Orakhelashvili 2003, p. 531.
11 ECtHR, *Ireland v United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 239.
12 ECtHR, *Loizidou v Turkey*, 23 March 1995, Appl. No. 15318/89 (preliminary objections), para. 93.

of the death penalty. Other Protocols which have been adopted over the years, most importantly the Eleventh, have strengthened the judicial character and efficiency of the implementation machinery. With the adoption of that Protocol in 1994 and its entry into force on 1 November 1998 the monitoring system established under the Convention changed significantly. The old three-tier system, consisting of the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe was replaced by a new system with a new European Court of Human Rights, no European Commission and a limited role for the Committee of Ministers. On 13 May 2004 Protocol No. 14 was adopted. Protocol No. 14 aims to improve the functioning of the control system of the Convention rather than to change its structure. This Protocol has yet – at the time of writing – to enter into force. All Member States of the Council of Europe have signed it. Russia is the only Member State that has not ratified Protocol No. 14.

The ECHR itself consists of 59 Articles, divided into three sections and one general provision in the first Article. Article 1 contains a general obligation on States parties to respect the rights and freedoms listed in section 1 of the Convention. This Article will be analysed in section 3.2 of this book. The substantive provisions of the Convention can be found in section 1 (Articles 2 to 18) of the Convention and in the various Protocols, as mentioned above. Articles 2 to 14 contain the actual rights and freedoms and Articles 15 to 18 provide rules on limitations and restrictions to these rights and freedoms. Section 2 of the Convention (Articles 19 to 51) contains rules regarding the ECtHR and section 3 (Articles 52 to 59) a variety of final treaty clauses.

3.1.2.3 Reservations and declarations

Under Article 57 ECHR States parties may make reservations to their obligations under the Convention and its Protocols, when signing or depositing their instrument of ratification. They may do so in respect of any particular provision of the Convention to the extent that any law then in force in their territory is not in conformity with the provision. Reservations of a general character are not allowed.[13] In addition, Article 4 of Protocol No. 6 prohibits reservations under Article 57 of the Convention in respect of provisions of the Sixth Protocol. This Protocol concerns the abolition of the death penalty. Moreover, according to Article 19(c) of the Vienna Convention on the Law of Treaties reservations are not allowed if they are incompatible with the object and purpose of the Convention (see section 1.2.4). According to Flinterman:

> 'the obligations ensuing from Articles 1 and 13-18 are of such a fundamental importance for the enjoyment of the rights and freedoms laid down in the Convention that restricting them by means of a reservation would be incompatible with the 'object and purpose' of the Convention and consequently must be considered inadmissible'.[14]

13 Article 57(1) of the ECHR.
14 Flinterman 2006, p. 1110.

No State party has made any reservation or declaration regarding Article 3 ECHR.

3.1.3 International sources for interpretation of the European Convention on Human Rights

Various sources are relevant in understanding the scope and content of the European Convention on Human Rights on the international level. These sources emanate from several monitoring organs and institutions. The most important institution for monitoring the implementation and enforcement of the Convention is the European Court of Human Rights. The role of the Court regarding the implementation, enforcement and interpretation of the European Convention will be outlined in section 3.1.3.1. Other organs which have also been given monitoring powers under the European Convention, although to a far lesser extent than the Court, include the Committee of Ministers of the Council of Europe under Article 46(2) of the Convention (section 3.1.3.2) and the Secretary General of the Council of Europe under Article 52 (section 3.1.3.3). Of further significance for the implementation, enforcement and interpretation of the ECHR are the reports of the former European Commission of Human Rights (section 3.1.3.4). I will briefly outline below the institutional role of the Court, the Committee, the Secretary General and the former European Commission regarding monitoring the Convention. Finally, on several occasions in this chapter I refer to the relevant legal instruments developed by the European Union, in particular the EU Qualification Directive. The Qualification Directive provides for minimum common standards accepted by the EU Member States based, in part, on the ECHR.

3.1.3.1 The role of the European Court of Human Rights and the status of its decisions

The European Court of Human Rights is a permanent judicial body established under the Convention to ensure the observance of the obligations undertaken by the States parties in the Convention and the Protocols (Article 19). The Court is independent and impartial and has jurisdiction to decide all matters concerning the interpretation and application of the Convention and its Protocols (Article 32) which are referred to it via inter-State cases (Article 33), individual applications (Article 34) or requests by the Committee of Ministers of the Council of Europe to give an advisory opinion (Article 47). The Court consists of a number of judges equal to the number of States parties (Article 20), who are of high moral character and who either possess the qualifications required for appointment to high judicial office or are jurisconsults of recognised competence. The judges serve in their own personal capacity and do not represent their respective governments (Article 21).

To consider cases brought before it, the Court sits in Committees of three judges, in Chambers of seven judges or in a Grand Chamber of 17 judges (Article 27).[15] Individual complaints submitted under Article 34 of the Convention may be declared inadmissible or struck out of its list without further examination by a Committee (Article 28).[16] If no such decision is taken a Chamber shall decide on the admissibility and merits of an individual complaint (Article 29(1)). Cases raising serious questions affecting the interpretation of the Convention or Protocols, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has delivered its judgment, relinquish jurisdiction in favour of the Grand Chamber unless one of the parties to the case objects (Article 30). Within a period of three months from the date of the Chamber's judgment any party to a case may request that the case be referred to the Grand Chamber. It is the prerogative of the Court to accept such a request which it will do if the case raises a serious question affecting the interpretation or application of the Convention or Protocols, or a serious issue of general importance (Article 43).[17]

The specific and important role the ECtHR plays in providing protection from refoulement in accordance with Article 3 of the Convention will be analysed in detail in section 3.3.2.5.

3.1.3.1a Individual applications

According to Article 34 ECHR, the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the States parties of the rights set out in the Convention or the Protocols (individual application). The importance of the individual complaint procedure becomes clear from the large number of applications which have been lodged under the Convention.[18] In accordance with the criteria laid down in Article 35 ECHR the Court may declare an application to be inadmissible. If the application is admissible the Court will try to secure a friendly settlement between the parties involved (Article 38). If a friendly settlement is reached the Court will decide to strike the case

15 With the adoption of Protocol No. 14 Article 27 will become Article 26 and will be amended as follows: 'to consider cases brought before it, the Court shall sit in a single-judge formation, in Committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges' (Article 6 of Protocol No. 14).

16 With the adoption of Protocol No. 14 Article 28, paragraph 1b, will make it possible for a Committee to declare an application admissible and at the same time deliver a judgment on the merits if the underlying question in the case is already the subject of well-established case law of the Court (Article 8 Protocol No. 14).

17 According to Article 43 ECHR a request for referral to the Grand Chamber or a re-hearing of the case may be made only in exceptional cases, when the case raises a serious question affecting the interpretation or application of the Convention or a serious issue of general importance: see Zwaak 2006, p. 238.

18 In the period from 1955 to 2007 a total of 469,376 applications were submitted to the Court. In 9,031 cases the Court delivered a judgment on the merits: see: ECtHR, *Annual Report 2007*, Strasbourg: Registry of the ECtHR 2008.

out of the list and publish the solution reached (Article 39). In other cases the Court will consider the merits of the application and decide on them by means of a reasoned judgment. The judgment does not necessarily represent the unanimous decision of the judges. A decision can be made by a majority of votes (Rule 23 of the Court's Rules of Procedure).[19] Judges are entitled to deliver separate – concurring or dissenting – opinions (Article 45). If the Court finds a violation of the Convention it may afford just satisfaction to the injured party (Article 41). At any time during the proceedings the Court may decide to strike an application out of its list (Article 37).

The final judgment of the Court is legally binding on the State party to the case (Article 46). Even though in a particular case only the respondent State is obliged to abide by the final judgment of the Court, the judgment is of significant importance to States parties not involved in that particular case. In *Ireland v. the United Kingdom* (1978) the Court considered:

> 'The Court's judgements in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (...)'.[20]

The role of the ECtHR is very significant in interpreting and applying the rights and freedoms of the Convention. Its judgments are binding on the parties concerned (Article 46) and create a precedent.[21]

Every judgment includes a presentation of the facts and the circumstances of the case, an outline of the relevant domestic and international law and considerations regarding the applicable provisions of the Convention, including a summary of the submissions of the parties involved and the assessment of the Court. Finally, the Court states its decisions whether or not the applicable provisions of the Convention have been violated, including the ratio of votes and whether or not just satisfaction should be afforded.

Admissibility decisions include a presentation of the facts and circumstances of the case, the deliberations of the Court on admissibility, the decision and the ratio of votes. In general, the Court's decisions and judgments provide a detailed description of the facts, including its sources, a thorough overview of the applicable laws and sufficient insight into the Court's reasoning. Both documents are a very important source for analysing the prohibition on refoulement contained in Article 3 ECHR and will therefore be extensively described and discussed in this chapter. Unfortunately, in many of its decisions and judgments it remains unclear how the Court has weighed

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19 The Rules of Procedure of the European Court of Human Rights are available via <www.echr.coe.int/eng/Judgments.htm, under 'basic texts'>.

20 ECtHR, *Ireland v United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 154.

21 Note that formally the Court is not bound by its own judgments, but has nevertheless reaffirmed on many occasions its willingness to adhere to its judgments: see Van de Lanotte & Haeck 2005, p. 731, Lawson 2000, pp. 15-16.

the various facts and circumstances involved, making it difficult to conclude how and why the Court came to its conclusion.[22]

3.1.3.1b Inter-State cases

According to Article 33 ECHR any State party may refer to the Court an alleged breach of the Convention or Protocols by any other State party (inter-State cases). Inter-State cases are rare and their significance is far less than that of individual applications.[23] For example, up to January 2006 only 19 State applications had been lodged, relating to only six situations in different States.[24] Only three of these 19 applications were considered by the ECtHR. Most important for this study were *Ireland v the United Kingdom* (1978) because it involved a complaint under Article 3 and *Cyprus v Turkey* (2001) involving Article 1 ECHR.[25] Other inter-State cases stranded with the former European Commission of Human Rights or the Committee of Ministers of the Council of Europe.

3.1.3.1c Advisory opinions

Under Article 47 ECHR the Court may, at the request of the Committee of Ministers, give advisory opinions on legal issues concerning the interpretation of the Convention and Protocols. The significance of this jurisdiction is greatly diminished by Article 47(2) of the Convention, according to which advisory opinions are not to deal with questions relating to the scope and content of the rights and freedoms of the Convention and Protocols.[26] The advisory jurisdiction of the Court has no relevance for this study.

3.1.3.2 The role of the Committee of Ministers of the Council of Europe

The Committee of Ministers was set up not by the European Convention on Human Rights, but by the Statute of the Council of Europe. The Committee is the policy-making and executive organ of the Council of Europe, made up of the (representatives of the) governments of the Member States of the Council of Europe. The main task

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22 When quoting from the Court's admissibility decisions I will – in most cases – be unable to refer to any particular paragraph because, unlike in its judgments, the Court does not structure most of its admissibility decisions in numbered paragraphs. Notable exceptions to this include the Court's (in)admissibility decisions in ECtHR, *Bankovic et al v Belgium and 16 other Contracting States*, 12 December 2001, Appl. No. 52207/99 (admissibility decision) and ECtHR, *Al-Moayad v Germany*, 20 February 2007, Appl. No. 35865/03.

23 ECtHR, *Survey of Activities 2007*, Strasbourg: Registry of the ECtHR 2008, p. 1 (para. 3). According to Prebensen other reasons are the substance of the issues raised and the identity of the States involved. Nevertheless, he argues that inter-State applications can play an important part in enforcing the Convention especially in cases of widespread human rights violations: Prebensen 2001, p. 538, 543-549.

24 Zwaak 2006, p. 50.

25 ECtHR, *Ireland v United Kingdom*, 18 January 1978, App. No. 5310/71. ECtHR, *Cyprus v Turkey*, 10 May 2001, App. No. 25781/94.

26 Zwaak 2006, p. 287.

of the Committee is to pursue the Council's aim, which is to 'achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress' (Article 1(a) of the Statute of the Council of Europe), including 'the maintenance and further realisation of human rights and fundamental freedoms' (Article 1(b) of the Statute of the Council of Europe).[27] As a result, the Committee adopted the European Convention on Human Rights and additional Protocols in accordance with Article 15(a) of the Statute.

Under Article 15(b) of the Statute the Committee may adopt recommendations to further the aim of the Council of Europe. Over the years a large number of recommendations have been adopted, many of which relate to the Convention.[28] These recommendations may provide an important source of information regarding the interpretation of the Convention. Although they are not legally binding,[29] they do represent a certain consensus among the States parties to the Convention on its interpretation and application and therefore should be regarded as a primary source of treaty interpretation in accordance with Article 31 of the Vienna Convention on the Law of Treaties (see section 1.2.1).[30] The importance of these recommendations is further strengthened by the fact that 'the Committee may request the governments of members to inform it of the action taken by them with regard to such recommendations' (Article 15(b) of the Statute of the Council of Europe). Notwithstanding the importance of the Committee's recommendations their relevance to the prohibtion on refoulement contained in Article 3 ECHR is limited, because they are not relevant for Article 3 or because they are of only a general nature. On only very few occasions in this chapter will I refer to such recommendations.

Under the ECHR the Committee of Ministers has been given the competence to supervise the execution of the judgments of the Court (Article 46(2)). After the Court

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27 For more info on the role of the Committee of Ministers of the Council of Europe see ibid., pp. 291-321.

28 Of particular relevance to this study are: Council of Europe, Committee of Ministers, Rec(94)5E, 21 June 1994 *on guidelines to inspire practices of the Member States of the Council of Europe concerning the arrival of asylum-seekers at European airports,* Council of Europe, Committee of Ministers, Rec(97)22E, 27 November 1997 *containing guidelines on the application of the safe third country concept,* Council of Europe, Committee of Ministers, Rec(98)13E, 18 September 1998 *on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the ECHR,* Council of Europe, Committee of Ministers, Rec(98)15E, 15 December 1998 *on the training of officials who first come into contact with asylum seekers, in particular at border points,* Council of Europe, Committee of Ministers, Rec(99)12E, 18 May 1999 *on the return of rejected asylum-seekers,* and Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism*, CM/Del/Dec(2002)804/4.3/appendix3E, 11 July 2002.

29 Van der Velde 1997, p. 117.

30 In accordance with Article 20(a) of the Statute of the Council of Europe adopting a recommendation under Article 15(b) of the Statute requires unanimity among the representatives casting a vote, and a majority of the representatives entitled to sit on the Committee. However, at their 519 bis meeting (November 1994) the Ministers' Deputies decided to make their voting procedure more flexible and made a "Gentlemen's agreement" not to apply the unanimity rule to recommendations.

has issued a judgment the Committee will be informed of the fact. The Committee will put the case on its agenda and will invite the State party concerned to inform it of the measures taken in accordance with the judgment. A statement by the Committee on the measures taken by the State party is published as a resolution. In most cases a violation is accepted by the respondent State party without resistance and no further measures need to be taken.[31]

Under the 'old' Convention the Committee was also given the competence to decide whether there had been a violation of the Convention by a State party where the complaint had not been considered by the Court. With the entry into force of the Eleventh Protocol this competence was revoked.

3.1.3.3 The role of the Secretary General of the Council of Europe

The organs of the Council of Europe, i.e. the Committee of Ministers and the Consultative Assembly, are served by the Secretariat of the Council of Europe, including a Secretary General (Article 10 of the Statute of the Council of Europe).[32] Under Article 52 of the European Convention on Human Rights the Secretary General may request any State party to furnish an explanation of the manner in which its internal law ensures the effective implementation of the Convention.[33] The Secretary General has full autonomy and discretion to make such a request. This mechanism can, to some extent, be compared with the reporting mechanisms established under the various United Nations human rights treaties. There are, however, significant differences. First, this is not a regularly used mechanism. It is initiated only at the request of the Secretary General. Furthermore, it is not followed by a concluding observations report or a general comment. The information requested is simply compiled and then published. If the Secretary General makes a request the States parties have a duty to provide the information sought. If a State party fails to comply, the Secretary General has no power to enforce his request.[34]

Article 52 ECHR has no relevance for the prohibition on refoulement contained in Article 3.

3.1.3.4 The role of the former European Commission of Human Rights

With the entry into force of the Eleventh Protocol to the Convention on 1 November 1998 the European Commission of Human Rights ceased to exist. Under the 'old' Convention the Commission provided the initial stage at which an (individual) application had to be lodged. It decided first on its competence to receive the application

31 Sundberg 2001, pp. 564-565.

32 For more information see Schokkenbroek 2006, pp. 323-332.

33 Ibid., p. 326. Van der Velde 1997, pp. 142-150.

34 In 1983 a request was made, inter alia, regarding the implementation in municipal law of Article 3 of the Convention. This request did not concern the scope and content of the prohibition on refoulement on the international level and is therefore not relevant for this study.

and on the rules of admissibility. If the Commission considered itself to be competent and the application admissible, it tried to broker a friendly settlement. If no settlement could be reached the Commission would consider the merits of the case in a non-binding report. The case would then be referred to either the Committee of Ministers of the Council of Europe or to the European Court of Human Rights.

The number of members of the Commission was equal to the number of States parties. The members would sit in their own individual capacity. Importantly, the Commission had great freedom to conduct the examination of the case as it saw fit and to make an inquiry on the spot. The Commission's examination and possible fact-finding inquiries often formed the basis for the Court's examination of the case. The Court, however, was not bound by the Commission's examination of the facts or its conclusion. The role of the Commission in the proceedings before the Court is best described as that of an independent and impartial advisory organ.[35]

In my analysis of the prohibition on refoulement contained in Article 3 ECHR I will refer to reports of the Commission on only a few occasions when they illustrate the issues being discussed.

3.1.4 Rules of interpretation of the European Convention on Human Rights

The general rules of treaty interpretation laid down in the Vienna Convention on the Law of Treaties, and explained in section 1.2.1 are applicable to the European Convention on Human Rights. The European Court has declared its willingness to be guided by the Vienna Convention and places great emphasis on the text, context and object and purpose of the European Convention.[36] To understand the prohibition on refoulement as analysed in this chapter it is important to understand some of the characteristics of interpreting the ECHR.

Of particular importance is the fact that the ECHR is a 'living instrument', to be interpreted in the light of present-day conditions.[37] The Convention calls for a dynamic or evolutive interpretation, reflecting social changes and taking into account contemporary realities and attitudes.[38] In *Selmouni v France* (1999), for example, the Court explicitly applied an evolutive interpretation as it stated 'that certain acts which were classified in the past as inhuman and degrading treatment as opposed

35 Van Dijk & Van Hoof et al 1998, p. 225.

36 ECtHR, *Golder v United Kingdom*, 21 February 1975, Appl. No. 4451/70, para. 29. Note that the Vienna Convention on the Law of Treaties had not yet entered into force at the time of this judgement, but that the Court considered Articles 31 to 33 of the Vienna Convention to state generally accepted principles of international law.

37 ECtHR, *Tyrer v United Kingdom*, 25 April 1978, Appl. no. 5856/72, para. 31. See also ECtHR, *Marckx v Belgium*, 13 June 1979, Appl. No. 6833/74, para. 41, in which the Court explicitly considered the continuing evolution of the domestic law of the Member States of the Council of Europe; ECtHR, V. *v United Kingdom*, 16 December 1999, Appl. No. 24888/94, para. 72; ECtHR, *T. v United Kingdom*, 16 December 1999, Appl. No. 24724/94, para. 70.

38 Van Dijk & Van Hoof et al 1998, p. 77. Bernhardt 1999, p. 18.

to torture could be classified differently in future'.[39] Obviously, a dynamic or evolutive interpretation reduces the relevance of the travaux préparatoires to the Convention as a supplementary source of interpretation.[40] The principle of evolutive interpretation does not go so far as to include the creation of new rights and obligations, even though ambiguity remains on where treaty interpretation ends and treaty amendment begins.[41]

Another important characteristic of the interpretation of the Convention is the principle of effectiveness, as already explained in section 1.2.1.1, implying that the Convention should be interpreted and applied so as to make its safeguards practical and effective.[42] The focus of the interpretation and application of the rights in the ECHR should be on making the enjoyment of human rights a realistic possibility for individuals. The principle of effectiveness has often been the basis for the Court's interpretation.[43]

In line with the principle of effectiveness, the ECHR calls for a liberal or progressive interpretation of rights and a narrow interpretation of restrictions (see for further explanation section 1.2.1.2). In *Wemhoff v the Federal Republic of Germany* (1968) the ECtHR held that it was 'necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties'.[44] This may seem contrary to the proportionality principle, which implies the need to strike a fair balance between the demands of the community and the requirements of the individual rights. It is true that the proportionality principle is a general principle entangled in the Convention system. However, it is applicable only to situations where it is called for, for example regarding the restriction clauses in the second paragraphs of Articles 8 to 11 (restrictions must be necessary in a democratic society), the non-discrimination guarantee of Article 14, the protection of property rights under Article 1 of the First Protocol and the state of emergency measures in Article 15.[45] The proportionality principle does not imply a fair balance between the demands of the community (for example, national security reasons) and the requirements of individual rights when it concerns rights with an absolute character which cannot be restricted, for example the prohibition on refoulement, as will be explained in section 3.3.3.[46] This was acknowledged by the Court in *Chahal v the United Kingdom* (1996) and emphasised in its unanimous judgment in *Saadi v Italy*

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39 ECtHR, *Selmouni v France*, 28 July 1999, Appl. No. 25803/94, para. 101.
40 Jacobs &. White 1996, p. 33. Orakhelashvili 2003, p. 537.
41 Van Dijk & Van Hoof et al 1998, pp. 79-80.
42 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 87. Van Dijk & Van Hoof et al 1998, p. 74. Jacobs &. White 1996, p. 35.
43 ECtHR, *Airey v Ireland*, 9 October 1979, Appl. No. 6289/73 (legal aid). ECtHR, *Marckx v Belgium*, 13 June 1979, Appl. No. 6833/74 (family life). ECtHR, *Plattform Arzte fur das Leben v Austria*, 21 June1988, Appl. No. 10126/82 (freedom of assembly). ECtHR, *Klass and Others v [Federal Republic of] Germany*, 6 September 1978, Appl. No. 5029/71 (victim requirement).
44 ECtHR, *Wemhoff v [Federal Republic of] Germany*, 27 June 1968, Appl. No. 2122/64, para. 8.
45 Van Dijk & Van Hoof et al 1998, p. 81.
46 Ibid., p. 82.

(2008).[47] Notable exceptions are refoulement cases where the future harm emanates from a naturally occuring illness and the lack of sufficient resources to deal with it in the country of origin, rather than from intentional acts or omissions of public authorities or non-State bodies (see section 3.3.2.3). In *N. v the United Kingdom* (2008) the Court considered that:

> 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[48]

With reference to the Court's judgment in *Saadi* this statement was strongly criticised by Judges Tulkens, Bonello and Spielmann in their dissenting opinion. They considered:

> 'Even though certain "proportionalist errings", severly criticised in legal writings, existed at one time, particularly in the case-law of the old Commission, the balancing exercise in the context of Article 3 was clearly rejected by the Court in its recent Saadi v Italy judgment of 28 February 2008, confirming the Chahal judgment of 15 November 1996 (…)'.[49]

Likewise, there is no margin of appreciation or room for discretion in the interpretation and application by the States parties of the absolute rights contained in the Convention.[50] Again, this will be further discussed in section 3.3.3.

A final important means of interpretation, referred to as a primary means of treaty interpretation in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, is relevant rules of international law on the same subject matter. Article 53 of the European Convention provides that its provisions may not be applied in a way that is inconsistent with other international obligations of the States parties. On many occasions and regarding many issues, the European Court has referred to other human rights treaties, both those with a global scope and regional human rights treaties. Of particular relevance for this study is the Court's repeated reference to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Refugee Convention.

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47 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 81, considering that it should not be inferred from the Court's remarks in *Soering v United Kingdom* (ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 89) that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged: ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, paras. 139 and 140.

48 ECtHR, *N. v United Kingdom*, 27 May 2008, Appl. No. 26565/05, para. 44.

49 Ibid., Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, para. 7. See also section 3.3.3.

50 Van Dijk & Van Hoof et al, 1998, p. 86.

3.2 Personal and (extra-)territorial scope of the European Convention on Human Rights, in particular with respect to the prohibition on refoulement

The responsibility of States parties to the European Convention on Human Rights to protect individuals from refoulement is determined not just by its Article 3 but also by Article 1. According to Article 1 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. This Article regulates to whom a State party is responsible for the protection of the rights and freedoms listed in the Convention. In other words it determines the personal and territorial scope of the Convention. In this section I will analyse who is entitled to protection under the Convention, first by analysing the word 'everyone' and looking at whether or not this entails a limitation as to the legal status of the person (section 3.2.1), and, secondly, by analysing the word 'jurisdiction' and looking at whether or not this entails a territorial limitation (section 3.2.2). In section 3.2.3 I will discuss the relevance of the territorial and extra-territorial scope of the Convention for the protection from refoulement under its Article 3.

3.2.1 Personal scope

The word 'everyone' in Article 1 of the Convention implies that no limitation as to the protected person's nationality or legal status may be applied. The protection of the European Convention is not limited to nationals of one or all States parties, but is guaranteed to all individuals, including stateless persons and illegal aliens.[51] For example, in *D. v the United Kingdom* (1997), the Court considered that:

> 'Regardless of whether or not he [the applicant] ever entered the United Kingdom in the technical sense ... it is to be noted that he has been physically present there and thus within the jurisdiction of the respondent State within the meaning of Article 1 of the Convention'.[52]

The European Court and former European Commission have repeatedly considered that the responsibility of a State party extends to all persons 'under its actual authority or responsibility', and therefore does not allow any limitation as to the nationality

51 Ibid., p. 3. Jacobs & White 1996, p. 22. See also ECtHR, *Siliadin v France*, 26 July 2005, Appl. No. 73316/01, in which an illegal alien was guaranteed protection against slavery and servitude under the Convention (Article 4).

52 ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. no. 30240/96, para. 48.

or legal status of the person concerned.[53] Furthermore, the text of Article 3 ECHR does not limit the personal scope of that particular prohibition.

3.2.2 Territorial and extra-territorial scope of the European Convention on Human Rights

The only limitation on the scope of the responsibility of the States parties to ensure the rights and freedoms of the Convention is provided by the phrase 'everyone within their jurisdiction' in Article 1 of the Convention, in which the key to analysing the scope of the Convention is determined by the word 'jurisdiction'. States parties have the responsibility to safeguard the rights of the Convention to everyone who is within their jurisdiction. The word 'jurisdiction' in Article 1 of the Convention, however, determines the responsibility of a State towards an individual, irrespective of whether or not the State's conduct is lawful. Its function is to ensure that breaches of the Convention are duly attributed to the relevant State party, and that therefore responsibility is assumed and remedies implemented. If a person is present within the territory of a State party the individual is within the jurisdiction of the State party, and that State party has therefore a responsibility to safeguard the rights and freedoms in accordance with the Convention (see section 3.2.2.1). If a person is not present within the territory of a State party the responsibility of that State party to safeguard the rights and freedoms of the Convention can still be engaged by reason of the State's extra-territorial conduct by which the individual is under its actual control, and consequently he is within the jurisdiction of the State party (see section 3.2.2.2).

3.2.2.1 Territorial scope

A State is primarily responsible for securing the rights and freedoms of the European Convention for those present within its territory,[54] irrespective of where they are within the territory and what legal status they have (see section 3.2.1). In accordance with Article 56 ECHR the territorial scope of the Convention is extended to those territories not being part of the State but for the international relations of which the State in question is responsible, provided it has agreed to this extension. For example,

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53 EComHR, *Stocké v [Federal Republic of] Germany*, 12 October 1989, Appl. No. 11755/85, para. 166. See also EComHR, *X. v [Federal Republic of] Germany*, 25 September 1965, Appl. No. 1611/62 and ECtHR, *Drozd and Janousek v France and Spain*, 26 June 1992, Appl. No. 12747/87, para. 91. See also Boeles 1990, p. 707. Lawson 1999-2, p. 251. Van der Velde 1997, p. 166.

54 According to Article 29 of the Vienna Convention on the Law of Treaties a treaty is binding upon each party in respect of its entire territory unless a different intention appears from the treaty or is otherwise established. What should be considered the territory of a State under international law is outlined in section 1.2.3.2.

such declarations have in the past been made with respect to Greenland by Denmark and with respect to Suriname and the Netherlands Antilles by the Netherlands.[55]

The territorial scope of the Convention cannot in general be limited through a formal reservation made under Article 57 ECHR. This Article allows reservations in respect of any particular provision of the Convention, but does not permit reservations of a general character or those which are incompatible with the object and purpose of the Convention.[56] In *Ilascu and Others v Moldova and the Russian Federation* (admissibility decision, 2001), Moldova had made the following declaration:

> 'The Republic of Moldova declares that it will be unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed Trans-Dniester republic within the territory actually controlled by such organs, until the conflict in the region is finally definitively resolved'.[57]

The Court considered 'that the declaration in question is of general scope, unlimited as to the provisions of the Convention but limited in space and time, whose effect would be that persons on that "territory" would be wholly deprived of the protection of the Convention for an indefinite period' and deemed it invalid.[58] In fact in its judgment on the merits the Court considered:

> 'that where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining de facto situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State'.[59]

The fact that the territorial scope of the Convention is not limited because of difficulties the State may encounter in securing compliance with the Convention in certain areas of its territory was also considered in *Assanidze v Georgia* (2004).[60] When, of course, a State has practical problems in ensuring the rights and freedoms of the Convention because of foreign occupation the reach of the State's actual responsibil-

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55 Suriname became independent in 1975 and the declaration with respect to Netherlands Antilles has been withdrawn: see Zwaak 2006, p. 18.

56 Section 3.1.2.3. Flinterman 2006, p. 1110.

57 Reservations and declarations made to any treaty of the Council of Europe, including the European Convention on Human Rights and the declaration made by Moldova, can be found via <conventions.coe.int>.

58 ECtHR, *Ilascu and Others v Moldova and the Russian Federation*, 4 July 2001, Appl. No. 48787/99 (admissibility decision).

59 Ibid., para. 333.

60 ECtHR, *Assanidze v Georgia*, 8 April 2004, Appl. No. 71503/01, para. 147 (and 146) in which the Court considered that: 'despite the malfunctioning of parts of the State machinery in Georgia and the existence of territories with special status, the Ajarian Autonomous Republic is in law subject to the control of the Georgian State'.

ities may be limited. In *Ilascu* the Court acknowledged the possibility of a reduced responsibility.[61]

It can be concluded from the Court's case law that, when it comes to territorial jurisdiction, the Court is applying some form of flexibility.[62] In principle, the State is responsible for ensuring all the rights and freedoms of the Convention for those present within its territory. Such responsibility will be limited only if the State has no de facto control over its own territory. To what extent a State's responsibility will then be limited is beyond the scope of this research.[63]

Finally, it must be noted that the territorial scope is not limited by the creation of international or transit zones, for example, at airports. These zones, both under general international public law and under the ECHR, remain part of the territory of the State.[64]

3.2.2.2 Extra-territorial scope

If a person is not present within the territory of a State party he can still be within the jurisdiction of the State party, engaging its responsibility to ensure the rights and freedoms of the Convention. Extra-territorial jurisdiction is determined by conduct of the State party through which the individual comes under the actual – de facto – control of the State and by which his rights and freedoms are affected. According to Lawson, control entails responsibility or control obliges responsibility.[65] It would of course go too far to assume that everyone who is affected by the conduct of a State party would be within the jurisdiction of that State party.[66] As Lawson puts it, 'a decision to cut development aid or to reduce quota for imports would then suffice to bring indeterminate numbers of people within the jurisdiction'. On the other hand, as Lawson continues:

> 'it would be too restrictive to require a formal legal relationship or some kind of structured relationship existing over a period of time, between the State organ acting abroad and the individuals concerned. This would unjustifiably exclude State accountability in situations of de facto control'.[67]

But what then is required? There needs to be conduct, either an act or omission, which is attributable to the State, affecting a person's individual rights and freedoms under the Convention and thereby bringing the individual and his rights and freedoms under the control of the State. A State is responsible in so far as its conduct affects the

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61 ECtHR, *Ilascu and Others v Moldova and the Russian Federation*, 8 July 2004, Appl. No. 48787/99, para. 333.
62 Gondek 2005, p. 369.
63 For more information on this topic see ibid., pp. 369 and 370.
64 ECtHR, *Amuur v France*, 25 June 1996, Appl. No. 19776/92, para. 52.
65 Lawson 1999-2, p. 256 (para. 6.5.6.4). Lawson 2004, p. 86.
66 Spijkerboer & Vermeulen 2005, p. 82.
67 Lawson 2002, p. 294.

individual and his rights, and establishes actual control. No impossible or disproportionate burden should be imposed on the State. Depending on the situation and the conduct involved it should be determined what rights and freedoms of the Convention can be protected and what the contents of the State obligations is deriving from these rights and freedoms.[68] In that sense, the concept of extra-territorial jurisdiction is as flexible as with regard to territorial jurisdiction explained above.

In the analysis of the case law of the European Court and former European Commission of Human Rights two situations establishing extraterritorial jurisdiction can be distinguished. First, the situation in which the State party exercises effective overall control over a foreign territory affecting the entire range of substantive rights set out in the Convention of all persons present within the foreign territory, and, secondly, the situation where agents of the State party exercise de facto control over a person in a more incidental way, so that the State has to ensure the rights and freedoms to the extent that they affect the person(s) involved.[69] Both situations will be analysed below.

3.2.2.2a Effective overall control over foreign territory

As already explained in section 1.2.3.3a, effective overall control over foreign territory engages responsibility for the protection of the human rights of all people present within that territory. Within the context of the ECHR this was first determined by the Court in *Loizidou v Turkey* (1996).[70] In this case the Court needed to examine whether Turkey could be held responsible for conduct of the administration of the Turkish Republic of Northern Cyprus (TRNC). The Court considered that Turkey was responsible as it exercised effective control over the TRNC through its armed forces which were still engaged in active duties. Furthermore, the Court considered in general terms that 'the obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration'.[71] This consideration was confirmed by the Court in *Cyprus v Turkey* (2001), in which the Court considered that:

> 'Having effective control over northern Cyprus, its [i.e. Turkey] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be

68 Ibid., pp. 295-296.

69 Ibid., pp. 296-297. See also Gondek 2005, pp. 354 and 355. Gondek introduces a situation involving the prohibition on refoulement as a distinctive third situation as it involves elements of extra-territoriality. He rightly points out, however, that such situations are, strictly speaking, not extra-territorial cases.

70 ECtHR, *Loizidou v Turkey*, 18 December 1996, Appl. No. 15318/89.

71 Ibid., para. 52; see also ECtHR, *Loizidou v Turkey*, 23 March 1995, Appl. No. 15318/89(preliminary objections), para. 62.

> engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support'.[72]

And in its admissibility decision in *Bankovic and Others v Belgium and 16 other States* (2001) the Court made it clear that effective control over a foreign territory as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercising all or some of the public powers normally to be exercised by that government, engages the responsibility of the State.[73] The responsibility of the State to ensure rights and freedoms because it exercises effective overall control over a foreign territory literally implies overall control to the extent the territory can be regarded as de facto belonging to the State. In the *Bankovic* case the Court considered that the bombing by NATO of radio and television facilities in Belgrade in April 1999 during the Kosovo campaign, in which 16 people were killed and another 16 seriously injured, did not constitute effective overall control, even though it could be argued that NATO controlled Serbian airspace. This approach also becomes clear from *Assanidze v Georgia* (2004), in which the Court considered that:

> 'in addition to the State territory proper, territorial jurisdiction extends to any area which, at the time of the alleged violation is under the "overall control" of the State concerned …, notably occupied territories …, to the exclusion of territories outside such control'.[74]

And finally, in *Issa and Others v Turkey* (2004) the Court further specified the concept of effective overall control of a foreign territory, implying that it should involve a sufficient number of troops or other personnel for which the State is responsible, they should be stationed and spread out over the whole territory, conducting constant patrols and controlling the main lines of communication in and out of the territory, which is somehow clearly demarcated.[75] The Court compared this situation with the involvement of Turkey in northern Cyprus, which it had assessed in *Loizidou v Turkey* (preliminary objections, 1995 and merits, 1996) and *Cyprus v Turkey* (2001),[76] and concluded that it differed from that situation because, even though both situations involved similar numbers of Turkish troops, approximately 30,0000, in northern Cyprus

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72 ECtHR, *Cyprus v Turkey*, 10 May 2001, Appl. No. 25781/94, para. 77. See also ECtHR, *Djavit An v Turkey*, 20 February 2003, Appl. No. 20652/92, paras. 18-23.

73 ECtHR, *Bankovic et al v Belgium and 16 other Contracting States*, 12 December 2001, Appl. No. 52207/99 (admissibility decision), para. 71.

74 ECtHR, *Assanidze v Georgia*, 8 April 2004, Appl. No. 71503/01, para. 138. Occupied territories are de jure not part of the State's territory and therefore, strictly speaking, territorial jurisdiction cannot be assumed. Nevertheless, the Court does so for the first time in this case, probably because de facto occupied territories can be regarded as part of a State's territory and because overall control implies that the State is responsible for the whole range of rights and freedoms of the Convention.

75 ECtHR, *Issa and Others v Turkey*, 16 November 2004, Appl. No. 31821/96, para. 75.

76 ECtHR, *Loizidou v Turkey*, 23 March 1995, Appl. No. 15318/89 (preliminary objections); ECtHR, *Loizidou v Turkey*, 18 December 1996, Appl. No. 15318/89 (merits). ECtHR; *Cyprus v Turkey*, 10 May 2001, Appl. No. 25781/94.

they were stationed throughout the whole territory, where they constantly patrolled the whole territory and had check points on all main lines of communication between the northern and southern part of Cyprus.[77]

What becomes clear from the Court's case law is that effective overall control by a State party of a foreign territory should involve actual and constant control over the whole of a demarcated territory to the extent that it establishes a form of extended de facto territorial jurisdiction.

3.2.2.2b Attribution of conduct to the State and control over a person and his rights

Where effective overall control over foreign territory engages the responsibility to ensure the complete set of rights and freedoms under the Convention, extra-territorial jurisdiction can also be engaged more or less incidentally in situations not involving any form of occupation or effective overall territorial control, but because of conduct which has produced effects or was performed outside the State's territory.[78] The attribution of extra-territorial conduct implies that certain conduct can be attributed to the State, affecting one or more human rights of an individual, to the extent that the individual (and not a territory) is under the actual – de facto – control or authority of the State.[79] The State must then ensure the rights and freedoms of the Convention which have been affected to the extent that it is able to do so. Three elements are essential for this concept of extra-territorial responsibility: first, the attribution of conduct; secondly, the actual – de facto – control or authority over the person concerned; and, thirdly, the effect on one or more human rights.[80] I will first outline the attribution of conduct requirement and then the issue of actual control over a person. The fact that a person's human rights must have been affected will be discussed in section 3.2.3 with respect to the prohibition on refoulement.

For a State party to be responsible for conduct performed or producing effects abroad, the conduct needs to be attributed to the State. The attribution of conduct to a State is already explained in general terms in section 1.2.3.3b. With respect to the European Convention on Human Rights the responsibility of a State party to the Convention for the conduct of its organs became clear from the European Commission's report in *Ireland v the United Kingdom* (1976), in which the Commission considered:

> 'The responsibility of a State under the Convention may arise for acts of all its organs, agents and servants. As in connection with responsibility under international law generally, their rank is immaterial in the sense that in any case their acts are imputed to the State. ... although the State can only incur new obligations through acts 'at the level of the State' by persons duly authorized to bind it (e.g. to conclude a treaty), its existing obligations can be violated also by a person exercising an official function vested in him at any, even the lowest level, without express authorization and even outside or against instructions.

77 ECtHR, *Issa and Others v Turkey*, 16 November 2004, Appl. No. 31821/96, para. 75.
78 Lawson 2002, p. 297.
79 Ibid., pp. 294-295.
80 Lawson 2004, p. 95.

> Responsibility does not necessarily require any 'guilt' on behalf of the State, either in a moral, legal or political meaning, and it does not suggest any 'tolerance' whatsoever of wrongdoing at the 'level of the State'...'.[81]

The European Court confirmed this consideration in its judgment in this case.[82]

The responsibility of the State for acts of private individuals became clear in *Stocké v the Federal Republic of Germany* (1989). The applicant, Mr. Stocké, a German national, was suspected of tax offences and had fled to Switzerland and then France. A private police informer managed under a false pretext to get him back to Germany, where he was arrested. Although in the end the Commission declared that no violation of the Convention had occurred, it did address the issue of extra-territoriality and the responsibility of the State for acts of private persons as it considered that Article 1 of the Convention 'is not limited to the national territory of the High Contracting Party concerned, but extends to all persons under its actual authority and responsibility, whether this authority is exercised on its own territory or abroad'.[83]

The extra-territorial scope of the Convention through the attribution of conduct and control over a person and his rights was considered by the European Commission as early as in *Hess v the United Kingdom* (1975). The Commission considered that under certain circumstances a State party may be responsible under the Convention for the actions of its authorities outside its territory. This case concerned the treatment of Rudolf Hess, a former Nazi leader, who was detained in a prison in Berlin under the supervision of the United Kingdom, France, the Soviet Union and the United States. The Commission decided that the United Kingdom was not responsible since the four Allied Powers had joint authority which could not be divided into four separate jurisdictions.[84] Lawson notes that the Commission might have been swayed by the fact that the United Kingdom, France and the United States were prepared to release Mr. Hess on humanitarian grounds, but the Soviet Union was blocking this, making it impossible for the United Kingdom to change anything on its own and therefore it did not have any real power or authority to bring about the release.[85] Hence, the United Kingdom had no actual – de facto – control or authority. In another example before the European Commission the State party involved had real power. In *W.M. v Denmark* (1992), the Danish ambassador to the former German Democratic Republic handed an East German national over to the local police authorities. The European Commission considered that authorised agents of a State, including diplo-

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81 EComHR, *Ireland v. United Kingdom*, 25 January 1976, Appl. no. 5310/71; Lawson 1999-2, p. 224.

82 ECtHR, *Ireland v United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 159.

83 EComHR, *Stocké v [Federal Republic] of Germany*, 12 October 1989, Appl. No. 11755/85, para.166. See also ECtHR, *Al Moayad v Germany*, 20 February 2007, Appl. No. 35865/03 (admissibility decision), para. 4, where a Yemeni citizen on an undercover mission for the US investigation and prosecution authorities in Yemen convinced the applicant that he could put him in touch with a person abroad who was willing to make a major financial donation (the purpose of which was a matter of dispute). Thereupon, the applicant decided to travel to Germany. See also Lawson 1999-2, p. 228, Lawson 2002, p. 288 and Lawson 2004, pp. 94 and 95.

84 EComHR, *Hess v United Kingdom*, 28 May 1975, Appl. No. 6231/73.

85 Lawson 2002, p. 285. Also Lawson 2004, p. 91.

matic or consular agents, can bring a person within the jurisdiction of the State when its agents exercise authority over that person to the extent that it affects him.

Attribution of extra-territorial conduct and control was first considered by the Court in *Drozd and Janousek v France and Spain* (1992).[86] In this case the applicants complained that their detention in France after conviction by a court in Andorra was in breach of the Convention, for which France and Spain could be held responsible. The Andorran court was made up of French and Spanish judges. The Court acknowledged the extra-territorial scope of the Convention through the attribution of conduct by emphasising that concerning the reach of the word 'jurisdiction' in Article 1 of the Convention the question is 'whether the acts complained of (…) can be attributed to France and Spain or both, even though they were not performed on the territory of those States'.[87] The Court concluded in the end that the acts of the French and Spanish judges sitting in the Andorran court could not be attributed to France or Spain, because the judges were not sitting in their capacity as French or Spanish judges, but were exercising their functions in an autonomous manner and their judgments were not subject to supervision by France or Spain.[88] Irrespective of the outcome of this case, the Court did accept the extra-territorial scope of the Convention through the attribution of conduct and the control over a person and his rights.[89]

A clear acceptance by the Court of attribution of extra-territorial conduct and control over a person and his rights can be found in *Öcalan v Turkey* (2003; Grand Chamber 2005). In this case the applicant was arrested in Kenya by Kenyan officials, handed over to Turkish security officers inside an aircraft located at Nairobi airport and flown to Turkey. According to the Court, directly after the applicant had been handed over by the Kenyan officials to the Turkish officials he was under actual and effective Turkish authority, and therefore within the jurisdiction of Turkey even though the applicant was outside Turkish territory.[90] The fact that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey is not a necessary requirement for concluding that extra-territorial jurisdiction existed. As I will outline below it is not a requirement which has been considered by the Court in other cases.[91]

Another case in which the Court accepted the attribution of extra-territorial conduct and control is *Ilascu and Others v Moldova and Russia* (2004). In this case the Court

86 ECtHR, *Drozd and Janousek v France and Spain*, 26 June 1992, Appl. No 12747/87.

87 Ibid., para. 91.

88 Ibid., para. 96.

89 For a comprehensive analysis of conduct attributable to a State see Lawson 1999-2, para. 6.5, pp. 223-259.

90 ECtHR, *Õcalan v Turkey*, 12 March 2003, Appl. No. 46221/99, para. 93 and ECtHR *Õcalan v Turkey*, 12 May 2005, Appl. No. 46221/99 (Grand Chamber), para. 91.

91 The reason the Court mentioned the fact that the applicant was returned to Turkey is most likely due to the fact that the Court, in particular in its 2003 judgment, wanted to distinguish the *Ocalan* case from the *Bankovic* case (ECtHR, *Bankovic et al v Belgium and 16 other Contracting States*, 12 December 2001, Appl. No. 52207/99 (admissibility decision)), which will be discussed in this setion below. See for an extensive comment on this issue '*Rechtspraak Vreemdelingenrecht*', 2005, no. 1, p. 17.

considered the Russian Federation to be responsible within the meaning of Article 1 ECHR for acts committed in the Transdniestrian region of the Republic of Moldova by Transdniestrian separatists, who were military and politically supported by Russia, and because of the participation of soldiers of the Fourteenth Army of the Russian Federation in the applicants' arrest in the Transdienstrian region.[92]

The attribution of extra-territorial conduct and control was also, in general terms, acknowledged by the Court in *Issa and Others v Turkey* (2004), in which the Court considered that:

> 'moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State. … Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.[93]

Interestingly, the Court, as it did in the abovementioned *Ilascu* case, assessed the facts of the case within the context both of effective overall control over a foreign territory and of attribution of extra-territorial conduct. The Court concluded that neither did Turkey have effective overall control over northern Iraq nor could the killings of the applicants' family members be attributed to Turkey.[94] I have already explained above the reasons why the Court concluded that Turkey did not have effective overall control over northern Iraq. With respect to the attribution of the killings to Turkey, the Court concluded that it had not been proved beyond reasonable doubt that Turkey was involved, even though the applicants had presented accounts of various threatening encounters with Turkish soldiers in the area and at the relevant time. The Court pointed out that, at the time of the killings, the area was also the scene of fierce fighting between PKK militants and KDP peshmergas.[95] As a result, the Court concluded that the applicants were not under the State's authority and control. In sum, it seems that the Court only accepts extra-territorial jurisdiction through the attribution of conduct if the applicant evidently is under the control of the State as for example in the *Öcalan* case.

Another case involving the issue of extra-territorial jurisdiction, and a controversial one, is *Bankovic and Others v Belgium and 16 Other Contracting States* (admissibility decision, 2001).[96] As already mentioned, the *Bankovic* decision concerned the bombing by NATO, involving 17 States parties, of radio and television facilities in Belgrade in April 1999 during the Kosovo campaign, in which 16 people were killed and another

92 ECtHR, *Ilascu and Others v Moldova and Russia*, 8 July 2004, Appl. No. 48787/99, paras. 382-384.
93 ECtHR, *Issa and Others v Turkey*, 16 November 2004, Appl. No. 31821/96, para. 71.
94 Ibid., paras. 75 and 81.
95 Ibid., paras. 77-79.
96 ECtHR, *Bankovic et al v Belgium and 16 other Contracting States*, 12 December 2001, Appl. No. 52207/99 (admissibility decision).

16 seriously injured. The Court had to consider whether or not as a result of the bombing, an extra-territorial act, the applicants and their deceased relatives would fall within the jurisdiction of the States parties. The Court first emphasised the primarily territorial scope of the Convention by referring to the ordinary meaning of the term 'jurisdiction' in international public law, the State practice in this regard, and the travaux préparatoires.[97] The Court then considered the possible extra-territorial scope of the Convention, emphasising its exceptional nature, mainly by referring to the *Loizidou* case and *Cyprus v Turkey* (2001). Extra-territoriality, according to the Court, does not imply that anyone adversely affected by an act imputable to a State party, wherever in the world that act may have been committed or its consequences felt, is subject to the jurisdiction of that Contracting State. The Court rejected the idea that Article 1 ECHR should be applied proportionately to the control exercised.[98] The Court also considered that controlling foreign airspace does not indicate effective control by which jurisdiction is engaged.[99] It considered that in its reasoning in *Cyprus v Turkey* (2001) it:

> 'was conscious of the need to avoid a regrettable vacuum in the system of human rights protection in northern Cyprus. … the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's "effective control" of the territory and by the accompanying inability of the Cypriot Government, as a Contracting State, to fulfil the obligations it had undertaken under the Convention'.[100]

The Court considered that the Convention operates in an:

> 'essentially regional context and notably in the legal space (espace juridique) of the Contracting States. … The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention'.[101]

In the *Bankovic* case the Court restricted the extra-territorial scope of the Convention to exceptional cases in which the State has effective overall control in territories which must have enjoyed the protection of the Convention prior to the military operation.[102] In my opinion, the Court's reasoning in this case is not persuasive. Moreover, the *Bankovic* decision is not in line with the Court's earlier and later case law on the issue of extra-territorial scope of the Convention. Because of the importance that has been,

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97 Ibid., paras. 59-66.
98 Ibid., para. 75.
99 Ibid., para. 76.
100 Ibid., para. 80.
101 Ibid., para. 80.
102 See Alexander Ruth and Mirja Trilsch in their comment on the judgment of the Court in the *Bankovic* case, *AJIL* 2003, p. 171.

and still is, attached to the *Bankovic* case, I will first give a detailed critique of the decision as such in five distinct points.[103] After that I will place the *Bankovic* case in the Court's later jurisprudence on the issue of extra-territoriality.

First, in analysing the meaning of the term 'jurisdiction' in Article 1 ECHR the Court referred to the ordinary meaning of the term in international public law. The term is complex and can be confusing, as outlined in section 1.2.3.3. I agree with Orakhelashvili that in the *Bankovic* case the Court focussed too much on the substantive notion of jurisdiction, i.e. the legal competence of a State to act, rather than the notion of remedial jurisdiction.[104] What is relevant, in my opinion, is whether or not the bombing can be attributed to the States parties and not whether the action was legal. Applying a substantive notion of jurisdiction is at variance with the Court's and Commission's case law on the issue of extra-territoriality, as is clear from all of the abovementioned cases, even though the Court appears to adhere to its previous case law.[105] Secondly, in confirming the ordinary meaning of the term 'jurisdiction' the Court referred to the subsequent practice of States parties, finding this indicative of a lack of any appreciation by the States parties of their extra-territorial responsibility in similar cases. The Court considered that:

> 'although there have been a number of military missions …, no State has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention by making a derogation pursuant to Article 15 of the Convention'.[106]

Arguably, it is hardly conclusive that the fact that States choose not to derogate under Article 15 of the Convention for certain extra-territorial actions necessarily indicates

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103 The critique is largely taken from Orakhelashvili 2003, pp. 529-568, and Alexander Ruth and Mirja Trilsch in their comment on the judgment of the Court in the *Bankovic* case, *AJIL* 2003, pp. 168-172. See also Gondek 2005, pp. 360-367.

104 ECtHR, *Bankovic et al v Belgium and 16 other Contracting States*, 12 December 2001, Appl. No. 52207/99, paras. 59 and 60 (admissibility decision); for example, in para. 59 the Court considered: 'while international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States'; then the Court referred to a variety of legal literature, all concerning the substantive notion of jurisdiction, and in para. 60 the Court said: 'accordingly, for example, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence.… In addition, a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying State in which case it can be found to exercise jurisdiction in that territory, at least in certain respects': see Orakhelashvili 2003, pp. 539-542.

105 ECtHR, *Bankovic et al v Belgium and 16 other Contracting States*, 12 December 2001, Appl. No. 52207/99, para. 71 (admissibility decision), where the Court said: 'in sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional'. See also Orakhelashvili 2003, p. 545. Alexander Ruth and Mirja Trilsch in their comment under the judgment of the Court in the *Bankovic* case, *AJIL* 2003, p. 171.

106 ECtHR, *Bankovic et al v Belgium and 16 other Contracting States*, 12 December 2001, Appl. No. 52207/99, para. 62 (admissibility decision).

that they do not consider themselves to be bound by the Convention in respect of their actions abroad.[107] Furthermore, although referring to subsequent practice of States parties is an important and legitimate tool for the interpretation of treaties, the rules of interpretation require not merely subsequent practice but also that such practice establishes, or is evidence of, an agreement between the States parties regarding the interpretation of the treaty. Reference in the Court's decision to three situations involving extra-territorial military missions hardly suffices, I would argue.[108] Thirdly, the Court looked at the travaux préparatoires to the Convention for further confirmation of the ordinary meaning of the term 'jurisdiction'. Although it is in accordance with Article 32 of the Vienna Convention on the Law of Treaties to use the preparatory works to a Convention as supplementary tools to confirm the ordinary meaning of a term, it appears, however, from the Court's decision that the travaux préparatoires were given too much importance.[109] Although the Court confirmed in the *Bankovic* case that the travaux préparatoires are not decisive, on two occasions the Court attached great weight to them. It did this, first, by arguing that if the drafters of the Convention had wanted to give it greater extra-territorial scope, they could have adopted an identical or similar text to that of the contemporaneous Articles 1 of the four Geneva Conventions of 1949.[110] Secondly, the Court accorded priority to the drafters of the Convention by considering that 'the Convention was not designed to be applied throughout the world'.[111] The emphasis on the travaux préparatoires seems to be incompatible with the Court's case law regarding the interpretation and applica-

107 According to Orakhelashvili, 'it could also mean that the States concerned simply do not expect their action in that specific situation to result in violation of Convention rights' or 'if a State that is engaged in armed conflict outside its territory lodged a formal declaration under Article 15, the public may feel that it really does intend to violate human rights in the course of its operations': Orakhelashvili 2003, p. 542.

108 Rules of treaty interpretation, in particular in this context under Article 31 of the Vienna Convention on the Law of Treaties, were explained in section 1.2.1.

109 As explained in section 1.2.1, the *travaux préparatoires* should be used with great care; their usefulness is marginal and seldom decisive, in particular in interpreting human rights treaties, as they call for a dynamic or evolutive interpretation. And, as already explained in section 3.1.4, this is certainly the case in the interpretation of the ECHR as the Convention is a living instrument which should be interpreted in the light of present day conditions.

110 ECtHR, *Bankovic et al v Belgium and 16 other Contracting States*, 12 December 2001, Appl. No. 52207/99, para. 75 (admissibility decision). Common Article 1 of the four Geneva Conventions of 1949 states: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'. See Altiparmak 2004, p. 232, in which the author argues that the phrase 'in all circumstances' in common Article 1 of the Geneva Conventions is used to emphasize that the application of the conventions does not depend on the character of the conflict and is not relevant to the jurisdiction problem: see also Orakhelashvili 2003, p. 547 and p. 550, in which he argues that in principle both Articles 1 do not differ with respect to the territorial scope of the respective Conventions. In my opinion common Article 1 of the Geneva Conventions provides that the States parties have obligations under the Conventions both in times of armed conflict and peace and does not relate to the territorial application of the Geneva Conventions.

111 ECtHR, *Bankovic et al v Belgium and 16 other Contracting States*, 12 December 2001, Appl. No. 52207/99 (admissibility decision), para. 80. See also Orakhelashvili 2003, p. 547.

tion of Article 1 of the Convention[112] and the supplementary character of the travaux préparatoires. The Court appeared merely to hold, by referring to the travaux préparatoires, that any further analysis was unnecessary.[113] Fourthly, as already mentioned above, the Court seemed to adhere to its previous case law, but a careful reading of the *Bankovic* decision shows that it came to a different conclusion. The Court referred to *Loizidou v Turkey* and *Cyprus v Turkey*, and considered the extra-territorial scope of the Convention to be exceptional, applying only in cases of effective overal control over foreign territory.[114] Neither the *Loizidou* case nor *Cyprus v Turkey* suggests that the extra-territorial scope is limited to situations of effective overall control.[115] Fifthly, according to the European Court the Convention has an essentially regional context.[116] It is true that the ECHR is a regional human rights treaty, i.e. it is open only to European States which are members of the Council of Europe. That fact, however, does not imply a territorial restriction of the Convention with respect to the responsibility of the (European) States parties.[117] Arguably, such limitation should have been explicitly provided in the Convention itself, which is not.[118] The object and purpose of the Convention are effectively to secure human rights for people who are within the States parties's jurisdiction and, therefore, to hold States parties responsible for violations of the Convention wherever they occur. In fact, in the *Loizidou* case the Court explicitly referred to the object and purpose of the Convention when it accepted its extra-territorial scope.[119] Arguably, a regional restriction would be contrary to the object and purpose of the Convention and an accidental turn from previous case law. Such a limitation would unjustifiably exclude State responsibility in situations of de facto control.[120] As Lawson puts it, 'it would be morally wrong and legally unsound if, in the field of human rights, States were allowed to do abroad

112 Orakhelashvili 2003, p. 547.

113 Alexander Ruth and Mirja Trilsch in their comment under the judgment of the Court in the *Bankovic* case, *AJIL* 2003, p. 171.

114 ECtHR, *Bankovic et al v Belgium and 16 other Contracting States*, 12 December 2001, Appl. No. 52207/99, para. 71 (admissibility decision), in which the Court stated that 'only when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government'.

115 For example, ECtHR, *Loizidou v Turkey*, 23 March 1995, Appl. No. 15318/89 (preliminary objections), para. 62, in which the Court stated: 'that, although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties ... the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory …'.

116 ECtHR, *Bankovic et al v Belgium and 16 other Contracting States*, 12 December 2001, Appl. No. 52207/99 (admissibility decision), para. 80, notably in the legal space of the States parties and it was not designed to be applied throughout the world.

117 Orakhelashvili 2003, p. 550.

118 Ibid., p. 550.

119 ECtHR, *Loizidou v Turkey*, 23 March 1995, Appl. No. 15318/89 (preliminary objections), para. 62.

120 Lawson 2002, pp. 294, 297. Orakhelashvili 2003, pp. 538-551.

what they had undertaken not to do at home'.[121] And as the Court considered in *Cyprus v Turkey* (2001), 'any other finding would result in a regrettable vacuum in the system of human-rights protection'.[122]

The deviant nature of the Court's decision in *Bankovic* becomes even clearer when one looks at the Court's judgments in *Öcalan v Turkey* (2003; Grand Chamber 2005), *Ilascu and Others v Moldova and Russia* (2004) and *Issa and Others v Turkey* (2004), all adopted after the *Bankovic* decision.[123] As I have already outlined above, in all these three judgments the Court acknowledged the possibility that a State party would be responsible in accordance with Article 1 ECHR by reason of the attribution of extra-territorial conduct, irrespective of where that conduct took place. One can only speculate why the Court adopted a different approach in *Bankovic*. Perhaps because the *Bankovic* case concerned an armed conflict situation, involving NATO. The Court may have found it difficult and awkward to assess questions relating to the use of force and to decide on the extra-territorial scope and on the specific responsibility of each of the 17 States parties involved.[124] It would be less speculative to say that the *Bankovic* case involved only aerial bombardment without the engagement of ground troops, and that this gave rise to the important question concerning what level of control is sufficient to establish jurdisdiction.[125]

Whatever the reasons may be, the *Bankovic* decision should, in my opinion, not be regarded as setting the standard for interpreting the word 'jurisdiction' in Article 1 ECHR and assessing extra-territorial responsibility under the Convention. In *Bankovic* the Court assessed the facts solely within the context of effective overall control over foreign territory and not within the context of the attribution of extra-territorial conduct and control over a person. From both earlier and later case law it becomes clear, in my opinion, that States parties to the Convention may have an extra-territorial responsibility to ensure the rights and freedoms of the Convention in accordance with Article 1 in two ways: either by having effective overall control over a foreign territory or by way of conduct which is attributable to the State, is performed or produces effects outside the territory of the State, brings the individual concerned under the actual – de facto – control or authority of the State and affects one or more rights ensured by the Convention.

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121 Lawson 2002, p. 289.

122 ECtHR, *Cyprus v Turkey*, 10 May 2001, Appl. No. 25781/94, para. 78.

123 ECtHR, *Õcalan v Turkey*, 12 March 2003, Appl. No. 46221/99 and ECtHR, *Õcalan v Turkey*, 12 March 2005, Appl. No. 46221/99 (Grand Chamber); ECtHR, *Ilascu and Others v Moldova and Russia*, 8 July 2004, Appl. No. 48787/99; ECtHR, *Issa and Others v Turkey*, 16 November 2004, Appl. No. 31821/96. See also, Altiparmak 2004, p. 233.

124 Alexander Ruth and Mirja Trilsch in their comment under the judgment of the Court in the Bankovic case, *AJIL* 2003, p. 172. Orakhelashvili 2003, p. 538. Gondek 2005, p. 356.

125 Gondek 2005, p. 356.

3.2.3 The relevance of the territorial and extra-territorial scope of the Convention for protection from refoulement

Having in section 3.2.2 concluded that the European Convention on Human Rights has both territorial and extra-territorial reach, the next question concerns the relevance of this conclusion for the prohibition on refoulement contained in its Article 3. The territorial and extra-territorial scope of the Convention determines when and towards whom a State is responsible for ensuring its rights and freedoms, including protection from refoulement, and it determines what obligations the State may have to ensure that the protection is effective. The latter issue will be discussed in section 3.4. In this section I will briefly outline the various scenarios in which a State party to the ECHR may become responsible for ensuring effective protection from refoulement in accordance with Article 3.

Before I do so it is important to understand where the issues of territorial and extra-territorial scope of the Convention for protection from refoulement are relevant. The issues are relevant for the question of what triggers a State to be responsible to provide protection from refoulement. According to the ECtHR the nature of the Contracting States' responsibility under Article 3 in refoulement cases lies in the act of exposing an individual to the risk of proscribed ill-treatment when such act constitutes a crucial link in the chain of events leading to treatment proscribed by Article 3.[126] The relevant question is: where does that act of exposure take place, within or outside the Contracting States' territory? What is not relevant is whether the risk of proscribed ill-treatment materialises, let alone where it may materialise.[127]

First, the consequences of the territoral reach of the Convention. A State party to the Convention is responsible for every person who is physically present within its territory. This includes people who are at the de jure border of the State, but de facto within its territory. Regulations regarding lawful entry will make no difference.[128] If, for example, an asylum-seeker arrives at the air- or seaport of a State party he is physically present within the territory of that State. The State is thus responsible for protecting the individual against refoulement in accordance with Article 3 ECHR.[129] This responsibility is irrespective of whether or not the asylum-seeker has lawfully entered or is lawfully present within the State.[130]

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126 ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 107; ECtHR, *Venkadajalasarma v Netherlands*, 17 February 2004, Appl. No. 58510/00, para. 63; ECtHR, *Thampibillai v Netherlands*, 17 February 2004, Appl. No. 61350/00, para. 61; ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 337.

127 Section 1.3.2.

128 ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96, para. 48; Boeles 1990, p. 706.

129 For example, the Committee of Ministers of the Council of Europe has implied a responsibility of States parties to the Convention vis-à-vis persons present at the de jure border of a State: see Council of Europe, Committee of Ministers, Rec(94)5E, 21 June 1994 *on guidelines to inspire practices of the member States of the Council of Europe concerning the arrival of asylum-seekers at European airports.*

130 ECtHR, *Amuur v France*, 25 June 1996, Appl. No. 19776/92, para. 52.

Secondly, extra-territorial scope by reason of the fact that a State may also be responsible for protecting individuals against refoulement in accordance with Article 3 ECHR when the individual is outside its territory. As I explained in section 3.2.2 a State may be responsible in such a scenario for protecting an individual against refoulement, first, because the individual is physically present within a foreign territory over which the State has effective overall control, or, secondly, because the individual is affected by extra-territorial conduct which can be attributed to the State and because of which the individual can effectively be protected from refoulement in accordance with Article 3 ECHR.[131] As I have said before, control entails responsibility and control determines the content of the responsibility. Whether or not a State is responsible for protecting an individual against refoulement in accordance with Article 3 ECHR depends on the amount of control the State has over the person involved. Within the context of protection from refoulement the actual control of the State party has to be the result of conduct, an act or an omission, by which the individual is directly exposed to a risk of treatment contrary to Article 3 of the Convention, and whereby the State party has real and effective power to protect the individual against refoulement.[132] The test is one of fact and not of law. A multitude of examples can be given in which individuals are claiming protection from refoulement outside the territory of a State party, and a State may have a responsibility to ensure protection from refoulement. This includes claims at embassies of State parties, people trying to reach the territory of a State party in order to obtain protection, for example, by boat, or even people who are received in reception centres located outside the territory of States parties. To date the Court has had no real involvement in cases concerning the State party's extra-territorial responsibility for protection from refoulement. To some extent extra-territorial responsibility involving possible refoulement was addressed by the European Commission in *W.M. v Denmark* (1992). In this case an East German national sought protection at the Danish embassy in the former East Berlin. Although the applicant in this case did not complain about the prohibition on refoulement under Article 3, the Commission concluded that Denmark was responsible for the rights and freedoms referred to in the Convention.[133] Presumably actual control was established in this case because the Danish embassy provided a safe haven for the individual. Handing him over to the East German authorities would, as a direct consequence, lead to a risk of his being exposed to ill-treatment proscribed by Article 3 ECHR, and the safety of the embassy compound could be regarded as a real and effective means of protection. A variation of the asylum-seeker located within the embassy compound of a State party is the 'asylum seeker' who is outside the embassy gate, trying to gain access to the embassy compound, but the gate remains closed. Although it is pure speculation how the European Court would deal with such a

131 See in general, Lawson 2002, pp. 294-295.

132 ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 76; ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 91. See also Lawson 1999-2, p. 242.

133 EComHR, *W.M. v Denmark*, 14 October 1992, Appl. No. 17392/90 (admissibility decision).

situation, the relevant question must be whether the State can provide the individual with effective protection from refoulement by opening the embassy gate and giving him access to the embassy compound. In my view, the State certainly has actual control over the individual because it has the power to open the gate to allow the individual to enter the embassy compound. And as a direct consequence of a refusal to open the gate the individual may be exposed to a risk of treatment contrary to Article 3 ECHR, and the safety of the embassy compound may be regarded as a real and effective means of protection. Another variation on the embassy scenario is more difficult to determine. Suppose the individual is neither within the embassy compound nor at the gate, but is requesting protection, for example, through regular or electronic mail or a visa request. In such a situation I would argue that a refusal to respond to the request neither has as a direct consequence the exposure of the individual to a risk of proscribed ill-treatment nor does the State party have real and effective power over the individual to provide protection.

What happens when people are outside their country of origin and are trying to reach the territory of the State party in search of protection from refoulement? To some extent this was addressed in *Xhavara and 12 Others v Italy and Albania* (admissibility decision, 2001), even though the applicants did not claim protection from refoulement. This case involved a group of Albanians who were illegally trying to reach Italy by sea. Their ship was seriously damaged and sank outside Italy's territorial waters when it was struck by an Italian war vessel. Fifty-eight passengers drowned. The survivors claimed that the Italian war vessel had deliberately hit their boat, attempting to prevent the Albanians' entry into Italy. The complaint was declared inadmissible because domestic remedies had not been exhausted. Nevertheless, the Court did note that Italy as a State party to the Convention had a responsibility in this case, irrespective of where the incident had occurred, i.e. inside or outside the State's territorial waters.[134] When an individual fails to reach the territorial waters of a State party, the State may still be responsible, depending on its conduct. I would argue that in situations where naval, police, customs or any other personnel who can be regarded as agents of the State boards a ship on the high seas, in the territorial waters of other States, or in any other way forces the ship to prevent entry into the State's territory, to return to the country where the people on board risk being subjected to proscribed ill-treatment, or in situations where the ship is being escorted back to the country of origin, the State party is responsible. The damaging, boarding or escorting of the ship by the State party establishes actual control as a direct consequence of which the people on board are exposed to a risk of proscribed ill-treatment and the State party has real and effective power to provide protection by not forcing them to return.

A variation on the sea scenario is the situation in which the individual is trying to reach the territory of the State by air. There are several ways by which States parties try to prevent asylum-seekers from reaching their territory by air. First, there are the

134 ECtHR, *Xhavara and 12 Others v Italy and Albania*, 11 January 2001, Appl. No. 39473/98 (admissibility decision). See also Lawson 2004, pp. 99 and 100.

carrier sanctions for airlines which take on board people without proper documents. Secondly, there is the stationing of State agents at foreign airports checking the documents of passengers boarding aeroplanes with the State as their destination. Thirdly, there is the refusal to allow an aeroplane to enter the State's airspace and to land on its territory. I would argue, in line with Boeles and Meijers, that if, through carrier sanctions, airlines are acting as the de facto screening agency to determine who is and who is not lawfully eligible to travel to a State party and thereby directly preventing people who may have a right to be protected from refoulement from claiming that right before the State party, the State is responsible.[135] As I outlined in section 1.2.3.3b with respect to general international human rights law and in section 3.2.2.2b with respect to the ECHR, a State may be responsible for the acts of private persons. If the pre-boarding screening at foreign airports is conducted by State officials the State is undoubtedly responsible. The refusal to allow an individual to enter the State's airspace is somewhat similar to the situation in which an individual is trying to gain access to the embassy compound. In my opinion, the State would be responsible if, as a direct and immediate consequence of the refusal to allow the aeroplane enter the State's airspace the individual claiming protection is exposed to a risk of subjection to proscribed ill-treatment.

Finally, we have the example of asylum-seekers received in so-called extra-territorial or regional reception centres. Within the EU plans have emerged to explore the possibility of receiving asylum-seekers and handling their claims for protection in designated centres located outside the territory of the EU Member States.[136] The responsibility of the EU Member States as States parties to the ECHR for protection from refoulement in accordance with Article 3 of the Convention is a complex issue and depends on factors such as the organisation and management of the centres, the authority responsible for determining a claim for protection and the relationship of the Member States with the host country. Whatever the actual contents of these plans will be and how they will be implemented, setting up regional reception centres to assess who will be eligible for protection by a State party of the European Convention involves a responsibility for the States parties. This responsibility will be determined either by the concept of effective overall control depending on the level of control the States parties will have within the territory of the reception centre, or by the concept of actual control attributable to the States parties. Clearly, if a State's officials are conducting the determination procedure, the State will be responsible. If the determination of the claim is conducted by non-State agents, the State, in my opinion, remains responsible, as it is, in certain circumstances, responsible for private persons. The question of responsibility will be more complex if the authority to assess the claim

135 Boeles 1990, p. 708.

136 See, for example, European Commission, Communication to the European Council and European Parliament, *On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin, Improving access to durable solutions*, 4 June 2004, COM(2004)410. For further reading on various EU proposals see Amnesty International 2003.

for protection is transferred, for example, to the host State, to international organisations such as the EU, the UNHCR or the International Organisation for Migration (IOM). To date, this situation has neither been dealt with by the ECtHR nor are the EU plans final. It would, therefore, go too far comprehensively to analyse reception in the region in this book.[137]

3.3 The content of the prohibition on refoulement under Article 3 of the European Convention on Human Rights

The responsibility for States parties to protect individuals who are within their jurisdiction against refoulement under Article 3 ECHR is engaged in the case of an act of removal by means of which the individual concerned is exposed to a risk of treatment contrary to Article 3. The material scope of the responsibility to protect individuals against refoulement is determined by the treatment prohibited under Article 3 ECHR and the existence of a risk that such treatment may occur after the removal. Importantly, Article 3 ECHR is formulated in absolute terms, allowing neither exceptions nor derogations in any circumstances. In this section the material scope or content of the prohibition on refoulement will be analysed. In section 3.3.1 I will discuss the prohibited forms of ill-treatment. In section 3.3.2 I will analyse the element of risk and in section 3.3.3 the absolute nature of the prohibition.

3.3.1 The harm from which a person is protected: torture and inhuman or degrading treatment or punishment

Article 3 of the ECHR protects any person from being subjected to torture, inhuman or degrading treatment or punishment. No definition of these forms of proscribed ill-treatment is to be found in the text of the Convention. It is therefore important to look at the extensive case law of the Court in this regard.

Article 3 prohibits all forms of ill-treatment referred to therein in equal terms; the text of the Article makes no distinction between torture and other forms of inhuman or degrading treatment or punishment. Nevertheless there is a difference to be made between the three forms of proscribed ill-treatment, in particular between torture on the one hand and inhuman and degrading treatment or punishment on the other. The distinction derives principally from a difference in the intensity of the suffering inflicted,[138] and from the required element of intent. Torture should be regarded as the most intense or severe form of inhuman treatment, requiring an element of intent and attaching a special stigma to deliberate inhuman treatment causing very serious

137 See further Wouters 2003, pp. 55 to 83.

138 ECtHR, *Ireland v United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 167; Vermeulen 2006, p. 406.

and cruel suffering.[139] Degrading treatment or punishment can be regarded as the least intense or severe form of proscribed ill-treatment.[140] In its case law the Court certainly draws a distinction between torture on the one hand and inhuman or degrading treatment or punishment on the other, but does often not make a sharp distinction between inhuman and degrading treatment or punishment.

Because of its distinguishable character I will first analyse torture in section 3.3.1.1 below. In section 3.3.1.2 I will analyse the concept of inhuman and degrading treatment or punishment within the meaning of Article 3 ECHR. In these sections the focus will be on the concepts of torture and inhuman and degrading treatment and punishment outside the context of refoulement. In section 3.3.1.3 I will discuss these concepts in a refoulement context.

3.3.1.1 Torture as defined outside the context of refoulement

Torture is the most intense or severe form of proscribed ill-treatment under Article 3 ECHR. It must cause very serious and cruel pain or suffering, which can be of both a physical and a mental nature.[141] For treatment or punishment to amount to torture it is necessary for the conduct to be inflicted intentionally. In principle, the element of intent stems from the fact that the treatment is inflicted for a certain purpose, such as obtaining admissions or information.[142] However, in some cases the Court does not consider the element of intent, and seems to base its conclusion that torture has been inflicted on the severity of the conduct, for example in *Selmouni v France* (1999) and *Ilascu and Others v Moldova and Russia* (2004). Both cases will be briefly discussed below.

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139 ECtHR, *Ireland v United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 167. See also, for example, ECtHR, *Aksoy v Turkey*, 18 December 1996, Appl. No. 21987/93, para. 63; ECtHR, *Aydin v Turkey*, 25 September 1997, Appl. No. 23178/94, para. 82; ECtHR, *Selmouni v France*, 28 July 1999, Appl. No. 25803/94, para. 96; ECtHR, *Mahmut Kayak v Turkey*, 28 March 2000, Appl. No. 22535/93, para. 117/ ECtHR, *Salman v Turkey*, 27 June 2000, Appl. No. 21986/93, para. 114; ECtHR, *Ilhan v Turkey*, 27 June 2000, Appl. No. 22277/93, para. 85; ECtHR, *Dikme v Turkey*, 11 July 2000, Appl. No. 20869/92, para. 93; ECtHR, *Akkoc v Turkey*, 10 October 2000, Appl. No. 22947/93 and 22948/93, para. 115. Vermeulen 2006, p. 406.

140 Vermeulen 2006, p. 408. For example, ECtHR, *Tyrer v United Kingdom*, 25 April 1978, Appl. No. 5856/72, paras. 29 and 30, in which the Court considered that the punishment to which the applicant was subjected did not amount to inhuman punishment but concluded it did amount to degrading punishment.

141 Vermeulen 2006, pp. 407 and 408.

142 ECtHR, *Aksoy v Turkey*, 18 December 1996, Appl. No. 21987/93, para. 64; ECtHR, *Selmouni v France*, 28 July 1999, Appl. No. 25803/94, paras. 98 and 100; ECtHR, *Mahmut Kaya v Turkey*, 28 March 2000, Appl. No. 22535/93, para. 117; ECtHR, *Salman v Turkey*, 27 June 2000, Appl. No. 21986/93, para. 114; ECtHR, *Ilhan v Turkey*, 27 June 2000, Appl. No. 22277/93, para. 85; ECtHR, *Akkoc v Turkey*, 10 October 2000, Appl. Nos. 22947/93 and 22948/93, para. 115; ECtHR, *Krastanov v Bulgaria*, 30 September 2004, Appl. No. 50222/99, para. 53; ECtHR, *Yaman v Turkey*, 2 November 2004, Appl. No. 32446/96, para. 45; ECtHR, *Chitayev and Chitayev v Russia*, 18 January 2007, Appl. No. 59334/00, para. 159.

Torture may encompass both prolonged ill-treatment and a single, isolated act, as long as it is severe enough, intentionally inflicted and for a certain purpose. Because of the case-specific approach of the ECtHR and former European Commission it is difficult, in general, to describe the minimum level of severity required for certain conduct to amount to torture. The minimum level of severity is relative, depending on the circumstances of each case, such as the duration of the treatment, the context in which it takes place, for example, detention situations, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.[143] In most cases severity is often found in the intensity of the act itself (for example rape), the repetition of an act, or the continuity of an act. In addition, it is possible for torture to be the result of an accumulation of conduct, such as in *Ilascu and Others v Moldova and Russia* (2004) in which the principal applicant had spent a very long time on death row (seven-and-a-half years), living in constant fear of execution, and while his sentence had no legal basis or legitimacy he was detained in solitary confinement; he had no contact with other prisoners or the outside world; his cell was unheated, even in severe winter conditions, and had no natural light source or ventilation; he was deprived of food as a punishment; could take showers only very rarely, often having to wait several months between one and the next; and he had no access to appropriate medical care.[144] Interestingly, while the Court considered these acts serious and cruel enough to amount to torture there was no mention by the Court of the element of intent.[145]

In *Aksoy v Turkey* (1996), the Court for the first time explicitly concluded that certain treatment was of such a serious and cruel nature that it could be defined only as torture. In this case the applicant was subjected to 'Palestinian hanging' while in police custody, i.e. he was stripped naked, with his arms tied together behind his back, and suspended by his arms, presumably causing radial paralysis in both arms. In the view of the Court:

> 'this treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant'.[146]

143 ECtHR, *Selmouni v France*, 28 July 1999, Appl. No. 25803/94, para. 100.

144 ECtHR, *Ilascu and Others v Moldova and Russia*, 8 July 2004, Appl. No. 48787/99, paras. 435-438.

145 Ibid., para. 440.

146 ECtHR, *Aksoy v Turkey*, 18 December 1996, Appl. No. 21987/93, paras. 23 and 64. In *Ireland v United Kingdom* the Commission held unanimously in its report that a combination of interrogation techniques used by the British authorities (wall-standing, hooding, subjection to continuous loud and hissing noise, deprivation of sleep, food and drink) amounted to torture, whereas the Court (by 16 votes to one) concluded that it amounted to inhuman treatment but not torture, because the conduct 'did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood': EComHR, *Ireland v United Kingdom*, 25 January 1976, Appl. No. 5310/71, p. 411; ECtHR, *Ireland v United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 167.

In *Aydin v Turkey* (1997), the Court considered that the various acts to which the applicant had been subjected, including rape, both cumulatively and individually amounted to torture.[147] In *Selmouni v France* (1999) the Court concluded that the following repeated and sustained assaults over a number of days while in police custody amounted to torture: dragging the applicant along by his hair; making him run along a corridor with police officers positioned on either side to trip him up; making him kneel down in front of a young woman to whom someone said, 'Look, you're going to hear somebody sing'; one police officer showing him his penis and saying 'Here, suck this', before urinating over him; and threatening him with a blowlamp and then a syringe.[148] In this case the Court took the view:

> 'that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies',

whereby the Court accepted that the concept of torture may change over time.[149] The Court did not consider the element of intent in this case.

Other cases in which the Court concluded that the treatment or punishment to which the applicant had been subjected amounted to torture include: *Salman v Turkey* (2000), involving the beating of the soles of the feet (*falaka*) accompanied by a blow to the chest; *Ilhan v Turkey* (2000), involving repeated kicking, beating and striking on the head with a G3 rifle, resulting in severe bruising and two injuries to the head causing brain damage and the significant lapse of time before receiving medical treatment (some 36 hours); *Dikme v Turkey* (2000), involving living in a permanent state of physical pain and anxiety owing to uncertainty about the applicant's fate and to the blows repeatedly inflicted on him during lengthy interrogation sessions; *Akkoc v Turkey* (2000), involving electric shocks, treatment with cold and hot water, blows to the head and threats made concerning the ill-treatment of the applicant's children while she was in police custody; and *Yaman v Turkey* (2004), involving being striped naked, submerged in cold water while being blindfolded, attached by the arms to the ceiling pipes, made to stand on a chair, electric cables being attached to the body, in particular to the sexual organs, and the administration of electric shocks.[150] In *Corsacov v Moldova* (2006) the Court considered that the practice of *falaka*, i.e. the beating of the soles of the feet, is a particularly reprehensible form of ill-treatment which presupposes an intention to obtain information, inflict punishment or intimidate so as to amount to torture, in which the Court took into account the applicant's injuries

147 ECtHR, *Aydin v Turkey*, 25 September 1997, Appl. No. 23178/94, para. 86.

148 ECtHR, *Selmouni v France*, 28 July 1999, Appl. No. 25803/94, paras. 103-105.

149 Ibid., para. 101.

150 ECtHR, *Salman v Turkey*, 27 June 2000, Appl. No. 21986/93, para. 115; ECtHR, *Ilhan v Turkey*, 27 June 2000, Appl. No. 22277/93, paras. 86 and 87; ECtHR, *Dikme v Turkey*, 11 July 2000, Appl. No. 20869/92, para. 95; ECtHR, *Akkoc v Turkey*, 10 October 2000, Appl. Nos. 22947/93 and 22948/93, paras. 116-117. See also ECtHR, *Cakici v Turkey*, 8 July 1999, Appl. No. 23657/94, paras. 91 and 92; ECtHR, *Yaman v Turkey*, 2 November 2004, Appl. No. 32446/96, paras. 11 and 45.

and his age (17 at the time of the events).[151] In *Sheydayev v Russia* (2006) the applicant was tortured while in detention as he was continously beaten, forced to make a false confession and theatened with harsh punishment, physical abuse and sodommy.[152] Finally, in *Chitayev and Chitayev v Russia* (2007) the applicants were subjected to torture while in detention as they were kept in a permanent state of physical pain and anxiety owing to their uncertainty about their fate and to the level of violence to which they were subjected throughout the six-month period of their detention.[153]

It should be noted that torture can be neither legalised nor arise from, be inherent in or incidental to lawful sanction such as detention. Such a limitation is not part of the concept of torture developed under Article 3 of the European Convention.[154]

3.3.1.1a Perpetrators of torture

For conduct to amount to torture it is not necessary for it to be carried out by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Such restriction is not part of the definition of torture developed under Article 3 of the ECHR. In *Dikme v Turkey* (2000) the Court explicitly found that the treatment to which the applicant was subjected was inflicted by agents of the State in the performance of their duties.[155] Nevertheless, it seems that the Court does not consider this to be a requirement for ill-treatment to amount to torture within the meaning of Article 3 of the Convention. In other cases in which the Court explicitly considered the existence of torture no such reference was made by Court. Furthermore, in *Mahmut Kaya v Turkey* (2000) the Court considered that States parties are required to take all possible measures to ensure that individuals within their jurisdiction are not subjected to ill-treatment proscribed Article 3, including torture, even if such treatment is administered by private persons.[156] This will be further discussed in the context of refoulement in section 3.3.1.3.

3.3.1.2 Inhuman and degrading treatment or punishment as defined outside the context of refoulement

Like torture, the term 'inhuman or degrading treatment or punishment' is not defined in the Convention. The content of this term has been developed on a case-by-case basis in the Court's case law. For conduct to amount to inhuman and degrading treatment or punishment within the meaning of Article 3 ECHR it must attain a minimum level of severity to distinguish proscribed ill-treatment from other forms

151 ECtHR, *Corsacov v Moldova*, 4 April 2006, Appl. No. 18944/02, paras. 64 to 66.
152 ECtHR, *Sheydayev v Russia*, 7 December 2006, Appl. No. 65859/01, paras. 6 to 9 and 62.
153 ECtHR, *Chitayev and Chitayev v Russia*, 18 January 2007, Appl. No. 59334/00, para. 159.
154 This is contrary to the concept of torture defined in and developed under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 1): see chapter 5.
155 ECtHR, *Dikme v Turkey*, 11 July 1995, Appl. No. 20869/92, para. 95.
156 ECtHR, *Mahmut Kaya v Turkey*, 28 March 2000, Appl. No. 22535/93, para. 115.

of harsh treatment or punishment which fall outside the scope of Article 3, albeit a level of severity which is lower than for torture.[157]

Inhuman and degrading treatment or punishment is primarily determined by the intensity of the treatment. For example, the Court holds treatment or punishment to be inhuman if, inter alia, it is premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering.[158] Such intensity may come from an accumulation of acts as well as a single act, for example the destruction of one's home.[159] It is not necessary for the victim to sustain any bodily injury; it may also inflict severe mental pain or suffering.[160] In fact, a mere threat of conduct prohibited by Article 3 may in itself constitute inhuman treatment, in particular when the threat is torture.[161] Intent may be a relevant factor, but it is not a decisive one.[162] In particular with respect to degrading treatment or punishment the Court has often pointed out that the question whether the purpose of the treatment or punishment was to humiliate or disgrace the victim is a further factor to be taken into account, but the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3.[163] The consent of the victim to inhuman or degrading treatment or punishment is a relevant, but not a decisive, factor. Vermeulen points out that the consent of the victim may deprive an act which would be felt by another person to be inhuman or degrading of that character, but that it is conceivable that there are treatments or punishment so inhuman or degrading that the person concerned, despite his consent, may be considered to have been subjected to ill-treatment within the meaning of Article 3 by reason of their severity.[164] The absence of consent does not necessarily give treatment or punishment an inhuman or degrading

157 Vermeulen 2006, p. 412.

158 For example, ECtHR, *Kudla v Poland*, 26 October 2000, Appl. No. 30210/96, para. 92.

159 ECtHR, *Selcuk and Asker v Turkey*, 24 April 1998, Appl. Nos. 23184/94 and 23185/94.

160 ECtHR, *Ireland v United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 174. See also Van de Lanotte & Haeck 2004, p. 138, footnote 53.

161 ECtHR, *Campbell and Cosans v United Kingdom*, 25 February 1982, Appl. Nos. 7511/76 and 7743/76, para. 26.

162 ECtHR, *Selcuk and Asker v Turkey*, 24 April 1998, Appl. Nos. 23184/94 and 23185/94, para. 79, in which the Court found the motive underlying the inhuman act of destruction of property to be irrelevant. In *Krastanov v Bulgaria* (2004) the Court concluded that the acts to which the applicant had been submitted were very serious amounting to inhuman treatment, but that they did not amount to torture because, inter alia, they were not inflicted on the applicant intentionally for the purpose of, for instance, making him confess to a crime or breaking his physical and moral resistance: ECtHR, *Krastanov v Bulgaria*, 30 September 2004, Appl. No. 50222/99, para. 53. See also Vermeulen 2006, p. 418.

163 ECtHR, *Labita v Italy*, 6 April 2000, Appl. No. 26772/95, para. 120; ECtHR, *Peers v Greece*, 19 April 2001, Appl. No. 28524/95, para. 74; EctHR, Price v United Kingdom, 10 July 2001, Appl. No. 33394/96, para. 30; ECtHR, *Berlinski v Poland*, 20 June 2002, Appl. Nos. 27715/95 and 30209/96, para. 59; ECtHR, *Yankov v Bulgaria*, 11 December 2003, Appl. No. 39084/97, para. 117, involving the question whether or not the shaving of the applicant's head while in detention amounted to degrading treatment or punishment within the meaning of Article 3 of the Convention. It was relevant to the Court's conclusion that it amounted to degrading treatment that it was likely that the shaving was aimed at debasing and/or subduing the applicant.

164 Vermeulen 2006, p. 419.

character within the meaning of Article 3. For example, in cases involving medical treatment the decisive element is the medical necessity and not the consent by the patient.[165]

The minimum level of severity is relative and depends on all the facts and circumstances of the case.[166] In this sense a qualification is introduced into what ill-treatment amounts to proscribed ill-treatment.[167] As with respect to torture, the case-specific approach of the Court makes it difficult to assess the minimum level of severity and to deduce, in general, what forms of treatment or punishment come within the scope of Article 3. In its extensive case law concerning Article 3 the Court has taken numerous facts and circumstances into account when determining the level of severity, all of which are important, but none are decisive as they are. Of particular importance are factors such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration and its physical or mental effects. Furthermore, various personal factors, such as the sex, age and state of health of the victim, were also, in some cases, taken into account. Age, for example, is particularly important in cases involving children.[168] And the state of health of the victim was explicitly taken into account in assessing a person's suitability for detention and his or her treatment in that context.[169] It remains ambiguous to what extent subjective elements, apart from the objectively determined physical and mental state of health, are relevant, as some people are less tolerant of or more susceptible to pain, suffering or humiliation than others. In some cases the Court has considered that, although the treatment or punishment involved may be perceived by the applicant as humiliating,

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165 ECtHR, *Herczegfalvy v Austria*, 24 September 1992, Appl. No. 10533/83, paras. 82 and 83. Vermeulen 2006, p. 419.

166 For example, ECtHR, *Ireland v United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 162 and later repeated in most cases involving Article 3 of the Convention.

167 Vermeulen 2006, p. 413: 'Thus, a certain qualification is introduced in a norm formulated in absolute terms, which is almost inevitable in the case of the application of an abstract norm, containing subjective concepts, to concrete cases'. The relationship between the relative nature of ill-treatment and the absolute character of the norm protected by Article 3 is discussed in section 3.3.3

168 ECtHR, *A. v United Kingdom*, 23 September 1998, Appl. No. 25599/94, para. 21, involving the beating of a 9-year-old with considerable force with a garden cane on more than one occasion; ECtHR, *Z and Others v United Kingdom*, 10 May 2001, Appl. No. 29392/95, para. 74. The age of the victims, 54 and 60 respectively, was also taken into account in ECtHR, *Selcuk and Asker v Turkey*, 24 April 1998, Appl. Nos. 23184/94 and 23185/94, paras. 77 and 78 and in ECtHR, *Yankov v Bulgaria*, 11 December 2003, Appl. No. 39084/97, para. 119 (age 55). And in ECtHR, *Mayeka and Mitunga v Belgium*, 12 October 2006, Appl. No. 13178/03, paras. 50 and 55 the youth of the (second) applicant – a 5-year-old child – was an important factor for the Court in considering that the treatment she had received as an unaccompanied minor in detention while awaiting deportation to be in breach of Article 3.

169 ECtHR, *Price v United Kingdom*, 10 July 2001, Appl. No. 33394/96, para. 30, the Court considered that to detain a severely disabled person in conditions where she was dangerously cold, risked developing sores because her bed was too hard or unreachable, and was unable to go to the toilet or keep clean without the greatest of difficulty, constituted degrading treatment contrary to Article 3 of the Convention. See also ECtHR, *Mouisel v France*, 14 November 2002, Appl. No. 67263/01, paras. 38-40.

it did not come within the scope of Article 3 ECHR.[170] In particular the feelings of the victim may be important with respect to degrading treatment or punishment.

In most cases the Court does not distinguish between inhuman treatment or punishment and degrading treatment or punishment. It seems that the difference between inhuman and degrading is again one of gradation in the suffering inflicted.[171] The Court holds treatment or punishment to be degrading if it is intended to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating them.[172] In fact, it may well suffice for the victim to be humiliated in his own eyes, but not in the eyes of others.[173] Nevertheless, such feelings need to have an objective basis in the facts and circumstances of the case. In *Tyrer v the United Kingdom* (1978) the applicant, a young boy, was sentenced to three strokes of the birch on the bare posterior, which were administered three weeks after the sentence at a police station, during which he was held by two policemen whilst a third administered the punishment, during which pieces of the birch broke off at the first stroke.[174] These objective facts were decisive in the Court's ruling that the corporal punishment inflicted on the applicant amounted to degrading punishment within the meaning of Article 3 ECHR.[175] Such objective facts and circumstances were, for example, absent in *Costello-Roberts v the United Kingdom* (1993), in which the applicant was also subjected to corporal punishment, but this time he was hit three times on his buttocks through his shorts with a rubber-soled gym shoe by the applicant's headmaster in private.[176] And in *Campbell and Cosans v the United Kingdom* (1982) it was considered that the applicants might have experienced feelings of apprehension, disquiet or alienation by the existence of corporal punishment at their school; they were, however, not subjected to such punishment or even directly subjected to a threat of it.[177] An important factor, in particular with respect to degrading treatment or punishment, is how publicly the treatment or punishment is carried out. On the other hand, the absence of publicity will not prevent treatment or punishment from amounting to degrading treatment or punishment within the meaning of Article 3.[178]

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170 ECtHR, *Marckx v Belgium*, 13 June 1979, Appl. No. 6833/74, para. 66, in which the Court considered that the legal rules affecting the applicant and involving national laws with respect to the recognition of an illegitimate child may be perceived by the applicant as humiliating, but they do not constitute degrading treatment coming within the ambit of Article 3.

171 Vermeulen 2006, p. 408.

172 ECtHR, *Ireland v United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 167; ECtHR, *Kudla v Poland*, 26 October 2000, Appl. No. 30210/96, para. 92.

173 ECtHR, *Tyrer v United Kingdom*, 25 April 1978, Appl. No. 5856/72, para. 32.

174 Ibid.

175 Ibid., para. 33.

176 ECtHR, *Costello-Roberts v United Kingdom*, 25 March 1993, Appl. No. 13134/87, para. 31.

177 ECtHR, *Campbell and Cosans v United Kingdom*, 25 February 1982, Appl. Nos. 7511/76 and 7743/76, para. 30.

178 ECtHR, *Tyrer v United Kingdom*, 25 April 1978, Appl. No. 5856/72, para. 32; ECtHR, *Raninen v Finland*, 16 December 1997, Appl. No. 20972/92, para. 55; ECtHR, *Õcalan v Turkey*, 12 May 2005, Appl. No. 4622/99 (Grand Chamber), para. 182, in which the Court considered that: 'the public nature of the treatment or the mere fact that the victim is humiliated in his or her own eyes may be a relevant consideration'.

The sex of the victim has never played an explicit role in the Court's considerations in cases involving Article 3 ECHR. The sexual orientation of the victim, however, was clearly taken into account in two cases concerning a government policy to investigate homosexuality in the British armed forces and to discharge homosexuals from the army.[179]

It is difficult to say in general what conduct then, according to the ECtHR, amounts to inhuman and degrading treatment or punishment within the meaning of Article 3 ECHR. Severe physical abuse, sexual abuse, the destruction of homes, property and subsequent deprivation of livelihood and forced eviction and the disappearance of family members are all examples of conduct which, in many cases, amounted to inhuman or degrading treatment within the meaning of Article 3.[180] Living conditions

179 ECtHR, *Smith and Grady v United Kingdom*, 27 September 1999, Appl. Nos. 33985/96 and 33986/96, paras. 121 and 122 and ECtHR, *Beck, Copp and Bazeley v United Kingdom*, 22 January 2003, Appl. Nos. 48535/99, 48536/99 and 48537/99, paras. 54 and 55. In both cases the Court considered that the treatment, i.e. the policy, investigation and discharge, was undoubtedly distressing and humiliating, but did not reach the minimum level of severity required to fall within the scope of Article 3 of the Convention. The Court did, however, conclude that the treatment violated the applicants' right to respect for private life as laid down in Article 8 of the Convention.

180 Examples of cases involving severe physical abuse, sexual abuse, the destruction of homes and the disappearance of family were the issue. Severe physical treatment was an issue in the following cases: ECtHR, *Mahmut Kaya v Turkey*, 28 March 2000, Appl. No. 22535/93, para. 118, involving the binding of wrists with wire in such a manner as to cut the skin and the prolonged exposure of the applicant's feet to water or snow. Physical and sexual abuse during childhood was an issue in the following cases: ECtHR, *E. and Others v United Kingdom*, 26 November 2002, Appl. No. 33218/96; ECtHR, *D.P. and J.C. v United Kingdom*, 10 October 2002, Appl. No. 38719/97. Rape was an issue in ECtHR, *M.C. v Bulgaria*, 4 December 2003, Appl. No. 39272/98. The destruction of homes and property and the subsequent deprivation of livelihood and forced eviction of the village were an issue in the following cases: ECtHR, *Selcuk and Asker v Turkey*, 24 April 1998, Appl. Nos. 23184/94 and 23185/94, paras. 77 and 78; ECtHR, *Dulas v Turkey*, 30 January 2001, Appl. No. 25801/94, paras. 54 and 55; ECtHR, *Bilgin v Turkey*, 16 November 2000, Appl. No. 23819/94, paras. 100 and 103; ECtHR, *Yoyler v Turkey*, 24 July 2003, Appl. No. 26973/95, paras. 74 and 75; ECtHR, *Ayder and Others v Turkey*, 8 January 2004, Appl. No. 23656/94, paras. 109-110; ECtHR, *Altun v Turkey*, 1 June 2004, Appl. No. 24561/94, paras. 52 and 53; ECtHR, *Hasan Ilhan v Turkey*, 9 November 2004, Appl. No. 22494/93, para. 108. The disappearance of a family member, in particular a child, was an issue in the following cases: ECtHR, *Kurt v Turkey*, 25 May 1998, Appl. No. 24276/94, paras. 133 and 134; ECtHR, *Cakici v Turkey*, 8 July 1999, Appl. No. 23657/94, paras. 98 and 99; ECtHR, *Timurtas v Turkey*, 13 June 2000, Appl. No. 23531/94, paras. 95-98; ECtHR, *Tas v Turkey*, 14 November 2000, Appl. No. 24396/94, para. 80; ECtHR, *Cicek v Turkey*, 27 February 2001, Appl. No. 25704/94, paras. 173-174; ECtHR, *Orhan v Turkey*, 18 June 2002, Appl. No. 25656/94, paras. 357 and 358; ECtHR, *Akdeniz v Turkey*, 31 May 2005, Appl. No. 25165/94, para. 124; ECtHR, *Bazorkina v Russia*, 27 July 2006, Appl. No. 69481/01, paras. 140 and 141; ECtHR, *Akhmadova and Sadulayeva v Russia*, 10 May 2007, Appl. No. 40464/02, para. 112, from which cases it becomes clear that the essence of inhuman treatment within the meaning of Article 3 does not so much lie in the fact of the disappearance of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention, inflicting suffering of a dimension and character distinct from emotional distress, which may be regarded as inevitably caused by the disappearance of a family member. Relevant factors in such cases are the relationship between the victim and the disappeared family member, the extent to which the victim has witnessed the events leading up to the disappearance, the involvement of the victim in

may also amount to proscribed inhuman or degrading treatment or punishment, although the Court is reluctant to conclude that they attain the necessary minimum level of severity.[181] Only in *A and Others v the United Kingdom* (2001), involving four children who were locked inside an extremely filthy house for most of the day for a period of almost four years, did the Court conclude that the living conditions amounted to proscribed ill-treatment.[182] Finally, imposing a death sentence on someone after an unfair trial with the risk of the sentence being carried out may also amount to proscribed ill-treatment, as the Court concluded in *Öcalan v Turkey* (Grand Chamber 2005).[183]

Article 3 ECHR has frequently been an issue in cases involving the arrest or detention of a person. While arrest or detention in itself is in principle not in breach of Article 3 ECHR it may involve treatment which comes within the meaning of Article 3.[184] Such treatment then needs to be excessive, disproportionate or to exceed the level of what is strictly necessary in the situation. In assessing this principle of proportionality relevant factors are the lawfulness of the arrest or detention, the conduct of the victim while arrested or detained, the injuries sustained by him and the state of his mental and physical health. For example, the use of force may be necessary in cases in which the victim tries to resist arrest or escape from detention, in particular when he is using force.[185] If, however, for example, the arrest is well planned or

attempts to obtain information about the disappeared person and the subsequent response of the authorities.

181 For example, ECtHR, *Lopez Ostra v Spain*, 9 December 1994, Appl. No. 16798/90, para. 60, in which the Court considered that the situation in which the applicant and her family had lived for years, i.e. close to a waste-treatment facility causing nuisance and contamination, was certainly very difficult but did not amount to degrading treatment within the meaning of Article 3 of the Convention. Other examples are: ECtHR, *Guzzardi v Italy*, 6 November 1980, Appl. No. 7367/76, para. 107, in which the applicant was convicted of a criminal offence and placed under 'special supervision', implying that he had to live on an island off the coast of Italy. The Court considered that certain aspects of the situation were undoubtedly unpleasant or even irksome; they did not attain the minimum level of severity. ECtHR, *Aerts v Belgium*, 30 July 1998, Appl. No. 25357/94, paras. 65 and 66, involving the conditions in a psychiatric wing of a prison which the Court considered were below the minimum acceptable from an ethical and humanitarian point of view, however, not severe enough to be brought within the scope of Article 3 of the Convention, in particular because there was no proof of a deterioration in the applicant's mental health.

182 ECtHR, *Z and Others v United Kingdom*, 10 May 2001, Appl. No. 29392/95, paras. 11 to 36 and 74.

183 ECtHR, *Öcalan v Turkey*, 12 May 2005, Appl. No. 46221/99 (Grand Chamber), paras. 167 to 175.

184 Vermeulen 2006, p. 419.

185 For example, ECtHR, *Caloc v France*, 20 July 2000, Appl. No. 33951/95, para. 100, involving a detainee who tried to escape, so that the authorities used force as a result of which the detainee suffered injury. See also ECtHR, *Klaas v Germany*, 22 September 1993, Appl. No. 15473/89, para. 30, in which it was considered that the applicant could have injured herself while resisting arrest and that the arresting officers had not used excessive force; ECtHR, *Berlinski v Poland*, 20 June 2002, Appl. Nos. 27715/95 and 30209/96, paras. 62 and 64, in which it was uncontested that the applicants were beaten up by the police resulting in a number of injuries. The Court concluded that the use of force was not excessive, weighing heavily against the applicants that they were trained and practising body-builders and that they effectively resisted the legitimate actions of the police. In ECtHR, *Iliev v Bulgaria*, 10 May 2007, Appl. No. 53121/99, para. 43 the Court noted that at the time of the applicant's arrest he was intoxicated and showed some resistance to the police officers

there is no resistance or threat from the detainee, the use of force will more easily be regarded as excessive.[186] It may also be the case that, while the victim was armed so that the use of force might have been justified, the circumstances of the case may nevertheless lead to the conclusion that the use of force was disproportionate. In *Shamayev and 12 Others v Georgia and Russia* (2005) for example, some of the applicants were extradited by force by Georgia to Russia because they resisted vigorously.[187] Even though the Court stated that it could reasonably be considered necessary to ensure the safety of the authorities and prevent disorder, it went on to say that it nonetheless had to consider whether this necessity was primarily the result of acts or omissions by the authorities themselves.[188] In other words, in a situation in which the use of force may become necessary by reason of the State's own conduct which provoked violence, an issue may arise under Article 3 ECHR. According to the Court the manner in which the extradition in *Shamayev and 12 Others* was enforced by the Georgian authorities in itself raised an issue under Article 3.[189] The manner of enforcement of the extradition involved the fact that the applicants were detained in the same cell, that only a few hours before their actual extradition they were informed about the fact that they were subject to extradition proceedings, that they were told to leave their cell in the middle of the night and were given various reasons other than their imminent extradition.[190] The Court considered that these facts amounted to attempted deception; inciting the applicants to riot.[191] Consequently, the Court concluded that in such circumstances recourse to physical force cannot be regarded as justified by the prisoners' conduct.[192]

If a person was taken into custody in good health, but is found to be injured or has died during detention, it is, according to the Court, incumbent on the State to

who detained him; consequently a certain degree of physical force in order to effect the detention and to subdue the applicant was reasonable.

186 ECtHR, *Tomasi v France*, 27 August 1992, Appl. No. 12850/87, para. 115; ECtHR, *Rehbock v Slovenia*, 28 November 2000, Appl. No. 29462/95, paras. 72 and 76, in which the police used excessive force while arresting the applicant; whereby the Court took into account the fact that the arrest was well-planned in advance and that the police had had sufficient time to evaluate all possible risks, and outnumbered the three suspects who did not threaten the police during their arrest. Furthermore, the applicant sustained serious injuries to his jaw and face. If it is impossible to establish on the basis of evidence whether or not the applicant's injuries were caused by the authorities exceeding the use of necessary force, the Court gives the benefit of the doubt to the State: see ECtHR, *Kmetty v Hungary*, 16 December 2003, Appl. No. 57967/00, para. 36.

187 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 377.

188 Ibid., para. 377.

189 Ibid., para. 381.

190 Ibid., para. 378.

191 Ibid., paras. 378 and 380.

192 Ibid., para. 381.

provide a plausible explanation of how those injuries or death occurred. When it fails to do so, an issue under Article 3 or, in the case of death, Article 2 ECHR arises.[193] Some treatment or punishment will almost by definition exceed what is strictly necessary; no proportionality test is required. In *Ireland v the United Kingdom* (1978) this involved a combination of wall-standing,[194] hooding,[195] subjection to a continuous loud and hissing noise, deprivation of sleep, food and drink.[196] In *Tekin v Turkey* (1998) this involved being held in a cold and dark cell, blindfolded and treated in a way which left bruises and wounds on the applicant's body.[197] In *Dougoz v Greece* (2001) this involved serious overcrowding and the lack of sleeping facilities, combined with the inordinate length of detention – 18 months – in these conditions.[198] And in *Istratii and Others v Moldova* (2007) the treatment was again overcrowding in combination with an insufficient quantity and quality of food, lack

193 ECtHR, *Ribitsch v Austria*, 4 December 1995, Appl. No. 18896/91, para. 34, in which the Court found the government's explanation, that the applicant had fallen while he was being moved under police escort, unconvincing; ECtHR, *Selmouni v France*, 28 July 1999, Appl. No. 25803/94, para. 87; ECtHR, *Colak and Filizer v Turkey*, 8 April 2004, Appl. Nos. 32578/96 and 32579/96, paras. 33 and 34; ECtHR, *Toteva v Bulgaria*, 19 May 2004, Appl. No. 42027/98, paras. 50 and 56; ECtHR, *Mehmet Emin Yuksel v Turkey*, 20 July 2004, Appl. No. 40154/98, paras. 25 and 30; ECtHR, *Balogh v Hungary*, 20 July 2004, Appl. No. 47940/99, paras. 47 and 51; ECtHR, *Celik and Imret v Turkey*, 26 October 2004, Appl. No. 44093/98, para. 44; ECtHR, *Tuncer and Durmus v Turkey*, 2 November 2004, Appl. No. 30494/96, para. 41; ECtHR, *Afanasyev v Ukraine*, 5 April 2005, Appl. No. 38722/02, para. 64; ECtHR, *Celikbilek v Turkey*, 31 May 2005, Appl. No. 27693/95, para. 66 (involving Article 2); ECtHR, *Bekos and Koutropoulos v Greece*, 13 December 2005, Appl. No. 15250/02, para. 47; ECtHR, *Corsacov v Moldova*, 4 April 2006, Appl. No. 18944/02, para. 60; ECtHR, *Boicenco v Moldova*, 11 July 2006, Appl. No. 41088/05, para. 103. If there is no evidence of any injury no issue under Article 3 of the Convention will arise: see ECtHR, *Sadik Onder v Turkey*, 8 January 2004, Appl. No. 28520/95, para. 40.

194 In ECtHR, *Ireland v United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 96 wall-standing is defined as: 'forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers'.

195 Ibid. hooding is defined as: 'putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation'.

196 ECtHR, *Ireland v United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 167.

197 ECtHR, *Tekin v Turkey*, 9 June 1998, Appl. No. 22496/93, para. 53.

198 ECtHR, *Dougoz v Greece*, 6 March 2001, Appl. No. 40907/98, para. 48. See also ECtHR, *Peers v Greece*, 19 April 2001, Appl. No. 28524/95, para. 75, in which the Court also considered that the conditions in detention amounted to degrading treatment within the meaning of Article 3 of the Convention, thereby taking into account the fact that the applicant had to spend, at least for two months, a considerable part of each 24-hour period practically confined to his bed in a cell with no ventilation and no window, which would at times become unbearable hot. Furthermore, he had to use the toilet in the presence of another inmate and the authorities took no steps to improve the unacceptable conditions: ECtHR, *Kalashnikov v Russia*, 15 July 2002, Appl. No. 47095/99, paras. 97-102, in which at least 11 to 14 inmates used a cell designed for 8 people; therefore, the inmates had to take turns at sleeping, under aggravating conditions such as constant lighting and general commotion and noise. Furthermore, the ventilation was inadequate, smoking was allowed and the sanitary conditions were very poor.

of adequate bedding, limited access to daylight and insufficient sanitary conditions.[199] In *Becciev v Moldova* (2005) the Court concluded that the conditions in detention amounted to a violation of Article 3 without specifying whether it amounted to inhuman or to degrading treatment. The conditions involved 37 days of insufficient food, no outdoor exercise, metal shutters on the cell's window to keep out natural light, the constant burning of electric light and no mattress or bedclothes but wooden platforms to sleep on.[200] In *Cenbauer v Croatia* (2006) the Court concluded that the conditions in detention amounted to degrading treatment, and not to inhuman treatment.[201] Although it is unclear whether or not the Court intentionally referred to degrading instead of inhuman treatment, the conditions seem to be less severe than in *Dougoz* and *Istratii and Others*. In *Cenbauer v Croatia* (2006) the applicant was held in a cell measuring 5.6 m² with another inmate (leaving the applicant's individual space of 2.8 m² below the minimum requirement of 4 m²); there was no toilet or running water in the cell; access to a common toilet was limited to daytime so that the applicant had to urinate in plastic containers at night, which, according to the Court, was humiliating; the applicant had to spend a substantial amount of time in his cell (at least from 7 p.m. until 7 a.m. and for several hours during the day); and no sufficient answer was given by the Croatian authorities to complaints regarding mouldy walls, dirtiness of the cell and the poor overall hygienic conditions.[202]

Conditions for detainees subject to the death sentence are a special concern of the Court. As early as in *Soering v the United Kingdom* (1989) the Court accepted that the death row phenomenon may be in breach of Article 3 ECHR, depending on the personal circumstances of the detainee and the conditions and time spent on death row. In this case it involved a mentally impaired 18-year-old, an average time of death row detention of six to eight years in a stringent regime with a risk of sexual abuse and physical attacks.[203]

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199 ECtHR, *Istratii and Others v Moldova*, 27 March 2007, Appl. Nos. 8721/05, 8705/05 and 8742/05, para. 71.

200 ECtHR, *Becciev v Moldova*, 4 October 2005, Appl. No. 9190/03, paras. 44 to 47.

201 ECtHR, *Cenbauer v Croatia*, 9 March 2006, Appl. No. 73786/01, para. 52.

202 Ibid., paras. 46 to 53. See also ECtHR, *Garabayev v Russia*, 7 June 2007, Appl. No. 38411/02, para. 82, in which the Court concluded that there was a violation of Article 3 without qualifying the treatment. In this case 'the applicant spent most of his three months' detention in a cell measuring 10 square metres shared with two other inmates and received food twice a day. He had been allowed very little exercise for the first 20 days of his detention, and no exercise in the remaining period. He was denied consular visits from the staff of the Russian Consulate, who could have provided some independent information about the conditions of his detention and his situation during that period. He was in constant fear for his life, anxious about the uncertainty of his own fate and that of his relatives. He was also hit by investigators on several occasions'.

203 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 111. See also ECtHR, *Poltoratskiy v Ukraine*, 29 April 2003, Appl. No. 38812/97, paras. 134-149; ECtHR, *Kuznetsov v Ukraine*, 29 April 2003, Appl. No. 39042/97, paras. 109-129; ECtHR, *G.B. v Bulgaria*, 11 March 2004, Appl. No. 42346/98, paras. 74-88; ECtHR, *Iorgov v Bulgaria*, 11 April 2004, Appl. No. 40653/98, paras. 74-87.

Proscribed ill-treatment also includes failure to provide the requisite medical care for detained persons and strip or body searches on one or more occasions conducted in an inappropriate way.[204]

Solitary confinement is, according to the Court, not in itself in breach of Article 3.[205] However, its length and the risk of harmful effects upon the prisoner's mental health and the extent of the social isolation may give rise to concern.[206] The Court has held that complete sensory isolation, coupled with total social isolation, of a detainee constitutes a form of inhuman treatment which cannot be justified by the requirement of security or any other reason. However, prohibiting contact with other detainees for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment.[207]

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204 ECtHR, *McGlinchey and Others v United Kingdom*, 29 April 2003, Appl. No. 50390/99, para. 57 and ECtHR, *Boicenco v Moldova*, 11 July 2006, Appl. No. 41088/05, paras. 112 to 119, being examples of cases involving the failure of prison authorities to provide the requisite medical care for a detained person; ECtHR, *Valasinas v Lithuania*, 24 July 2001, Appl. No. 44558/98, para. 177, in which the Court considered that, 'while strip-searches may be necessary on occasions to ensure prison security or prevent disorder or crime, they must be conducted in an appropriate manner. Obliging the applicant to strip naked in the presence of a woman, and then touching his sexual organs and food with bare hands showed a clear lack of respect for the applicant, and diminished in effect his human dignity. It must have left him with feelings of anguish and inferiority capable of humiliating and debasing him'; ECtHR, *Iwanczuk v Poland*, 15 November 2001, Appl. No. 25196/94, paras. 58 and 59, involving strip-search in front of a group of prison guards; ECtHR, *Lorsé and Others v Netherlands*, 4 February 2003, Appl. No. 52750/99, paras. 73 and 74, involving systematic strip-searching in the absence of convincing security needs; see also ECtHR, *Van der Ven v Netherlands*, 4 February 2003, Appl. No. 50901/99, paras. 61 and 62.

205 ECtHR, *Rohde v Denmark*, 21 July 2005, Appl. No. 69332/01, para. 93.

206 Ibid., para. 97, in which the Court concluded that the solitary confinement, which lasted 11 months and 14 days, did not amount to inhuman treatment because: 'The applicant was detained in a cell which had an area of about eight square metres and in which there was a television. Also, he had access to newspapers. He was totally excluded from association with other inmates, but during the day he had regular contact with prison staff, e.g. when food was delivered; when he made use of the outdoor exercise option or the fitness room; when he borrowed books in the library or bought goods in the shop. In addition, every week he received lessons in English and French from the prison teacher and he visited the prison chaplain. Also, every week he received a visit from his counsel. Furthermore, during the segregation period in solitary confinement the applicant had contact twelve times with a welfare worker; and he was attended to thirty-two times by a physiotherapist, twenty-seven times by a doctor; and forty-three times by a nurse. Visits from the applicant's family and friends were allowed under supervision. The applicant's mother visited the applicant approximately one hour every week. In the beginning friends came along with her, up to five persons at a time, but the police eventually limited the visits to two persons at a time in order to be able to check that the conversations did not concern the charge against the applicant. Also, the applicant's father along with a cousin visited the applicant every two weeks'.

207 ECtHR, *Lorsé and Others v Netherlands*, 4 February 2003, Appl. No. 52750/99, paras. 63 and 66, in which the Court also considered that removal from association with other prisoners for security, disciplinary or protective reasons did not in itself amount to inhuman treatment or degrading punishment. See also ECtHR, *Van der Ven v Netherlands*, 4 February 2003, Appl. No. 50901/99, para. 51; ECtHR, *Õcalan v Turkey*, 12 May 2005, Appl. No. 46221/99 (Grand Chamber), para. 191; and ECtHR, *Mathew v Netherlands*, 29 September 2005, Appl. No. 24919/03, para. 199.

Furthermore, in one case, *Yankov v Bulgaria* (2003), the Court even accepted that the forced shaving off of a prisoner's hair constituted degrading treatment within the meaning of Article 3, because it resulted in a forced change in the person's appearance, leaving a physical mark on the victim and a feeling of inferiority.[208] The Court considered that the shaving off had no legal basis or valid justification. This was degrading and reached the minimum level of severity, whereupon the Court took into account the applicant's age (55 years old) and the fact that he appeared at a public hearing nine days after his hair had been shaved off.[209] Another remarkable case in which the Court found certain treatment in detention to be degrading was *Moisejevs v Latvia* (2006).[210] In this case, the applicant, during pre-trial detention, complained that on days on which he had Court hearings he had not been given a normal lunch; he had been given only a slice of bread, an onion and a piece of grilled fish or a meatball. The Court considered that such a meal was insufficient to meet the body's functional needs, especially in view of the hearings and the increased psychological tension. Furthermore, on a number of occasions when returning to the prison in the evening the applicant had received only a bread roll instead of a full dinner. The Court concluded that the applicant had regularly suffered hunger on the days of the hearings. The Court considered that this amounted to degrading treatment within the meaning of Article 3 ECHR.

Other situations which have been at issue before the Court and may also have involved an inevitable element of suffering or humiliation include medical treatment and the expulsion of aliens. Medical treatment will not amount to inhuman or degrading treatment within the meaning of Article 3 ECHR if it can be justified by medical necessity. In *Herczegfalvy v Austria* (1992), for example, the applicant, a psychiatric patient, was forcibly given food and medication, and he was isolated and attached with handcuffs to a security bed for several weeks. Even though this treatment involved suffering and humiliation, it was not in breach of Article 3 ECHR because it was in accordance with general accepted psychiatric principles.[211]

Similarly, the expulsion of aliens may involve an inevitable element of suffering or humiliation. For such suffering or humiliation to amount to treatment proscribed by Article 3 ECHR it, again, needs to exceed what is strictly necessary with respect to the expulsion. I have already mentioned *Shamayev and 12 Others v Georgia and Russia* (2005) in which the extradition of five of the applicants was carried out with excessive force.[212] In cases not involving physical violence the Court seems reluctant to conclude that the expulsion in itself involved ill-treatment within the meaning of Article 3 ECHR. In *Berrehab v the Netherlands* (1988), for example, the applicant,

208 ECtHR, *Yankov v Bulgaria*, 11 December 2003, Appl. No. 39084/97, paras. 112-122: the Court was not convinced by the government's arguments that the head shaving was done for hygienic reasons.

209 Ibid., para. 119.

210 ECtHR, *Moisejevs v Latvia*, 15 June 2006, Appl. No. 64846/01.

211 ECtHR, *Herczegfalvy v Austria*, 24 September 1992, Appl. No. 10533/83, para. 83.

212 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 October 2005, Appl. No. 36378/02, para. 381.

a Moroccan national, was refused a new residence permit after he divorced his Dutch wife, which resulted in his deportation and separation from his (Dutch) daughter. The Court considered that the case did not show that the applicants (Mr. Berrehab, his daughter and his new wife) underwent suffering of a degree corresponding to the concepts of inhuman or degrading treatment.[213] In *Nsnona v the Netherlands* (1996), a 9-year-old child was returned to the Democratic Republic of Congo (then Zaire) on a journey via Switzerland which took seven days. The Court considered that this must have been a distressing journey. However, the child was in the hands of the Netherlands authorities for as long as she was at Schiphol airport in the Netherlands; on her way to Switzerland she was accompanied by an adult whom she knew; and she was looked after in a Swiss nursery while she was in Zurich. In any event, according to the Court, it had not been suggested that the child had sustained any damage, however slight, to her mental or physical health. The Court concluded that the child's removal did not constitute treatment of such a nature as to be inhuman or degrading in the context of Article 3 ECHR.[214] A different conclusion was reached by the Court in *Mayeka and Mitunga v Belgium* (2006). In this case a 5-year-old child was deported, unaccompanied, by Belgium to the Democratic Republic of Congo (DRC). According to the Court the child's detention while awaiting deportation caused her considerable stress, to such a degree that it amounted to inhuman treatment. A significant factor in that conclusion was her very youth, which should have taken precedence over considerations relating to her illegal status.[215] Furthermore, it was taken into account by the Court that the child's mother was a refugee lawfully residing in Canada and that mother and daughter had a right to be reunited.[216] The deportation itself and the way it was enforced also led to the conclusion that Article 3 had been violated. Of particular relevance in that regard were the fact that the child had to travel alone (irrespective of the presence of an air hostess who looked after her during the flight) and that very poor arrangements were made in the DRC.[217] Interestingly, the Court found a violation of Article 3 not just in respect of the child (the second applicant), but also in respect of the mother (the first applicant). The Court made it clear that whether a parent qualifies as a victim of the ill-treatment of her child depends on the existence of special factors which give the mother's suffering a dimension and character distinct from the emotional distress which may be regarded

213 ECtHR, *Berrehab v Netherlands*, 21 June 1988, Appl. No. 10730/84, para. 30. See also ECtHR, *Rodrigues Da Silva and Hoogkamer v Netherlands*, 25 March 2003, Appl. No. 50435/99 (admissibility decision), para. 1, involving the refusal to allow the Brazilian mother (first applicant) to reside with her Dutch daughter (second applicant) in Netherlands. The Court considered that the facts of the case did not demonstrate that the minimum level of severity was attained and declared the case inadmissible. See also ECtHR, *Uner v Netherlands*, 26 November 2002, Appl. No. 46410/99 (admissibility decision) involving an applicant who was declared an undesirable alien and then excluded for 10 years from Dutch territory, where his partner and small children resided. The Court found that the facts of this case did not demonstrate that the minimum level of severity was attained.

214 ECtHR, *Nsona v Netherlands*, 28 November 1996, Appl. No. 23366/94, para. 99.

215 ECtHR, *Mayeka and Mitunga v Belgium*, 12 October 2006, Appl. No. 13178/03, paras. 55 and 58.

216 Ibid., para. 57.

217 Ibid., paras. 66 to 71.

as inevitably caused to relatives of a victim of a serious human rights violation. Relevant factors will include the closeness of the family tie, in this case the bond between mother and daughter. The State's reactions and attitudes to the situation when it is brought to its attention are also important. In this case Belgium was aware of the mother's status in Canada as well as of the lack of proper reception and care for the child in the DRC, yet the Belgium authorities merely informed the mother that her daughter had been detained and provided her with a telephone number at which she could be reached.[218] In essence, the Court accepted in this case that the right to family life could, under certain circumstances, be breached on such a level as to amount to inhuman or degrading treatment proscribed by Article 3 ECHR.

A relevant factor in the context of expulsion may also be the fact that the alien is suffering from post-traumatic stress disorder. In *Cruz Varas and Others v Sweden* (1991) one of the applicants suffered from post-traumatic stress disorder prior to his expulsion and his mental health appeared to deteriorate following his expulsion. Even so, the Court concluded that no substantial grounds had been shown that his expulsion would expose him to a real risk of being subjected to ill-treatment contrary to Article 3 of the Convention, and 'accordingly the Court does not consider that the first applicant's expulsion exceeded the threshold set by Article 3'.[219] Apparently, the Court concluded that the expulsion did not reach the minimum level of severity because, after the applicant's expulsion, he was not exposed to a real risk of ill-treatment, even though the Court acknowledged that he suffered from post-traumatic stress disorder and his health appeared to have deteriorated after his expulsion. The Court did not accept a separate claim that the expulsion itself might be in breach of Article 3 ECHR, apparently because, after the applicant's expulsion, he was not exposed to proscribed ill-treatment.[220] It should be noted that situations in which the expulsion itself is in breach of Article 3 have to be distinguished from the question whether or not the expulsion violates the prohibition on refoulement contained in Article 3 ECHR. In cases involving the prohibition on refoulement the expulsion itself is not necessarily inhuman, but it may lead to a risk of being subjected to proscribed ill-treatment in the country to which the person is expelled.

3.3.1.2a Perpetrators of inhuman and degrading treatment or punishment

States parties to the European Convention on Human Rights have, under Article 1, a responsibility to ensure to everyone within their jurisdiction the rights and freedoms of the Convention, including, taken together with Article 3 ECHR, to take all possible measures to ensure that individuals are not subjected to torture or inhuman or degrading treatment or punishment, even if such treatment is administered by private indi-

218 Ibid., paras. 61 and 62.

219 ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 84.

220 See also ECtHR, *Pavlovic v Sweden*, 23 February 1999, Appl. No. 45920/99 (admissibility decision) and ECtHR, *Nasimi v Sweden*, 16 March 2004, Appl. No. 38865/02 (admissibility decision), in which the Court considered that the symptoms of a post-traumatic stress disorder appeared to relate to the prospect of being expelled from Sweden and the applicant's fears of returning to Iran, but that those fears were not reasonably substantiated.

viduals.[221] The question of who the perpetrator of proscribed ill-treatment is is irrelevant to the extent that any treatment reaching the necessary minimum level of severity is prohibited under Article 3 ECHR. The question is relevant only to determining to what extent the State can be held responsible. In *A. v the United Kingdom* (1998), for example, the Court considered that the beating of the applicant by his stepfather reached the level of severity prohibited by Article 3 ECHR. The Court then continued that:

> 'it remains to be determined whether the State should be held responsible, under Article 3, for the beating of the applicant by his stepfather", and concluded that in its view "the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3.'[222]

In this case the Court considered the State party to be responsible to the extent that it ought to have provided adequate legal protection against proscribed ill-treatment administered by private individuals in terms of taking effective steps to protect the victims from further abuse and to prosecute the perpetrators. In situations in which the ill-treatment is administered by private individuals it cannot always be expected that the authorities are aware of any ill-treatment, and therefore have the opportunity to take effective steps.[223]

3.3.1.3 Proscribed ill-treatment in the context of refoulement

3.3.1.3a Defining the ill-treatment

In refoulement cases the requirement that the possible treatment must attain a minimum level of severity is often repeated. Again it depends on the facts and circumstances of the case, making it difficult to say, in general, what treatment comes within the scope of Article 3 ECHR. Even more so in refoulement cases because they involve the assessment of a future possibility of ill-treatment. In most cases concerning the prohibition on refoulement the treatment to which the applicant may be subjected is

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221 ECtHR, *A. v United Kingdom*, 23 September 1998, Appl. No. 25599/94, para. 22; ECtHR, *Mahmut Kaya v Turkey*, 28 March 2000, Appl. No. 22535/93, para. 115; ECtHR, *Z and Others v United Kingdom*, 10 May 2001, Appl. No. 29392/95, para. 73; ECtHR, *D.P. and J.C. v United Kingdom*, 10 October 2002, Appl. No. 38719/97, para. 109; ECtHR, *E. and Others v United Kingdom*, 26 November 2002, Appl. No. 33218/96, para. 88; ECtHR, *M.C. v Bulgaria*, 4 December 2003, Appl. No. 39272/98, para. 149.

222 ECtHR, *A. v United Kingdom*, 23 September 1998, Appl. No. 25599/94, para. 22. See also ECtHR, *Assenov and Others v Bulgaria*, 28 October 1998, Appl. No. 24760/94, para. 95; ECtHR, *E. and Others v United Kingdom*, 26 November 2002, Appl. No. 33218/96, paras. 89 and 92.

223 ECtHR, *D.P. and J.C. v United Kingdom*, 10 October 2002, Appl. No. 38719/97, para. 114, in which the Court concluded that it had not been shown that the local authorities should have been aware of the sexual abuse inflicted on the applicants in their homes and that in those circumstances the authorities could not be regarded as having failed in any positive obligation to take steps to protect them from abuse. See for a different judgment ECtHR, *E. and Others v United Kingdom*, 26 November 2002, Appl. No. 33218/96, para. 96.

not explicitly examined. The Court merely stipulates that an assessment needs to be made of the conditions in the country of destination against the standards of Article 3 ECHR.[224] The Court then either finds that there are substantial grounds for believing that the applicant's return would expose him to a real risk of being subjected to treatment proscribed by Article 3 ECHR without addressing the conduct which may await the person involved, or finds that no such substantial grounds have been shown.[225]

In some cases the awaited treatment or punishment was explicitly considered. In *Soering v the United Kingdom* (1989) for example, as I have already pointed out, the Court concluded that the death row phenomenon attained the minimum level of severity and amounted to inhuman or degrading treatment or punishment. The facts upon which this conclusion was based were:

> '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'.[226]

The fact of awaiting execution was also relevant in *Bader and Others v Sweden* (2005) in which the Court considered that:

> 'the death sentence imposed on the first applicant following an unfair trial would inevitably cause the applicants additional fear and anguish … as there exists a real possibility that the sentence will be enforced in that country [Syria]'.[227]

Together with the absence of assurances that the first applicant would receive a new trial at which the death penalty would not be sought or imposed, the Court concluded that this situation would lead to a real risk of being subjected to treatment proscribed by Article 2 ECHR. And in general terms, in *Shamayev and 12 Others* (2005) the Court considered that the circumstances relating to a death sentence can give rise to an issue under Article 3 ECHR.[228] Likewise, in certain circumstances the imposition

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224 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 91; ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 69.

225 It should be noted that the Court first assesses the existence of a real risk before it examines the ill-treatment awaiting the applicant upon return. Therefore, in cases where no real risk exists the Court will obviously not address the type and level of ill-treatment.

226 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 111. The average time spent on death row is six to eight years, with a risk of homosexual abuse and physical attack in a stringent custodial regime. At the time of the offence the applicant was 18 years old and there was psychiatric evidence of an abnormality of mind substantially impairing his mental responsibility for his acts. See also ECtHR, *Nivette v France*, 14 December 2000, Appl. No. 44190/98 (partial admissibility decision); ECtHR, *Einhorn v France*, 16 October 2001, Appl. No. 71555/01 (admissibility decision).

227 ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04, para. 47.

228 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 333.

of an irreducible life sentence or life imprisonment without the possibility of early release, may also give rise to an issue under Article 3 ECHR.[229]

Other cases in which the Court explicitly discussed the possible treatment included *Ould Barar v Sweden* (admissibility decision, 1999), in which the Court acknowledged that in certain circumstances an issue under Article 3 may arise in the case of expulsion to a country where there is an officially recognised regime of slavery.[230] Furthermore, in *Jabari v Turkey* (2000), involving an asylum-seeker for whom substantial grounds existed for believing that if returned to Iran she would be charged with and punished for adultery, the inhuman and degrading punishment, i.e. stoning to death, awaiting the applicant upon return was considered.[231] In *D. and Others v Turkey* (2006) the Court explicitly discussed the conduct of corporal punishment. In this case, one of the applicants was sentenced to 100 lashes for fornication in Iran. According to the Court the public execution of the sentence was decisive in this case for considering the corporal punishment to be inhuman within the meaning of Article 3 ECHR.[232] In *Salah Sheekh v the Netherlands* (2007) the Court classified beating, kicking, robbing, intimidating, harassing and making the applicant carry out forced labour to which the applicant had been subjected in the past and was at risk of being subjected to upon his return as inhuman treatment.[233] And in *Collins and Akaziebie v Sweden* (admissibility decision, 2007) the Court made it clear that subjecting a woman to female genital mutilation amounts to ill-treatment contrary to Article 3 ECHR.[234]

Finally, *Tomic v the United Kingdom* (2003) is an example of ill-treatment in the context of refoulement which did not amount to proscribed ill-treatment. In *Tomic,* the Court considered that the threat that returning refugees would not be able to repossess their former property, and would have problems with the recognition of documents and papers and difficulties in obtaining pensions and jobs in a post-armed conflict situation in Croatia did not reach the minimum level of severity required to engage Article 3 ECHR.[235] The Court considered that these threats, which can be

229 ECtHR, *Nivette v France*, 14 December 2000, Appl. No. 44190/98 (partial admissibility decision); ECtHR, *Einhorn v France*, 16 October 2001, Appl. No. 71555/01 (admissibility decision).

230 ECtHR, *Ould Barar v Sweden*, 19 January 1999, Appl. No. 42367/98 (admissibility decision).

231 ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, paras. 34 and 41.

232 The Court considered: 'That it is permissible that a human being can, in the aforementioned conditions, deliver such a physical violence to one of his fellow human beings, and in addition, in public, is sufficient to qualify the punishment of the applicant as "inhumnan" in itself' (unofficial translation from RSDWatch.org); ECtHR, *D. and Others v Turkey*, 22 June 2006, Appl. No. 24245/03, para. 50. It should be noted that private executions of punishments may still be inhuman, as was discussed in section 3.3.1.2. See, for example, ECtHR, *Öcalan v Turkey*, 12 May 2005, Appl. No. 4622/99 (Grand Chamber), para. 182, in which the Court considered that: 'the public nature of the treatment or the mere fact that the victim is humiliated in his or her own eyes may be a relevant consideration'.

233 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 146.

234 ECtHR, *Collins and Akaziebie v Sweden*, 8 March 2007, Appl. No. 23944/05 (admissibility decision).

235 ECtHR, *Tomic v United Kingdom*, 14 October 2003, Appl. No. 17837/03 (admissibility decision). In this case the applicant referred to the Court's judgment in ECtHR, *Cyprus v Turkey*, 10 May 2001, Appl. No. 25781/94, in which discriminatory treatment was found to infringe Article 3 of the Convention. The Court observed, however, that this case concerned very different circumstances

regarded as socio-economic threats, had no or little bearing on the question of a real risk of ill-treatment within the meaning of Article 3. In *N. v the United Kingdom* (2008) the Court stated that 'although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights'.[236] In this case, the Court appears to rule out economic, social and cultural rights as coming within the scope of the Convention. The Court referred to its judgment in *Airey v Ireland* (1979). However, the Court's reference to the *Airey* case is incomplete and misleading.[237] In that judgment economic, social and cultural rights were explicitly not ruled out of the scope of the Convention. In that case, too, the Court considered that:

> 'Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention'.[238]

Moreover, in both *Airey* and *N. v the United Kingdom* (2008) the essence of the case was not economic, social and cultural rights *per se*, but a core fundamental human right, i.e. the right to be protected from proscribed ill-treatment.[239] The fact that socio-economic considerations do not necessarily have a bearing on the question of a real risk of ill-treatment within the meaning of Article 3 ECHR was also stated by the Court in *NA. v the United Kingdom* (2008).[240]

In other cases the possible treatment or punishment which may await the applicant was not an explicit element of the Court's considerations, but can be derived from them. In *Chahal v the United Kingdom* (1996) the Court made numerous references to various forms of ill-treatment as it extensively discussed the security and human rights situation in the country of return (i.e. India), involving extra-judicial killings, disappearance, torture and widespread, often fatal, mistreatment of prisoners.[241] In *Ahmed v Austria* (1996), the Court referred to the refugee status the applicant was granted by Austria and the subsequent risk of being subjected to persecution within

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of an enclaved minority in northern Cyprus who were the object of very severe restrictions which curtailed the exercise of basic freedoms.

236 ECtHR, *N. v United Kingdom*, 27 May 2008, Appl. No. 26565/05, para. 44.

237 Ibid., Joint Dissenting Opinion of Judges Tulkens, Bonello and Speilmann, para. 6.

238 ECtHR, *Airey v Ireland*, 9 October 1979, Appl. No. 6289/73, para. 26. Also, EctHR, *Larioshina v Russia*, 23 April 2002, Appl. No. 56869/00 (admissibility decision) in which the Court stated that 'a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman or degrading treatment'.

239 ECtHR, *N. v United Kingdom*, 27 May 2008, Appl. No. 26565/05, Joint Dissenting Opinion of Judges Tulkens, Bonello and Speilmann, para. 6.

240 ECtHR, *NA. v United Kingdom*, 17 July 2008, Appl. No. 25904/07, para. 122.

241 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, paras. 99, 102 to 104.

the meaning of the Refugee Convention.[242] The Court concluded that such a risk still existed and that expulsion of the applicant would be in breach of Article 3 ECHR, thereby implying that, at least to some extent, persecution within the meaning of the Refugee Convention falls within the scope of ill-treatment proscribed by Article 3 ECHR. Arguably not every form of persecution within the meaning of the Refugee Convention amounts to ill-treatment proscribed in Article 3 ECHR.[243] The *Ahmed* case does however imply that, when there is a risk of persecution under the Refugee Convention, there may also be a risk of ill-treatment proscribed under Article 3.[244] And in the absence of a well-founded fear of persecution within the meaning of the Refugee Convention the person concerned may be at risk of being subjected to ill-treatment proscribed by Artilce 3.[245] In *Hilal v the United Kingdom* (2001), involving a political opponent of the regime in Tanzania, it was considered that in general political opposition members are subjected to arbitrary arrests and detention and ill-treatment.[246] In *Said v the Netherlands* (2005) it was considered that deserters from the Eritrean army, such as the applicant, were in general subjected to inhuman treatment ranging from detention incommunicado to prolonged exposure to the sun at high temperatures and the tying of hands and feet in painful positions.[247]

The question remains whether or not different standards apply for treatment to fall within the scope of Article 3 ECHR when it comes to situations of refoulement compared to situations outside the context of refoulement. Neither the text of Article 3 ECHR nor its object and purpose or case law indicates that a different standard applies or should apply. In fact in *D. and Others v Turkey* (2006) the Court considered that Article 3 is equally absolute in cases involving deportation and implies that no different standards, for example, with regard to corporal punishment, apply in such cases.[248]

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242 ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, para. 42.

243 Vermeulen in his comment on ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, in '*Rechtspraak Vreemdelingenrecht*', 1996, no. 21, p. 100, in which he gives an example of an act of persecution that will not amount to treatment contrary to Article 3 of the European Convention; i.e. detention for several months for a political, non-violent protest,. See also his comment on ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, in '*Rechtspraak Vreemdelingenrecht 1974-2003*', no. 2, p. 30.

244 Vermeulen in his comment on ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, in '*Rechtspraak Vreemdelingenrecht*', 1996, no. 21, p. 100 and on ECtHR, Ch*ahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, in '*Rechtspraak Vreemdelingenrecht 1974-2003*', no. 2, p. 30. In ECtHR, *Ismoilov and Others v Russia*, 24 April 2008, Appl. No. 2947/06, para. 125 the Court found it significant that the applicants had been granted refugee status by UNHCR. It was considered they had a well-founded fear of being persecuted and ill-treated.

245 ECtHR, *Ryabikin v Russia*, 19 June 2008, Appl. No. 8320/04, para. 118.

246 ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99, para. 66.

247 ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, para. 54.

248 ECtHR, *D. and Others v Turkey*, 22 June 2006, Appl. No. 24245/03, para. 45: '*La Cour se doit d'insister tout particulièrement sur le fait que le recours à des formes de peines, y compris les châtiments judiciaires corporels, contraires à cette disposition n'est aucunement admissible. Ainsi, chaque fois qu'il y a des motifs sérieux et avérés de croire qu'une personne courra, dans le pays de destination, un risque réel d'être soumise à un tel traitement, la responsabilité de l'Etat contractant est engagée en cas d'expulsion ...*'.

Applying a different standard would undermine the absolute character of Article 3 and the fundamental values it enshrines.[249] In *Saadi v Italy* (2008) the Court stated that 'it cannot accept the argument ... that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State'.[250] Article 3 ECHR protects people from being subjected to torture and other forms of inhuman and degrading treatment. That is the underlying fundamental value of Article 3. For that reason no distinction can be made between ill-treatment conducted or tolerated by a State party directly and that conducted or tolerated by other States to which the individual concerned may be exposed after expulsion. In the former situation the State party is directly responsible for the proscribed ill-treatment, and in the latter situation by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment.[251] The discussion should not be about a distinction between ill-treatment in the context of refoulement and outside such a context, but about what treatment should and should not fall within the ambit of Article 3 ECHR. All cases described above come within the scope of Article 3 ECHR for all the right reasons. The treatment to which the applicants were subjected or were at risk of being subjected is against the fundamental values enshrined in Article 3 ECHR. Notable exceptions are perhaps the cases of *Yankov v Bulgaria* (2003) and *Moisejevs v Latvia* (2006).[252] A consistent application of Article 3 ECHR would mean that when, upon expulsion, there is a real risk of being shaved bald or receiving a light meal in certain circumstances the individuals concerned cannot be expelled.[253] In light of these cases one may question whether or not the concept of degrading treatment has been streched too far. This discussion has particular relevance for the absolute character of Article 3 ECHR. Some States parties have suggested balancing the individual protection rights of aliens under Article 3 and the danger such an individual may pose to a State's national security if, for example, the individual is suspected of terrorist activities.[254] This issue will be further discussed in section 3.3.3 regarding the absolute character of Article 3 ECHR.

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249 The absolute character of Article 3 ECHR is discussed in section 3.3.3.

250 ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, para. 138.

251 ECtHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99 (Grand Chamber), para. 67; ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, para. 126.

252 ECtHR, *Yankov v Bulgaria*, 11 December 2003, Appl. No. 39084/97; ECtHR, *Moisejevs v Latvia*, 15 June 2006, Appl. No. 64846/01.

253 Lawson & Verhey 2006. A similar argumentation was used by Lawson in respect of the responsibility of States for acts performed outside their territory, inLawson 2002, p. 289.

254 Observations of the Governments of Lithuania, Portugal, Slovakia and the United Kingdom in ECtHR, *Ramzy v Netherlands*, Appl. No. 25424/05, 21 November 2005, para. 3. Avaliable via <redress.org/publications/GovernmentintervenorsobservationsinRamzy%20case22November.pdf>. Intervention of the United Kingdom in *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, paras. 117-123. The *Ramzy* case was declared admissible by the Court: ECtHR, *Ramzy v Netherlands*, 27 May 2008, Appl. No. 25424/05 (admissibility decision).

3.3.1.3b State versus non-State perpetrators of ill-treatment

As I have already mentioned in section 3.3.1.2a the question of who the perpetrator of proscribed ill-treatment is is relevant only to determine to what extent the State can be held responsible. In cases involving the prohibition on refoulement the responsibility of a State is engaged as a result of conduct by that State whereby the individual is exposed to a real risk of being subjected to proscribed forms of ill-treatment in the country of return.[255] Neither is responsibility engaged as a consequence of the proscribed ill-treatment itself nor is there a question of adjudicating or establishing the responsibility of the country of return.[256] Therefore, in cases involving the prohibition on refoulement, the question of who the perpetrator of ill-treatment is is irrelevant. What is relevant is whether or not there is a real risk of being subjected to proscribed ill-treatment, irrespective of where the risk comes from. In *H.L.R. v France* (1997) the Court considered that:

> 'owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention (art. 3) may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection'.[257]

This includes countries where no State authority exists.[258] The irrelevance of the source of the risk was confirmed by the Court in *Salah Sheekh v the Netherlands* (2007). In this case the Court considered that experiences of proscribed ill-treatment as a consequence of the general unstable situation in which criminal gangs frequently, but arbitrarily, intimidated and threatened people were insufficient to remove that treatment from the scope of Article 3 ECHR.[259] In other words, a real risk of proscribed ill-treatment may arise out of indiscriminate violence; the source of the risk of ill-treatment is irrelevant.

3.3.1.3c Situations in the country of origin amounting to ill-treatment

It is not just people facing a risk of being subjected to proscribed ill-treatment emanating from intentionally inflicted acts of public authorities or non-State actors in the country of origin which are are protected by Article 3 ECHR. In very exceptional

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255 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 91; ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 76.

256 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 91.

257 ECtHR, *H.L.R. v France*, 29 April 1997, Appl. No. 24573/93, para. 40; ECtHR, *Ammari v Sweden*, 22 October 2002, Appl. No. 60959/00 (admissibility decision); ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, para. 163. See also ECtHR, *T.I. v United Kingdom*, 7 March 2000, Appl. No. 43844/98 (admissibility decision), in which the German government still held the position that protection from refoulement under Article 3 could only be afforded if the risk emanated from State or quasi-State authorities.

258 ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, para. 46, involving Somalia. Arguably, situations of civil war may come within the scope of Article 3 of the Convention.

259 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 147.

circumstances, for example involving a terminally ill person who is in dire need of medical and social care, the removal of that person to a country in which he will have no access to the necessary medical and social care may be in violation of Article 3 ECHR.[260] In *D. v the United Kingdom* (1997), the Court considered that:

> 'given the fundamental importance of Article 3 in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts [i.e. proscribed forms of treatment emanating from intentionally inflicted acts of the public authorities or non-State bodies] which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country'.[261]

In this case the Court considered that the applicant, who was in the advanced stages of the terminal and incurable illness AIDS, should under these exceptional circumstances not be removed to the island of St. Kitts because of the absence of proper palliative medical and social care.[262] Thus, the Court implied that under exceptional circumstances the absence of proper medical and social care may amount to inhuman treatment. Under what exceptional circumstances the Court has applied Article 3 in this context will be further discussed in section 3.3.2.3.[263]In general, the Court has stressed that Article 3 ECHR:

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260 Such situations are not covered by the EU Qualification Directive, Article 6 of which requires a concrete actor of serious harm.

261 ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96, para. 49.

262 Ibid., paras. 52 and 53. The European Commission reached a similar conclusion in EComHR, *B.B. v France*, 9 March 1998, Appl. No. 30930/96, although in this case the Commission perceived the possibility of medical treatment and social care in the receiving country as 'precarious'. The Court did not consider the merits of this case because a friendly settlement was reached: ECtHR, *B.B. v France*, 7 September 1998, Appl. No. 30930/96.

263 Other cases involving the issue of absence of medical treatment and social care include: ECtHR, *S.C.C v Sweden*, 15 February 2000, Appl. No. 46553/99 (complained declared inadmissible); ECtHR, *Tatete v Switzerland*, 6 July 2000, Appl. No. 41874/98 (struck out of the list); ECtHR, *Bensaid v United Kingdom*, 6 February 2001, Appl. No. 44599/98 (no violation); ECtHR, *Henao v Netherlands*, 24 June 2003, Appl. No. 13669/03 (complained declared inadmissible); ECtHR, *Meho and Others v Netherlands*, 2 January 2004, Appl. No. 76749/01 (complaint declared inadmissible); ECtHR, *Ndangoya v Sweden*, 22 June 2004, Appl. No. 17868/03 (complaint declared inadmissible); ECtHR, *Salkic and Others v Sweden*, 29 June 2004, Appl. No. 7702/04 (complaint declared inadmissible); ECtHR, *Amegnigan v Netherlands*, 25 November 2004, Appl. No. 25629/04 (complaint declared inadmissible); ECtHR, *Hukic v Sweden*, 27 September 2005, Appl. No. 17416/05 (complaint declared inadmissible); ECtHR, *Ramadan and Ramadan-Ahjredini v Netherlands*, 10 November 2005, Appl. No. 35989/03 (complaint declared inadmissible). And before the European Commission: EComHR, *M.N. v France*, 10 March 1994, Appl. No. 19465/92 (admissible; Court (13 July 1995) concluded violation of Article 8 and did not consider claim under Article 3); EComHR, *Tanko v Finland*, 19 May 1994, Appl. No. 23634/94 (complaint declared inadmissible); EComHR, *Karara v Finland*, 29 May 1998, Appl. No. 40900/98 (complaint declared inadmissible).

> 'principally applies to prevent a deportation or expulsion where the risk of ill-treatment in the receiving country emanates from intentionally inflicted acts of the public authorities there or from non-State bodies when the authorities are unable to afford the applicant appropriate protection'.[264]

Only in very exceptional circumstances will Article 3 ECHR apply in situations which do not emanate from intentional acts or ommisions, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.[265] As I discussed in section 3.3.1.3, it cannot be ruled out that a risk of a violation of socio-economic rights comes within the scope of the prohibition on refoulement under Article 3; certainly when implications of a socio-economic nature have significant bearing on civil and political rights.[266]

3.3.2 The element of risk

The backbone of the prohibition on refoulement under Article 3 ECHR is the element of risk. The nature of the State party's responsibility under Article 3 in cases concerning refoulement 'lies in the act of exposing an individual to the risk of ill-treatment'.[267] In order for an individual to be granted protection from refoulement under Article 3 ECHR substantial grounds must be shown for believing that he faces a risk of being subjected to torture or to inhuman or degrading treatment or punishment after removal to another State.[268] In other words, a credible claim must be presented containing sufficient facts and circumstances to induce one to believe that a real risk exists.

There are two sides to the risk criterion. First, there is the substantive or material side, commonly referred to as 'real risk', indicating what level of possible proscribed ill-treatment is required in order for there to be a right to be protected from refoulement. Secondly, there is the evidentiary side, commonly referred to as 'substantial grounds must be shown', indicating the standard and burden of proof relevant to show the existence of a real risk.

In section 3.3.2.1 I will first analyse the real risk criterion as it has been defined by the Court in its case law. This will include issues such as prospectivity and objectivity, the individualisation of the risk and the required facts and circumstances to meet

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264 ECtHR, *N. v United Kingdom*, 27 May 2008, Appl. No. 26565/05, para. 31.

265 Ibid., para. 43.

266 ECtHR, *Airey v Ireland*, 9 October 1979, Appl. No. 6289/73, para. 26; ECtHR, *Tomic v United Kingdom*, 14 October 2003, Appl. No. 17837/03 (admissibility decision); ECtHR, *N. v United Kingdom*, 27 May 2008, Appl. No. 26565/05, Joint Dissenting Opinion of Judges Tulkens, Bonello and Speilmann, para. 6.

267 ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 76.

268 For example, ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 91; ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, paras. 69 and 70; ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 103.

the necessary level of risk in order for an individual to be afforded protection. In section 3.3.2.2 I will outline the evidentiary standard, or standard of proof, to show that substantial grounds exist for believing that there is a real risk. This will include issues of credibility and evidence. Furthermore, section 3.3.2.2 will include an analysis of the burden of proof. In section 3.3.2.3 I will analyse refoulement cases for which a different standard applies, i.e. cases where the source of proscribed ill-treatment in the country of return stems from factors which cannot either directly or indirectly engage the responsibility of the public authorities of that country. In section 3.3.2.4 I will discuss at what moment in time the assessment of the risk should take place. In section 3.3.2.5 I will then analyse the role of the ECtHR in the risk assessment and, finally, in section 3.3.2.6 I will discuss the issue of national protection, i.e. protection which may be obtained from the individual's country of origin. This will include the concept of an internal protection alternative and diplomatic assurances.

3.3.2.1 Defining the risk: a real personal foreseeable risk

3.3.2.1a Prospectivity and objectivity

In *Soering v the United Kingdom* (1989) this risk was, for the first time, defined by the Court as a foreseeable or likely consequence of the extradition and not as a certainty or a high probability, hereby the Court explicitly referred to the prohibition on refoulement laid down in Article 3 of the Convention against Torture and the risk criterion developed therein.[269] In the second refoulement case, *Cruz Varas and Others v Sweden* (1991), this time involving the expulsion of asylum-seekers, the Court simply referred to its judgement in *Soering* and made no further specifications with respect to the risk criterion.[270] Additional language was used by the Court in *Vilvarajah and Others v the United Kingdom* (1991). In this case the Court repeated the risk definition it had adopted in the previous cases of *Soering* and *Cruz Varas and Others,* defining it as a real, personal and foreseeable risk exceeding the mere possibility of being subjected to proscribed ill-treatment.[271] So, in general the level of risk required to be afforded protection from refoulement in accordance with Article 3 is a real, personal, foreseeable or likely risk which goes beyond a mere possibility but does not need to be certain or highly probable. The risk criterion is not formulated as a probability calculus, but focuses on the facts presented, the credibility of the author and claim and its plausibility in light of the situation in the country of origin.

A real, personal and foreseeable risk implies that the risk must be prospective; it must be real, i.e. realistic and not fictional; and it must be personal, i.e. it must relate to the individual concerned. The risk criterion is an objective requirement which does not include an independent assessment of any subjective fear the individual may feel

269 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 88.

270 ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, paras. 69.

271 ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, paras. 108 and 111.

that he will be ill-treated.[272] Subjective fear is relevant only when it has an objective basis substantiating the existence of a real risk. In general, the risk – or foreseeability of the ill-treatment – is determined by the specific facts and circumstances of each case.

Foreseeablity and the personal element of the risk have been the topic of discussion since the Court's judgment in the *Vilvarajah* case in 1991, in particular because the Court used the phrase 'special distinguishing features'. After the Court had found that the fact that the applicants belonged to the Tamil community was not enough for them to foresee that they would be subjected to proscribed ill-treatment, because the risk for Tamils in general did not exceed a mere possibility of ill-treatment, it continued and stated that 'there existed no special distinguishable features' which suggested that the applicants would be subjected to ill-treatment.[273] The phrase appears to imply that only a heightened, individualised risk would suffice and raises three important questions regarding the Court's interpretation of the real risk criterion: first, does the phrase imply an element of comparison between members of the same group in order to have a real risk within the meaning of Article 3 (often referred to as singled out); secondly, does the phrase exclude the possibility of mere membership of a group being sufficient to establish a real, personal and foreseeable risk;[274] thirdly, how does the phrase define the element of foreseeability in terms of the facts and circumstances which must be presented in order to meet the required level of risk? I will discuss these three questions below.

3.3.2.1b Individualisation: an element of comparison?

In theory, the phrase 'special distinguishing features' can be interpreted to imply an element of comparison, i.e. the person concerned, if belonging to a group which is the target of violence or human rights violations, must be treated differently from or substantially worse than other members of the group in order to have a real, personal and foreseeable risk. The *Vilvarajah* case involved a group of Tamils

272 In *Cruz Varas and Others* (ECtHR, 20 March 1991, Appl. No. 15576/89, para. 84) and *Pavlovic v Sweden* (ECtHR, 23 February 1999, Appl. No. 45920/99 (admissibility decision) the applicants were suffering from post-traumatic stress syndrome. Notwithstanding that the Court considered in both cases that no substantial basis had been shown for the applicant's fear. In *Shamayev and 12 Others v Georgia and Russia* (ECtHR, 12 April 2005, Appl. No. 36378/02, para. 340) the Court noted that it had 'no doubt that the applicants' fear of being confronted with a threat to their lives or treatment contrary to Article 3 of the Convention was subjectively well-founded and genuinely perceived as such. The subjective view of events which may arouse feelings of fear or uncertainty in an individual with regard to his or her fate is, without any doubt, an important factor to be taken into account when assessing the facts (see paragraphs 378-81 and 445 below). However, when the Court examines an extradition measure under Article 3 of the Convention, it first assesses the existence of an objective danger which the extraditing State knew or ought to have known about the time it reached it disputed decision'.

273 ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 112.

274 The term 'group persecution' is borrowed from the field of refugee law, referring to a situation whereby a group as a whole has a risk of being subjected to persecution or, in the context of Article 3 ECHR, of torture or inhuman or degrading treatment or punishment.

threatened with return to Sri Lanka. The Court considered the security and human rights situation for Tamils in Sri Lanka to be unsettling, but not severe enough for the risk for Tamils in general to exceed the mere possibility of being ill-treated. The Court thereby relied decisively on the fact that the UNHCR had begun its voluntary repatriation programme.[275] In this context, according to the Court, the five applicants were no worse off than other Tamils. The applicants, like all Tamils, may have had a chance of being detained and ill-treated, but a mere possibility is not sufficient.[276] Clearly, according to the Court, the fact that the applicants belonged to the Tamil community was not enough to suggest that they would be subjected to proscribed ill-treatment. After this – interim – conclusion the Court continued and stated that 'there existed no special distinguishable features' that the applicants would be subjected to ill-treatment.[277] What the Court in fact did was first to say that it was not convinced that Tamils in general were targeted on a scale large enough for it to accept the existence of a real risk for every Tamil from Sri Lanka, and, secondly, that the applicants in particular had not shown sufficient personal grounds for the Court to accept the existence of a foreseeable or real risk. In my opinion it would therefore be wrong to interpret the Court's judgment in *Vilvarajah* as if a comparison between members of a particular group is always required in order to show the existence of a real risk. What is required is that the claim contains a fact or facts which relate to the applicant on the basis of which it can be concluded that the applicant has a real, personal and foreseeable risk of proscribed ill-treatment. Such fact can be the single fact of the applicant belonging to a group which as a whole is targeted on such a scale that protection should be afforded to all members of that group, because the scale of targeting is such that a risk of ill-treatment is foreseeable (see an analysis regarding the level of targeting required, below). It can also be that a number of facts or circumstances – relating to the individual concerned – are required for the Court to conclude that a risk of ill-treatment is foreseeable, and belonging to or membership of a group can be one of those facts. Later in section 3.3.2.1d I will discuss what facts and

275 ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, paras. 109 and 110. Zieck notes that UNHCR's involvement in voluntary repatriation programmes may have little meaning as regards safety and security in the country of origin because, even in situations of lack of safety and insecurity the UNHCR may still play a facilitating role regarding refugees who nevertheless want to return voluntarily: Zieck, comment on ECtHR, *D. and Others v Turkey*, 22 June 2006, Appl. No. 24245/03, published in NJCM-Bulletin Vol. 31 (2006) No. 8, p. 1169 (in Dutch).

276 ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 111. See also ECtHR, *Jeltsujeva v Netherlands*, 1 June 2006, Appl. No. 39858/04 (admissibility decision), para. 1, in which the Court considered that it found no indication in the case-file that the applicant's personal position, as a Chechen, would be any worse than that of the generality of other people hailing from Chechnya who currently resided elsewhere in the Russian Federation after having left Chechnya on account of the violent and unsettled situation there.

277 ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 112.

circumstances may be required for the Court to conclude that a foreseeable risk exists by looking at the Court's case law.

The conclusion that the risk criterion does not contain a comparative element is in accordance with the Court's later case law, in particular its judgments in *N. v Finland* (2005) and *Salah Sheekh v the Netherlands* (2007), two cases in which the Court referred to its judgment in the *Vilvarajah* case.[278] *N. v Finland* (2005) concerned an applicant from the Democratic Republic of Congo (DRC) who had acted as an infiltrator and informant in President Mobutu's special protection force and reported directly to very senior-ranking officers close to the President. According to the Court 'on account of those activities the Court finds that he would still run a substantial risk of treatment contrary to Article 3, if now expelled to the DRC'.[279] The Court then compared this case to its judgment in *Vilvarajah* and concluded that in this respect (i.e. the applicant's activities) *N.* differs from *Vilvarajah*. What the Court did, by using language similar to the phrase 'special distinghuising features', was to attach overriding importance to the specific activities of the applicant as infiltrator and informant in comparison to other former Mobutu supporters, who, at the time of the Court's assessment, ran no particular risk.[280] As in the *Vilvarajah* judgment the Court basically applied a two-step assessment. First, it assessed the group to which the applicant belonged. In the *Vilvarajah* case this group was the group of Tamils from Sri Lanka who had 'only' a mere possibility of being subjected to ill-treatment. In *N. v Finland* the group was the group of former Mobutu supporters who ran no particular risk. The second step, which the Court applied after it had considered that the group as a whole faced no real risk, involved an assessment of other personal facts and circumstances. In the *Vilvarajah* case this led to the conclusion that even then the applicants would not have a real risk. In *N.* the Court concluded that the applicant did have a real risk.

Salah Sheekh v the Netherlands (2007) concerned an applicant from Somalia who belonged to the minority Ashraf population. The Court started by considering that before leaving Somalia the applicant, as a member of a minorty group, had been subjected to inhuman treatment because 'members of a clan beat, kicked, robbed, intimidated and harassed him on many occasions and made him carry out forced labour. Members of the same clan also killed his father and raped his sister …'.[281] Furthermore, the Court considered that it was evident that members of the Ashraf, and other minority, group(s) would remain vulnerable to these types of human rights abuses and were not the victims of indiscriminate violence but were clearly tar-

278 ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, and ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, in which the Court, in paras. 162 and 148 respectively, explicitly referred to its judgment in the *Vilvarajah* case regarding the issue of 'special distinguishing features' or terms of identical meaning.

279 Ibid., para. 162.

280 Ibid., paras. 162 and 164. As in *Vilvarajah*, the Court, regarding the minimal risk for 'ordinary' Mobutu supporters, attached weight to the fact that people had been returning voluntarily (para. 161). See also the comment by Bruin in '*Rechtspraak Vreemdelingenrecht*' 2005, No. 3, para. 3.

281 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 146.

geted.[282] The Court then added that in the context of this case 'it cannot be required of the applicant that he establishes that *further* special distinguishing features, concerning him personally, exist in order to show that he was, and continues to be, personally at risk'.[283] The Court did not reject the concept of special distinguishing features but made it clear that the concept does not rule out that the mere fact of belonging to a certain group against which large-scale human rights violations are committed can be sufficient for the Court to conclude that a real, personal and foreseeable risk of proscribed ill-treatment exists. The fact that the applicant had been subjected to inhuman treatment because he belonged to a minority group which was targeted was sufficient to conclude that expulsion would be in violation of Article 3 of the Convention. And again the Court made it clear that the assessment of a real risk in the context of Article 3 may involve a two-step assessment. Unlike in the *Vilvarajah* and *N.* judgments, in this case the Court did not need to take the second step as it had concluded already in step one that a real risk existed.

The conclusion that mere membership of a targeted group can be sufficient to establish a real, personal and foreseeable risk was, with reference to the *Salah Sheekh* judgment, confirmed by the Court in *Saadi v Italy* (2008):

> 'in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, ..., that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned'.[284]

It is particularly interesting in this case that the Court unequivocally opened up the possibility of a real, personal and foreseeable risk solely based on membership of a group. In *Salah Sheekh* past experiences were still a part of the Court's considerations, but from the quotation above it becomes clear that such experiences are not necessarily decisive.

The possibility of having a real, personal and foreseeable risk of proscribed ill-treatment based on the mere fact of belonging to a group which is systematically exposed to a practice of ill-treatment was confirmed by the Court in *NA v the United Kingdom* (2008).[285] In addition, in this case the Court seems to open up the possibility of a third way of establishing the existence of a real risk. Not only can a risk be based on a number of facts directly related to the individual concerned, or based on the single fact that the individual belongs to a group which is systematically targeted,

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282 Ibid., paras. 146 and 148.

283 Ibid., para. 148 [emphasis added].

284 ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, para. 132. See also ECtHR, *Sultani v France*, 20 September 2007, Appl. No. 45223/05, para. 67.

285 ECtHR, *NA. v United Kingdom*, 17 July 2008, Appl. No. 25904/07, para. 116. The Court explicitly stated that in *Salah Sheekh v Netherlands* (2007) the treatment of the applicant's clan and his membership thereof were sufficient to conclude that expulsion would be in breach of Article 3. The applicant's past experiences of ill-treatment were immaterial.

but also on the exceptional general situation of extreme violence which exists in the country of origin. The Court stated:

> 'From the foregoing survey of its case-law, it follows that the Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such a approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return'.[286]

One may argue that in this statement the Court allows for protection from refoulement under Article 3 of the European Convention in cases of indiscriminate violence as described in Article 15(c) of the EU Qualification Directive, albeit only in the most extreme cases of general violence.[287]

3.3.2.1c Membership of a particular group

The question remains when mere membership of a group is sufficient to establish a real, personal and foreseeable risk of proscribed ill-treatment. The scale necessary to warrant protection is difficult to determine by analysing the Court's case law. Let me first go back to *Vilvarajah and Others v the United Kingdom* (1991). With respect to a prima facie claim for Tamils from Sri Lanka the Court in the *Vilvarajah* case considered the improvements in the north and east of Sri Lanka, the installation of Indian Peace Keeping Forces in these areas and the ending of major fighting in Jaffna. The Court did consider the occasional fighting and persistent threat of violence in these areas and the fact that civilians might become caught up in the fighting. It, however, relied decisively on the fact that the UNHCR had begun its voluntary repatriation programme, a strong indication for the Court that the situation had improved enough for Tamils to return.[288] In its assessment of the situation of Tamils in Sri Lanka the Court was apparently convinced that Tamils, as a group, were not targeted on a scale large enough for the Court to believe that all Tamils were at risk of being ill-treated as proscribed by Article 3 ECHR. In *Chahal v the United Kingdom* (1996), involving the situation of Sikhs in India, the Court refered to the systematic, widespread and even endemic targeting of Sikhs.[289] It concluded that the applicant in this case had a real risk of being subjected to proscribed ill-treatment if returned to India. However, his high profile as a prominent Sikh separatist was a decisive factor in the Court's judgment, making it difficult to conclude that the Court had accepted a (prima facie) claim for protection in this case because of the endemic targeting of

286 Ibid., para. 115.

287 Article 15 of the EU Qualification Directive states: 'Serious harm consists of: … (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.

288 ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, paras. 109 and 110.

289 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 104.

Sikhs in India.[290] In *Tomic v the United Kingdom* (2003), involving the situation of Serbs in Croatia, the Court considered that the general information with respect to violence against Serbs in Croatia 'does not however disclose a situation of endemic targeting of Serbs that the applicant may claim that he himself is at real risk of being a victim of such an incident [referring to stone-throwing, arson and murder]'.[291] The Court seemed to accept – in theory – the possibility of a prima facie claim for protection in the situation of the endemic targeting of Serbs.

Unlike the Court, the former European Commission seemed to have been closer to accepting a claim for prima facie protection. In *Bahaddar v the Netherlands* (1996) the Commission concluded that expulsion of the applicant would be in breach of Article 3 ECHR, thereby taking extensively into account the general security and human rights situation in the country of return, Bangladesh, in particular with regard to the Shanti Bahini (an illegal organisation striving for the regional autonomy of the Chittagong Hill Tracts using violent methods) and considering 'the existence of a suspicion of the applicant's involvement with Shanti Bahini to constitute a special distinguishing feature'.[292] Interestingly, the European Commission does not talk of endemic targeting of the Shanti Bahini group, but refers to reports of routinely employed torture and other abuse during arrest and interrogation,[293] in other words, systematic human rights violations. Unfortunately, the Court did not consider the merits of this case, as it concluded that the domestic remedies had not been exhausted.[294]

In recent years the Court has provided some clarity on the question of when mere membership of a group may be sufficient to establish a real, personal and foreseeable risk of proscribed ill-treatment. First, *Said v the Netherlands* (2005) involved an Eritrean national who claimed protection essentially because he was a deserter from the Eritrean army before demobilisation,[295] an undisputed and credible fact in this case. Based on that fact, and that fact alone, the Court posed the question whether the applicant was at risk of treatment contrary to Article 3 ECHR and held:

> 'in this context, and apart from the efforts employed by the Eritrean authorities in apprehending deserters as already mentioned above …, the Court further takes note of the general information from public sources describing the treatment meted out to deserters in Eritrea …, which ranges from incommunicado detention to prolonged sun exposure at high temperatures and the tying of hands and feet in painful positions. There can be no doubt that this constitutes inhuman treatment. … The Court considers that substantial grounds have

290 Ibid., paras. 98 and 106.

291 ECtHR, *Tomic v United Kingdom*, 14 October 2003, Appl. No. 17837/03 (admissibility decision).

292 EComHR, *Bahaddar v Netherlands*, 13 September 1996, Appl. No. 25894/94, para. 101. It is worthy of note that other personal facts were discussed by the Commission. It was concluded that the applicant was never arrested, that there was no evidence of a warrant for his arrest, but that he had convincingly shown his involvement with the Shanti Bahini.

293 Ibid., para. 100. Part of the evidence presented to the Commission was, inter alia, a report by Amnesty International in which there was talk of widespread torture and ill-treatment of people in policy custody and jail (para. 60).

294 Ibid.

295 ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, paras. 53 and 54.

> been shown for believing that, if expelled at the present time, the applicant would be exposed to a real risk of being subjected to torture or to inhuman or degrading treatment or punishment'.[296]

The fact that the applicant was a deserter from the Eritrean army before demobilisation, and the general information regarding the treatment of deserters, was the basis for the conclusion that a real – foreseeable – risk existed.[297] It became clear that, according to the Court at the time of its judgment, all Eritrean deserters having deserted before demobilisation, would be at risk of proscribed ill-treatment. Secondly, in *Salah Sheekh v the Netherlands* (2007), involving an applicant from Somalia belonging to the minority Ashraf population, the Court noted that human rights abuses of members of minorities like the Ashraf had been well documented, in particular experiences of the kind experienced by the applicant in the past.[298] The Court continued to consider that members of the Ashraf population were vulnerable to inhuman treatment, because they belonged to the minority Ashraf population,[299] and that the applicant's past experiences were the result of violence directed at the Ashraf population, violence which was therefore not arbitrarily.[300] Thirdly, in *Saadi v Italy* (2008) the Court held that Article 3 'enters into play' when the individual concerned is a member of a group which is systematically exposed to ill-treatment.[301]

The above case law indicates that the Court is willing to accept a prima facie claim for protection when a group (not necessarily an ethnic group) is the target of proscribed ill-treatment. It appears to be necessary for the group to be systematically targeted to an endemic level.[302] Situations in which the violence is less endemic, systematic or particularly aimed at a group are less evident.

People fleeing general violence or general instability will not have a real, personal and foreseeable risk of proscribed ill-treatment unless they can show the existence of one or more personal facts which makes them the target of proscribed ill-treatment. In *H.L.R. v France* (1997) the Court considered that it 'can but note the general situation of violence existing in the country of destination [Colombia]. It considers,

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296 Ibid., para. 54.

297 See also Reneman in her comment in *NAV* 2005, No. 161 and Bennekom in his comment in *NJCM-Bulletin* 2005, pp. 842-843, on ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02.

298 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 146.

299 Ibid., para. 146.

300 Ibid., para. 148.

301 ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, para. 132. See also ECtHR, *Sultani v France*, 20 September 2007, Appl. No. 45223/05, para. 67 and EctHR, *Sodatenko v Ukraine*, 23 October 2008, Appl. No. 2440/07, para. 68.

302 Certainly it will not be in all cases involving endemic violence directed at a specific group that a real, personal and foreseeable risk will be accepted. In *Mamartkulov and Askarov v Turkey* (Appl. Nos. 46827/99 and 46951/99, 6 February 2003 and 4 February 2006, Grand Chamber) information from a reliable sources, i.e. the United Nations Special Rapporteur on torture and Amnesty International, was presented informing the Court about endemic practices of torture in Uzbekistan, the country to which the applicants were extradited, directed in particular at the political opposition group to which the applicants belonged. Without much comment the Court was not persuaded by this information.

however, that this circumstance would not in itself entail, in the event of deportation, a violation of Article 3'.[303] In this case the Court was not convinced that other factors showed that the applicant would be personally targeted.[304] Also the situation in which protection is claimed because of the random killing of family members during a civil war will not suffice. The risk will then be too arbitrary; the applicant must show the existence of factors meaning that he or she is personally at risk.[305] Finally, general instability in the country of origin will also not suffice to show the existence of a real, personal and foreseeable risk of proscribed ill-treatment.[306] The question remains when killing or violence is random or indiscriminate and when it is not. In *Salah Sheekh* the Court considered that 'it appears from the applicant's account that he and his family were targeted because they belonged to a minority'.[307] In addition, the Court noted that the vulnerability to human rights abuses of members of minorities like the Ashraf had been well-documented.[308] Apparently, both the applicant's account and general country of origin information made it clear that the violence against minorities in Somalia was not indiscriminate but clearly targeted.[309]

3.3.2.1d Facts and circumstances required to meet the necessary level of risk

The final and most important question remains: what facts and circumstances are necessary to establish a real, personal and foreseeable risk? It is difficult to say in general what may determine the foreseeability of proscribed ill-treatment as it may be different in each case. In most cases a single fact will not suffice to show the existence of a real risk, but rather a combination of facts and circumstances must be put forward. In addition, foreseeability may be influenced by specific concepts such as the internal protection alternative or diplomatic assurances. These concepts will be further discussed in section 3.3.2.6. In this section I will attempt to outline what facts and circumstances may be relevant in determining the foreseeability of the risk by providing a detailed look at the Court's case law. Up to August 2008 the Court had considered, in a judgment, the merits of 29 cases involving claims for protection from refoulement in accordance with Article 3 ECHR. In 17 of those cases the Court concluded that there had been a violation of Article 3. In addition, in numerous admissibility decisions the Court has declared complaints inadmissible, including on

303 ECtHR, *H.L.R. v France*, 29 April 1997, Appl. No. 24573/93, para. 41.

304 Ibid., para. 42.

305 ECtHR, *Tomic v United Kingdom*, 14 October 2003, Appl. No. 17837/03 (admissibility decision), involving a Serb asylum seeker referring to the killing of his wife during the armed conflict in Croatia and Bosnia-Herzegovina in 1992 and the killing of his brother-in-law during violence in 1999. The Court was not convinced that the killing was part of a situation of endemic targeting of Serbs.

306 ECtHR, *Aoulmi v France*, 17 January 2006, Appl. No. 50278/99, paras. 66 and 67 (it should be noted that strangely the English version of this judgment as published on the Court's website, HUDOC, does not contain paras. 47 to 91 of the judgment).

307 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 148.

308 Ibid., para. 146.

309 ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, para. 132. See also ECtHR, *Sultani v France*, 20 September 2007, Appl. No. 45223/05, para. 67.

substantive grounds. In all these cases the Court one way or the other relied on very distinct personal facts and circumstances, on positive developments in the country of origin, on matters of credibility and evidence, or on the availability of internal protection or the presentation of diplomatic assurances. In order to obtain a better idea of what personal facts and circumstances may be decisive in concluding that a real risk exists I will analyse some of the more relevant judgments of the Court. I will start with the 17 cases in which the Court concluded that removal of the applicant would be in breach of Article 3, after which I will focus on some cases in which the opposite conclusion was reached.

Soering v the United Kingdom (1989) concerned an extradition case in which the risk was evident.[310] It was clear that after extradition to the USA the applicant would be charged with capital murder for which the death penalty would be sought. Consequently, he would be put on death row, which would amount to proscribed ill-treatment. In *Chahal v the United Kingdom* (1996) the applicant's high-profile position as an advocate of Sikh separatism in India was of particular importance, together with the current violation of human rights by the security forces in Punjab and elsewhere in India and the inability of India to afford appropriate protection.[311] In *Ahmed v Austria* (1996) the fact that the applicant had been granted refugee status in Austria was essential.[312] The Court considered that, because the circumstances in the country of origin (Somalia) had not changed, the well-founded fear of persecution or the risk of proscribed ill-treatment had not changed.[313] *D. v the United Kingdom* (1997) was a very exceptional case involving compelling humanitarian considerations concerning a terminally ill person for whom there was no adequate medical and social care available in his country of origin.[314] In *Jabari v Turkey* (2000) the Court gave due weight to the UNHCR's conclusion that the applicant had a well-founded fear of persecution under the Refugee Convention and the fact that the applicant was charged with a criminal offence, adultery, in Iran.[315] In *Hilal v the United Kingdom* (2001) it was a combination of facts, including that the applicant was a member of an opposition party for which he had been arrested and detained, that he had been ill-treated during his detention, that his brother had also been detained and had died in prison, and that the police had gone to his wife's house on a number of occasions looking for the applicant and making threats.[316] In *Shamayev and 12 Others v Georgia and Russia* (2005), involving the extradition of 13 Chechnens to Russia from Georgia, subjection to proscribed ill-treatment was foreseeable because five applicants, who had already been extradited, had been held in solitary confinment, without being permitted to communicate with their lawyers, as well as the fact that general country

310 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 98.
311 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, paras. 98, 105 and 106. On the issue of national protection see section 3.3.2.6a and 3.3.2.6b.
312 ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, para. 42.
313 Ibid., para. 44.
314 ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96, para. 54.
315 ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, paras. 40 and 41.
316 ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99, paras. 64 to 66.

of origin information implied that a risk of proscribed ill-treatment existed for the one applicant who had not yet been extradited and was faced with the possibility of being extradited.[317] In *Said v the Netherlands* (2005) the decisive factors were that the applicant had deserted from the Eritrean army before demobilisation and the known – severe – consequences for deserters.[318] In *N. v Finland* (2005) the applicant's special activities as an infiltrator and informant in President's Mobutu's special protection force were decisive.[319] In *Bader and Others v Sweden* (2005) particular weight was attached to the fact that the (first) applicant was by judgment of a Syrian Regional Court convicted, in absentia, of complicity in a murder and sentenced to death; the authenticity of which was confirmed by the Swedish embassy in Syria. The Court noted that the death penalty for serious crimes is enforced in Syria. Information regarding the possible re-opening of the case and the likelihood of a different outcome were vague and imprecise.[320] In addition, the Court considered that the death sentence followed an unfair trial which would inevitably cause all applicants additional fear and anguish.[321] In *D. and Others v Turkey* (2006) the risk of being exposed in Iran to corporal punishment of 50 lashes delivered twice in the execution of a criminal sentence was imminent and certain for one of the applicants because she had been convicted of fornication in Iran.[322] Consequently, the Court concluded that the expulsion of not just the applicant but her whole nuclear family would be in breach of Article 3. Interestingly, from *Bader and Others v Sweden* and *D. and Others v Turkey* it becomes evident that the Court accepts that the real risk of one family member being subjected to proscribed ill-treatment means that the expulsion of other family members would carry with it an equal violation of Article 3. In other words, family members share in the harm possibly done to one family member as also being proscribed by Article 3. In *Salah Sheekh v the Netherlands* (2007) past experiences of ill-treatment (e.g. beating, kicking, robbing, intimidation, harassment, forced labour, the rape of the applicant's sister and the killing of his father) and the discriminate violence against the applicant's minority Ashraf group in Somalia were decisive for the Court.[323] In *Garabayev v Russia* (2007) three elements were decisive: first, several letters addressed to the Russian Public Prosecutor and written by the applicant, his lawyers and various public figures expressed fears that the applicant would be tortured and personally persecuted for political motives and gave information on the general situation in Turkmenistan;[324] secondly, the Russian authorities had failed properly to assess the real risk of ill-treatment;[325] thirdly, following his extra-

317 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, paras. 362 to 367.
318 ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, para. 52.
319 ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/01, para. 162.
320 ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04, paras. 44 and 45.
321 Ibid., para. 47.
322 ECtHR, *D. and Others v Turkey*, 22 June 2006, Appl. No. 24245/03, para. 47.
323 ECtHR *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 146.
324 ECtHR, *Garabayev v Russia*, 7 June 2007, Appl. No. 38411/02, para. 78.
325 Ibid., paras. 79 and 80.

dition the applicant was ill-treated, strengthening the well-founded fears that existed before his extradition.[326] In *Saadi v Italy* (2008) reliable and consistent reports of ill-treatment of people in police custody together with the fact that the applicant had been sentenced in Tunisia to 20 years' imprisonment were decisive for the Court to conclude substantial grounds had been shown that there is a real risk.[327] In *Ismoilov and Others v Russia* (2008) the Court concluded that the extradition of the applicants to Uzbekistan would give rise to a violation of Article 3 because the applicants were considered refugees by the UNHCR and because torture was systematic in Uzbekistan.[328] In *Ryabikin v Russia* (2008) the Court emphasised the almost certainty of the applicant being detained coupled with the extremely poor conditions of detention as well as the prevalence of ill-treatment and torture in detention.[329] Finally, in *NA v the United Kingdom* (2008) a mix of elements was essential for the conclusion that expulsion would be in breach of Article 3 ECHR. This included, inter alia, the deteriorating security situation in Sri Lanka, the fact that the applicant was a 32-year-old male Tamil, and – importantly – the applicant's credible account of his arrests, detention and ill-treatment in the past of which records were likely to continue to exist, as a result of which he might become of interest to the authorities during his passage through the airport.[330]

In 12 judgments the Court concluded that removal of the applicant(s) would not be in breach of Article 3 ECHR. The first judgment was in *Cruz Varas and Others v Sweden* (1991). In this case the Court found that there was no breach of the Convention because no substantial grounds had been shown for believing that the applicant would face a real risk of proscribed ill-treatment upon his return to Chile. In addition, the Court noted that 'a democratic evolution was in the process of taking place in Chile which had led to improvements in the political situation and, indeed, to the voluntary return of refugees from Sweden and elsewhere'.[331] In other words, the claim was denied primarily for reasons of credibility and evidence (see section 3.3.2.2) and secondarily because of improvements in the country of origin.[332] The second judgment was in *Vilvarajah and Others v the United Kingdom* (1991). As already mentioned the Court considered the security and human rights situation for Tamils in Sri Lanka to be unsettling, but not severe enough for the risk for Tamils in general to exceed the mere possibility of being ill-treated.[333] In addition, with regard to the applicants themselves no 'special distinghuishing features' existed for concluding that

326 Ibid., paras. 81 and 82.
327 ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, paras. 143-146.
328 ECtHR, *Ismoilov and Others v Russia*, 24 April 2008, Appl. No. 2947/06, paras. 125 and 127.
329 ECtHR, *Ryabikin v Russia*, 19 June 2008, Appl. No. 8320/04, paras. 116 and 121. See also, EctHR, *Soldatenko v Ukraine*, 23 October 2008, Appl. No. 2440/07, para. 72.
330 ECtHR, *NA. v United Kingdom*, 17 July 2008, Appl. No. 25904/07, paras. 130 to 147.
331 ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 80.
332 Ibid., paras. 78 (credibility), 79 (evidence) and 80 (general situation).
333 ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, paras. 109 and 110.

the risk would exceed a mere possibility.[334] When one looks at the undisputed facts which were presented in this case that is a remarkable conclusion. Bearing in mind the unsettling situation for Tamils in Sri Lanka, it was evident that the applicants had been subjected to inhuman treatment in the past, that relatives had been murdered, that their homes had been destroyed, that they had been arrested and detained and that three of the five applicants had been subjected to inhuman treatment and even torture upon their return to Sri Lanka.[335] When comparing these personal facts to those in the cases in which the Court concluded that removal would be in breach of Article 3, as mentioned above, they are, in my opinion, similar or even more convincing, and yet in the *Vilvarajah* case the Court concluded otherwise.[336] A third judgment in which the Court concluded that removal would not be in breach of Article 3 was given in *Nsona v the Netherlands* (1996). This case involved the possible risk of proscribed ill-treatment of a 9-year-old child upon her return to the Democratic Republic of Congo (then Zaire). The Court concluded that, the arrangements that were made by the removing airline for the child to be met upon arrival at Kinshasa Airport proved adequate. Consequently, the Court was of the opinion 'that there is insufficient ground for reproaching the Netherlands Government for not having acted with due diligence'.[337] Upon arrival the child was met by a business associate of the airline, who turned her over to the immigration authorities at the airport, which in turn the following day took her to the home of a couple with whom she had stayed before.[338] In this case, there were basically no facts presented which indicated the existence of a real risk.[339] A fourth judgment, given in *H.L.R. v France* (1997), involved the risk of proscribed ill-treatment upon the applicant's return to Colombia; where the risk emanated from non-State actors (drug traffickers) who allegedly wanted to take revenge on the applicant. The Court concluded, on both substantive and evidentiairy grounds, that the applicant's removal would not be in breach of Article 3 ECHR. The Court was concerned about the violence in Colombia and the difficulties the Colombian authorities would face in containing that violence. There was however insufficient evidence to conclude that the applicant would be avenged by drug-traffickers and, if so, that the Colombian authorities were incapable of affording him appropriate protection.[340] A fifth judgment was given in *Mamatkulov and Askarov v Turkey*

334 Ibid., para. 112.

335 Ibid., paras. 111 and 112.

336 Ibid., paras. 111 and 112. See Boeles 1992, pp. 99-104 and Vermeulen in his comments on this case in '*Rechtspraak Vreemdelingenrecht 1974-2003*' 2004, no. 1, p. 17. It is pure speculation what are the reasons for this divergence, but it should be noted that the *Vilvarajah* case was only the second case in which the Court had had to deal with asylum seekers claiming protection from refoulement in accordance with Article 3 of the Convention.

337 ECtHR, *Nsona v Netherlands*, 28 November 1996, Appl. No. 23366/94, para. 102.

338 Ibid., para. 101.

339 It must be noted that this case did not so much concern the question of a real risk in the receiving country as the issue of whether or not the removal itself would amount to proscribed ill-treatment (see section 3.3.1.2).

340 ECtHR. *H.L.R. v France*, 29 April 1997, Appl. No. 24573/94, paras. 41 to 43. The issue of national protection is further discussed in section 3.3.2.6b.

(2003; Grand Chamber 2005) involving the extradition of two alleged terrorists to Uzbekistan. The Court was not convinced that a real risk existed in this case, again for substantive and evidentiary reasons. The Court considered that most information provided described only the general situation in Uzbekistan, did not support the specific allegations made by the applicants in the instant case and required corroboration by other evidence.[341] Furthermore, the Court was convinced by diplomatic assurances provided by the Uzbek authorities to Turkey that the applicants would not be subjected to proscribed ill-treatment.[342]

The 'lost' judgments described so far, with the exception of those in the *Vilvarajah* case (1991) and *Mamatkulov and Askarov* (2003, Grand Chamber 2005), are all different from the 17 cases won by the applicants. A violation of Article 3 was in these 'lost' cases primarily denied because of issues of evidence and/or credibility, or because of such specific concepts as the possibility of protection being afforded in the country of origin or because of diplomatic assurances guaranteeing the applicant's safety. A case in which the Court closely examined the facts and circumstances and where credibility, evidence or any specific concepts was not an issue is *Venkadajalasarma v the Netherlands* (2004). It seems, at first sight, that in this case the Court applied a high standard, because several interesting but insufficient personal facts and circumstances were put forward and the Court used the words 'high profile'.[343] In my opinion however, such conclusion would simplify the Court's reasoning and take it out of context. In this case the Court concluded its assessment with the statement:

> 'In this context, the Court notes that the activities which the applicant was made to carry out for the LTTE consisted of the transportation of foodstuffs, kitchen-work and the digging of trenches … It considers that this kind of relatively low-level support, provided under duress, is unlikely to lead the Sri Lankan authorities to believe that the applicant could be a high-profile member of the LTTE in whom they might still be interested (cf. Chahal, cited above, para. 106)'.[344]

In my view the words 'high-profile' may be confusing, as they appear to suggest that being a high-profile member is a necessary feature for the finding of the existence of a real risk. However, the Court used these words in the specific context of the case, allowing for a different understanding. The Court started its assessment by considering the relevant personal facts and circumstances. It observed:

> 'that it is not disputed that the applicant left Sri Lanka following his refusal to join the ranks of the LTTE and after he had been detained for two days by the Sri Lankan army

341 ECtHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99 (Grand Chamber), para. 73.
342 Ibid., para. 76.
343 ECtHR, *Venkadajalasarma v Netherlands*, 17 February 2004, Appl. No. 58510/00, para. 68.
344 Ibid., para. 68.

> on suspicion of LTTE involvement, during which detention he was subjected to torture or ill-treatment'.[345]

However, despite these undisputed facts the Court then observed that the applicant went to the army camp to apply for a travel pass to Colombo:

> 'it would appear, therefore, that he had no reason to believe that he was under any kind of suspicion of LTTE involvement. He was nevertheless arrested and detained by the army on suspicion of being an LTTE supporter, tortured and ill-treated, and confronted with an informant. Not having been recognised by the informant, he was released without charge two days later. In view of the fact that he was also issued with the requested travel pass, the Court considers it unlikely that the army were aware of the applicant's activities for the LTTE or that a file drawn up on the applicant would contain a mention of any suspicion of involvement in the LTTE. In these circumstances, the Court finds that it has not been established that the applicant is known to the authorities as a (suspected) LTTE supporter and that, therefore, they would have an interest in him'.[346]

It was decisive for the Court that no suspicion of the applicant's involvement with the LTTE had been raised. The Court then continued to find that, even assuming that the authorities were, or were to become, aware of the applicant's activities for the LTTE, the security situation in Sri Lanka had considerably improved, in particular for Tamils arriving or staying in Colombo.[347] It was only then that the Court considered that 'in this context', the low-level support the applicant gave to the LTTE was unlikely to lead the Sri Lankan authorities to believe he could be a high-profile member of the LTTE.[348] In other words, in a different context in which a suspicion of LTTE involvement would have been raised, for example, or if the travel pass had not been issued and the general situation had not considerably improved, a real risk might have existed for the applicant even without his having been a high-profile LTTE member. Equally a real risk might have existed, if, in this context, the applicant had been a high-profile LTTE member. As mentioned before in the context of the *Vilvarajah* case and *N. v Finland* the Court applied a two-step assessment. It first assessed the facts presented and found them, in this case, to be insufficient, in particular because specific personal facts and circumstances were lacking. It then implied that this might have been different had the applicant been a high-profile person.

The importance of personal facts and circumstances is further emphasised in *Shamayev and 12 Others v Georgia and Russia* (2005). The 13 applicants in this case faced extradition to Russia by Georgia. Five of the 13 had already been extradited when the Court considered the case; three applicants were – at that time – faced with possible extradition, two of whom had disappeared in Georgia and were later arrested and detained in Russia; and five applicants were in no immediate danger of being

345 Ibid., para. 64.
346 Ibid., para. 65.
347 Ibid., paras. 66 and 67.
348 Ibid., para. 68.

extradited, as no such decision had been taken by the Georgian authorities. In this case the Court distinghuished between the three situations. For the five applicants who had already been extradited the Court considered that there was insufficient evidence to conclude that they were personally at risk of being subjected to proscribed ill-treatment at the time of their extradition to Russia.[349] The significant and undisputed personal fact that a decision had been made to extradite them was not enough for the Court to conclude that a real risk existed. It was relevant in that regard that (1) assurances had been provided that the five applicants would not be sentenced to death or ill-treated while in detention (see section 3.3.2.6b), and (2) insufficient evidence had been provided that the five applicants would be exposed to proscribed ill-treatment. According to the Court, the applicants' representatives had provided only general information on acts of violence committed by Russian armed forces against civilians in the Chechen Republic and had never put forward facts 'which could have served to render tangible or increase the personal risk hanging over the applicants after they had been handed over to the Russian authorities'.[350] Such facts could, according to the Court, have been previous subjections to ill-treatment, the applicants' role and position within the Chenchen community and within the armed conflict or any other facts which would indicate that they were well-known within their country.[351] This conclusion of the Court was altered neither by the fact that the five applicants were held in solitary confinement[352] nor by general country of origin information from various sources indicating large-scale brutality and violence against the civilian population in the Chechen Republic, torturing and inhuman treatment of detainees on a massive scale, the commission of serious crimes against applicants to the ECtHR and their family members, summary executions and disappearance.[353] It is interesting to note that these facts were decisive for a finding of the existence of a real risk of proscribed ill-treatment in the situation of the one applicant who was faced with extradition.[354]

In general, relevant personal facts and circumstances relate to the applicant's political activities and past experiences of ill-treatment and detention. With regard to political activities their type and scale are relevant. In *Kandomabadi v the Netherlands* (admissibility decision, 2004) the applicant had participated in student demonstrations in 1999, but his role was mininal. He was not a leader or organiser; he was no student or member of a student union; and he had not previously been politically active. Furthermore, the Iranian authorities had announced an amnesty for 10,000

349 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 352.

350 Ibid., para. 351.

351 Ibid.

352 Ibid., para. 362.

353 Ibid., para. 267 (source: Council of Europe), para. 268 (source: Human Rights Watch), para. 269 (source: Amnesty International), para. 270 (source: UN Special Rapporteur on Torture) and para. 271 (source: International Helsinki Federation for Human Rights).

354 Ibid., paras. 362 to 368.

people involved in the demonstrations.[355] Past experiences or activities are relevant to the extent that they may indicate a risk of future subjection to proscribed ill-treatment.[356] The extent to which they are indicative depends on issues such as the type of experiences and activities, their duration and frequency, the time at which they took place and what has happened since, both with respect to the person in question and in general. In *Thampibillai v the Netherlands* (2004) the applicant's previous arrest and detention was not sufficient because he was released without charge; he was not arrested again; and he was able to travel unhindered and leave his country, Sri Lanka, with a passport in his own name.[357] Furthermore, the security situation in Sri Lanka had improved.[358] In *A.B. v Sweden* (admissibility decision, 2004) the applicant had based his claim, among other factors, on political activities in Iran and his alleged imprisonment and torture, more than 20 years previously. The Court considered that it would therefore not attract the attention of the Iranian authorities today.[359] In *Berisha and Haljiti v "the former Yugoslav Republic of Macedonia"* (admissibility decision, 2005) the applicants relied on their membership of the Roma community in Kosovo and incidents including 'shouting, house stoning and verbal threats'. Apparently, neither the situation of the Roma in Kosovo nor the incidents in question were severe enough to conclude that there was a real, personal and foreseeable risk of proscribed ill-treatment.[360]

Political activitities in the country of refuge may also be a relevant factor. Again, in *A.B. v Sweden* (admissibility decision, 2004) the political activities of the applicant in Sweden were considered by the Court. It was, however, not persuaded, as these activities dated back almost ten years. They also involved the publication in 2002 of a book voicing criticism of the authorities in Iran. This also did not persuade the Court, as the book had been written in Swedish and only 1,000 copies had been printed. Furthermore, according to the Swedish embassy in Iran, the book did not contain any information which could be considered offensive by the Iranian authorities, since the applicant's experiences and activities described in the book were old and depicted in a vague and summary manner.[361]

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355 ECtHR, *Kandomabadi v Netherlands*, 29 June 2004, Appl. Nos. 6276/03 and 6122/04 (admissibility decision). Additional factor include the close attention from the Iranian authorities to the applicant and his family after his father had left Iran seeking asylum without being ill-treated.

356 ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 77, in which it was considered that medical evidence indicated that the applicant at some stage in the past had been subjected to inhuman treatment. The Court, nevertheless, found that no future risk existed: ECtHR, *Venkadajalasarma v Netherlands*, 17 February 2004, Appl. No. 58510/00, para. 65. Furthermore, the Court considered that even if the authorities are or were to become aware of the applicant's LTTE activities, the security climate in Sri Lanka had considerably improved (para. 66): ECtHR, *Liton v Sweden*, 12 October 2004, Appl. No. 28320/03 (admissibility decision).

357 ECtHR, *Thampibillai v Netherlands*, 17 February 2004, Appl. No. 61350/00, para. 63.

358 Ibid., para. 64.

359 ECtHR, *A.B. v Sweden*, 31 August 2004, Appl. No. 24697/04 (admissibility decision).

360 ECtHR, *Berisha and Haljiti v "the former Yugoslav Republic of Macedonia"*, 16 May 2005, Appl. No. 18670/03 (admissibility decision).

361 ECtHR, *A.B. v Sweden*, 31 August 2004, Appl. No. 24697/04 (admissibility decision).

It may also be relevant that a person is a failed asylum-seeker, and that therefore he or she runs a risk in the country of origin. In *F. v the United Kingdom* (admissibility decision, 2004) this was the fact on which the applicant based his claim for protection from refoulement under Article 3 ECHR. The Court assessed this claim but considered on the basis of documentary evidence presented by the United Kingdom that failed asylum-seekers were no longer subjected to ill-treatment in Iran.[362]

What happens to a person's immediate family may also be a relevant factor. In *Bader and Others v Sweden* (2005) and *D. and Others v Turkey* (2006) a family claimed protection under Article 3 ECHR. In both cases the claim revolved round one principal applicant. In *Bader and Others* the husband faced a real risk of being executed after he had been sentenced to death; and in *D. and Others* the wife had a real risk of being subjected to corporal punishment (100 lashes) after having been convicted of fornication. In *Bader and Others v Sweden* (2005) the Court considered that not only would the principal applicant face considerable fear and anguish, but so would his wife and children.[363] Consequently, the deportation of all four applicants would, if implemented, give rise to violations of Articles 2 and 3 ECHR. With an explicit reference to its judgment in *Bader and Others v Sweden* (2005) the Court equally considered in *D. and Others v Turkey* (2006) that the expulsion of all applicants would carry an equal violation of Article 3 of the Convention.[364] With these two judgments it becomes clear that the risk to one family member may have significant material consequences for other family members, in particular spouses and minor children. Their cases should not only be linked in a procedural context, but also in a material context, i.e. the risk of one family member may determine the independent risk of another, where the risk of the one family member amounts to proscribed ill-treatment.

It is not just personal facts and circumstances which are relevant. The risk of being subjected to proscribed ill-treatment in the country of origin must be assessed in the light of the general situation in that country. Again, a variety of information may be relevant. In general, such information involves the political and institutional situation in the country of origin, the level of violence, the plight of refugees, the practices of the army and law enforcement agencies, the type and number of human rights violations and the implementation and enforcement of, in particular human rights, laws.[365]

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362 ECtHR, *F. v United Kingdom*, 31 August 2004, Appl. No. 36812/02 (admissibility decision).

363 ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04, paras. 46 and 47.

364 ECtHR, *D. and Others v Turkey*, 22 June 2006, Appl. No. 24245/03, para. 56.

365 See in this regard the following cases: ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, taking into account the significant improvement in the security situation in Sri Lanka as indicated by the UNHCR's volutary repatraition and in spite of persistent threats of violence; ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, paras. 100-103, taking nto account on the one hand the conduct of Punjabi police officers and security forces without regard for human rights, disappearances, torture of endemic proportions and arbitrary killings, in particular of Sikhs, the lack of fundamental reform or reorganisation of the Punjabi police, and on the other hand, the return to democratic elections in the province of Punjab, a number of judgments against police officers, the appointment of an

3.3.2.1e Risk sur place

A phenomenon which has received little or no attention in the context of Article 3 ECHR is the concept of a risk *sur place*. This concept is well known in the context of the Refugee Convention, and is accordingly discussed in chapter 2.3.2.1d. In general, a risk *sur place* implies that the risk of harm will be established after the person concerned has left his country of origin. The concept of a risk *sur place* is based on the prospective nature of the prohibition on refoulement, and in particular the element of a real risk. Given this basis the concept of a risk *sur place* may also be applied in the context of Article 3. A risk *sur place* can emanate from circumstances arising in the country of origin of the person concerned during his absence, or as a result of his actions after he had left his country of origin.

Only in *A.B. v Sweden* (admissibility decision, 2004) and *N. v Finland* (2005) did the Court implicitly refer to the concept of a risk *sur place*. In *A.B. v Sweden* (admissibility decision, 2004) the Court took into account the applicant's political activities in Sweden as well as the publication of a book in Sweden, but – as mentioned before – it was persuaded neither by the activities, as they dated back almost ten years, nor by the book as it was published in Swedish and only 1,000 copies were printed.[366] In *N. v Finland* (2005) the Court considered that:

> 'neither can it be excluded that the publicity surrounding the applicant's asylum claim and appeals in Finland might engender feelings of revenge in relatives of dissidents possibly affected by the applicant's actions in service of President Mobutu. It is relevant in this connection that the applicant himself does not appear to have played any active role in making his asylum case known to the public and, in particular, to other DRC nationals currently in Finland'.[367]

The Court acknowledges the possibility that the risk, at least in part, may be due to the circumstances arising in Finland after the applicant had left the DRC. The second sentence of the Court's judgment cited here is particularly interesting because the Court places some relevance on the fact that the applicant had no active role in these circumstances. It is unclear exactly what relevance that fact has, and in particular whether or not the Court would be willing to accept a sur place claim when the risk is based on circumstances intentionally created by the applicant himself in order to

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ombudsman and a promise by the new Chief Minister to ensure transparency and accountability; ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, para. 44 and ECtHR *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, taking into account the continuous violence in Somalia; ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96, para. 282, taking into account the inadequate medical and social care on the islands of St. Kitts and Nevis was a relevant factor; ECtHR, *Shamayev and 12 Others v Georgia and Russia*, Appl. No. 36378/02, paras. 362, 363 and 366, taking into account the treatment of Chechen prisoners in Russia; ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, para. 54, taking into account the treatment meted out to deserters in Eritrea, ranging from incommunicado detention to prolonged sun exposure at high temperatures and the tying of hands and feet in painful positions.

366 ECtHR, *A.B. v Sweden*, 31 August 2004, Appl. No. 24697/04 (admissibility decision).

367 ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, para. 165.

obtain protection. In both cases mentioned above the relevant *sur place* facts all involved a continuation of activities conducted by the applicants in their respective countries of origin. Again, from this limited amount of case law it cannot be concluded to what extent the continuation of activities is a required element for taking into account activities which are conducted in the country of refuge. Arguably, to require a continuation of activities or not to allow protection when the need for it is based on circumstances intentionally created in the country of refuge is incompatible with the absolute character of Article 3. It is notable that Article 5 of the EU Qualification Directive does not exclude a real risk of, inter alia, ill-treatment proscribed by Article 3 ECHR when there is no continuation of activities or when the individual has intentionally created circumstances generating a need for protection.[368]

3.3.2.2 The standard and burden of proof

In order for an applicant to be granted protection from refoulement under Article 3 ECHR substantial grounds must be shown for believing a real risk exists.[369] This is the essence of the standard of proof required for a refoulement claim under Article 3 and is an – interrelated – matter of credibility and evidence. Below in this section I will first discuss issues of credibility (section 3.3.2.2a), after which I will discuss issues of evidence (section 3.3.2.2b) and, finally, the burden of proof (section 3.3.2.2c).

3.3.2.2a Issues of credibility and plausibility

The credibility of a claim for protection from refoulement in accordance with Article 3 is determined by a number of factors such as the detail, comprehensiveness, consistency and plausibility of the evidence. These factors in turn depend on the personal and general facts and circumstances presented and whether or not they are in line with what is known of the country of origin. All relevant information should be put forward as promptly and consistently as possible, even though the ECtHR has acknowledged that asylum-seekers may have some apprehension towards the autorities, in particular when talking about experiences of torture. In *Cruz Varas and Others v Sweden* (1991), for example, the first applicant was completely silent with respect to his alleged clandestine activities and torture by the police until more than 18 months after his first interrogation by the Swedish authorities. According to the Court this

368 Article 5(2) of the EU Qualification Directive does, however, express some hesitation when a real risk is based on the individual's own actions since he has left the country of origin because it gives preference to those who do meet the requirement of continuation. According to Article 5(2): 'A … real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin'. See also section 2.3.2.1d.

369 The substantial grounds test applied by the European Court is also used in the EU Qualification Directive regarding the standard of proof required for people to be eligible for subsidiary protection: Article 2(e).

cast considerable doubt on the applicant's credibility.[370] The credibility of the applicant's claim was further called into question by the changes he made following each police interrogation.[371] In *Nasimi v Sweden* (2004) the Court was struck by the fact that the applicant did not make any specific allegations of torture until more than a year after he applied for asylum, although he must have been aware that such information would be important to the immigration authorities.[372] And in *Hemat Kar v Sweden* (2002) the Court observed that:

> 'throughout the proceedings before the Swedish authorities, the applicant kept altering his statements with respect to such essential facts as his own nationality and past countries of residence, his family's whereabouts, the reasons leading to his departure for Sweden and the nature of the risks that would follow were he to be expelled from Sweden. There were major discrepancies between the information given in the initial inquiry and that given subsequently before the Swedish immigration authorities. Moreover, in support of his claims, he relied on documents from Iran which turned out to be irrelevant, non-authentic or both, and were accompanied by contradictory and inconsistent explanations'.[373]

The complaint was declared inadmissible. Another example is provided by *Tekdemir v the Netherlands* (admissibility decision, 2002) in which the applicant had sought asylum in the Netherlands on three occasions each time giving different reasons. The first time he based his claim on the fact that he had driven members of the PKK in Turkey; the second time he relied on his kinship with two Turkish nationals who had obtained asylum in the Netherlands; and the third time he claimed he had been tortured in Turkey. These claims were not substantiated by the applicant and were contradicted by the Netherlands authorities.[374] Both the ECtHR and the former European Commission have acknowledged that complete accuracy and consistency may not always be expected from victims of torture or ill-treatment or from asylum-seekers.[375] If, however, the applicant fails to give information of vital importance or to explain major inconsistencies, the credibility of the claim may be undermined.[376] For example, the claim in *Solhan v the Netherlands* (admissibility decision, 2001) was seriously undermined because, among other reasons, the applicant in claiming to have been a pharmacist was unable to name more than four kinds of medicine or to give the

370 ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 78.
371 Ibid., para. 78.
372 ECtHR, *Nasimi v Sweden*, 16 March 2004, Appl. No. 38865/02 (admissibility decision).
373 ECtHR *Hemat Kar v Sweden*, 5 March 2002, Appl. No. 62045/00 (admissibility decision).
374 ECtHR, *Tekdemir v Netherlands*, 1 October 2002, Appl. No. 49823/99 (admissibility decision).
375 EComHR, *Hatami v Sweden*, 23 April 1998, Appl. No. 32448/96, para. 106. The Court did not consider the merits of the case as a friendly settlement was reached between the parties (Judgment, 9 October 1998); ECtHR, *B. v Sweden*, 26 October 2004, Appl. No. 16578/03 ((in)dmissibility decision); ECtHR, *Bello v Sweden*, 17 January 2006, Appl. No. 32213/04 (admissibility decision). See also Bruin, Reneman & Bloemen 2006, p. 89.
376 ECtHR, *B. v Sweden*, 26 October 2004, Appl. No. 16578/03 ((in)dmissibility decision); ECtHR, *Bello v Sweden*, 17 January 2006, Appl. No. 32213/04 (admissibility decision).

name of the wholesaler who supplied him.[377] And in *Bello v Sweden* (admissibility decision, 2006) the applicant had apparently attempted to bring her story more into line with a newspaper article by changing the place where she had lived.[378]

Contrary to the above-described negative (at least for the applicant) examples is *Said v the Netherlands* (2005). This case concerned an Eritrean national seeking protection basically because he was a deserter from the Eritrean army. The Dutch authorities did not dispute his service in the army, but found that the claim lacked all credibility because of various implausible statements in the story, including about his escape, making his desertion also not credible.[379] The Court, however, turned to the essential part of the applicant's story, which was his desertion from the army and the risk run by deserters on their return to Eritrea. The Court observed that the applicant's statements were consistent, that he had put forward persuasive arguments to rebut the State's claim that his account lacked credibility, for example, by referring to information provided by Amnesty International, and that it was undisputed that he had served in the army and that he had left Eritrea – and therefore the army – before demobilisation had begun.[380] The Court then concluded that:

> 'in these circumstances it is difficult to imagine by means other than desertion the applicant might have left the army. Even if the account of his escape may appear somewhat remarkable, the Court considers that it does not detract from the overall credibility of the applicant's claim that he is a deserter'.[381]

The Court then turned to the question whether or not the applicant, as a deserter, would run a risk of ill-treatment if he returned to Eritrea. The Court then started the actual assessment of the application of Article 3 ECHR. It can be concluded from this case that, while an asylum story may contain implausible elements, the relevant question is whether or not the essence of the story is credible and is decisive for the application of Article 3.[382]

Another example of a case in which certain elements could have seriously undermined the claim is *N. v Finland* (2005). The applicant in this case came from the DRC. The Court had certain reservations about the applicant's testimony before Delegates of the Court and it found the applicant's account of his journey not credible.[383] Furthermore, he had used several different identities in Finland. Notwithstanding these

377 ECtHR, *Solhan v Netherlands*, 16 January 2001, Appl. No. 48784/99 (admissibility decision): other reasons for undermining the claim included the fact that the applicant had always been released shortly after having been arrested without any further consequences, the fact that the allegation that his pharmacy was destroyed remained fully unsubstantiated and that it had not appeared that the applicant's spouse who had returned to Turkey had encountered any problems.

378 ECtHR, *Bello v Sweden*, 17 January 2006, Appl. No. 32213/04 (admissibility decision).

379 ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, paras. 43 and 44 and 45 for the implausible parts of the applicant's story.

380 Ibid., paras. 51 and 52.

381 Ibid., para. 53.

382 See comment by Bruin in *Rechtspraak Vreemdelingenrecht* 2005, No. 2, p. 24-25.

383 ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, para. 154.

elements in his claim the Court did consider that, in the light of the overall evidence, the applicant's story was sufficiently consistent and credible.[384] Besides a statement by and the evidence of the applicant and a statement by the Finnish authorities the evidence included statements by the applicant's wife, a Finnish public servant (head of the Africa section of the Directorate of Immigration), a witness from the DRC whose evidence was considered to be credible and clearly in support of the applicant's claim, and a variety of country of origin information from the UNHCR and the British Home Office.

Another factor which may seriously undermine the credibility of a claim is visiting the receiving country without experiencing any problems. In *Nwosu v Denmark* (admissibility decision, 2001) the applicant, while living in Denmark, had visisted his country of origin, Nigeria, several times without any problems.[385]

Whatever the reasons may be for questioning the credibility of the applicant's claim, they will put the claim seriously in doubt only when they relate to essential parts of it. If non-essential parts of a claim are implausible or lack consistency or detail, as was the case with the claim in *Said v the Netherlands* (2005) described above, then it cannot – automatically – be concluded that the whole claim lacks credibility.

It should also be kept in mind that a plausible explanation can be given of why a claim lacks credibility. Feeling apprehension towards the authorities of the country of asylum or, in general, difficulty in substantiating a claim by documentary evidence will not suffice.[386] Giving a plausible explanation for factors which undermine credibility may be even more difficult when these factors concern the substance of the claim or when legal representation was present throughout the proceedings.[387]

In two refoulement cases, both involving extradition, the Court applied a stricter standard of proof citerion. In *Shamayev and 12 Others v Georgia and Russia* (2005) and *Garabayev v Russia* (2007) the Court referred to the test of 'beyond reasonable doubt'.[388] This criterion is often applied by the Court in cases not involving refoulement in order to show that a violation of Article 3 ECHR took place.[389] As Vermeulen rightly points out, this is a rather strict criterion and is not applied in cases involving the expulsion of asylum-seekers. A test of beyond reasonable doubt is incompatible with the substantial grounds criterion applied in asylum cases.[390] It remains unclear why the Court applied the beyond reasonable doubt test in *Shamayev* and

384 Ibid., paras. 155 and 156.

385 ECtHR, *Nwosu v Denmark*, 10 July 2001, Appl. No. 50359/99 (admissibility decision).

386 ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 78.

387 ECtHR, *Zubeyde v Norway*, 28 February 2002, Appl. No. 51600/99 (admissibility decision) in which the applicant had consistently given misleading information regarding the substance of her claim; ECtHR, *Cruz Varas and Others*, 20 March 1991, Appl. No. 15576/89, para. 78, in which it was noted that the first applicant was legally represented at all stages throughout the proceedings.

388 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 338; ECtHR, *Garabayev v Russia*, 7 June 2007, Appl. No. 38411/02, para. 76.

389 ECtHR, *Mathew v Netherlands*, 29 September 2005, Appl. No. 24919/03, para. 156. See also Vermeulen 2006, p. 410, note 28.

390 Vermeulen 2006, pp. 410 and 438. See also sections 3.3.2.1 and 3.3.2.2.

Garabayev. Of relevance in this regard could be the fact that in extradition cases, compared to expulsion cases, it is known that the person concerned will be handed over to the authorities of the country of origin. The (criminal) charges against him and the relevant articles of the penal code will have been communicated with the extraditing State. Furthermore, the maximum penalty will be known as well as the procedural safeguards. In cases involving the expulsion of asylum-seekers it is unclear what kind of treatment and/or punishment the person concerned will be confronted with.

3.3.2.2b Issues of evidence (in support of the claim)

In principle, documentary evidence in support of the claim should be presented as promptly and consistently as is practically possible.[391] Such evidence should relate to the person concerned and not be too general.[392] The Court has, however, acknowledged that it may not always be possible for the applicant to provide documentary evidence, especially if such evidence has to be obtained from the country from wich the applicant has fled.[393] In *Shamayev and 12 Others v Georgia and Russia* (2005) the Court acknowledged that the applicants could not be blamed for not providing sufficient evidence. This case concerned, among others, five applicants who had been extradited to Russia by Georgia while the case was pending before the Court. The Court took into account the fact that, with the exception of a few written exchanges, the applicants were deprived of an opportunity to state their version of the facts, that medical certificates included in the case were all supplied by the State without the applicants having an opportunity to complain about their state of health, and that the representatives of the applicants were not authorised to contact their clients.[394] Notwithstanding this last criticism the Court considered that the applicants' representatives had failed to submit sufficient information about the objective reasonableness of the personal risk.[395]

On the one hand full proof of the facts and circumstances is not required. But on the other hand a complete absence of supporting documentary evidence, in particular with respect to the essential personal facts and circumstances of the claim, may seriously undermine credibility.[396] As long as the evidence is not forged or fabricated

391 ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, para. 49.

392 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 350.

393 ECtHR, *Bahaddar v Netherlands*, 19 February 1998, Appl. No. 25894/94, para. 45; ECtHR, *Shikpohkt and Sholeh v Netherlands*, 27 January 2005, Appl. No. 39349/03 (admissibility decision); ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, para. 49.

394 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 349.

395 Ibid., para. 350.

396 ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 78; ECtHR, *Zubeyde v Norway*, 28 February 2002, Appl. No. 51600/99 (admissibility decision); ECtHR, *Avetissov v Sweden*, 5 March 2002, Appl. No. 71427/01 (admissibility decision); ECtHR, *Javanmardi and Ahmadi v Sweden*, 19 March 2002, Appl. No. 65538/01 (admissibility decision); ECtHR, *S.R. v Sweden*, 23 April 2002, Appl. No. 62806/00 (admissibility decision). ECtHR, *S.A. v Netherlands*,

the Court is willing to accept it. It nevertheless takes into account any delays in presenting documentary evidence. In its (in)admissibility decision in *Nasimi v Sweden* (2004) the Court stated that it was struck by the fact that a copy of an important document (the purported revolutionary Iranian court summons) had been submitted to the Swedish authorities one year and eight months after its date of issue.[397] Though the applicant was aware of the existence of the summons long before he received a copy of it, he failed even to mention the document to the Swedish authorities. According to the Court this was remarkable. Similar language was used by the Court in its (in)admissibility decision in *B. v Sweden* (2004). The Court took into account the fact that various documents had been put forward at two, late, stages in the proceedings in Sweden. First, more than a year and a half, and secondly, two years and a half, after the documents were issued. The Court said that while it:

> 'appreciates the difficulty in obtaining such documents in Libya and to send them abroad, it notes that some of them were purportedly issued when the applicant was still in Libya and generally considers that the delays in submitting the documents are rather remarkable'.[398]

The explanation given for the delay by the applicant – he had stated he had been unable to contact his family while in hiding – was difficult to reconcile with another statement according to which a friend had visited his parents. Finally, it is relevant to mention here that the Court noted that the documents in question were all submitted at different stages of the proceedings, all following a rejection of his asylum claim.

Documentary evidence presented by the applicant may not always be believed by the Court.[399] Documents may of course also prove a lack of real risk. For example, in *F. v the United Kingdom* (admissibility decision, 2004) the Court based its findings on a detailed fact-finding mission conducted by the Swedish Immigration Board and a report by the Dutch Immigration Service showing that failed asylum-seekers who were returned to Libya after a long period of time were likely to be held for a few days and interviewed, but not subjected to proscribed ill-treatment.[400]

The credibility or persuasiveness of the evidence put forward depends on the type, comprehensiveness and consistency of the evidence and the information it contains, but also on the independence, reliability and objectiveness of the source and the authority and reputation of the author.[401] Reports which consider the human rights

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12 December 2006, Appl. No. 3049/05 (admissibility decision).

397 ECtHR, *Nasimi v Sweden*, 16 March 2004, Appl. No. 38865/02 (admissibility decision).

398 ECtHR, *B. v Sweden*, 26 October 2004, Appl. No. 16578/03 (admissibility decision).

399 ECtHR, *H.L.R. v France*, 29 April 1997, Appl. No. 24573/93, para. 42, in which the Court apparently was not convinced by the letters of the applicant's aunt in which she indicated that his life was in danger (see also para. 32).

400 ECtHR, *F. v United Kingdom*, 31 August 2004, Appl. No. 36812/02 (admissibility decision).

401 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 100; ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, para. 143; ECtHR, *NA v United Kingdom*, 17 July 2008, Appl. No. 25904/07, para. 120.

situation in the country of origin and directly address the grounds for the alleged real risk of ill-treatment are of particular importance.[402] A variety of sources has been used by the Court in its case law. It would be going too far to give an overview of every source and document used in every case before the Court. In general, however, the sources include State institutions, institutions of the Council of Europe, United Nations agencies and institutions, non-governmental organisations, academics and fact-finding by the Court and former European Commission. Of particular relevance seem to be country reports of the various States parties' Ministries of Foreign Affairs as well as the country reports of the United States State Department.[403] Amnesty International and Human Rights Watch are among the most quoted non-governmental organisations.[404] The United Nations High Commisssioner for Refugees (UNHCR) and various Special Rapporteurs from the United Nations, in particular the one on Torture, are also often consulted.[405] In *NA. v the United Kingdom* (2008) the Court acknowledged the capacities of agencies of the United Nations to gather information and provide material which might be highly relevant to the Court's assessment of the case before it:

> 'particularly given their direct access to the authorities of the country of destination as well as their ability to carry out on-site inspections and assessments in a manner which States and non-governmental organisations may not be able to do'.[406]

402 ECtHR, *NA v United Kingdom*, 17 July 2008, Appl. No. 25904/07, para. 121.

403 Country reports from various States were, for example, used in: ECtHR, *Tomic v United Kingdom*, 14 October 2003, Appl. No. 17837/03 (admissibility decision); ECtHR, *T.I. v United Kingdom*, 7 March 2000, Appl. No. 43844/98 (admissibility decision); ECtHR, *Venkadajalasarma v Netherlands*, 17 February 2004, Appl. No. 58510/00, paras. 41 to 43, 47, 48 and 52, including the Dutch Ministry of Foreign Affairs, the UK Home Office and the US Department of State; ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, para. 35; ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, para. 122; ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, paras. 47-79.

404 Amnesty International reports were, for example, used in: ECtHR, *H.L.R. v France*, 29 April 1997, Appl. No. 24573/93, para. 42; ECtHR, *T.I. v United Kingdom*, 7 March 2000, Appl. No. 43844/98 (admissibility decision); ECtHR, *Venkadajalasarma v Netherlands*, 17 February 2004, Appl. No. 58510/00, paras. 46, 49. ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, paras. 29, 31-34; ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 84.

405 Information from the UNHCR was, for example, used in: ECtHR, *Andric v Sweden*, 23 February 1999, Appl. No. 45917/99 (admissibility decision); ECtHR, *Pavlovic v Sweden*, 23 February 1999, Appl. No. 45920/99 (admissibility decision); ECtHR, *Venkadajalasarma v Netherlands*, 17 February 2004, App No. 58510/00, para. 51; ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, paras. 117-121; ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, paras. 100-102. Information from the UN Special Rapporteurs was, for example, used in: ECtHR, *T.I. v United Kingdom*, 7 March 2000, Appl. No. 43844/98 (admissibility decision), Special Rapporteur on extra-judicial and summary executions.

406 ECtHR, *NA v United Kingdom*, 17 July 2008, Appl. No. 25904/07, para. 121.

Occasionally, the Court makes use of news media as a source of information.[407] Notably, in *Paez v Sweden* (1997) reference was made to a decision of the Committee against Torture in an individual case under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, because that case involved the applicant's brother.[408] And in the inadmissibility decision in *F. v the United Kingdom* (2004) reference was again made to a decision of the Committee against Torture in a similar individual case under Article 3 of the Convention against Torture to shed light on the treatment of homosexuals in Iran.[409]

It does seem that sources are not always used consistently by the Court. In *Chahal v the United Kingdom* (1996) and *Ismoilov and Others v Russia* (2008), for example, the information regarding the endemic or systematic practices of torture came from the United Nations Special Rapporteur on torture.[410] Similar language was used by the Special Rapporteur in a report on the practices of torture in Uzbekistan.[411] This information, however, was not used by the Court in *Mamatkulov and Askarov v Turkey* (2003), in which the applicants were extradited to Uzbekistan.[412] The reasons for this inconsistency are not clear.

The more recent the sources the more persuasive the information will be. Nevertheless, the Court does use sources of a less recent date. In *Chahal v the United Kingdom* (1996) the Court's judgment was delivered in 1996, but sources from 1994 and 1995 were used.[413] In *Meho and Others v the Netherlands* (2004) the applicant relied on a UN report of October 2000, while the Court had obtained and relied on a report from the same UN organisation of December 2002 as well as on other, NGO, reports from August 2002 and 2003 which indicated that there had been significant changes.[414]

Finally, the type of documentation that the State should present is further discussed below in the context of the burden of proof (section 3.3.2.2c).

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407 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 113, using the BBC news service; ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, para. 28 using the *Economist*.

408 ECtHR, *Paez v Sweden*, 30 October 1997, Appl. No. 29482/95, para. 29.

409 ECtHR, *F. v United Kingdom*, 22 June 2004, Appl. No. 17341/03 (admissibility decision).

410 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 222414/93, para. 104; ECtHR, *Ismoilov and Others v Russia*, 24 April 2008, Appl. No. 2947/06, para. 121.

411 UN Special Rapporteur on torture report to the Commission on Human Rights, mission to Uzbekistan, UN doc. E/CN.4/2003/68/add.2, 3 February 2003.

412 ECtHR, *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. Nos. 46827/99 and 46951/99 and ECtHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99 (Grand Chamber). Extradition to Uzbekistan was also the issue in ECtHR, *Ismoilov and Others v Russia*, 24 April 2008, Appl. No. 2947/06, para. 127.

413 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 222414/93, para. 99.

414 ECtHR, *Meho and Others v Netherlands*, 20 January 2004, Appl. No. 76749/01 (admissibility decision).

3.3.2.2c Burden of proof

The burden of showing that substantial grounds exist for believing that the person concerned, if removed, would face a real risk of being subjected to treatment contrary to Article 3 in the country of origin is a shared responsibility of the individual concerned and the State. In *Said v the Netherlands* (2005) the Court considered:

> 'it is nevertheless incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, to the greatest extent practically possible, material and information allowing the authorities of the Contracting State concerned, as well as the Court, to assess the risk a removal may entail'.[415]

The initial burden of presenting a credible claim and providing documentary evidence is on the individual applicant.[416] It is then the State which has the responsibility for assessing the claim, including any evidence he has provided and the prevailing conditions in the country of origin in the light of the person's story.[417] In addition to the State's responsibility for assessing the claim the State also has the responsibility actively to gather information relevant to the claim. In *Said v the Netherlands* (2005) the Dutch authorties relied solely on information provided by the Dutch Ministry of Foreign Affairs, while the Court made clear that other sources taken together with the Dutch Ministry's information would have provided a much more complete and accurate idea of the situation in the applicant's country of origin (Eritrea) regarding the punishment for deserters which, contrary to the information provided by Dutch authorities, would lead to the conclusion that expulsion would lead to a real risk subjection to treatment contrary to Article 3.[418] In *Bader and Others v Sweden* (2005) the Court found it surprising that the Swedish authorities had not contacted the (first) applicant's lawyer in his country of origin, Syria, even though the (first) applicant had given them the lawyer's name and address and the lawyer, in all probability, would have been able to provide useful information about the criminal case and judgment in which the (first) applicant was convicted and sentenced to death: the decisive element in this case.[419] Furthermore, in this case the applicants had submitted the aforementioned judgment which, on the request of the Swedish Aliens Appeal Board, was confirmed as authentic.[420] This authentic judgment was the decisive factor in determining the existence of a real risk and creating a rebuttable presumption that the applicants' removal to Syria would be in breach of Articles 2 and 3 of the Conven-

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415 ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, para. 49.

416 Vermeulen in his comments on ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, '*Rechtspraak Vreemdelingenrecht 100*', 2001, no. 13, p. 88 and '*Rechtspraak Vreemdelingenrecht 1974-2003*', 2004, no. 1, p. 16.

417 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 91; ECtHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99 (Grand Chamber), para. 67; ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 October 2005, Appl. No. 36378/02, para. 337; ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 136.

418 ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, para. 54.

419 ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04, para. 45.

420 Ibid., paras. 17 and 22.

tion. According to the Court, the Swedish authorities could have rebutted this presumption by obtaining diplomatic assurances that the criminal case in Syria would be re-opened and that the death penalty would not be sought or imposed.[421] An important question raised here is whether or not Sweden has an obligation to seek diplomatic assurances. This question will be addressed in section 3.3.2.6b. In general, the fundamental and absolute character of Article 3 ECHR imposes an obligation on the State rigorously to scrutinise a person's claim for protection from refoulement, in the words of the Court: 'a rigorous scrutiny must necessarily be conducted of an individual's claim',[422] and independently to gather and assess relevant information.

In gathering information and assessing a claim many States tend to use primarily their own country reports. Such reports are often written by a State's Ministry of Foreign Affairs in close cooperation with its diplomatic services. In *Salah Sheekh v the Netherlands* (2007) the Court found:

> 'that given the absolute nature of the protection afforded by Article 3, it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources, such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations'.[423]

Consequently, a State cannot merely rely on country reports from its own Ministry of Foreign Affairs, in particular when the applicant has provided reasons which cast doubt on the accuracy of those reports.[424] The above-quoted finding from the *Salah Sheekh* judgment implies that State sources, United Nations agencies and reputable non-governmental organisations may be considered reliable and objective. In *Salah Sheekh v the Netherlands* (2007) the Court made use of information provided by the UNHCR and such non-governmental organisations as Amnesty International, Médecins sans Frontières and the Dutch Refugee Council.[425] In *Saadi v Italy* (2008) the Court again attached great weight to information provided by non-governmental organisations, in particular Amnesty International and Human Rights Watch.[426] In addition, it took into account information from the US State Department.[427] Unlike in the *Salah Sheekh* case it considered the reliability of these sources when it discussed the authority and reputation of the authors of the reports, the seriousness of the investigations by means of which they were compiled, the fact that on relevant points the

421 Ibid., para. 45.
422 ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, para. 39.
423 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 136. In this case this included information from the UNHCR, Amnesty International, Médecins sans Frontières, an independent expert, the UK Home Office, the International Crisis Group and the Dutch Refugee Council.
424 Ibid., para. 136.
425 Ibid., paras. 80 to 84, and paras. 100 to 102.
426 ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, paras. 65 to 79.
427 Ibid., paras. 82 to 93.

reports were consistent with each other and that the conclusions were corroborated by numerous other sources.[428]

A complicating factor could be the question of national protection, i.e. protection from the authorities of the country of origin where the risk emanates from non-State actors such as criminal organisations (see section 3.3.2.6). In *H.L.R. v France* (1997) the Court placed a very heavy burden on the applicant when it considered that, even though the Colombian authorities had difficulty in containing the violence in their country, 'the applicant has not shown that they are incapable of affording him appropriate protection'.[429]

It is also important to note that not necessarily all aspects of a claim must be assessed. As I already mentioned above, in *Said v the Netherlands* (2005) the essence of the claim consisted of the applicant's desertion from the Eritrean army. That part of the claim was considered to be credible, and the question then was whether or not the applicant, as a deserter, would be at risk of ill-treatment contrary to Article 3 of the Convention if returned to Eritrea.[430]

3.3.2.3 Cases in which a different standard of risk applies

A different standard applies in cases 'where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country'.[431] As already outlined in section 3.3.1.3c, only in very exceptional circumstances will the removal of an individual in such a case be in breach of Article 3 ECHR. So far, the only case, according to the Court, in which such exceptional circumstances existed was *D. v the United Kingdom* (1997).[432] All other complaints in this context were declared inadmissible,[433] with the exeption of the complaint in *Bensaid v the United*

428 Ibid., para. 143; ECtHR, *NA. v United Kingdom*, 17 July 2008, Appl. No. 25904/07, para. 120.

429 ECtHR, *H.L.R. v France*, 29 April 1997, Appl. No. 24573/94, para. 43. This heavy burden was criticised in a dissenting opinion in which four judges, Pekkanen, Thor Vilhjalmsson, Lopes Rocha and Lohmus, admitted that the real evidence in this case was quite meagre. They insisted that it was only to be expected: that killers seldom gave advance warning before striking.

430 ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, paras. 53 and 54.

431 ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96, para. 49.

432 Ibid., paras. 51-53. The European Commission accepted the removal of a terminally-ill AIDS patient in the absence of medical and social care in the country of return (DR Congo) to be in breach of Article 3 of the Convention: EComHR, *B.B. v France*, 9 March 1998, Appl. No. 30930/96; the Court did not consider the merits of this because a friendly settlement was reached: ECtHR, *B.B. v France*, 7 September 1998, Appl. No. 30930/96.

433 ECtHR, *S.C.C v Sweden*, 15 February 2000, Appl. No. 46553/99 (complaint declared inadmissible); ECtHR, *Henao v Netherlands*, 24 June 2003, Appl. No. 13669/03 (complaint declared inadmissible); ECtHR, *Meho and Others v Netherlands*, 2 January 2004, Appl. No. 76749/01 (complaint declared inadmissible); ECtHR, *Ndangoya v Sweden*, 22 June 2004, Appl. No. 17868/03 (complaint declared inadmissible); ECtHR, *Salkic and Others v Sweden*, 29 June 2004, Appl. No. 7702/04 (complaint declared inadmissible); ECtHR, *Amegnigan v Netherlands*, 25 November 2004, Appl. No. 25629/04 (complaint declared inadmissible, but applicant did recieve a residence permit in Netherlands); ECtHR, *Hukic v Sweden*, 27 September 2005, Appl. No. 17416/05 (complaint declared inadmissible);

Kingdom (2001).[434] The Court later concluded in its judgment that Bensaid's removal would not be in breach of Article 3.[435] The exceptional circumstances in *D. v the United Kingdom* (1997) included the advanced stages of a terminal and incurable illness (AIDS), the rapid deterioration in the applicant's conditions whereby the limited quality of life he still enjoyed depended on the availability of sophisticated treatment and care he received in the United Kingdom, and the most dramatic consequences a return to his country of origin, the Caribbean island of St. Kitts, would have for him, because of a lack of appropriate medical treatment and social care. In the numerous inadmissibility decisions regarding complaints made in this context the claim was not accepted by the Court for various reasons, including because the applicant had recently been diagnosed with HIV and treatment had started and was available in the applicant's country of origin, beause the illness had not reached an advanced or terminal stage and that there was a prospect of medical and family support in the applicant's country of origin or because the case involved a serious but not exceptional enough mental health problem and mental health care was available in the country of origin. For example, in *Salkic and Others v Sweden* (admissibility decision, 2004) the Court considered that, even though the mental health care in the country of origin, Bosnia-Herzegovina, was clearly not of the same standard as in Sweden, there were health centres with mental health units where the applicants had already been examined and given new appointments.[436] As mentioned, the Court declared *Bensaid v the United Kingdom* (2001) admissible, but concluded in its judgment that no exceptional circumstances such as in *D. v the United Kingdom* (1997) existed.[437] This case involved an applicant suffering from schizophrenia. Although it is an incurable, long-term mental illness which requires constant management, and removal would arguably increase the risk, it is not terminal, a relapse would be likely to occur also in the United Kingdom, and medical treatment, although less favourable, was available in Algeria, the applicant's country of origin.[438]

The exceptional nature and high standard applied in these cases is based on a combination of factors, both personal and relating to the (medical and social) conditions in the country of origin and the fact that treatment was already provided in the State party. Bruin has identified four cumulative elements from the Court's case law

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ECtHR, *Ramadan and Ramadan-Ahjredini v Netherlands*, 10 November 2005, Appl. No. 35989/03 (complaint declared inadmissible). ECtHR, *Tatete v Switzerland*, 6 July 2000, Appl. No. 41874/98 was struck out of the list.

434 ECtHR, *Bensaid v United Kingdom*, 25 January 2000, Appl. No. 44599/98 (admissibility decision).

435 Ibid. Also, ECtHR, *N. v United Kingdom*, 27 May 2008, Appl. No. 26565/05.

436 ECtHR, *Salkic and Others v Sweden*, 29 June 2004, Appl. No. 7702/04 (admissibility decision). Similar reasoning was given by the Court in its (in)admissibility decision in ECtHR, *Hukic v Sweden*, 27 September 2005, Appl. No. 17416/05 concerning a child suffering from Down's syndrome and an epileptic illness being returned to Bosnia and Herzegovina. The Court considered that although care and treatment in Bosnia and Herzegovina might not be of the same standard as in Sweden or as readily available, treatment and rehabilitation could be provided in the applicant's home town.

437 ECtHR, *Bensaid v United Kingdom*, 6 February 2001, Appl. No. 44599/98, para. 40. Admissibility decision reached on 25 January 2000.

438 ECtHR, *Bensaid v United Kingdom*, 6 February 2001, Appl. No. 44599/98, paras. 36-40.

in this regard: first, the nature and stage of the illness; secondly, the possibility of medical treatment in the country of origin, in particular with respect to possible deterioration; thirdly, the existence of social care, in particular from family members; and, fourthly, the length of stay on the territory of the State party.[439] Analysing the Court's case law adopted since *D. v the United Kingdom* (1997) it seems that the availability of some form of medical treatment and social care in the country of origin, even if it is of lesser quality than in the State party, and even if it is at a considerable cost, together with the nature and stage of the illness – certainly when it is not terminal – is the decisive factor for declaring cases inadmissible.[440] The length of stay within the State party has not been a consideration for the Court since *D. v the United Kingdom* (1997), and even in that case it was an additional consideration.[441]

The burden of proof for the individual is also significantly higher in these cases. In *Bensaid v the United Kingdom* (2001) the Court considered that the applicant if returned to Algeria and suffering a deterioration in his condition, would not receive adequate support or care to be to a large extent speculative. So were the arguments concerning the attitude of the applicant's family as devout Muslims, the difficulties of travel and the effects of these factors on the applicant's health.[442] Nevertheless, the applicant had submitted extensive evidence, including an undisputed medical report, stating that there was a high risk that he would suffer a relapse and the recurrence of psychotic symptoms on returning, effective treatment for which would be unlikely, and that the requirement to undertake an arduous journey through a troubled region would make the risk higher and the relapse would be likely to be substantial.[443] Furthermore, the applicant had submitted an expert's report with respect to the violence and terrorist activities in the region to which the applicant would be returned.[444]

It is clear that the Court applies a higher threshold in cases where the alleged future harm emanates from a naturally occurring illness and the lack of sufficient resources to deal with it in the country of origin, rather than where it emanates from the intentional conduct of public authorities or non-State actors. In *N v the United Kingdom* (2008) the Court made clear its reasons.[445] First, it considered that the Convention

439 Bruin 2001, p. 319.

440 ECtHR, *Bensaid v United Kingdom*, 6 February 2001, Appl. No. 44599/98, para. 38; ECtHR, *Heneo v Netherlands*, 24 June 2003, Appl. No. 13669/03 (admissibility decision); ECtHR, *Meho and Others v Netherlands*, 20 January 2004, Appl. No. 76749/01 (admissibility decision); ECtHR, *Ndangoya v Sweden*, 22 June 2004, Appl. No. 17868/03, in which treatment was available at considerable cost and only in the cities of Tanzania; ECtHR, *Salkic and Others v Sweden*, 29 June 2004, Appl. No. 7702/04 (admissibility decision); ECtHR, *Hukic v Sweden*, 27 September 2005, Appl. No. 17416/05 (admissibility decision).

441 ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96, para. 53. See also Boeles' comment on ECtHR, *Heneo v Netherlands*, 24 June 2003, Appl. No. 13669/03, in '*Jurisprudentie Vreemdelingenrecht*', 2004, no. 126 and Lodder's comment on ECtHR, *Amegnigan v Netherlands*, 25 November 2004, Appl. No. 26629/04 (admissibility decision), in *NJCM-Bulletin* 2006, p. 209.

442 ECtHR, *Bensaid v United Kingdom*, 6 February 2001, Appl. No. 44599/98, para. 39.

443 Ibid., para. 16.

444 Ibid., para. 17.

445 ECtHR, *N. v United Kingdom*, 27 May 2008, Appl. No. 26565/05, para. 44.

was essentially directed at the protection of civil and political rights. Secondly, Article 3 of the Convention did not impose an obligation on States parties to alleviate disparities between advances in medical science and socio-economic standards through the provision of free and unlimited health care to all aliens without a right to stay within their jurisdiction; a fair balance had to be found between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. This approach was criticised by Judges Tulkens, Bonello and Spielmann in a Joint Dissenting Opinion in this case, particularly regarding the minimal relevance the Court attaches to economic, social and cultural rights and socio-economic threats and the fair balance argument.[446]

3.3.2.4 At what point in time must the risk be assessed?

The assessment of the risk focusses on the foreseeable consequences of the removal. On many occasions the Court has acknowledged that:

> 'since the nature of the Contracting States' responsibility under Article 3 in cases of this kind [i.e. refoulement cases] lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts wich were known or ought to have been known to the Contracting State at the time of the expulsion'.[447]

The Court has made it clear that the risk criterion requires an assessment ex-nunc by the State, in which the moment of removal is decisive.[448] Every time a person is threatened with removal an assessment needs to be made of the risk existing at that particular time. Thus all relevant information which is known or ought to be known to the State organ, either executive or judicial, has to be taken into account. Consequently, information which comes to light after the initial assessment, for example during an appeal before a national Court, must also be taken into account.[449] This can have both 'positive' consequences for the individual concerned, i.e. the security situation in the receiving country has decreased, and 'negative' consequences, i.e. the situation has improved. In *Venkadajalasarma v the Netherlands* (2004), for example, the Court noted, and took into account, a considerable improvement in the development of the security situation in Sri Lanka, the country of origin.[450] It was

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446 ECtHR, *N. v United Kingdom*, 27 May 2008, Appl. No. 26565/05, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, paras. 6 and 7. See also section 3.3.1.3a.

447 ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 107; ECtHR, *Venkadajalasarma v Netherlands*, 17 February 2004, Appl. No. 58510/00, para. 63; ECtHR, *Thampibillai v Netherlands*, 17 February 2004, Appl. No. 61350/00, para. 61; ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 337.

448 For example, ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 136.

449 See also section 3.4.2.3b.

450 ECtHR, *Venkadajalasarma v Netherlands*, 17 February 2004, Appl. No. 58510/00, paras. 66 and 67.

concluded that expulsion would not violate Article 3 ECHR.[451] The opposite occured in *NA. v the United Kingdom* (2008), in which the Court emphasised the security situation in Sri Lanka which had again deteriorated since approximately mid-2005.[452] In *N. v Finland* (2005), on the other hand, the Court relied for the credibility of the applicant's story on a witness statement supporting the applicant's claim, thereby noting that the evidence was not available to the Finnish authorities when the applicant's case was being considered by them.[453] The Court concluded that expulsion would lead to a violation of Article 3 ECHR.

The moment of removal, or imminent removal, is decisive. In principle, this is no different when removal has already taken place before the case comes before a court. Even then, what was known or ought to have been known to the removing State at the time of removal is relevant. In *Vilvarajah and Others v the United Kingdom* (1991) the applicants were deported to Sri Lanka while their cases were still pending in the United Kingdom. The Court considered that:

> 'it is claimed that the second, third and fourth applicants were in fact subjected to ill-treatment following their return … Be that as it may, however, there existed no special distinguishing features in their cases that could or ought to have enabled the Secretary of State to foresee that they would be treated in this way'.[454]

What is relevant, according to the Court, is what was foreseeable at the time of removal. In *Cruz Varas and Others v Sweden* (1991), for example, the first applicant was expelled by Sweden to Chile after proceedings against him had ended in Sweden and just a day after he had lodged his application to the former European Commission. The Court took into account that, following his expulsion, he was unable to locate any witnesses or adduce any other evidence which might to some degree have corroborated his claims.[455] Allegations made by the applicant that, after his return to Chile, an unknown person had approached him and had threatened his family in Chile and that one brother-in-law was attacked and two others were stopped, searched and questioned by officials were not further discussed by the Court. The Court finally noted that the decision to expel the applicant was taken after thorough examination of his case by Sweden. In light of all this the Court concluded that no foreseeable real risk existed at the time of expulsion.[456] It took into account information, or the

451 See also ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 80, in which the Court took into account the fact that Chile, the country of destination, was in the process of a democratic evolution which had led to improvements in the political situation. And also ECtHR, *Liton v Sweden*, 12 October 2004, Appl. No. 28320/03 (admissibility decision) in which the Court took into account that the ruling Awmi League in Bangladesh had lost power in favour of the Bangladeshi National Party from which the applicant had nothing to fear.

452 ECtHR, 17 July 2008, *NA. v United Kingdom*, Appl. No. 25904/07, para. 140.

453 ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, para. 153.

454 ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 112.

455 ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 79.

456 Ibid., para. 82.

lack thereof, which came to light after the expulsion and concluded it did not alter Sweden's assessment of the foreseeable consequences of the expulsion. In *Shamayev and 12 Others v Georgia and Russia* (2005) five of the 13 applicants had already been extradited at the time of the Court's judgment. Consequently, it assessed the risk for those five based on what was known, or ought to have been known, to the State party (Georgia) at the time of the applicants' extradition and concluded that at that time no real risk existed.[457] One of the 13 applicants was faced with extradition at the time of the Court's judgment. The Court considered that in the two years which had passed since the five other applicants had been extradited evidence now, i.e. at the time of the Court's judgment, suggested that a real risk existed.[458] Apparently, this evidence did not change the Court's conclusion regarding the five extradited applicants that Georgia ought to have known a risk existed. A slightly different assessment was made by the Court in *Al-Moayad v Germany* (admissibility decision, 2007).[459] The applicant in this case had already been extradited at the time of the Court's consideration of the case. Nevertheless, the Court took into account subsequent events, i.e. events that had taken place after the applicant's extradition from Germany to the United States. In this case the applicant claimed he would be at risk of proscribed ill-treatment in the form of interrogation techniques following his extradition, in particular because, as a person suspected of involvement in international terrorism, he would be detained outside US territory, perhaps in Guantanamo Bay. The Court observed that no real risk existed because (1) diplomatic assurances had been given to avert the danger of subjection to proscribed ill-treatment (see section 3.3.2.6b), and (2) following the applicant's extradition there was no indication that he had been detained outside the USA or been ill-treated in US custody.[460] The value of the diplomatic assurances, and consequently the risk, was assessed by the relevant State party, Germany, in the light of the facts and circumstances which occurred after the person's removal. The Court seems to allow this by stating that the subsequent events 'confirm' the assessment of the risk made before the extradition.[461] In other words, it confirms what was foreseeable at the time of removal. In that sense the time of removal remains the decisive point in time. Given that interpretation this case is in line with the Court's previous case law outlined above. A similar type of reasoning was employed by the Court in *Salkic and Others v Sweden* (admissibility decision 2004), in which the Court took into account facts and circumstances which occurred after the applicants' removal (i.e. that they were given medical care in their country of origin, Bosnia and Herzegovina, and that their health had not deteriorated) and concluded that this seemed to confirm the correctness of the assessment made by

457 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 340 (read in connection with para. 367).

458 Ibid., para. 367.

459 ECtHR, *Al-Moayad v Germany*, 20 February 2007, Appl. No. 35865/03 (admissibility decision).

460 Ibid, paras. 67 and 68.

461 Ibid., para. 67 and para. 106 with regard to Article 6 (admissibility decision). See also ECtHR, *Nsona v Netherlands*, 28 November 1996, Appl. No. 23366/94, para. 102.

Sweden before the applicants' removal.[462] To confirm the risk assessment made at the time of the removal it was considered relevant, in both *Salkic* and *Al-Moayad*, that the applicants in question had not been subjected to proscribed ill-treatment. The question remains: what would happen if the applicants were subjected to ill-treatment upon return; would that have changed the risk assessment? In one case, the extradition case of *Garabayev v Russia* (2007), subsequent incidents of ill-treatment were taken into account to the extent that they confirmed the Court's conclusion that substantial fears of ill-treatment existed before the extradition.[463] In two other cases, i.e. *Vilvarajah and Other v the United Kingdom* (1991)[464] and *Shamayev and 12 Others v Georgia and Russia* (2005),[465] the applicants undoubtely faced proscribed ill-treatment upon their return. Apparently, in both cases that did not change what could or ought to have been foreseen at the time of removal. In another case, *Mamatkulov and Askarov v Turkey* (2003), the Court did take into account that there were no reports about possible ill-treatment of the applicants after their extradition to Uzbekistan, but merely reports concerning – according to the Court – the general situation in the Republic of Uzbekistan.[466] It must be noted however that, first, the reports were not as general as the Court considered them to be. For example, they contained information about the political parties and movements to which the applicants belonged.[467] Secondly, it was impossible to obtain reports specifically on the situation of the applicants after their extradition as, for example, the applicants' representatives had not been allowed contact with their clients. As outlined in section 3.3.2.1, the threshold for foreseeing that the subjection of proscribed ill-treatment is high. Therefore, it will be difficult to put forward facts and circumstances which occur after a removal which alter the Court's judgement on the risk assessment and lead to the conclusion that a real risk could or should have been foreseen at the time of removal. Furthermore, it seems that when there is information which may confirm the assessment the Court is placing more emphasis on that information than when there is information which may refute the assessment. In other words, when the risk assessment can be confirmed by information which presented itself after the removal the Court will conduct a more rigorous or fuller assessment of the facts, whereas when the risk assessment can be refuted the Court will conduct a marginal review of the facts.

462 ECtHR, *Salkic and Others v Sweden*, 29 June 2006, Appl. No. 7702/04 (admissibility decision).
463 ECtHR, *Garabayev v Russia*, 7 June 2007, Appl. No. 38411/02, para. 82.
464 ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 112.
465 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, paras. 362 to 367.
466 ECtHR, *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. Nos. 46827/99 and 46951/99, para. 72.
467 Ibid., paras. 53 and 54.

3.3.2.5 The role of the European Court of Human Rights in the risk assessment

The assessment of the risk is primarily the responsibility of the relevant State party, but this may be different when it concerns a complaint regarding Article 2 or 3 ECHR. In general, the Court considers that it:

> 'is sensitive to the subsidiary nature of its role and must be cautious in taking on the role of first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case … Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and as a general rule it is for those courts to assess the evidence before them … Though the Court is not bound by the findings of domestic courts, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts'.[468]

However, the Court does consider that 'where allegations are made under Articles 2 and 3 of the Convention however, the Court must conduct a particularly thorough scrutiny'.[469] When it comes to refoulement cases the Court has in only a very few cases – all decisions on admissibility – fully relied on the assessment conducted by the State party, thereby setting a high threshold for doing otherwise. In *Damla and Others v Germany* (admissibility decision, 2000), the State had assessed a claim for protection in three separate sets of asylum proceedings. The Court considered this to be sufficient and that nothing suggested that Germany had drawn 'grossly unfair or arbitrary conclusions'.[470] Similar language was used in *Kaldik v Germany* (admissibility decision, 2005), involving a case where the risk of inhuman treatment was due to factors which could not, either directly or indirectly, engage the responsibility of the public authorities of that country.[471] In *Cruz Varas and Others* (1991) and *Vilvarajah and Others* (1991) the Court explicitly attached great weight to the knowledge and experience of the relevant State party in dealing with asylum cases from a particular country.[472] Of particular importance for the Court was an assessment made under the Convention relating to the status of refugees and the subsequent granting

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468 ECtHR, *Matyar v Turkey*, 21 February 2002, Appl. No. 23423/94, para. 108. See also ECtHR, *Klaas v Germany*, 22 September 1993, Appl. No. 15473/89, paras. 29 and 30; ECtHR, *D.P. and J.C. v United Kingdom*, 10 October 2002, Appl. No. 38719/97, para. 136; ECtHR, *Damla and Others v Germany*, 26 October 2000, Appl. No. 61479/00 (admissibility decision), in which the Court considered: 'as a general rule, the assessment of the facts and the taking of evidence and its evaluation is a matter which necessarily comes within the appreciation of the national courts and cannot be reviewed by the Court unless there is an indication that the judges have drawn grossly unfair or arbitrary conclusions from the facts before them'.

469 ECtHR, *Matyar v Turkey*, 21 February 2002, Appl. No. 23423/94, para. 109.

470 ECtHR, *Damla and Others v Germany*, 26 October 2000, Appl. No. 61479/00 (admissibility decision).

471 ECtHR, *Kaldic v Germany*, 22 September 2005, Appl. No. 28526/05 (admissibility decision).

472 ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 81; ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 114.

of refugee status.[473] Be that as it may, explicit acknowledgements of the States parties' experiences with asylum cases, as in *Cruz Varas* and *Vilvarajah*, have not been repeated by the Court since. And even in these two cases the Court conducted some assessment of its own of the facts and circumstances. In most cases, however, the Court confirms the conclusions of the State party's assessment but does not fully rely on it. In fact, in most cases, both in admissibility decisions and judgments on the merits, the Court conducts some re-assessment of its own. Only in a very few cases though has that led to a different outcome, for example, because the State party had taken into account an alleged danger to its own national security; because new information, from whatever source or nature, had been put forward; because the Court obtained oral evidence on its own account leading to a different conclusion on the claim's credibility; because of the absence of procedural safeguards in the expelling country; or because the Court was simply not convinced that the assessment made by the State party was correct. In *Chahal v the United Kingdom* (1996) a new assessment by the Court was called for, because the State party primarily contended that no real risk of ill-treatment had been established and that a further reason for deportation was the applicant's threat to national security.[474] In this case the Court first considered that an alleged danger to national security can be no justification for expulsion if there is a real risk for the applicant of being subjected to ill-treatment upon his return. Secondly, the Court considered that there were substantial reasons for believing that the applicant would have a real risk of being subjected to treatment contrary to Article 3 ECHR, thereby taking into account all information available at the time of its considerations.[475] In *Jabari v Turkey* (2000), the State party had not made any assessment at all, but an assessment was made by the UNHCR upon which the Court relied.[476] The Court reserves for itself the right to conduct a full assessment of a claim for protection from refoulement under Article 3 ECHR. In *Hilal v the United Kingdom* (2001) the Court fully assessed the applicant's claim for protection on its own account and, unlike the British authorities, concluded that the claim was credible, thereby taking into account materials which were provided only during the proceedings before the Court.[477] It seems that the Court is willing to conduct a full assessment of its own when the national proceedings followed give it reason to do so, for example because the claim was assessed in an accelerated procedure or because doubts have been cast on the information relied on by the national authorities, in particular because the situation in the country of destination may have changed since the national pro-

473 ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, para. 42. And in ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, para. 41, the Court relied on a similar assessment made by the UNHCR. See also ECtHR, *Ismoilov and Others v Russia*, 24 April 2008, Appl. No. 2947/06, para. 125.

474 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 76.

475 Ibid., paras. 75-107.

476 ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, paras. 40 and 41.

477 ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99, paras. 63-66. Also in ECtHR, *Conka v Belgium,* 5 February 2002, Appl. No. 51564/99, involving the issue of collective expulsion of aliens the Court conducted a full and comprehensive assessment.

ceedings ended. In *Said v the Netherlands* (2005) the applicant's claim for asylum was denied by the Dutch authorities in an accelerated procedure as lacking credibility. Although the Court did not explicitly discuss the legality of the Dutch accelerated procedure[478] it did consider that the Court 'must proceed, as far as possible, to an assessment of the general credibility of the statements made by the applicant before the Netherlands authorities and during the present proceedings'.[479] The Court observed that the applicant's statements were consistent and that persuasive arguments had been submitted to rebut the Dutch authorities' claim that his statements lacked credibility. In *N. v Finland* (2005) the Court appointed two of its members as delegates in order to take oral evidence from the applicant and three witnesses, leading to the conclusion that, although reservations about the applicant's own evidence existed, the overall evidence that was before the Court, including the other witness statements, showed that the claim was sufficiently consistent and credible.[480] In *Salah Sheekh v the Netherlands* (2007) the Court considered that 'in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, a full and ex nunc assessment is called for as the situation in a country of destination may change in the course of time'.[481] According to the Court this was implied partly because the applicant had provided 'reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government'.[482] The Court thus considered, taking into account a considerable amount of material provided to and obtained by it, that there were no guarantees that the applicant would be able to be admitted and settle in an area within the country of destination (Somalia) possibly considered to be safe, and that a real chance existed that he would end up in an area where he be subjected to treatment contrary to Article 3 of the Convention.[483] It is important to mention in this regard that the Dutch government relied on information provided by one source, i.e. its Ministry of Foreign Affairs, whereas the Court relied on a variety of other sources which provided information different from the Ministry's.

To conclude, it can be said that, although the Court will in principle rely on the assessment of the facts and circumstances carried out by the State, as States are primarily responsible, it does allow itself to conduct a full and rigorous re-assessment of all the relevant facts and circumstances when it is not satisfied with the State's assessment. In particular in cases concerning the expulsion or extradition of aliens and involving a claim under Article 3 ECHR, the Court must be able rigorously or fully to assess the claim and obtain information proprio motu.[484] This is particularly important when there are reasons to believe that the State has not conducted a proper assessment, in situations where the applicant has not yet been expelled, because the

478 ECtHR, *Said v Netherlands*, 17 September 2002, Appl. No. 2345/02 (admissibility decision).
479 ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, para. 50.
480 ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, paras. 152-155.
481 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 136.
482 Ibid., para. 136.
483 Ibid., paras. 138-149.
484 Ibid., para. 136. The term 'full assessment' was first used by the Court in the *Salah Sheekh* judgment and must be regarded as synonymous with 'rigorous assessment'.

situation in the receiving country may have changed in the course of time and the assessment that must be made is an ex nunc assessment.[485]

Besides allowing itself to conduct a full and rigorous re-assessment of the facts and circumstances of a case, the Court also plays an active role in the gathering and verification of facts and circumstances, in particular when the applicant has not (yet) been removed and thus the material point for the assessment is the Court's consideration of the case. The Court is not bound by the material placed before it and is free to obtain and assess material itself.[486] Since the abolishment of the European Commission on 1 November 1998 the Court has been increasingly active in this regard.[487] In *Salah Sheekh v the Netherlands* (2007) the Court considered:

> 'that given the absolute nature of the protection afforded by Article 3, it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources, such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations. In its supervisory task under Article 19 of the Convention, it would be too narrow an approach under Article 3 in cases concerning aliens facing expulsion or extradition if the Court, as an international human rights court, were only to take into account materials made available by the domestic authorities of the Contracting State concerned without comparing these with materials from other, reliable and objective sources'.[488]

An example of the very active and significant role of the Court in the gathering and verification of facts is *T.I. v the United Kingdom* (2000), involving possible indirect refoulement from the United Kingdom via Germany to Sri Lanka, in which the German authorities, at the Court's request, provided information on its asylum law and its enforcement.[489] Another example of the Court's active role is *Shamayev and 12*

485 Ibid., para. 136.

486 See, for example, ECtHR, *Ireland v United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 160; ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, paras. 74 and 75; ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 107; ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, paras. 96 and 97; ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, para. 44; ECtHR, *H.L.R. v France*, 29 April 1997, Appl. No. 24573/93, para. 37; ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99, para. 60; ECtHR, *Venkadajalasarma v Netherlands*, 17 February 2004, Appl. No. 58510/00, para. 63; ECtHR, *Thampibillai v Netherlands*, 17 February 2004, Appl. No. 61350/00, para. 61; ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 136.

487 Note that, before the abolition of the European Commission on 1 November 1998, the establishment and verification of facts was considered by the Court to be primarily a matter for the Commission, and only in exceptional cases would the Court use its powers in this area. For example, in ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, the Court relied on the findings of the Commission (para. 44) and in ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, the Court relied on material gathered by the Commission as well as material that came to light during the Court's proceedings (para. 101).

488 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 136.

489 ECtHR, *T.I. v United Kingdom*, 7 March 2000, Appl. No. 43844/98 (admissibility decision).

Others v Georgia and Russia (2005), in which the Court conducted a fact-finding mission to Georgia and Russia.[490] In *Meho and Others v the Netherlands* (2004) the Court based its decision to declare the complaint with respect to the absence of appropriate medical in Kosovo on public information gathered inadmissible on its own motion.[491] Finally, in *N. v Finland* (2005) the Court appointed two of its members as delegates in order to take oral evidence – through a fact-finding mission to Finland – from the applicant and other witnesses, including a senior official in the Finnish Directorate of Immigration.[492] All of the above is in accordance with the Court's own rules. Under Rule A1 of the Annex to the Rules of Court, the Chamber of the Court may adopt any investigative measure which it considers capable of clarifying the facts of the case, invite the parties to produce documentary evidence and decide to hear witnesses or experts. Furthermore, the Court may invite people or institutions of its choice to express an opinion or make a written report, and it may appoint one or more judges of the Court to conduct an inquiry, carry out an on-site investigation or take evidence in some other manner.[493]

In conclusion, with respect to cases involving the prohibition on refoulement under Article 3 ECHR the Court allows itself actively to gather and verify relevant facts and to conduct a full and rigorous assessment of both fact and law. To that extent the Court may act as an appellate judicial body after national remedies have been exhausted.

3.3.2.6 Protection from the country of origin (national protection)

In *H.L.R. v France* (1997) the Court made it clear that it must be shown not only that a real risk exists, but also that the authorities of the country of origin are not able to obviate the risk by providing appropriate protection.[494] When the country of origin can provide protection the individual concerned must seek protection from its own rather than from another State. In *H.L.R. v France* (1997) and *Njie v Sweden* (admissibility decision, 1999) it was clear that the risk did not emanate from the State but

490 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02.

491 ECtHR, *Meho and Others v United Kingdom*, 20 January 2004, Appl. No. 76749/01 (admissibility decision).

492 ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, para. 152.

493 Rule A1, investigative measures, of the Annex to the Rules, Rules of Court, European Convention on Human Rights, Registry of the Court, Strasbourg, November 2003. As an example see a letter dated 31 August 2004 in which the Court indicated that it 'may be opportune to organise a "fact-finding hearing" (Rule A1 of the Annex to the Rules of Court) in Starsbourg, during which the Court could hear experts with personal knowledge of the situation in norther) in Somalia': letter by the Section Registrar of the European Court of Human Rights, 31 August 2004, reference no. ECHR-LE2.4aRmod, addressed to Mr P.H. Hillen, lawyer, Netherlands in *Abukar v Netherlands*, Appl. No. 20218/04 (not published). See also Rule 19 (2) which states that, with respect to the seat of the Court, 'the Court may decide, at any stage of the examination of an application, that it is necessary that an investigation or any other function be carried out elsewhere by it or one or more of its members', available via <www.echr.coe.int> (basic texts).

494 ECtHR, *H.L.R. v France*, 29 April 1997, Appl. No. 24573/93, para. 40.

from non-State actors. In the *H.L.R.* case the non-State actor was a criminal organisation, and in the *Njie* case it was private individuals. The Court considered that in such situations it must be shown that the authorities are incapable of affording the applicant appropriate protection.[495] The ability to provide internal protection is a question of both capability and willingness on the part of the State. In *Chahal v the United Kingdom* (1996) the risk emanated from regional State officials, in particular from security forces in Punjab and elsewhere in India. And although the Court did not doubt the State's good faith and efforts, and thus its willingness, to provide appropriate protection, it concluded that evidence suggested that India would not be able to provide the necessary protection, as the central government had insufficient control over its security forces.[496] In *N. v Finland* (2005) the risk of ill-treatment emanated from relatives of dissidents who might seek revenge on the applicant for his past activities in the service of President Mobutu in the former republic of Zaire. Without further explanation the Court considered that the current 'authorities would not necessarily be able or willing to protect' the applicant against threats from non-State actors.[497]

When there is no State authority in the country of origin it will be very difficult to provide appropriate protection by reason of that fact.[498] It may however not be impossible. In *Salah Sheekh v the Netherlands* (2007) the applicant faced a risk of being subjected to proscribed ill-treatment from non-State actors in Somalia, a country without a clear State authority. In spite of the absence such authority the Court did consider the possibility of obtaining protection in Somalia from clans controlling a certain area.[499]

The issue of national protection has seen two more recent developments. A first development is the concept of an internal protection alternative. A second development is the concept of diplomatic assurances. Both concepts will be discussed separately below in sections 3.3.2.6a and 3.3.2.6b respectively. Finally, section 3.3.2.6c will discuss the question to what extent it is relevant, in the context of national protection, that the country of origin is a State party to one or more human rights treaties, and to the European Convention on Human Rights in particular.

3.3.2.6a Internal protection alternative

An internal protection alternative is an area within the country of origin from which the individual has not originated and where he has no real risk of being subjected to proscribed ill-treatment. It is presumed that the risk is limited to a specific area

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495 Ibid., para. 43; ECtHR, *Njie v Sweden*, 19 October 1999, Appl. No. 47956/99 (admissibility decision).

496 ECtHR, *Chahal v United Kingdom*, 15 November 1996, App No. 22414/93, paras. 91, 99, 104 and 105.

497 ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, para. 164. See also ECtHR, *Hukic v Sweden*, 27 September 2005, Appl. No. 17416/05 (admissibility decision).

498 ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, para. 44.

499 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 147. The possibility of parties or organisations controlling a State or a substantial part thereof providing adequate protection is also regulated in Article 7 of the EU Qualification Directive.

in the country of origin and is non-existent in other parts of the country. The Court has been confronted with the concept of internal protection alternative in a few cases. And although some interesting considerations can be found in those cases, the Court has, unfortunately, never had comprehensively to consider in much detail the substantive and procedural aspects of the concept. In both the *Chahal* and *Hilal* cases the risk of proscribed ill-treatment emanated from (local) State authorities. In such a situation it will be difficult to expect an internal protection alternative to be available, because the perpetrator is part of the country's state apparatus and his influence will only rarely be limited to a certain geographical area.

In *Chahal v the United Kingdom* (1996) the applicant, a high-profile Sikh militant, originated from the province of Punjab in India and feared being subjected to ill-treatment by Punjabi security forces if returned to India. The United Kingdom government proposed that the applicant be removed to an airport of his choice in India, thereby trying to evade the Punjabi security forces and hence the risk of his being subjected to proscribed ill-treatment. The Court, however, not only assessed the risk of being subjected to proscribed ill-treatment in Punjab but extended its assessment to the rest of India. The Court concluded that the Punjabi police and security forces were well capable of targeting Sikh militants in areas of India far away from Punjab, and that, despite the efforts of the Indian government and courts to bring about change, the Indian government had no effective control over the practices of Punjabi security forces in and outside Punjab or over human rights violations by the police elsewhere in India.[500] Therefore, the Court was not pursuaded that an internal protection alternative was available in India, because (1) the actions of the perpetrators of proscribed ill-treatment, the Punjabi security forces, were not limited to a specific area in India (i.e. the State of Punjab), and (2) a risk of human rights violations emanating from police officers also existed elsewhere in India.

The issue of an internal protection alternative in the country of return was again considered in *Hilal v the United Kingdom* (2001), this time concerning Tanzania. The applicant in this case originated from the island of Zanzibar and feared being ill-treated by the authorities, in particular the police. The United Kingdom argued that, even assuming that the applicant was at risk in Zanzibar, the situation in mainland Tanzania was more secure.[501] Relying on various reports provided by both parties the Court considered that it appeared 'that the situation in mainland Tanzania is far from satisfactory and discloses a long-term, endemic situation of human rights problems'.[502] Furthermore, it relied on information that members of the Zanzibari CCM, which is the ruling party, came to the mainland to harras political opponents, that the Tanzanian mainland police were institutionally linked to the Zanzibari police and that there was the possibility of extradition between Tanzania and Zanzibar.[503] The Court concluded, therefore, that the internal protection option did not offer a reliable guarantee against

500 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, paras. 103-105.
501 ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99, para. 67.
502 Ibid., para. 67.
503 Ibid., para. 67.

the risk of ill-treatment.[504] As in the *Chahal* case, no internal protection alternative was available because (1) the actions and influence of the perpetrators of the inhuman treatment were not limited to Zanzibar but extended to Tanzania, and (2) a risk of human rights violations existed in the proposed alternative protection area.

It may be easier to expect an internal protection alternative to be available in situations where the risk of ill-treatment does not emanate from State authorities. At least it must be shown in such situations 'that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection'.[505]

An even more different situation was presented in *Salah Sheekh v the Netherlands* (2007), involving Somalia. In this case the risk of proscribed ill-treatment emanated from non-State actors in a country without a clear State entity. The Court considered it essential to the question of an internal protection alternative 'whether the applicant was able to obtain protection against and seek redress for the acts perpetrated against him', and that the situation had not undergone a substantial change for the better so that the risk had been removed or he would be able to obtain protection.[506] Since the risk of proscribed ill-treatment came from an opposing clan the relevant question was whether he could be safe in an area in which the clan was not active and in which he could obtain protection in areas considered by the Dutch Government to be relatively safe.[507] According to the Dutch Government – and affirmed by the UNHCR – these areas were Somaliland, Puntland, the south of Mudug and the islands off the coast of southern Somalia.[508] The Court discussed the subject of an internal protection alternative in Somalia for the applicant by looking at three issues, i.e. safety, accessibility and durability of residing in the alternative areas. The issue of safety was only shortly addressed by the Court. The Court acknowledged that the alternative areas appeared to be generally more stable and peaceful than other areas in south and central Somalia, but nevertheless had its doubts about the safety of the internal protection alternatives in Somalia, in particular because the applicant did not originate from these areas.[509] When it came to the issue of safety the Court considered that the applicant would not receive protection from a clan residing in the alternative areas, where his own clan did not have a presence.[510] Unable to obtain clan protection the applicant would almost invariably end up in miserable, isolated settlement, according to the Court.[511] The Court linked the issue of safety to Article 3 of the Convention, implying that the conditions in an internal protection area must at least meet

504 Ibid., para. 68.
505 ECtHR, *H.L.R. v France*, 29 April 1997, Appl. No. 24573/97, para. 40.
506 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 147.
507 Ibid., para. 138.
508 Ibid., paras. 53, 70, 76, 100 and 139.
509 Ibid., paras. 139-140.
510 Ibid., para. 140.
511 Ibid., para. 140.

the standards required in Article 3.[512] Interestingly, the Court noted that where the UNHCR's concerns were focussed on humanitarian elements; on the possible destabilising effects of an influx of involuntary returnees on the already overstreched absorption capacity of the internal flight alternatives in Somalia, and on the dire situation in which returnees found themselves, the Court was of the opinion that:

> 'such considerations do not necessarily have a bearing, and certainly not a decisive one, on the question whether the person concerned would face a real risk of ill-treatment within the meaning of Article 3 of the Convention in those areas'.[513]

The fact that the Court attached little weight to socio-economic considerations in the context of an internal protection alternative is in line with the Court's case law regarding a real risk of ill-treatment within the meaning of Article 3. As I outlined in section 3.3.1.3a, the Court has repeatedly stated, although not without internal criticism, that socio-economic considerations do not necessarily have a bearing on the question of a real risk of ill-treatment within the meaning of Article 3 ECHR.[514]

The Court's main concerns related to the question of the accessibility of the alternative areas and whether or not the applicant would be able to remain and settle in an alternative area ('durability') and not be vulnerable to 'indirect refoulement'. The Court made clear that it is the responsibility of the State party when relying on an internal flight alternative for the person who is to be expelled to be able to travel to the area concerned, to gain admittance there and that it is guaranteed that he will be allowed or enabled to stay and settle there, failing which an issue is raised under Article 3, as the absence of these guarantees may lead to the possibility that the person concerned may end up in an unsafe area where he may be subjected to ill-treatment.[515] Note that, according to the Court, it must be guaranteed that the person concerned is able to stay and settle in the alternative protection area. This is an important condition implying that (1) a mere presumption of being able to stay and settle will not be sufficient, and (2) that a mere possibility of travelling to the area and gain admittance will also be insufficient.[516] Moreover, the Court was willing

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512 Ibid., para. 140 and 141. See also ECtHR, *Jeltsujeva v Netherlands*, 1 June 2006, Appl. No. 39858/04 (admissibility decision), in which the Court linked the living conditions in the internal protection area, i.e. the Russian Federation excluding Chechnya, with the requirements of Article 3, and considered that if the general living conditions in the Russian Federation for internally displaced persons might be far from ideal, they could ot be regarded as so harrowing as toattain the minimum level of severity required for treatment to fall within the scope of Article 3 of the Convention.

513 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 141.

514 ECtHR, *NA. v United Kingdom*, 17 July 2008, Appl. No. 25904/07, para. 122; ECtHR, *N. v United Kingdom*, 27 May 2008, Appl. No. 26565/05, para. 44. Criticism came from Judges Tulkens, Bonello and Spielmann in their Joint Disstenting Opinion in ECtHR, *N. v United Kingdom*, 27 May 2008, Appl. No. 26565/05, at para. 6

515 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, paras. 141 and 143.

516 This may have serious consequences for Article 8(3) of the EU Qualification Directive, according to which EU Member States may apply an internal protection alternative even if there are technical obstacles to return to the country of origin. In a strict legal sense applying Article 8(3) means only that the applicant will not be granted refugee and subsidiary protection status; he is still protected

to accept in *Salah Sheekh* that the Dutch Government might succeed in removing the applicant to either Somaliland or Puntland, but that his stay there was certainly not guaranteed. The authorities of Somaliland and Puntland had made it clear that they were opposed to forced deportations to their areas and that they did not accept EU travel documents.[517] Moreover, it was impossible for the Dutch Government to monitor the applicant after his removal.[518] Therefore, because access and the ability to stay were not guaranteed in the alternative areas the applicant had 'a real chance' of being removed or of being having no alternative but to go to areas of the country which were considered unsafe.[519] In other words, there was then a danger of 'indirect refoulement'. Here the Court referred to its admissibility decision in *T.I. v the United Kingdom* (2000),[520] which will be discussed in section 3.4.1.3.

In both *Chahal* and *Hilal* the risk of ill-treatment emanated from State actors and the applicants in these cases would continue to be at risk in other parts of the country. Where State actors are the source of the risk it will be difficult to find a safe and reliable internal flight alternative, in particular when the State controls the whole country. A safe alternative may be available if the risk emantes from non-State actors or when a safe, accessible and durable alternative area is available in the country of origin. It remains unclear who, besides State authorities, may in such situation be able to provide protection. With respect to the situation in Sri Lanka the Court has acknowledged the ability of people to be protected in areas of the country controlled by the Tamil oppostion group, the LTTE,[521] and with respect to Somalia the Court has acknowledged the possibility of protection afforded by the authorities of two breakaway regions, Somaliland and Puntland, as well as by ethnic clans.[522] An internal alternative may also be available in situations where, for example, international organisations have the ability to provide protection.[523] In *Muratovic v Denmark* (two

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from refoulement under Article 3 ECHR. However, such a legalistic approach undermines the applicant's genuine qualification as a person in need of subsidiary protection. Fortunately, Article 8(3) allows States not to apply this provision strictly because it uses the term 'may' rather than 'should': Article 8 (3) of EU Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted: [2004] OJ L304/12).

517 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 142.

518 Ibid., para. 143.

519 Ibid., para. 143.

520 ECtHR, *T.I. v United Kingdom*, 7 March 2000, Appl. No. 43844/98 (admissibility decision).

521 ECtHR, *Thampibillai v Netherlands*, 17 February 2004, Appl. No. 61350/00, para. 67. Note that the accessibility of the LTTE protection area in Sri Lanka was a requirement for the Court to accept that area as an internal protection alternative. The Court considered that Tamils 'are now free to travel throughout the whole country without requiring prior permission to enter certain areas, and that there has been a sharp reduction in roadblocks and checkpoints around the country'.

522 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 142.

523 See in this regard Article 7(1)(b) of EU Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted: [2004] OJ L304/12, according to which protection can be provided by parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.

admissibility decisions; 2004) the Court acknowledged that the presence of the United Nations Interim Administration Mission in Kosovo (UNMIK) could guarantee a safe haven for members of various ethnic minorties.[524] Kosovo is part of Serbia, but since 1999 has been governed by UNMIK.[525] Since 1999 security was in hands of the Kosovo Force (KFOR), which was under the command of NATO.[526] Unfortunately, it remains unclear under what circumstances UNMIK can provide a safe haven.

The assessment of the risk involved in refoulement cases must be very factual, as protection from refoulement should be practical and effective. Equally, the safety, accessibility and durability of an internal flight alternative should be practical and effective and assessed on a case-by-case basis. Therefore, if an internal flight alternative is available and provides sufficient protection from subjection to proscribed ill-treatment it should be taken into account in the risk assessment. Who provides the protection is relevant for the effectiveness of the protection alternative. Protection may be provided by the authorities of the country of return or by non-State actors, including United Nations or NATO (peacekeeping) forces. The relevant question is, of course, can they provide practical and effective protection? The mere presence and mandate to provide protection of a peacekeeping force or UN administrative authority, or any other actor for that matter, is not enough. What is relevant is whether or not it has the actual ability and willingness to provide durable protection. This includes factors such as presence, mandate, territorial control, human and material resources and accountability, and, again, they must be assessed on a case-by-case basis.[527]

3.3.2.6b Diplomatic assurances to guarantee safety

Diplomatic assurances are not new and have played a part in extradition cases for some time. In recent years, however, the issue of diplomatic assurances as a means of showing the ability of the country of origin to obviate the risk has gained ground in cases involving asylum-seekers. I will first discuss extradition cases involving the issue of diplomatic assurances. After that I will focus on asylum cases.

In *Soering v the United Kingdom* (1989), involving the risk of imposition and execution of the death penalty in the USA, and hence the death row phenomenon, the Court was not convinced by the assurances provided. The assurances in this case were provided by the prosecutor, the USA, and consisted of a sworn affidavit stating that, should the applicant be convicted of the capital murder offence as charged, a representation would be made that the United Kingdom had requested that the death penalty be neither imposed nor carried out.[528] The Court was not convinced by these assurances, in particular because they related to the imposition of the death penalty

524 ECtHR, *Sadena Muratovic v Denmark*, 19 February 2004, Appl. No. 14513/03 ((in)admissiblility decision) and ECtHR, *Aslan and Atifa Muratovic v Denmark*, 19 February 2004, Appl. No. 14923/03 (admissibility decision).

525 UN SC res. 1244 (1999), 10 June 1999.

526 Zwanenburg 2004, pp. 46-49.

527 See section 2.3.2.4 for criticism on this issue.

528 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 20.

and not to the death row phenomenon. Besides, the prosecution had indicated that it would persist in seeking the death penalty.[529] Furthermore, with respect to the imposition of the death penalty the assurances were provided by the State's public prosecutor and not by the sentencing judge or the State governor who would have the power to provide effective guarantees in this respect. Neither the judge, for reasons of judicial independence and integrity, nor the State governor, as a matter of policy, had provided any assurances regarding the imposition or execution of the death penalty.[530] With respect to the imposition of the death penalty the Court considered that in order for the guarantees to be effective they 'must at the very least significantly reduce the risk of a capital sentence being imposed or carried out'. The Court considered this was not the case because 'there was "some risk", which was "more than merely negligible", that the death penalty would be imposed'.[531] Interestingly, the Court rejected the assumption that diplomatic relations even between two countries as close as the UK and the USA could make up for insufficient safeguards.[532]

In later extradition cases concerning the United States and the death penalty, however, the Court was convinced by the diplomatic assurances provided by the prosecutor. These assurances would reduce the risk of proscribed ill-treatment to negligible proportions. The Court declared the complaints inadmissible. In *Nivette v France* (admissibility decision, 2001) the responsible District Attorney in the USA had, under oath and in writting, stated that she would under no circumstances charge the applicant with one of the special circumstances necessary for the imposition of the death penalty or life imprisonment without any possibility of early release. This statement was binding on her successors and the State of California where the prosecution would take place.[533] And in *Einhorn v France* (admissibility decision, 2001) the District Attorney had confirmed by means of a sworn affidavit he would not seek the death penalty. A diplomatic note from the United States embassy in France, which referred to an earlier case making clear that with respect to the applicant that imposition of the death penalty was prohibited, confirmed the affidavit.[534] In the abovementioned extradition cases, all involving the issue of the death penalty and the United States of America, the decisive question was whether or not the assurances significantly reduced the risk of proscribed ill-treatment to a negligible level. An important factor in answering that question was whether or not the person or institution which had provided the assurances had the actual power to prevent the death penalty

529 Ibid., para. 98.

530 Ibid., paras. 59 and 60.

531 Ibid., para. 93. Note that Article IV of the 1972 US-UK Extradition Treaty stipulated that such assurances should be given to the extent that the death penalty would not be carried out.

532 Larsaeus 2006, p. 14 in which she refers to ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 97. In this paragraph the ECtHR raises the issue of trust and diplomatic relations between the UK and the US by quoting a statement made by a Home Office Minister in the British Parliament on the issue.

533 ECtHR, *Nivette v France*, 3 July 2001, Appl. No. 44190/98 (admissibility decision).

534 ECtHR, *Einhorn v France*, 16 October 2001, Appl. No. 71555/01 (admissibility decision).

(or death row phenomenon) from being sought, imposed or carried out.[535] In addition, all of the abovementioned cases involved situations in which it was actually possible to reduce the level of risk to negligible proportions.

The issue of diplomatic assurances in an extradition case involving the risk of a death sentence also played a prominent role in *Shamayev and 12 Others v Georgia and Russia* (2005).[536] This case is particularly interesting because it involved extradition to Russia, a State party to the ECHR; a topic which I will adress separately in section 3.3.2.6c. In this case 13 Russian citizens of Chechen origin claimed that their extradition from Georgia to Russia, among other things, would expose them to a real risk of subjection to ill-treatment proscribed in Article 3 ECHR as well as to being sentenced to death. The complaint before the Court was lodged on 4 October 2002; the day on which five of the 13 applicants were extradited.[537] The Russian authorities subsequently offered 'all the necessary guarantees' concerning the treatment of the five extradited applicants and gave assurances that they would not be sentenced to death.[538] These guarantees included unhindered access for the applicants to appropriate medical treatment, legal advice and access to the Court itself, that they would not face capital punishment and that their health and safety would be protected.[539] These diplomatic assurances were submitted both orally and in writing and were given in respect of each of the five extradited applicants. The assurances were given by the highest prosecuting authority in Russia (the Acting Procurator-General) and contained a guarantee that the applicants would not be sentenced to death or subjected to torture and cruel, inhuman or degrading treatment or punishment. Furthermore, the Acting Russian Procurator-General pointed to the fact that Russia had had a moratorium on the death penalty since 1996.[540] The Court found the assurances to be credible. According to the Court: (1) the assurances came from the highest ranking prosecuting authority responsible for criminal prosecution in the Russian Federation, who was also responsible for ensuring the rights of prisoners,[541] (2) it was important for the Court that the assurances were given in respect of those applicants whose identity could be substantiated and who had been in possession of Russian passports at the time of their arrest,[542] (3) with regard to the extradited

535 Guarantees regarding the applicant's safety from being sentenced to death were also an issue in ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04. However, in this case no diplomatic assurances were requested or provided (para. 45).

536 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02.

537 Registrar of the ECtHR, *Shamayev and 12 Others v Georgia and Russia*, Appl. No. 36378/02, Press Release No. 552, 6 November 2002, via <www.echr.coe.int>.

538 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, paras. 76 and 77.

539 Registrar of the ECtHR, *Shamayev and 12 Others v Georgia and Russia*, Appl. No. 36378/02, Press Release No. 601, 26 November 2002, via <www.echr.coe.int> and ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 77.

540 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, paras. 342 and 343.

541 Ibid., paras. 344 and 345.

542 Ibid., para. 346.

applicants neither had the death sentence been sought by the Russian prosecution nor had the applicants been sentenced to that penalty,[543] and (4) photographs indicated that the conditions in detention for the extradited applicants did not appear to be in breach of Article 3 of the Convention and the two applicants who had been in correspondence with the Court did not complain about their detention conditions.[544] The Court's conclusion regarding the assurances' credibility is unconvincing, in particular because, with regard to the one applicant whose extradition was imminent, the Court concluded that his extradition would be in breach of Article 3 ECHR because of what had happened to the five applicants already extradited: they had been subjected to proscribed ill-treatment.[545] In addition, the Russian Federation had failed to comply with a fact-finding mission requested by the Court.[546] There was little cooperation from Russia as the Russian government notified the Court that the Stavropol Regional Court, within the jurisdiction of which the five extradited applicants were detained, was refusing the European Court access to the applicants. The ECtHR strongly condemned this and informed the Russian authorities of their obligations under international law, in particular the ECHR.[547] The behaviour of the Russian authorities illustrates that giving diplomatic assurances and being a party to the ECHR are no guarantee that the State will actually comply with the assurances given or with its obligations under the Convention. It raises serious doubts whether or not diplomatic assurances with respect to possible proscribed ill-treatment should be accepted, because of the fundamental values protected by Article 3 ECHR and the possible irreparable harm caused by their violation, in particular when they are given by a State party in the territory of which torture and other forms of proscribed ill-treatment are systematically taking place, yet routinely denied.[548] Moreover, it is questionable to what extent the assurances actually reduced the risk of proscribed ill-treatment or imposition of the death penalty to a negligible level. The problem in this case with regard to

543 Ibid., para. 347.

544 Ibid., para. 348.

545 Ibid., paras. 362 to 367. See also section 3.3.2.1d.

546 The Court declared *Shamayev and 12 Others*, Appl. No. 36378/02 admissible on 16 September 2003 and initially scheduled a fact-finding mission to both Georgia and Russia in October 2003, later to be adjourned to the beginning of 2004: see Registrar of the ECtHR, *Shamayev and 12 Others v Georgia and Russia*, Appl. No. 36378/02, Press Release No. 528, 24 October 2003, via <www.echr.coe.int>. On 23-25 February 2004 the Court conducted a fact-finding mission to Georgia, the results of which have not been made public. A fact-finding mission to Russia was planned for June 2004: see *Human Rights Watch* 2004, p. 26.

547 Registrar of the ECtHR, *Shamayev and 12 Others v Georgia and Russia*, Appl. No. 36378/02, Press Release No. 528, 24 October 2003, via <www.echr.coe.int>. See also *Human Rights Watch* 2004, p. 25.

548 *Human Rights Watch* 2004, p. 26, note 84 in which reference was made to one report of the European Committee for the Prevention of Torture, *Public Statement Concerning the Chechen Republic of the Russian Federation*, Doc-ID: p-rus-2003decl-en, 10 July 2003) and two reports issued by Human Rights Watch: *Human Rights Watch* 2000 and *Human Rights Watch* 2002. See also Rieter's comment on Registrar of the ECtHR, *Shamayev and 12 Others v Georgia and Russia*, Appl. No. 36378/02, Press Release No. 528, 24 October 2003, in *European Human Rights Cases*, 22 January 2003, No. 4, p. 24.

the five extradited applicants was that the Court was not convinced that a real risk existed.[549] It appears that the decisive factor in this judgment was the fact that the applicant's representatives had merely, according to the Court, referred to the general situation of the conflict in the Chechen Republic and had not shown that the applicants were personally at risk.[550] Nevertheless, the diplomatic assurances must have played a part in the findings, in particular in the context of the death sentence and the situation in detention. Given the minimal evidence in support of the applicants' claim the Court may have been easily convinced that the assurances would contribute to the removal of a potential risk. The Court indeed did not rule out that a possibility of ill-treatment existed.[551] Looking objectively at the assurances and comparing *Shamayev and 12 Others v Georgia and Russia* (2005) with earlier cases involving extradition and the death penalty as described above, it does not become clear whether or not the Acting Russian Procurator-General has indeed the effective authority to decide on seeking or imposing the death penalty. In any event it did not seem necessary to discuss this issue further because the Court was convinced that none of the applicants was in fact sentenced to death at the time of the Court's findings, even though the Court had not been given a copy of any sentence.[552] As for possible proscribed ill-treatment of the five extradited applicants the Court relied on photographs, medical records and correspondence from two applicants. This is far from convincing, in particular because of the fact that the medical records were provided by Russia and, with the exception of a few written exchanges, the applicants were deprived of any opportunity to state their version of the facts. Also, the applicants' representatives were not authorised to contact their clients, as was acknowledged by the Court.[553] Furthermore, various external reports had painted a dire picture for Chechen detainees in Russian prisons.[554] Apparently, the Court found these reports to be too general.[555]

Another case involving extradition and the issue of diplomatic assurances, albeit not involving the death penalty, which calls for a detailed analysis is *Mamatkulov and Askarov v Turkey* (2003; Grand Chamber 2005).[556] It is again a case in which the Court's judgment, in two instances, regarding diplomatic assurances is far from convincing. The two applicants in this case were extradited by Turkey to Uzbekistan after Turkey had received assurances regarding their safety, but while their cases were still pending before the Court and despite a request by the Court for an interim measure to suspend the extraditions. In its judgment the Court concluded that the

549 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 350.
550 Ibid., para. 352.
551 Ibid., para. 352.
552 Ibid., para. 347.
553 Ibid., para. 349.
554 Ibid., paras. 267 (e), 268, 269, 270, 271.
555 Ibid., para. 351.
556 ECtHR, *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. No. 46827/99 and 46951/99 and ECtHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99 (Grand Chamber).

applicants' extradition was not in breach of Article 3 ECHR. This was later confirmed by the Court's Grand Chamber. It remains speculative as to what extent the Court in both instances relied on the diplomatic assurances provided by Uzbekistan. In the initial judgment of 2003 the Court stated that it '*observes* that the Turkish Government contend that the applicants were extradited after an assurance had been obtained from the Uzbek Government' and that it 'takes *formal cognisance* of the diplomatic notes from the Uzbek authorities'.[557] In its Grand Chamber judgment the Court noted that the applicants were extradited after an assurance had been obtained, but did not comment.[558] The failure of the Court, in the judgments of both the Chamber and the Grand Chamber, to comment on the diplomatic assurances provided by Uzbekistan is worrying.[559] The assurances were provided by the Uzbek Ministry of Foreign Affairs in two separate notes, consisting of two letters written by the Uzbek Public Prosecutor and communicated to the Turkish authorities, according to which the applicants' property would not be liable to general confiscation, the applicants would not be subjected to acts of torture or sentenced to capital punishment and Uzbekistan would live up to its obligations under the United Nations Convention against Torture, to which it is a party.[560] In a later letter to Turkey the Uzbek authorities stated that they had made arrangements for the applicants' security during the criminal investigation and their trial.[561] Following the applicants' conviction in Uzbekistan Turkish diplomatic officials were allowed to visit them in their respective prisons; where they were found to be in good health and had not complained about the conditions of their detention.[562] Unlike the Turkish diplomats, the applicants' representatives were never able to contact the applicants, let alone visit them or obtain on-site evidence regarding their health and detention conditions.[563] In my opinion, the diplomatic assurances provided were not sufficient to reduce the risk to a negligible level. The reference to the State's legal obligations under the Convention against Torture does not sound convincing, given the systematic practices of torture which exist in Uzbekistan according to various well-documented sources.[564] As Judges Bratza, Bonello and Hedigan

557 ECtHR *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. Nos. 46827/99 and 46951/99, paras. 75 and 76 [emphasis added].

558 ECtHR *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99 (Grand Chamber), para. 76.

559 See also *Human Rights Watch* 2004, p. 28.

560 ECtHR, *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. Nos. 46827/99 and 46951/99, paras. 29 and 75 (see also Grand Chamber judgment, 4 February 2005, para. 76).

561 ECtHR, *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. Nos. 46827/99 and 46951/99, para. 30.

562 Ibid., para. 34.

563 Ibid., paras. 36 and 74.

564 Ibid., paras. 53 and 54, and Joint Partly Dissenting Opinion of Judges Bratza, Bonello and Hedigan, para. 11 in which reference was made to the finding of Amnesty International that Uzbekistan had failed to implement its treaty obligations under the CAT and that, despite those obligations, widespread allegations of ill-treatment and torture of members of opposition parties and movements continued to be made at the date of the applicants' arrest and surrender. See section 5.3.2.5b regarding the views of the Committee against Torture and the use of diplomatic assurances in the context of the prohibition on refoulement under Article 3 CAT. According to the Committee a State should

pointed out in their dissenting opinion to the Grand Chamber judgment in this case, 'an assurance, even one given in good faith, that an individual will not be subjected to ill-treatment is not of itself a sufficient safeguard where doubts exist as to its effective implementation'.[565] Moreover, in *Ismoilov and Others v Russia* (2008) the Court concluded that:

> 'Given that the practice of torture in Uzbekistan is described by reputable international experts as systematic (see paragraph 121 above), the Court is not persuaded that the assurances from the Uzbek authorities offered a reliable guarantee against the risk of ill-treatment'.[566]

Further, assuring that the applicants' property will not be confiscated is irrelevant with respect to the risk of being subjected to proscribed ill-treatment. Finally, the follow-up monitoring of the Turkish diplomats seems to have been far from adequate as it entailed only one visit two years after the extradition.[567] Furthermore, it must be borne in mind that visits from foreign diplomats will hardly ever reveal evidence of torture. Torturers no doubt will do everything they can to hide any evidence that torture has been committed. Besides putting significant weight on the diplomatic assurances, the Court also leaned heavily on the fact that the human rights information provided by the applicants' representatives was of a rather general nature and lacked personal elements. A similar consideration was used by the Court in *Shamayev and 12 Others v Georgia and Russia* (2005), as outlined above in this section.[568] Nevertheless, I find this an odd consideration, given the fact that the applicants' representatives had not been allowed contact with their clients and therefore must have had great difficulty in conducting inquiries and obtaining further evidence. Furthermore, the information provided by the applicants' representatives was extensive, well-documented, and indicated a poor human rights situation involving systematic practices of torture, in particular with respect to members of a banned opposition group called 'Erk' to which the applicants belonged.[569] Finally, the Court also relied on the medical certificates issued by the doctors in the prisons in which the applicants were detained, which did not support the allegations the applicants had made

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not rely on diplomatic assurances with regard to States which do not systematically violate the provisions of CAT.

565 ECtHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99 (Grand Chamber), Joint Partly Dissenting Opinion of Judges Bratza, Bonello and Hedigan, para. 10.

566 ECtHR, *Ismoilov and Others v Russia*, 24 April 2008, Appl. No. 2947/06, para. 127.

567 See *Human Rights Watch* 2004, p. 28, where reference is made to the UN Special Rapporteur's requirement of a post-return monitoring system which reinforces unequivocal guarantees that a person will not be subject to torture upon return and for the duration of his stay in the country of return: Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, GA UN A/58/120, 3 July 2003, para. 15.

568 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 350.

569 ECtHR *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. Nos. 46827/99 and 46951/99, paras. 53 and 54.

concerning ill-treatment during detention.[570] The Court took the medical certificates into account without in any way questioning their objectivity. All of this was accepted unaltered by the Grand Chamber of the Court in its judgment in 2005.[571]

A final case involving extradition and the issue of diplomatic assurances worth mentioning here is *Al-Moayad v Germany* (admissibility decision, 2007) involving a Yemeni national suspected of terrorist activities who was extradited to the United States of America by Germany. The focus of the Court's attention was on the question whether or not the applicant was at risk of being extradited to Guantanamo Bay or any other US detention facility outside the territory of the United States. The reason for this focus was that the Court was gravely concerned by worrying reports which had been received about interrogation methods used by the US authorities on people suspected of involvement in international terrorism and detained outside US' territory, including in Guantanamo Bay.[572] The Court was satisfied by the diplomatic assurances given by the US that the applicant would not be detained in Guantanamo Bay or prosecuted by a military tribunal or any other extraordinary court, because (1) such assurances were given by the US embassy in Germany by means of a note verbale, (2) the German authorities and courts expressly stated in the extradition proceedings and in their conditions for allowing the extradition that they understood the assurances to comprise a undertaking not to detain the applicant in a facility outside the USA, (3) following the applicant's extradition there had been no indication that he had been detained in a prison outside the USA, and (4) that it had not been Germany's experience that assurances given to it in the course of proceedings concerning the USA were not respected in practice.[573] There are several comments to be made concerning the acceptance of the diplomatic assurances. First, they relate to the place of detention and consequently, and only implictly, to proscribed ill-treatment, rather than explicitly guaranteeing that the applicant will not be subjected to proscribed ill-treatment. Secondly, the assurances are silent on the risk of the applicant being sentenced to death. Thirdly, apparently having a positive experience with assurances provided in the past is an indication of the value of new assurances.

There are two non-extradition cases in which the Court considered diplomatic assurances: first, in 1996, in *Chahal v the United Kingdom;* secondly, in *Saadi v Italy* in 2008.

In *Chahal v the United Kingdom* India had on two occasions provided assurances to the United Kingdom regarding the applicant's safety. India had informed the United Kingdom's Home Secretary that:

570 Ibid., paras. 72, 73, 74 and 76.

571 ECtHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99 (Grand Chamber).

572 ECtHR, *Al-Moayad v Germany*, 20 February 2007, Appl. No. 35865/03, para. 66.

573 Ibid., paras. 67 and 68.

> 'we [i.e. the Indian government] have noted your request to have a formal assurance to the effect that, if Mr. Karamjit Singh Chahal were to be deported to India, he would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities'.[574]

Although the ECtHR did not doubt the good faith of the Indian government in providing the guarantees, it was not persuaded by their effectiveness. It considered that:

> 'despite the efforts of that government, the NHRC [i.e. National Human Rights Commission] and the Indian Courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem'.[575]

The Court was particularly concerned about the endemic nature of the practice of torture upon people in police custody, the inadequate measures taken to bring those responsible to justice, the problems of widespread, often fatal, mistreatment of prisoners and the lack of systematic reform of the police even though the National Human Rights Commission had called for it.[576] From the Court's judgment in *Chahal* it becomes clear that the assurances, albeit directed at the applicant and provided in good faith by the Indian government, would have an inadequate effect because of the endemic nature of torture and the lack of effective control of it by the Indian government. In this case the Court relied significantly on the endemic nature of torture in India. A second, non-extradition, case is *Saadi v Italy* (2008).[577] In this case the applicant, a criminal suspected of terrorist activities, was threatened with expulsion to Tunisia. At the request of Italy Tunisia provided certain guarantees. Initially, the Tunisian Ministry of Foreign Affairs stated that it was 'prepared to accept the transfer to Tunisia of Tunisians imprisoned abroad … in strict conformity with the national legislation'.[578] Several days later, in a second note the Ministry continued and stated:

> 'that the Tunesian laws in force guarantee and protect the rights of prisoners in Tunesia and secure to them the right to a fair trial. The Minister would piont out that Tunesia has voluntarily acceded to the relevant international treaties and conventions'.[579]

On the issue whether or not diplomatic assurances had been given that the applicant would not be subjected to treatment contrary to Article 3 of the Convention the Court's response was clear and simple: 'the Tunisian authorities did not provide such assurances'.[580] The Court continued:

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574 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 37.
575 Ibid., para. 105.
576 Ibid., para. 104.
577 ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06 (Grand Chamber).
578 Ibid., para. 54.
579 Ibid., para. 55.
580 Ibid., para. 147.

> 'that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifest contrary to the principles of the Convention'.[581]

The expulsion cases of *Chahal* and *Saadi* are interesting to compare with *Mamatkulov and Askarov v Turkey* (2003; Grand Chamber 2005), in particular because in the latter case the Court remained completely silent – in two instances – about the diplomatic assurances. There are several interesting issues to compare. First, in *Mamatkulov and Askarov* Uzbekistan had assured the Turkish authorities that it would abide by its international legal obligations under the Convention against Torture. However, various well-documented sources, including Amnesty International and UN sources, spoke of endemic torture in Uzbekistan, amongst other places, targetting the political group to which the applicants belonged. Similar language was used by the same UN source (i.e. the UN special rapporteur on torture) in *Chahal*. Secondly, in *Chahal*, the applicant was explicitly considered to be a high-profile person in his home country. Such a consideration was not given with respect to *Mamatkulov and Askarov*. However, the applicants were suspected of an attempted terrorist attack on the President of Uzbekistan and were members of a banned opposition group. Arguably, this gave them a high profile. Thirdly, in *Mamatkulov and Askarov* the Court was not pursuaded by the information provided by, for example, Amnesty International, because of its general nature. In *Saadi* it was again, amongst others, Amnesty International which provided general information on the human rights situation in Tunisia. In the former case the Court was not convinced; in the latter it was.

Another interesting issue to discuss with relation to diplomatic assurances is the monitoring of the removed individual. This concerns monitoring both by the expelling State and by the individual's representative. To start with the latter form, the opportunity for the individual's representative to contact and visit his client after removal was an issue in *Shamayev and 12 Others v Georgia and Russia* (2005) and *Mamatkulov and Askarov v Turkey* (2003; Grand Chamber 2005). In both cases the applicants' representatives were not authorised to contact, let alone visit, their clients. In the *Shamayev* case the Court had actually asked the Russian Government to allow the applicants' representatives unhindered access to their clients.[582] The Court acknowledged the fact that the representatives were not given such access and that 'in those circumstances the applicants themselves cannot be entirely blamed for not providing sufficient evidence after their extradition'.[583] In the *Mamatkulov* case the Court completely disregarded the impossibility of the applicants' representatives contacting and visiting their clients. Where the impossibility of having contact with and/or access

581 Ibid., para. 147.

582 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 228.

583 Ibid., para. 349.

to removed persons is a problem in terms of gathering information, in the context of diplomatic assurances it is even more problematic when an expelling State is unable to monitor the situation of the individual expelled. Monitoring may provide additional safeguards for the individual and may be an important tool for the expelling State to check whether the receiving State is complying with the assurances given. Unfortunately, the issue of monitoring by the expelling State was not discussed by the Court in any of the cases involving diplomatic assurances. In *Mamatkulov and Askarov v Turkey* (2003; Grand Chamber 2005) the fact that Turkish diplomatic officials had been allowed to visit the applicants after their extradition was mentioned in the Court's judgment, but without any comment from the Court.[584] In *Garabayev v Russia* (2007) the applicant had been extradited to Turkmenistan but had returned three months later. The Russian Consultate in Turkmenistan had asked on several occasions to be allowed to meet the extradited applicant. This was refused by the Turkmen officials.[585] The Court considered the denial of such visits to be a relevant element in its considerations that, at the moment of extradition, the applicant had a real risk of being subjected to proscribed ill-treatment.[586] Also, the Court found it relevant that the Russian authorities had not sought assurances about the applicant's safety.[587]

A final interesting question which I posed in section 3.3.2.2c is whether or not States parties to the ECHR have an obligation to seek diplomatic assurances. The question was posed as a response to the Court's findings in *Bader and Others v Sweden* (2005).[588] It is important to acknowledge the particular circumstances of this case. The issue here was whether or not criminal proceedings in Syria, following which the principal applicant was originally sentenced to death, could be re-opened. The Swedish Embassy had sought information in this regard, but this information was vague and imprecise. In this context the Court noted that the Government of Sweden had not obtained guarantees from the Syrian aurthorities regarding the re-opening of the case. In other words, in this case an opportunity had presented itself for the Swedish Government, where it already had sought information, to ask for official clarification on a legal matter, i.e. the re-opening of a criminal trial. In such circumstances it is understandable that the Court should urge Sweden to be more active and to ask for assurances. Another case in which the question whether or not diplomatic assurances should have been sought was *Garabayev v Russia* (2007).[589] This was an extradition case in which the Russian authorities had not addressed Article 3 concerns in the proceedings which served as the basis for the applicant's extradition to Turkmenistan in spite of numerous concerns being raised about the possibility of ill-treatment. As stated before, diplomatic assurances are common in extradition cases.

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584 ECtHR, *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. Nos. 46827/99 and 46951/99, para. 34.
585 ECtHR, *Garabayev v Russia*, 7 June 2007, Appl. No. 38411/02, para. 34.
586 Ibid., para. 82.
587 Ibid., para. 79.
588 ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04, para. 45.
589 ECtHR, *Garabayev v Russia*, 7 June 2007, Appl. No. 38411/02, para. 79.

It is therefore understandable that the Court should question the absence of a request for diplomatic assurances.

To conclude, in order for diplomatic guarantees to be adequate and effective they must reduce the level of risk to negligible proportions. Relying on good faith or on general assurances with reference to a State's national and international legal obligations is not sufficient. This is even more so when States are known to resort to or tolerate inhuman treatment. Diplomatic assurances are requested most often in extradition cases. In such cases it is often clear what can be expected; it is clear what criminal charges are made and what penal sentence is sought. Consequently, it is easier to determine the value and effectiveness of the assurances given. In cases involving the expulsion of aliens seeking 'asylum' protection it is much more difficult to assess the value of the assurances given. Assurances are either too vague or too general or may fail to have any effect on the individual concerned because of the endemic targeted nature of the violence. Futhermore, what is worrying with respect to the findings of the ECtHR in its case law in the context of diplomatic assurances is that nothing is said about the obligation on States parties to implement an effective system of close monitoring. In *Mamatkulov and Askarov v Turkey* (2003; Grand Chamber 2005) and *Shamayev and 12 Others v Georgia and Russia* (2005) there was no monitoring system in place, except for a single visit by Turkish officials in the *Mamatkulov* case.[590]

3.3.2.6c The country of origin is a State party to one or more human rights treaties

In the context of both national protection and diplomatic assurances a relevant issue is the extent to which a State can rely on the fact that the receiving country is a State party to one or more human rights treaties. The relevant question is: is it certain that the receiving country will live up to its international legal obligations to the extent that the risk of proscribed ill-treatment is obviated? Most of the countries to which the individuals concerned in refoulement cases were to be returned under the European Convention are countries which are party to the ICCPR.[591] Some of these countries

590 ECtHR, *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. Nos. 46827/99 and 46951/99, para. 34; ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02.

591 The States which are party to the ICCPR include the following countries: Algeria (*Bensaid v United Kingdom*, 6 February 2001, Appl. No. 44599/98), Chile (*Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89), Colombia (*H.L.R. v France*, 19 April 1997, Appl. No. 24573/94), Democratic Republic of Congo (*Nsona v Netherlands*, 28 November 1996, Appl. No. 23366/94 and *N. v Finland*, 16 July 2005, Appl. No. 38885/02), Eritrea (*Said v Netherlands*, 5 July 2005, Appl. No. 2345/02), India (*Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93), Iran (*Jabari v Tureky*, 11 July 2000, Appl. No. 40035/98 and *D. and Others v Turkey*, 22 June 2006, Appl. No. 24245/03), Peru (*Olaechea Cahuas v Spain*, 11 August 2006, Appl. No. 24668/03), Russian Federation (*Shamayev and 12 Others v Georgia and Russia*, 12 October 2005, Appl. No. 36378/02), Somalia (*Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94 and *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04), Sri Lanka (*Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, *Thampibillai v Netherlands*, 17 February 2004, Appl. No. 61350/00 and *Venkadajalasarma v Netherlands*, 17

are party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[592] and only one, the Russian Federation, is a party to the ECHR. In general the Court observed:

> 'that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case [*Saadi v Italy* (2008], reliable sources have reported practices resorted to or tolerated by the authorities which are manifest contrary to the principles of the Convention'.[593]

In general, being a party to a human rights treaty is of only limited relevance. What is relevant is whether or not the country of origin has effectively and adequately implemented the rights contained in these treaties. Of the countries of origin mentioned in the Court's case law none has a very good human rights record. In *Ahmed v Austria* (1996) the country of origin was Somalia, which at that time had no central government, making it diffcult to rely on Somalia effectively guaranteeing its human rights obligations. In *Chahal v the United Kingdom* (1996) the Court explicitly took into account the endemic nature of torture in the country. Furthermore, the fact that the country of origin is a State party to a human rights treaty does not automatically absolve the removing State of its obligations under the human rights treaties to which it is bound.

The relevance of the fact that the country of origin is a party to a human rights convention may be different when the country is a party to the ECHR and thereby subject to the control system of the Convention and the (binding) judgments of the Court. In general, one may assume that States party to the European Convention honour their obligations under the Convention in good faith; if not, the individual concerned can lodge a complaint before the Court.[594] In *Avetissov v Sweden* (admissibility decision, 2002) the Court declared the complaint inadmissible, among other reasons, because the receiving State, Russia, was a State party to the Convention and the Court might receive an application alleging breaches by Russia of the Convention.

February 2004, Appl. No. 58510/00), Syrian Arab Republic (*Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04), Uzbekistan (*Mamatkulov and Askarov*, 6 February 2003, Appl. Nos. 46827/99 and 46951/99, Grand Chamber, 4 February 2005), United Republic of Tanzania (*Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99), United States of America (*Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88). Of these countries Algeria, Chile, Colombia, the DRC, the Russian Federation, Somalia, Sri Lanka (as of 3 January 1998) and Uzbekistan are States party to the First Optional Protocol, thereby accepting the competence of the Human Rights Committee to receive and examine individual complaints.

592 Algeria, Chile, Colombia, the DRC, Peru, the Russian Federation, Somalia, Sri Lanka, the Syrian Arab Republic, Uzbekistan and the USA are party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, under which Algeria, Chile, Peru and the Russian Federation have accepted the competence of the Committee against Torture to receive and examine individual complaints.

593 ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06 (Grand Chamber), para. 147.

594 Lawson 2006, p. 20 in which the author refers to ECtHR, *Veemäe v Finland*, 15 March 2005, Appl. No. 38704/03 (admissibility decision).

An important factor in this case was that the applicant had voluntarily returned to Russia and that he had no difficulty with the Russian authorities upon his return except for being arrested at the border.[595] In its (in)admissibility decision in *Tomic v the United Kingdom* (2003) the Court attached 'importance to the fact that the case concerns expulsion to a High Contracting Party to the European Convention on Human Rights, which has undertaken to secure the fundamental rights guaranteed under its provisions', after it had already concluded that no substantial grounds had been shown for believing that the applicant would face a real risk of being subjected to proscribed ill-treatment upon his return to Croatia.[596] And in *Veemäe v Finland* (2005) the Court added that the applicant would be free to lodge an application against Estonia should he consider his treatment there to be in breach of Article 3 or any other provision of the Convention.[597] In all three admissibility decisions the fact that the country of origin was a State party to the ECHR was a fact taken into account, but was certainly not a decisive factor. Good faith is not necessarily enough. A State party is not absolved of its own responsibilities under the Convention and may not automatically rely on the fact that the country of return is a State party to the Convention. In a case involving indirect refoulement, *T.I. v the United Kingdom* (2000), the Court did take into account the fact that the country to which the applicant would be removed first, Germany, was a party to the ECHR.[598] Although the Court first acknowledged the fact that every State party has its own responsibility under the Convention, it nevertheless seemed to place great weight on the fact that the applicant would be removed to Germany before possibly being removed to his country of origin (Sri Lanka). The Court conducted a thorough scrutiny of the chance of the applicant being protected in Germany against removal to Sri Lanka, because there were concerns that he would run a risk of being subjected to proscribed ill-treatment in Sri Lanka. Based, however, on assurances provided by the German authorities, the Court accepted the minimal protection offered by the Germans, which was based on a provision which provided the German authorities with discretionary powers to suspend deportation in cases of substantial danger to the life, personal integrity or liberty of an alien. The Court thus took into account the fact that the German authorities had assured the Court that they would scrupulously comply with any request for an interim measure by the Court to suspend the execution of a deportation order if the applicant lodged a complaint before it. Clearly, two important factors were taken into account in the *T.I.* case. First, the case concerned the issue of indirect refoulement, i.e. the applicant was not directly at risk of proscribed ill-treatment in Germany. Secondly, Germany was a party to the European Convention and had assured the Court it would fully comply with the Convention's control system.

595 ECtHR, *Avetissov v Sweden*, 5 March 2002, Appl. No. 71427/01 (admissibility decision).

596 ECtHR, *Tomic v United Kingdom*, 14 October 2003, Appl. No. 17837/03 (admissibility decision). See also ECtHR, *Hukiç v Sweden*, 27 September 2005, Appl. No. 17416/05 (admissibility decision) and ECtHR, *Jeltsujeva v Netherlands*, 1 June 2006, Appl. No. 39858/04 (admissibility decision).

597 ECtHR, *Veemäe v Finland*, 15 March 2005, Appl. No. 38704/03 (admissibility decision).

598 ECtHR, *T.I. v United Kingdom*, 7 March 2000, Appl. No. 43844/98 (admissibility decision).

The principle of good faith may have come under pressure in *Shamayev and 12 Others v Georgia and Russia* (2005). Assurances regarding the applicants' safety were provided by Russia, including of access to the ECtHR.[599] In the light of these guarantees the interim measure suspending extradition was not extended. It is unclear whether or not the fact that Russia was subjected to the jurisdiction and control of the ECtHR played a part in the Court's decision not to extend the interim measures request. However, in its judgment the Court was alarmed by the persecution and killing of people of Chechen origin, in particular those who had lodged applications with the Court, as well as the ill-treatment faced by the five extradited applicants upon their return to Russia.[600] In fact, the Court concluded that the impending extradition of one applicant would be in breach of the prohibition on refoulement under Article 3 of the Convention. While the Court at first relied on the fact that Russia was a State party to the Convention and would surely comply with its protection mechanisms, it had second thoughts after it learned of serious instances of inhuman treatment, in particular of people who had lodged a complaint before the Court.

In my opinion, the fact that the country of origin is a State party to the ECHR is an element to be taken into account, albeit with great care. While in principle a State may in good faith rely on other States parties to honour their Convention obligations, this may not result in automatic expulsion or extradition. In particular in cases involving Article 3 of the Convention a State will retain its own responsibilities under the Convention. When credible information implies that a State party to the Convention will not live up to its obligations, the actual implementation and enforcement of the rights and freedoms of the Convention, in particular with respect to the prohibition on torture and inhuman or degrading treatment or punishment, must be assessed. Such information may come from the individual concerned; however, the *T.I.* decision made it clear that it is not just the individual who has a responsibility in this regard, but also the expelling or extraditing State. And while it is important to scrutinise the possibility of lodging an application to the Court once the receiving country has breached its obligations under Article 3 the irreparable harm caused by such violation makes this possibility of minimal value.

3.3.3 The absolute character of the prohibition on refoulement

Torture, inhuman and degrading treatment and punishment are prohibited by Article 3 of the ECHR in absolute terms. Even though the text of the Article does not say so explicitly, it does not allow for any exceptions, contrary to many other Articles of the Convention, for such reasons as public order, health, morals or national secur-

599 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 77.

600 Ibid., paras. 366 and 367.

ity.[601] Furthermore, Article 15(2) of the Convention explicitly prohibits derogations from Article 3 in times of war or other public emergencies threatening the life of the nation. The absolute character of Article 3 of the Convention has often been emphasised by the Court in its case law.[602] Most recently and most clearly its absolute character was re-emphasised unanimously by the Court's Grand Chamber in *Saadi v Italy* (2008).[603] Because of the absolute character of Article 3 ECHR no justifications can be provided by States parties for treating or punishing a person within the meaning of Article 3. So, the penalising nature and deterrent effect of judicial punishment, the conduct of the victim, serious socio-economic problems and the lack of resources of the State and the fight against organised crime and terrorism cannot be reasons for States to torture or ill-treat a person within the meaning of Article 3.[604]

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601 See for interesting reading on this Harris, O'Boyle & Warbrick 1995, pp. 55 and 56. Addo & Grief 1998, pp. 510-524.

602 For example, ECtHR, *Ireland v United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 163; ECtHR, *Tyrer v United Kingdom*, 25 April 1978, Appl. No. 5856/72, para. 30; ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 88; ECtHR, *Aksoy v Turkey*, 18 December 1996, Appl. No. 21987/93, para. 62; ECtHR, *Aydin v Turkey*, 25 September 1997, Appl. No. 23178/94, para. 81; ECtHR, *Raninen v Finland*, 16 December 1997, Appl. No. 20972/92, para. 55; ECtHR, *Selcuk and Asker v Turkey*, 24 April 1998, Appl. Nos. 23184/94 and 23185/94, para. 75; ECtHR, *Assenov and Others v Bulgaria*, 28 October 1998, Appl. No. 24760/94, para. 93; ECtHR, *Selmouni v France*, 28 July 1999, Appl. No. 25803/94, para. 95; ECtHR, *Labita v Italy*, 6 April 2000, Appl. No. 26772/95, para. 119; ECtHR, *Sevtap Veznedaro Lu v Turkey*, 11 April 2000, Appl. No. 32357/96, para. 28; ECtHR, *Dikme v Turkey*, 11 July 2000, Appl. No. 20869/92, para. 89; ECtHR, *Kudla v Poland*, 26 October 2000, Appl. No. 30210/96, para. 90; ECtHR, *Bilgin v Turkey*, 16 November 2000, Appl. No. 23819/94, para.101; ECtHR, *Dulas v Turkey*, 30 January 2001, Appl. No. 25801/94, para. 52; ECtHR, *D.P. and J.C. v United Kingdom*, 10 October 2002, Appl. No. 38719/97, para. 109; ECtHR, *E. and Others v United Kingdom*, 26 November 2002, Appl. No. 33218/96, para. 88; ECtHR, *Lorse and Others v Netherlands*, 4 February 2003, Appl. No. 52750/99, para. 58; ECtHR, *Poltoratskiy v Ukraine*, 29 April 2003, Appl. No. 38812/97, para. 130; ECtHR, *Kmetty v Hungary*, 16 December 2003, Appl. No. 57967/00, para. 32; ECtHR, *Ayder and Others v Turkey*, 8 January 2004, Appl. No. 23656/94, para. 107; ECtHR, *Altun v Turkey*, 1 June 2004, Appl. No. 24561/94, para. 51; ECtHR, *Balogh v Hungary*, 20 July 2004, Appl. No. 47940/99, para. 44; ECtHR, *Khashiyev and Akayeva v Russia*, 24 February 2005, Appl. Nos. 57942/00 and 57945/00, para. 170; ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 335; ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, para. 166.

603 ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, paras. 137-138.

604 The penalising nature or deterrent effect of judicial punishment or disciplinary measures was an issue in: ECtHR, *Albert and Le Compte v Belgium*, 10 February 1983, Appl. Nos. 7299/75 and 7496/76, para. 22, even though the Court put too much emphasis on the fact that the aim of the disciplinary measure (i.e. the withdrawal of the applicant's right to practise medicine) was to penalise the applicant and not to debase him, it was not degrading because the measure did not have any adverse effect on the applicant's personality in a manner incompatible with Article 3; see also ECtHR, *Abdulaziz, Cabales and Balkandali v United Kingdom*, 28 May 1985, Appl. Nos. 9214/80, 9473/81 and 9474/81, para. 91, in which the Court put too much emphasis on the fact that the difference in treatment did not denote any contempt or lack of respect for the personality of the applicants, and that it was not designed to and did not humiliate or debase them, but was intended solely to achieve the aims of immigration control; ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88. Fight against crime was an issue in: ECtHR, *Balogh v Hungary*, 20 July 2004, Appl. No. 47940/99, para. 53;fight against alleged terrorist activities of the PKK was an issue in: ECtHR, *Selcuk and Asker v Turkey*, 24 April 1998, Appl. Nos. 23184/94 and 23185/94, para. 79; ECtHR, *Yoyler v Turkey*,

The Committee of Ministers of the Council of Europe reiterated the absolute character of Article 3 in its Guidelines on human rights and the fight against terrorism.[605]

Although the prohibition on torture and inhuman or degrading treatment or punishment is formulated in unqualified terms it does contain an element of relativity. As I explained in section 3.3.1.2, treatment will amount to proscribed ill-treatment only if it attains a minimum level of severity, which is relative and depends on the specific facts and circumstances of each case. Furthermore, certain situations may involve inevitable suffering or humiliation and will attain the minimum level of severity only when the conduct involved is excessive, disproportionate or unnecessary. For example, authorities may have to use force in order to arrest a suspected criminal or prevent a detainee from escaping. Furthermore, medical necessity may call for certain ill-treatment, and expulsion from a foreign country may in itself be degrading. Moreover, how should a situation in which, for reasons of self-defence, ill-treatment is used be assessed? If the taking of a life is not contrary to Article 2 of the Convention in a situation of self-defence, would severe wounding in such a situation a fortiori also not be justifiable?[606] The relevant question is whether or not conduct in the context of an arrest, detention, medical needs, expulsion or self-defence amounts to inhuman treatment proscribed by Article 3. This is an issue of relativity rather than proportionality in the sense that it does not require a balancing act between the purpose of the arrest or detention and the prohibition on torture and inhuman or degrading treatment or punishment, but rather requires an assessment of the ill-treatment itself in the context of all the facts and circumstances and whether or not it amounts to proscribed ill-treatment. This element of relativity does not qualify the right to be protected from proscribed ill-treatment in the sense that in certain situations such treatment would be permitted, but it qualifies the treatment and distinguishes harsh treatment from proscribed ill-treatment.[607] Furthermore, the relative nature of proscribed ill-treatment does not change the fact that certain conduct may, by reason of its severity, by definition amount to inhuman or degrading treatment or punishment, irrespective of any necessity. Moreover, the Court has never justified removal by referring to the minimum level of severity threshold conditional for its engagement.[608]

The absolute character of Article 3 of the Convention with respect to the prohibition on refoulement was acknowledged by the Court in *Chahal v the United Kingdom*

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24 July 2003, Appl. No. 26973/95, para. 74; ECtHR, *Ayder and Others v Turkey*, 8 January 2004, Appl. No. 23656/94, para. 110. The fight against terrorism and organised crime was also an issue in ECtHR, *Khashiyev and Akayeva v Russia*, 24 February 2005, Appl. Nos. 57942/00 and 57945/00, para. 170. Serious socio-economic problems and lack of resources was an issue in: ECtHR, *Poltoratskiy v Ukraine*, 29 April 2003, Appl. No. 38812/97, para. 148; ECtHR, *Kuznetsov v Ukraine*, 29 April 2003, Appl. No. 39042/97, para. 128.

605 Article IV, Council of Europe, Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies, December 2002.

606 Harris, O'Boyle & Warbrick 1995, p. 56.

607 Palmer 2006, p. 439. H Harris, O'Boyle & Warbrick 1995, p. 55.

608 Den Heijer 2008, p. 294.

(1996).[609] In this case the applicant, an Indian national and well-known supporter of Sikh separatism, was suspected of having committed terrorist activities inside the United Kingdom.[610] Although the British authorities considered a balancing act between the national security of the United Kingdom and Chahal's need to be protected to be necessary, the Court ruled that the absolute character of Article 3 of the Convention did not permit deportation to India if there was a real risk of his being subjected to torture or inhuman or degrading treatment or punishment, irrespective of the applicant's conduct, however undesirable or dangerous, even to the country's national security.[611] According to the Court Article 3 ECHR leaves no room whatsoever for a balancing act between the national security of a State and the need of the individual for protection.[612] The absolute character of Article 3 does not allow States parties to apply a margin of appreciation in this respect. A similar decision was taken by the Court in *Ahmed v Austria* (1996) involving a Somalian national whose refugee status was revoked by Austria because of his conviction for attempted robbery. The Court concluded that expulsion by Austria to Somalia would be in breach of Article 3 of the Convention because of a real risk of proscribed ill-treatment and irrespective of the applicant's criminal conviction.[613] In 2005, the Court reconfirmed the absolute character of Article 3 in a refoulement case, i.e. *N. v Finland*.[614] In all three cases mentioned above the applicant's conduct in the country of asylum was no reason to allow exceptions under Article 3. The Court explicitly acknowledged in these cases that the protection afforded under Article 3 from refoulement is thus wider than that provided under Article 33 of the Refugee Convention which does allow exceptions (see section 2.3.3).[615]

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609 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 80.

610 The applicant had been charged with various conspiracies to assassinate and murder but was released. He was also charged with assault and affray in connection with public disturbances in London of which he was convicted and sentenced to six and nine months in detention. These sentences were later quashed by the Court of Appeal.

611 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, paras. 80-81; See also Vermeulen in '*Rechtspraak Vreemdelingenrecht*' 1996, No. 20, comment on the *Chahal* case.

612 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 81; note that the Court considered in this case that there was no room for a balance and that this consideration was different from the inherent search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual rights in the rest of the Convention, as the Court stated in *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 89.

613 ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, para. 46; see also ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96, para. 47, in which the applicant was forced by the UK to return to his country of origin because he was in possession of a substantial amount of cocaine. The European Court concluded the expulsion to be in violation of Article 3 of the Convention.

614 ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, para. 166.

615 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 80; ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, para. 41; ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, para. 159. See for an analysis of the protection from refoulement under Article 33 of the Convention relating to the Status of Refugees chapter 2 of this book.

In spite of the absolute character of Article 3 the Court is aware of the fact that this raises issues concerning criminals seeking protection and at the same time evading justice, issues regarding drug trafficking, and issues in the fight against terrorism. In *Soering v the United Kingdom* (1989) the Court considered that '[i]ndeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 in particular.'[616] Furthermore, the Court considered that 'suspected offenders who flee abroad should be brought to justice'.[617] In *Chahal v the United Kingdom* (1996) the Court considered that it:

> 'is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct'.[618]

A similar finding was made by the Court in *D. v the United Kingdom* (1997) with respect to the efforts of States parties to combat the harm caused to their societies through the supply of drugs from abroad.[619]

In recent years certain developments have shown attempts to weaken the absolute character of prohibitions on torture and other forms of inhuman or degrading treatment or punishment and prohibitions on refoulement, including Article 3 ECHR. In general, this includes such developments as the legalisation of certain interrogation techniques, redefining them, applying secret expulsion methods or practices of extraordinary rendition, refusing to grant certain individuals residence permits or access to basic facilities and relying on diplomatic assurances.[620] Two worrying developments occurred in relation to the ECHR: first, the judgment of the Court in *Mamatkulov and Askarov* (2003; Grand Chamber 2005), and, secondly, interventions by several States parties in individual cases involving the expulsion of aliens under Article 3 ECHR.

In *Mamatkulov and Askarov v Turkey* (2003) the Court concluded that the extradition of two applicants who were accused and convicted of terrorist-related activities, including their involvement in a series of bombings in Tashkent in February 1999, was not in breach of Article 3 of the Convention. In section 3.3.2.6b, with respect

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616 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 86.

617 Ibid., para. 89.

618 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 79. See also ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, para. 40; ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 335, in which the Court reiterated the absolute character of Article 3 while acknowledging the difficulties States faced in order to protect their communities from terrorist violence. The European Commission considered in the *Chahal* case '*t*hat the State is not without means of dealing with any threats posed thereby, the individual being subjected to the ordinary criminal laws of the country concerned' EComHR, *Chahal v United Kingdom*, 27 June 1995, Appl. No. 22414/93, para. 104.

619 ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96, para. 46.

620 Bruin & Wouters 2003, pp. 5-29. Wouters 2006, pp. 1-8.

to the issue of diplomatic assurances, I have analysed the serious flaws in the Court's reasoning. I can only hope that the activities of the applicants in no way contributed to the Court's ruling in this case.

Perhaps more worrying were the interventions of several States parties in *Ramzy v the Netherlands* (submitted to the Court in 2005 and declared admissible in 2008) and *Saadi v Italy* (Grand Chamber 2008). In *Ramzy* an intervention was made by Lithuania, Portugal, Slovakia and the United Kingdom. At the time of writing the *Ramzy* case was still pending before the ECtHR.[621] *Saadi* was decided by the Grand Chamber of the Court on 28 February 2008. Until the Court had passed judgment in the *Saadi* case *Ramzy* received more attention. Not only were four States parties granted leave to intervene in that case, so were several non-governmental organisations. In essence the interventions made in both cases were similar. Because *Ramzy* initially received more attention and because the interventions were more detailed I will focus on those. *Ramzy* concerned the removal to Algeria of a man suspected of involvement in an Islamic extremist group in the Netherlands.[622] In accordance with Article 36 of the Convention the Court had granted leave to the Governments of Lithuania, Portugal, Slovakia and the United Kingdom, as well as the non-governmental organisations AIRE Centre, Interights (also on behalf of Amnesty International, the Association for the Prevention of Torture, Human Rights Watch, the International Commission of Jurists, Open Society Justice Initiative and Redress) and Justice and Liberty. The intervening Governments took the position that, notwithstanding the absolute character of Article 3 of the Convention, in the context of the removal of an alien and the assessment of a risk of ill-treatment proper weight needs to be afforded to the fundamental rights of the citizens of Contracting States who are threatened by terrorism.[623] The arguments presented by the intervening Governments affect the basis of the prohibition on refoulement developed under Article 3 of the Convention. The Governments stated that the prohibition on refoulement was only implied and not expressly set out in Article 3 and that the absolute character of Article 3 in the context of treatment by a State party of people within its jurisdiction cannot automatically be transposed in the context of the removal of an alien in order to protect national security.[624] Furthermore, the intervening Governments draw a distinction between the forms of ill-treatment proscribed by Article 3, torture being the most serious and severe form of ill-treatment and degrading treatment the least serious and severe one.[625] In this regard the intervening Governments seemed to favour a proportionality test in the sense that the seriousness or severity of the possible ill-treatment must be weighed against the level of threat posed to the State's national

621 The *Ramzy* case was declared admissible on 27 May 2008: ECtHR, *Ramzy v Netherlands*, 27 May 2008, Appl. No. 25424/05 (admissibility decision).

622 ECtHR, Press release, 20 October 2005, No. 554.

623 Observations of the Governments of Lithuania, Portugal, Slovakia and the UK in ECtHR, *Ramzy v Netherlands*, Appl. No. 25424/05, 21 November 2005, para. 3.

624 Ibid., paras. 10 and 25.1.

625 Ibid., paras. 19, 21, 22 and 24.2.

security.[626] Furthermore, the Governments proposed that the element of risk in cases involving national security threats was formulated as a more-likely-than-not test rather than likely or foreseeable, as has been the consistent case law of the Court (see section 3.3.2.1).[627] In general, the Governments proposed a balancing act between the degree and nature of the risk faced by the individual in the receiving State and the degree and nature of the risk faced by the removing State. The non-governmental organisations in their intervention in *Ramzy* addressed the arguments of the intervening Governments by emphasising the absolute character of Article 3, including in the context of expulsion of an alien, as consistently reaffirmed by the ECtHR and others.[628]

In *Saadi v Italy* (2008) the United Kingdom, with the support of Italy, made a similar intervention.[629] In *Saadi* the Grand Chamber of the Court unanimously rejected the arguments of the United Kingdom and Italy and stated that the absolute character of Article 3 ECHR could not be called into question.[630] The Court made two things very clear:[631] first, no distinction could be made between treatment inflicted directly by a State party and treatment which might be inflicted by or in other States upon the expulsion of an alien;[632] and, secondly, in the latter situation protection against proscribed ill-treatment should not be weighed against the interest of the community as a whole. The Court explicitly confirmed its judgment in *Chahal v the United Kingdom*.[633] Importantly, a danger to a State's national security or community cannot influence the assessment of the risk that the individual concerned would be subjected to proscribed ill-treatment after expulsion. Either a real risk exists or it does not.[634] Furthermore, it would also be incorrect to require a higher standard of proof or stronger evidence where the individual concerned was considered a danger to the security or community of the State.[635] What is relevant is the level of risk

626 Ibid., para. 22.1.

627 Ibid., para. 36.

628 Amnesty International, The Association for the Prevention of Torture, Human Rights Watch, Interights, The International Commission of Jurists, Open Society Justice Initiative and Redress, *Written Comments pursuant to Article 36 (2) of the European Convention on Human Rights and Rule 44 (2) of the Rules of the European Court of Human Rights in the case of Ramzy v Netherlands, Appl. No. 25424/05, 22 November 2005*. Liberty & Justice, *Third Party Intervention Submissions in the case of Ramzy v Netherlands, Appl. No. 25424/05, 22 November 2005*.

629 ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, paras. 117-123.

630 Ibid., paras. 137 and 138.

631 Ibid., para. 138: 'the Court cannot accept the argument of the United Kingdom Government, supported by the respondent Government, that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole …'.

632 See a brief discussion in section 3.3.1.2.

633 Ibid., paras. 138 and 141; ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93.

634 ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, para. 139: 'Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not'.

635 Ibid., paras. 139 and 140.

involved, irrespective of where it comes from and how it is established or proven. In this regard I would argue that applying a different standard in cases where the future harm emanates from a naturally occurring illness and the lack of sufficient resources to deal with in the country of origin is incompatible with the absolute character of Article 3.[636]

The Court's confirmation of the absolute character of Article 3 ECHR, including in refoulement cases, is understandable when one looks at the Court's case law. It is also understandable when one looks at the text of Article 3, which allows no limitations, and at the text of Article 15(2), which allows no derogation from Article 3 in times of public emergencies. Finally, it is understandable when one looks at the underlying premise of the absolute character of Article 3. As Judge Myjer states in his concurring opinion in *Saadi,* States must not resort to methods which undermine the very values they seek to protect. And while the fight against terrorism inevitably poses enormous problems for States in protecting their citizens they are not allowed to combat terrorism at all costs. Upholding human rights in the fight against terrorism is, first and foremost, a matter of upholding our values, even with regard to those who may seek to destroy them. Democratic States which value the rule of law should not be accused of using double standards.[637] In addition, I believe that the absolute character of Article 3 ECHR stems not just from its strict unconditional and non-derogable formulation and qualification, but perhaps more so from the values Article 3 aims to protect. No one shall be subjected to forms of treatment which are considered too cruel or inhuman. This does, however, pose the question whether or not the forms of treatment which are prohibited under Article 3 have been stretched too far. Looking for example at the concept of degrading treatment, and in particular at *Yankov v Bulgaria* (2003) and *Moisejevs v Latvia* (2006), I mentioned in section 3.3.1.2, I wonder whether it is reasonable to expect States to refrain from expelling people such as Yankov and Moisejevs in a situation in which they pose a genuine danger to the State's national security. The absolute character of Article 3 would imply that where a suspected terrorist is threatened with expulsion but substantial grounds have been shown that a real risk exists that he will be subjected to head-shaving during detention (*Yankov v Bulgaria* (2003)) or will be given light meals on trial days (*Moisejevs v Latvia* (2006)) he may not be expelled.[638]

636 Sections 3.3.1.3 and 3.3.2.3. See also the criticism of Judges Tulkens, Bonello and Spielmann in ECtHR, *N. v United Kingdom*, 27 May 2008, Appl. No. 26565/05, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, para. 7.

637 Concurring Opinion of Judge Myjer, joined by Judge Zagrebelsky in ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06.

638 ECtHR, *Yankov v Bulgaria*, 11 December 2003, Appl. No. 39084/97; ECtHR, *Moisejevs v Latvia*, 15 June 2006, Appl. No. 64846/01.

3.4 The character and contents of State obligations deriving from the prohibition on refoulement under Article 3 of the European Convention on Human Rights

The prohibition on refoulement developed under Article 3 of the ECHR is an independent norm which protects people who are within the jurisdiction of a State party from being faced with a real risk of proscribed ill-treatment.[639] The nature of the State's responsibility under Article 3 in refoulement cases lies in exposing an individual to the risk of proscribed ill-treatment and not in subjecting the individual to proscribed ill-treatment itself.[640] In the context of extradition this is formulated in terms of liability rather than responsibility where liability is incurred by the extraditing State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.[641] The difference in terminology can be explained as extradition takes place in a legal context in which the extraditing and receiving States have a shared – legal – responsibility often based on bilateral extradition agreements.

The specific obligations which derive from the responsibility for ensuring protection from refoulement depends on the concrete circumstances, so that it is essential that the State's obligation is functional to the individual right of protection from refoulement. In other words, the State must act or must refrain from acting when, as a result of that action or omission, the individual is directly exposed to a risk of treatment contrary to Article 3 ECHR and when the State party in question has a real and effective power to protect the individual against refoulement.[642] For example, an individual who is within a State's territory may not be removed from that territory if, by such removal, he will be forced to go to a country where he will have a real risk of being subjected to proscribed ill-treatment. Thus, the State has an obligation not to remove that individual. Another example is that, if the individual finds himself within the diplomatic mission of a State party, that State may have the obligation to allow his presence or, in order to secure effective protection from refoulement, may even have the obligation to enable him to travel to the territory of the State party.

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639 See section 3.2.2.

640 ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 76; ECtHR, V*ilvarajah and Others v United Kingdom*, 8 May 1990, Appl. Nos. 13163/87, 13164/87, 13165/87, 1244/87 and 13448/87, para. 107 (2); ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, paras. 80 and 85; ECtHR, *Nsona v Netherlands*, 28 November 1996, Appl. No. 23366/94, para. 92 (c); ECtHR, *Thampibillai v Netherlands*, 17 February 2004, Appl. No. 61350/00, para. 61; ECtHR, *Venkadajalasarma v Netherlands*, 17 February 2004, Appl. No. 58510/00, para. 63; ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, para. 48.

641 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 91; ECtHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99, para. 67; ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, para. 126.

642 ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 76; ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 91; see also Lawson 1999-2, p. 242.

This section will discuss the various obligations which can be derived from the prohibition on refoulement contained in Article 3 ECHR. These obligations can be divided into negative obligations, i.e. obligations whereby the State must refrain from action, or positive obligations, whereby the State must take action.

Primarily, the responsibility for ensuring protection from refoulement will entail such obligations as not to expel, deport, return, extradite or in any other way forcibly remove a person to a country where he will face a real risk of being subjected to proscribed ill-treatment.[643] In addition, this includes the obligation not to hand the person concerned over to the authorities of the country in which he will not be safe. These are all negative obligations on the State as they require the responsible State to refrain from acting. In section 3.4.1 I will address these negative obligations in more detail, thereby distinguishing between a general obligation on non-removal, the specific obligation of non-extradition and the specific obligation of indirect refoulement.

A State's responsibility to protect a person against refoulement may also entail positive obligations, whereby the responsible State is required to act rather than refrain from acting. This may potentially include such obligations as allowing a person to enter the State's territory or embassy compound as well as allowing him to remain on the State's territory and provide him with substantive rights. In addition, it includes the obligation on States to adopt procedural safeguards and effective remedies in order to ensure effective protection from refoulement. In section 3.4.2 I will address a number of (possible) positive obligations stemming from the prohibition on refoulement. I will first question whether or not the ECHR, and the prohibition on refoulement in particular, may potentially entail a right to asylum, including a right to enter and a right to remain. In the second section I will address the consequences of the removal of an alien in breach of the prohibition on refoulement and whether or not this engages certain positive obligations. Finally, I will address the obligation on a State to adopt procedures to determine whether or not an alien who falls within the jurisdiction of a State has a right to be protected.

643 See among others: ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, paras. 90 and 91; ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, paras. 69 and 70; ECtHR, *Vilvarajah and Others v United Kingdom*, 8 May 1990, Appl. Nos. 13163/87, 13164/87, 13165/87, 1244/87 and 13448/87, para. 103; ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 74; ECtHR, *H.L.R. v France*, 29 April 1997, Appl. No. 24573/93, para. 34; ECtHR, *Thampibillai v Netherland*s, 17 February 2004, Appl. No. 61350/00, para. 59; ECtHR, *Venkadajalasarma v Netherlands*, 17 February 2004, Appl. No. 58510/00, para. 61; ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 135.

3.4.1 Negative obligations

3.4.1.1 Prohibition on removal

It is commonly observed by the European Court that States parties to the Convention have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. It is, however, well established in the case law of the Court that expulsion by a State party may give rise to an issue under Article 3 ECHR, as I have explained above, obliging the State party not to expel the person in question to that country.[644] The main obligation on States parties under the prohibition on refoulement entailed in Article 3 of the Convention is the prohibition on the forced removal of the person in question. The character of this obligation is – primarily – negative, requiring that State parties refrain from transferring a person to a country where there is a risk of subjection to ill-treatment proscribed in Article 3 of the Convention.[645] It is irrelevant in what legal setting the removal takes place. The prohibition on refoulement covers all forms of forced removal, including the extradition of a criminal

644 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, paras. 90 and 91; ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, paras. 69 and 70; ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 131447/87 and 13448/87, para. 102; ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 73; ECtHR, *Nsona v Netherlands*, 28 November 1996, Appl. No. 23366/94, para. 92 (a); ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, para. 38; ECtHR, *H.L.R. v France*, 29 April 1997, Appl. No. 24573/93, para. 33; ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96, para. 46; ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, para. 38; ECtHR, *Bensaid v United Kingdom*, 6 February 2001, Appl. No. 44599/98, para. 32; ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99, para. 59; ECtHR, *Thampibillai v Netherlands*, 17 February 2004, Appl. No. 61350/00, para. 59; ECtHR, *Venkadajalasarma v Netherlands*, 17 February 2004, Appl. No. 58510/00, para. 61; ECtHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99, para. 66; ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, para. 46; ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, para. 158; ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 October 2005, Appl. No. 36378/02, para. 334; ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04, para. 41; ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 135.

645 This follows directly from the prohibition on refoulement implicitly entailed in Article 3 of the Convention which was explicitly considered by the Court in: ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 74; ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, para. 39; ECtHR, *H.L.R. v France*, 29 April 1997, Appl. No. 24573/93, para. 34; ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99, para. 59; ECtHR, *Thampibillai v Netherlands*, 17 February 2004, Appl. No. 61350/00, para. 59; ECtHR, *Venkadajalasarma v Netherlands*, 17 February 2004, Appl. No. 58510/00, para. 61; ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, para. 46; ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, para. 158; ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 October 2005, Appl. No. 36378/02, para. 335; ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04, para. 41; ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 135.

and the expulsion or deportation of an alien.[646] Collective expulsion of aliens, without an individual assessment, is also prohibited under Article 4 of Protocol No. 4 to the Convention.[647]

The prohibition on forcibly removing a person continues to exist for as long as a real risk of proscribed ill-treatment in the country of origin exists.[648] Consequently it is implied that, if the situation in the country of origin improves to the extent that a real risk of subjection to proscribed ill-treatment no longer exists, the individual may be removed.[649]

No other situations of forced removal have been assessed in cases brought before the Court. Therefore, it remains unclear to what extent the prohibition on refoulement also covers measures taken by States as a result of which a person is indirectly forced to leave the country but not directly physically removed. So long as the State does not intend to proceed effectively with expulsion and there is no realistic prospect of removal, the individual cannot claim to be a victim within the meaning of Article 34 of the Convention as regards to his complaint that expulsion will be in breach of his rights under Article 3.[650]

Finally, the legal status of the territory to which a person may not be removed in accordance with the prohibition on refoulement developed under Article 3 ECHR

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646 Extradition cases include: ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88; ECtHR, *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. Nos. 46827/99 and 46951/99 (Grand Chamber Judgment, 4 February 2005); ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 October 2005, Appl. No. 36378/02 and ECtHR, *Olaechea Cahuas v Spain*, 10 August 2006, Appl. No. 24668/03. Cases involving the expulsion of aliens include: ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 70; ECtHR, *Vilvarajah and Others v United Kingdom*, 8 May 1990, Appl. Nos. 13163/87, 13164/87, 13165/87, 1244/87 and 13448/87; ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93; ECtHR, *Nsona v Netherlands*, 28 November 1996, Appl. No. 23366/94; ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94; ECtHR, *H.L.R. v France*, 29 April 1997, Appl. No. 24573/94; ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96; ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98; ECtHR, *Bensaid v United Kingdom*, 6 February 2001, Appl. No. 44599/98; ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99; ECtHR, *Thampibillai v Netherlands*, 17 February 2004, Appl. No. 61350/00; ECtHR, *Venkadajalasarma v Netherlands*, 17 February 2004, Appl. No. 58510/00; ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02; ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02; ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04; ECtHR, *D and Others v Turkey*, 22 June 2006, Appl. No. 24245/03; ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04.

647 ECtHR, *Pavlovic v Sweden*, 23 February 1999, Appl. No. 45920/99 (admissibility decision); ECtHR, *Andric v Sweden*, 23 February 1999, Appl. No. 45917/99 (admissibility decision); ECtHR, *Conka v Belgium*, 5 February 2002, Appl. No. 51564/99.

648 ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, para. 47.

649 This was implied in ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, in which Austria wanted to expel the applicant to Somalia after his refugee status had been revoked. The Court concluded that expulsion of the applicant would be in breach of Article 3 of the Convention, based primarily on the fact that the situation in Somalia for the applicant had not changed since he was granted refugee status and it was acknowledged that he faced a real risk of ill-treatment upon return.

650 ECtHR, *Bonger v Netherlands*, 15 September 2005, Appl. No. 10154/04 (admissibility decision).

has not been an issue. All cases brought before the Court involved the (possible) removal to another State and not to areas outside the sovereign control of States.[651]

3.4.1.2 Prohibition on extradition

As has already been said the prohibition on refoulement is applicable in extradition situations. In such a context a conflict of treaty obligations may occur, in that an extradition treaty may oblige the State to extradite an individual and the prohibition on refoulement under Article 3 ECHR prohibits the State from doing so. Notably, the absolute character of Article 3 ECHR does not resolve the conflict. As was discussed in section 1.3.2.6 a conflict of treaty obligations raises questions of priority and responsibility, not of validity, except when there is a conflict between a treaty obligation and a rule of *jus cogens*.[652] As was also discussed in section 1.3.2.6, if Article 3 ECHR prevents the individual concerned from being subjected to torture, Article 3 prevails. If, however, Article 3 ECHR prevents a person from being subjected to other forms of proscribed ill-treatment it is more difficult to resolve a conflict.

The Court has avoided discussion on a conflict of treaty obligations between Article 3 of the Convention and an obligation under an extradition treaty. It is of course not the Court's responsibility to address this issue, but only to assess the claim made under Article 3 of the Convention.[653] In *Soering v the United Kingdom* (1989) the Court ignored the 1972 Extradition Agreement between the United Kingdom and the United States; thereby circumventing the rule of *lex posterior derogat legi priori* (see section 1.3.2.6). The UK–US Extradition Agreement does provide for a conflict clause in the context of the death penalty, but not in relation to torture or other forms of proscribed ill-treatment.[654] I can only presume that if the Court were to address a conflict of treaty obligations it would let Article 3 prevail. An indication of such a presumption is found in *Soering v the United Kingdom* (1989). The Court referred to Article 3 ECHR as enshrining one of the fundamental values of the democratic societies making up the Council of Europe and emphasised that similar provisions could be found in other global and regional treaties. The Court concluded that Article 3 'is generally recognised as an internationally accepted standard'.[655]

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651 See section 1.2.3.2.

652 Mus 1996, pp. 63 and 64.

653 Dugard & Van den Wyngaert 1998, p. 195.

654 Article IV United Kingdom-United States Extradition Treaty, ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 36. The text of the 1972 UK-US Extradition Treaty is available at <police.homeoffice.gov.uk/publications/operational-policing/us-uk-ext-treaty-1972>.

655 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 88. According to Swart the Court is not orientated towards the ECHR but far more towards the notions of *jus cogens* (see section 1.3.2.6): comment on ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, in '*Rechtspraak Vreemdelingenrecht*', 1989, no. 94, p. 290. Preference for Article 3 ECHR is also considered by Vermeulen, in: Vermeulen 1990, p. 432 (par. 3.5).

3.4.1.3 Prohibition on indirect refoulement

The obligation to protect against refoulement prohibits not only removal to a country where there is a real risk of being subjected to torture or inhuman or degrading treatment or punishment contrary to Article 3 of the Convention, but also the removal to a third – intermediary – country from which the individual may then be removed to the country in which he faces a real risk of proscribed ill-treatment. In other words, Article 3 ECHR also prohibits indirect refoulement. It was not until the Court's (in)admissibility decision in *T.I. v the United Kingdom* (2000) that the prohibition on indirect refoulement was explicitly acknowledged by the Court.[656]

A situation of indirect refoulement involves two elements of risk. First, there is of course the existence of a real risk that the person will be subjected to proscribed ill-treatment in the (final) country of destination. And, secondly, there is the additional risk that the person concerned will be sent to the country of final destination by the third – intermediary – country. The real risk of being subjected to proscribed ill-treatment is initially only marginally addressed. In *T.I. v the United Kingdom* (2000), involving possible removal by Germany, the third country, to the applicant's country of origin, Sri Lanka, the Court first assessed the real risk of proscribed ill-treatment in Sri Lanka, then whether or not the applicant had an arguable claim in that respect (i.e. do the materials presented give rise to concerns). Then the Court assessed the responsibility of the United Kingdom concerning the risk that Germany might send the applicant to Sri Lanka. The Court assessed this latter risk in two ways. The Court's first and primary concern was the existence of procedural safeguards in Germany of any kind, protecting the applicant from being removed to Sri Lanka. The Court concluded that procedural safeguards existed, but questioned their effectiveness for the applicant because of Germany's interpretation and application of them, in particular their approach to a risk emanating from non-State agents, which was relevant in the applicant's case. Even though there was a protection gap between the Court's interpretation of Article 3 ECHR and Germany's interpretation with respect to a risk emanating from non-State actors, there was no risk of indirect refoulement, according to the Court, because protection would be afforded to the applicant under a German provision offering temporary protection which was, for the Court, apparently broader than their interpretation of Article 3 of the Convention and included a risk emanating from non-State actors.[657] In *T.I. v the United Kingdom* (2000) the Court adopted a relatively low standard of protection concerning removal by the third country to the country of origin. Based on assurances provided by the German authorities the Court accepted protection based on a provision which gave discretionary powers to

656 ECtHR, *T.I. v United Kingdom*, 7 March 2000, Appl. No. 43844/98 (admissibility decision). The Court had previously suggested a prohibition on indirect refoulement in ECtHR, *Amuur v France*, 25 June 1996, Appl. No. 19776/92, para. 48 and ECtHR, *Andric v Sweden*, 23 February 1999, Appl. No. 45917/99 (admissibility decision).

657 Article 53, para. 6, of the German Aliens Act, granting a discretionary power to the German authorities to suspend deportation in the case of a substantial danger to life, personal integrity or liberty of an alien.

the German authorities to suspend deportation in cases of substantial danger to the life, personal integrity or liberty of an alien.

In *T.I.* it was important that Germany was a State party to the ECHR. In particular, because the Court relied on assurances provided by Germany that the applicant would be able to seek protection under German national law. The Court emphasised in *T.I.* that all States parties to the European Convention have an individual responsibility to ensure the rights and freedoms of the Convention. States parties may not automatically rely on the responsibility of other States parties.[658] The Court has not addressed the concept of 'safe third countries' as such. Looking at the *T.I.* case, the Court does not seem to accept that a third country is automatically safe, for example because that country is a party to the ECHR (see also section 3.3.2.6c). Every State party has its own responsibility for assessing on a case-by-case basis whether or not the removal of an individual to a country is in accordance with Article 3 of the Convention, i.e. whether or not the individual is protected from being removed to his or her country of origin. A minimal form of protection provided for in law and for which an individual can make a claim will suffice; certainly in third countries which are party to the Convention. Whether or not the standard set by the Court in *T.I.* will be applied in every situation involving indirect refoulement and a State which is a party to the ECHR is doubtful. The importance of the third country being a State party to the Convention resurfaced in the first half of 2008. A request for interim measures was received by the Court in four cases, cases involving the possible removal to Greece and from there on to the applicants' country of origin. In three cases, two against the Netherlands and one against Belgium, this request was denied (February 2008).[659] According to the Court:

> 'as your client is returning to a country that adheres to the European Convention on Human Rights, his application falls manisfestly outside the scope of rule 39 and therefore has not been submitted the the President of the Chamber for decision'.[660]

Apparently the Court is of the opinion that no interim measure is necessary in cases of potential removal to another State party to the ECHR. According to the Court:

> 'Interim measures are indicated only in limited spheres. In practice the Court applies Rule 39 only if there is an imminent risk of irreparable damage. … It will be open to your client to make an application against Greece, including an application for interim measures, if

658 In ECtHR, *T.I. v United Kingdom*, 7 March 2000, Appl. No. 43844/98 (admissibility decision), the Court considered that the UK could not automatically rely on the responsibility of Germany in the context of arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries deciding asylum claims. See also Vermeulen and Battjes' comment on this case in '*Rechtspraak Vreemdelingenrecht 1974-2003*', 2004, no. 4, p. 45.

659 This involves the following cases: two cases against Netherlands, Appl. Nos. 6211/08 and 7399/08, and *Quaraishi v Belgium*, Appl. No. 6130/08.

660 ECtHR, Letter to Mr Walls, applicant's counsel, in Appl. No. 6211/08, 11 February 2008.

it appears that he will be removed from Greece in breach of his rights under the Convention'.[661]

A different decision was taken by the President of the Court's Chamber in a case against Finland also involving Greece (June 2008).[662] It is unclear why in this case the request for interim measures was granted. Interestingly, in the case against Belgium, the applicant complained that he would run a real risk of proscribed ill-treatment in Greece because of the conditions for asylum-seekers in Greece. The Court asked the Belgian government whether asylum-seekers in Greece would be subjected to treatment contrary to Article 3 ECHR; whether the remedy available in Belgium was in accordance with Article 13 ECHR; and whether there was a risk of indirect refoulement to Afghanistan. The difference between the case against Finland and the three other cases is unclear. Perhaps time is a factor. Between the rejection of the request for interim measures in the two cases against the Netherlands and the one case against Belgium in February 2008 and the granting of such a request in the case against Finland in June 2008, the UNHCR released a critical position paper on the return of asylum-seekers to Greece under the EU Dublin Regulation.[663] The UNHCR stated, inter alia, that asylum-seekers, including Dublin returnees, continued to face undue hardships in having their claims heard and adequately adjudicated on, giving rise to a risk of refoulement.[664] The UNHCR advised Governments to refrain until further notice from returning asylum-seekers to Greece under the Dublin Convention.[665] The difference between *T.I. v the United Kingdom* (2000) and these four interim request cases is perhaps explained by the fact that in the *T.I.* case the German authorities had begun preparations to expel the applicant to Sri Lanka. In this case there was a clear difference in interpretation of Article 3 ECHR with regard to a risk emanating from non-State actors between the host country (the United Kingdom) and the third country (Germany).[666] With regard to Greece there was no difference in interpretation of Article 3 ECHR, but a difference in application and enforcement. According to the UNHCR it was clear that Greece's asylum system was not in accordance with European standards.

Unlike the Court, the Committee of Ministers of the Council of Europe in 1997 adopted guidelines in order to assess whether or not a country might be regarded as a safe third country.[667] The Committee stated that all the criteria should be met in each individual case, like the Court calling for a case-by-case assessment. The guidelines include observance by the third country of international human rights standards relevant to asylum as established in universal and regional instruments,

661 Ibid.
662 ECtHR, Letter to Pakolaisneuvonta Ry, applicant's counsel, in Appl. No. 29565/08, 20 June 2008.
663 UNHCR 2008.
664 Ibid., para. 24.
665 Ibid., para. 26.
666 Bruin 2008, p. 156.
667 Council of Europe, Committee of Ministers, Rec(97)22E, 27 November 1997 *containing guidelines on the application of the safe third country concept*.

including compliance with the prohibition on torture, inhuman or degrading treatment or punishment and international principles relating to the protection of refugees as embodied in the Refugee Convention, with special regard for the principle of non-refoulement. Furthermore, the third country will have to provide effective protection from refoulement and the opportunity to seek and enjoy asylum, and the asylum-seeker has already been granted effective protection in the third country or has had the opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek protection there before moving on to the member State in which the aylum request was lodged, or that as a result of the personal circumstances of the asylum-seeker, including his or her prior relations with the third country, there was clear evidence of his admissibility to the third country.

3.4.1.4 Prohibition on rejection at the frontier and beyond (including the open sea)

In none of the individual cases involving the prohibition on refoulement has the Court had to deal with a person claiming protection at the – de facto – border of a State party or even further away from the State's territory. In *Amuur v France* (1996) the applicants – Somali nationals coming from Syria – complained that holding them in the 'international zone' at Paris-Orly Airport constituted unlawful detention contrary to Article 5(1) ECHR. As I have already explained in section 3.2.2.1 this 'international zone' is in legal terms part of the territory of France.[668] Therefore, this case did not involve an issue of rejection at the frontier. What does become clear from the *Amuur* case is that States may not hinder the right of persons who are present within the territory of a State party to be effectively protected from refoulement. Thus, installing legal boundaries or other forms of administrative or legal obstacles whereby people who are already de facto present in the territory are prevented from claiming their right to be protected from refoulement may be in breach of Article 3 ECHR.[669]

What happens if the person concerned does not find himself at the State's actual border but further away from the State's territory? *Xhavara and 12 Others v Italy and Albania* (admissibility decision, 2001) involved a group of Albanians who were trying to reach Italy by sea, but failed to reach the Italian border or even its territorial waters after their ship was struck by an Italian naval vessel. The Court made it clear that Italy had responsibility for the Albanians in this case (see section 3.2.3).[670] Unfortunately, the Albanians had not claimed protection from refoulement. Thus, the Court did not need to address the issue of what particular obligations Italy would have to ensure effective protection from refoulement. Notwithstanding the absence of the Court's view in this situation, no doubt ensuring effective protection in situations of

668 ECtHR, *Amuur v France*, 25 June 1996, Appl. No. 19776/92, para. 52.

669 See also ECtHR, *Gebremedhin v France*, 26 April 2007, Appl. No. 25389/05, in which the Court acknowledged the responsibility of France for the protection of an alien who had presented himself at Charles de Gaulle aiport.

670 ECtHR, *Xhavara and 12 Others v Italy and Albania*, 11 January 2001, Appl. No. 39473/98 (admissibility decision).

individuals at sea for which a State party is responsible entails positive obligations, for example, allowing the individuals to set foot on land and have their claims for protection assessed.

As I explained in section 3.2.3 a State party to the European Convention may be responsible for ensuring the protection from refoulement of an individual who is outside the territory of the State, inter alia, if the person concerned is affected by conduct which can be attributed to the State and because of which the person is under the State's actual control and can effectively be protected. In line with this reasoning a person finding himself at the de facto border of a State party and claiming protection is within the State party's effective control and can be protected simply by allowing him to cross the State's border. Consequently, it is prohibited for a State party to reject a person in need of protection who finds himself at the State's actual border. The logical consequence would then be for the State to allow the person to enter its territory and determine his right to be protected from refoulement. Hence, the State would have two positive obligations which will be further discussed in section 3.4.2. Equally, a person who is further away from a State's territory but is within its effective control may have a right to be protected from refoulement by that State. The type and content of the State's obligations in that regard depend on the situation in which the person finds himself. For example, if he finds himself within the embassy compound of the State, the State has an obligation not to hand him over to the local authorities if the person faces a real risk of being subjected to proscribed ill-treatment, a negative obligation. If, on the other hand, the person finds himself outside the embassy compound, the State has the obligation to allow him to enter the compound, i.e. a positive obligation.

3.4.2 Positive obligations

3.4.2.1 Obligation to admit (a right to asylum, to enter and to remain)

It is commonly observed by the Court that the Convention does not contain a right to political asylum. What is potentially meant by this term is unclear and not relevant for a further analysis of a State's positive obligations under the prohibition on refoulement. In general, the Court initially considers that States parties have a right to control the entry, residence and expulsion of aliens.[671] Then the Court considers that the

671 ECtHR *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 131447/87 and 13448/87, para. 102; ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 73; ECtHR, *Nsona v Netherlands*, 28 November 1996, Appl. No. 23366/94, para. 92 (a); ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, para. 38; ECtHR, *H.L.R. v France*, 29 April 1997, para. 33; ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96, para. 46; ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, para. 38; ECtHR, *Bensaid v United Kingdom*, 6 February 2001, Appl. No. 44599/98, para. 32; ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99, para. 59; ECtHR, *Thampibillai v Netherlands*, 17 February 2004, Appl. No. 61350/00, para. 59; ECtHR, *Venkadajalasarma v Nether-*

expulsion of aliens may give rise to an issue under Article 3 of the Convention. Clearly the sovereign right to expel aliens is not unlimited. In order for a State to ensure effective protection against expulsion it may be implied that the sovereign right to control the entry and residence of aliens is also not unlimited. In fact, ensuring effective protection against expulsion, which is a State's principal responsibility, may require it to take additional action, including allowing the person concerned to enter and remain on its territory.[672] This would also immediately follow from the previously mentioned prohibition on rejection at the frontier and beyond.

A logical consequence of the prohibition on removing an alien and/or the obligation to allow him entry may be to tolerate the presence of the alien on the territory of the State. There is however no obligation under Article 3 of the Convention for the State to regularise the alien's presence in terms of providing him with a residence permit.[673] The Court made this explicit in its (in)admissibility decision in *Bonger v the Netherlands* (2005) when it considered:

> 'to the extent that the applicant also complains that he is denied a residence permit for as long as he is not expelled, the Court considers that this complaint must be rejected for being incompatible ratione materiae as neither Article 3 nor any other provision of the Convention and its Protocols guarantees, as such, a right to a residence permit'.[674]

Notably, the ECtHR has not ruled out the possibility that there may be an obligation of regularisation under Article 8 of the ECHR, emphasising though that Article 8 cannot be construed as guaranteeing, as such, the right to a particular type of residence permit.[675] Furthermore, the prohibition on non-removal under Article 3 of the Convention does not automatically mean that a State is obliged to tolerate the individual's presence on its territory. A State may opt to find that other solutions, for example, having the individual resettled to a safe third country.[676]

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lands, 17 February 2004, Appl. No. 58510/00, para. 61; ECtHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99, para. 66; ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, para. 46; ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, para. 158; ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 October 2005, Appl. No. 36378/02, para. 334; ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04, para. 41; ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 135.

672 Noll analyses two opposing views in this regard: on the one hand the particularist view which is that the silence of the European Convention in this regard is proof that it was never intended for the Convention to entail a right of entry; on the other hand the universalist view which points to a broad interpretation and maximises the protection, in: Noll 2000, pp. 389 and 399.

673 This is different for Member States of the European Union. According to Article 18 of the EU Qualification Directive EU Member States are obliged to grant a residence permit to a person eligible for subsidiary protection; a protection status which in part is based on Article 3 ECHR.

674 ECtHR, *Bonger v Netherlands*, 15 September 2005, Appl. No. 10154/04 (admissibility decision).

675 ECtHR, *Sisojeva and Others v Latvia*, 15 January 2007, Appl. No. 60654/00 (Grand Chamber), para. 91.

676 ECtHR, *G.H.H. and Others v Turkey*, 31 August 1999, Appl. No. 43258/98 (admissibility decision), para. 4: 'the applicants claimed that as non-European asylum seekers they were barred under the asylum law of the respondent State from being granted permanent asylum or refugee status in Turkey.

In principle, the State party is not obliged to provide a variety of substantive rights and benefits to aliens who may not be removed. In exceptional circumstances and for humanitarian reasons this may be different. In *D. v the United Kingdom* (1997) the applicant was in need of medical care and the State party had assumed responsibility for his medical and palliative treatment.[677] Arguably, if an alien is in critical need of medical care the State has a responsibility to provide the necessary care, irrespective of the alien's legal status. Not providing such care may be in breach of Article 3 or even Article 2 of the Convention (the right to life). In general, any alien who is within the jurisdiction of a State party in accordance with Article 1 of the Convention may not be tortured or ill-treated as proscribed by Article 3. Situations may occur in which aliens cannot be expelled in accordance with the prohibition on refoulement, but whose presence in the country is not regularised, for example because of the application of Article 1F of the Refugee Convention (see section 2.3.3.3), in fact they are declared 'undesirable aliens'. It is not unlikely that their situation may become unbearable or degrading to the extent that it comes within the scope of Article 3. This is not unthinkable, taking into account what according to the Court can amount to degrading treatment.[678] In this regard it is again interesting to look at the Court's case law concerning what treatment amounts to inhuman or degrading treatment, as described in section 3.3.1.2. As a consequence, a State may have an obligation to revoke the declaration of undesirable alien. Moreover, it is also not unthinkable that the situation of an unremovable and unlawful alien may result in other positive obligations on the State, for example with regard to access to medical or educational facilities, housing, and the labour market. The element of time may be an important factor in this regard, when the real risk in the country of origin continues to exist and expulsion remains impossible.

Furthermore, when an alien is within the jurisdiction of a State party the State has a responsibility to ensure all the rights and freedoms of the Convention to him,

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> They maintained that this discriminatory policy violated their rights under Article 14 of the Convention in conjunction with Articles 2, 3 and 8. ….The Government replied that they had lawfully exercised the geographical preference option when ratifying the Geneva Convention in order to limit their obligation to grant permanent refugee status in Turkey to European asylum seekers who fulfil the criteria laid down in that Convention. Non-European asylum seekers like the applicants have their requests for asylum processed by the authorities and pending a decision on a request an asylum seeker is granted a temporary residence permit. If recognised as a refugee with the meaning of the Geneva Convention he or she will be resettled in a third country with the assistance of the UNHCR. The Government stressed that this policy was fully in line with their commitments under international asylum law, was a humanitarian response to the plight of non-European asylum seekers and disclosed no breach of Article 14 of the Convention. The Court observes that the essence of the applicants' complaints under this head concerns the manner in which the respondent State implements its asylum and refugee policy. It notes that there is no right as such under the Convention or its Protocols to political asylum …'.

677 ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96, paras. 53 and 54.

678 See section 3.3.1.2, and in particular references to *Yankov v Bulgaria* (2003) and *Moisejevs v Latvia* (2006): ECtHR, *Yankov v Bulgaria*, 11 December 2003, Appl. No. 39084/97 and ECtHR, *Moisejevs v Latvia*, 15 June 2006, Appl. No. 64846/01.

except where restrictions are lawfully imposed on aliens.[679] Consequently, his right to family life, for example, may be restricted in accordance with Article 8(2) of the Convention. The question remains when such an exception is necessary in a democratic society and in the interests of the State or its community. Beyond this general responsibility a State party does not have as such to guarantee social-economic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living.[680]

It exceeds the scope of this study to analyse possible obligations on States parties towards aliens who cannot be expelled under Article 3 of the Convention, but arguably States parties may have obligations as regards such people which exceed mere tolerating their presence, but, at least under Article 3, not to the extent of issuing residence permits.[681]

Tolerating the presence of aliens who have a right to be protected from refoulement will in particular be relevant when the aliens are already on the territory of the State. But what obligations does the State have when it is responsible for providing protection from refoulement because of the extra-territorial scope of the Convention. In principle, the State is obliged to make sure that the alien concerned is not removed to the country where he or she has real risk of subjection to proscribed ill-treatment. This can mean that the alien must be allowed entrance to the territory of the State if effective protection so dictates. As already mentioned, this will be the case in situations where the alien is at the State's border. It will be more complicated when the alien is at an embassy of the State or when he is at a regional reception centre outside the territory of the State. Whether or not in such situations the alien has a right to be transferred to the territory of the State depends on whether or not protection from refoulement in such a place can practically and effectively be guaranteed. In particular embassies will provide problems concerning its effectiveness and practicality. With respect to regional reception centres it depends on factors such as security, organisation and facilities, whether or not they are able to provide effective and practical protection from refoulement.[682]

3.4.2.2 Obligations after removal

Since States parties have a right to control the entry, residence and expulsion of aliens, unless they give rise to an issue under Article 3 of the Convention, no obligation will

679 For example in accordance with Article 16 ECHR according to which: 'Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens'.

680 ECtHR, *Pancenko v Latvia*, 28 October 1999, Appl. No. 40772/98 (admissibility decision).

681 ECtHR, *Bonger v Netherlands*, 15 September 2005, Appl. No. 10154/04 (admissibility decision).

682 In the UK, *Proposal on "A new vision for refugees"*, final report, CO/HO Future of Migration Project, January 2003, it was proposed to resettle aliens who were eligible for protection to a third country and not leave them in the regional reception centres: see: Amnesty International 2003, p. 211.

exist after the State has removed an alien if no such issue has arisen.[683] If, however, the removal is in violation of the prohibition on refoulement under Article 3 of the Convention the State party remains responsible for breaching this prohibition even if it has removed the alien. Not having any responsibility would de facto nullify effective protection from refoulement under Article 3 ECHR as States could then easily evade their responsibility simply by removing all individuals seeking such protection. Therefore, the obligations after removal must at least include an acknowledgment that Article 3 has been violated. Whether or not it may also include any obligation to take further action remains unclear. So far, the Court has not found a breach of Article 3 ECHR in cases where the applicant was removed while the case was pending, let alone indicated that a State may be obliged to take other action.[684] If the removal would indeed have been in breach of Article 3 other obligations may include various legal or political actions to prevent the applicant from being subjected to proscribed ill-treatment, including allowing him to return to the State, or in any other way be provided with redress for being the victim of a violation of Article 3 of the Convention. In such a context Article 41 ECHR could be relevant. According to Article 41 the Court shall, if necessary, afford just satisfaction to the injured party, if it finds that there has been a violation of the Convention or Protocols and if the internal law of the State party concerned allows only partial reparation to be made. In most of the cases in which the Court concluded that removal would be in breach of Article 3 of the Convention, acknowledgement of that fact was considered to be adequate just satisfaction.[685] As already said, in no cases where removal has already taken place has the Court concluded that the removal was in breach of Article 3. Therefore, it did not have to consider the application of Article 41 of the Convention in that context. Article 41 is undoubtedly applicable. The problem is how the elements of 'injured party' and 'just satisfaction' are to be interpreted. The words 'injured party' are

683 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, paras. 90 and 91; ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, paras. 69 and 70; ECtHR, *Vilvarajah and Others v United Kingdom*, 8 May 1990, Appl. Nos. 13163/87, 13164/87, 13165/87, 1244/87 and 13448/87, para. 103; ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 74.

684 For example, in *Cruz Varas and Other v Sweden* (20 March 1991, Appl. No. 15576/89), *Vilvarajah and Others v United Kingdom* (30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87), *Mamatkulov and Askarov v Turkey* (6 February 2003, Appl. Nos. 46827/99 and 46951/99) and *Salkic and Others v Sweden* (admissibility decision, 29 June 2004, Appl. No. 7702/04) the applicants had already been removed at the time of the Court's consideration. However, in *Cruz Varas and Others, Vilvarajah and Others* and *Mamatkulov and Askarov* the Court considered the removal not to be in breach of Article 3, and in *Salkic and Others* the application was declared inadmissible. And in *Alzery v Sweden* (admissibility decision, 26 October 2004, Appl. No. 10786/04) the applicant had lodged an application under, among others, Article 3 of the Convention, claiming that his expulsion from Sweden to Egypt had resulted in his being tortured and ill-treated, for which Sweden was responsible. Unfortunately, the application was declared inadmissible by the Court.

685 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para.127; ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 158; ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, para. 54; ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99, para. 83.

synonymous with the term 'victim' in Article 34 of the Convention, i.e. the person directly affected by the failure to observe the Convention, who is the alien who was removed while it was foreseeable that there was a real risk of his being subjected to proscribed ill-treatment.[686] In theory, the alien is the injured party when the State has violated the prohibition on refoulement and not when the alien is actually subjected to ill-treatment. Arguably, any just satisfaction should be aimed either at preventing subjection to ill-treatment or undoing the removal. In *Vilvarajah and Others v the United Kingdom* (1991) the British Adjudicator considered that the applicants were, at the time of their removal, at risk of being subjected to proscribed ill-treatment, and concluded that following their removal they should be returned to the United Kingdom with the minimum of delay.[687] As I have already indicated, there may be various legal and political ways of doing this, which may not be easily implemented. Nevertheless, in my opinion the fundamental nature of the prohibition on torture and other forms of inhuman treatment from which the prohibition on refoulement has been developed requires States to do whatever is possible to ensure that the individual concerned will not be subjected to such treatment when it was foreseeable for the State that a real risk thereof existed at the time of removal.[688]

Finally, I must mention here that States have obligations to monitor the safety of the person concerned after his or her removal in certain situations. In *Salah Sheekh v the Netherlands* (2007) the Court considered the possibility of the applicant being removed to an alternative protection area within the country of origin (see section 3.3.2.6a). Part of the Court's concern in this regard was the applicant's ability to enter and remain in the alternative area, which was, according to the Court, by no means guaranteed. The Court then continued 'and with no monitoring of deported rejected asylum seekers taking place, the Government have no way of verifying whether or not the applicant succeeds in gaining admittance'.[689] The monitoring of deported rejected asylum-seekers is also an issue in the context of diplomatic assurances. It remains unclear to what extent monitoring after removal is an explicit obligation on a State when it has relied on diplomatic assurances. So far, the Court has not considered this element explicitly in relation to the expelling State, but only in relation to the applicants' representative. In *Mamatkulov and Askarov v Turkey* (2003; Grand Chamber 2005) representatives of the expelling State, Turkey, were able to visit the applicants once, two years after their extradition.[690] As I have already discussed in section 3.3.2.6b I find this far from adequate monitoring. Unfortunately, the Court made no comment on this issue.

686 Van Dijk & Van Hoof et al 1998, p. 248.

687 ECtHR, *Vilvarajah and Others v United Kingdom*, 8 May 1990, Appl. Nos. 13163/87, 13164/87, 13165/87, 1244/87 and 13448/87, para. 71.

688 See further on Article 41 (former Article 50) of the Convention: Van Emmerik 1997.

689 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 143.

690 ECtHR, *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. No. 46827/99, para. 34.

3.4.2.3 Obligation to install procedural safeguards

3.4.2.3a The initial determination procedure

Because of the fundamental values enshrined in Article 3 of the Convention and its absolute character States parties must necessarily conduct a rigorous scrutiny of any claim for protection in accordance with Article 3.[691] This not only imposes obligations on the State regarding the assessment of the merits of such claim, as discussed in section 3.3.2.2c, but also implies that the State must organise its determination procedure in such a way as to enable rigorous scrutiny to be carried out and those people for whom the State is responsible who claim protection to have actual access to the procedure. No legal or practical limitations may be imposed to prevent access to the initial determination procedure. This includes denying access to the procedure because of a lack of proper documentation, such as a visa, passport or identification card, or because the person concerned came from a safe country of origin or safe third country.[692] In addition, a State may not shelter behind the fact that, for example, the UNHCR has already conducted proceedings for the determination of refugee status in accordance with the Refugee Convention. Such proceedings do not absolve the State from conducting its own assessment in accordance with Article 3 of the Convention.[693] Futhermore, people claiming protection at the de facto border of the State party and who are within the jurisdiction of the State may not be refused an assessment of their claims.[694]

With respect to the institutionalisation and organisation of the procedure States seem to have a wide margin of discretion, for example, with respect to what organ within the State should be given the authority to assess refoulement claims under Article 3. Some requirements, however, have been formulated by the Court in its case law, in particular with regard to the time frame. In *Bahaddar v the Netherlands* (1998) the Court made it clear that in principle 'formal requirements and time-limits laid down in domestic law should normally be complied with, such rules being designed to enable the national jurisdictions to discharge their caseload in an orderly manner'. The Court, however, continued to consider that 'time-limits should not be so short, or applied so inflexibly, as to deny an applicant … a realistic opportunity to prove his or her claim'.[695] In *Jabari v Turkey* (2000) the Court made it clear that an automatic and mechanical time-limit of only five days for submitting a claim with the authorities is contrary to Article 3 of the Convention. The Court considered that it:

> 'is not persuaded that the authorities of the respondent State conducted any meaningful assessment of the applicant's claim, including its arguability. It would appear that the

691 ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, para. 39.
692 Mole 2000, p. 33.
693 See, for example, ECtHR, *D. and Others v Turkey*, 22 June 2006, Appl. No. 24245/03, para. 54.
694 Council of Europe, Committee of Ministers, Rec(98)15E, 15 December 1998 *on the training of officials who first come into contact with asylum seekers, in particular at border points*.
695 ECtHR, *Bahaddar v Netherlands*, 19 February 1998, Appl. No. 25894/94, para. 45.

> applicant's failure to comply with the five-day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears about being removed to Iran'.[696]

The flexibility of the time frame called for with respect to scrutinising a claim under Article 3 of the Convention relates both to the applicant and to the State. If the applicant, for example, needs time to gather evidence, in particular from the country from which he fled (*Bahaddar*), or was not able to submit a claim on time because the time-limit was too short (*Jabari*), an automatic, mechanical and short time-limit may not be applied. Similarly, if a State party is confronted with a mass influx of asylum-seekers it cannot be held against it that it did not scrutinise every individual claim within a given time frame. Nevertheless, in the end every individual claim needs to be assessed, during the course of which the individual may not be expelled.

Furthermore, the Committee of Ministers of the Council of Europe has issued guidelines regarding procedural guarantees for the initial assessment, in particular concerning 'asylum seekers' who arrive at airports.[697] These guidelines include the assurance that all 'asylum' requests presented at the airport shall be examined in compliance with the rule of law, on the basis of domestic law and international obligations, and shall respect the right of the 'asylum seeker' to be interviewed, the right to be received and accommodated in an appropriate place at the border with sufficient food and recreational facilities, the right to be informed about the procedure, the right to an interpreter during the interview, the right to confidentiality of the interview and the information in the asylum-seeker's file, the right to have contact with a representative of the UNHCR, the right to contact legal counsel after the first interview and the right to medical and social assistance.

3.4.2.3b Appeal procedures: effective legal remedies offered by Article 3 in conjunction with Article 13

If a claim is assessed and, according to the State, no substantive grounds have been shown for believing the applicant would face a real risk of proscribed ill-treatment, the individual concerned must be able to challenge any subsequent decision to remove him, in accordance with both Articles 3 and 13 of the Convention. Such decision must be served on the individual concerned in a timely manner. The Court finds it unacceptable for an individual to be informed of a 'negative' decision and the consequent removal only moments before the removal is actually enforced.[698] Article 13 of the ECHR provides that:

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696 ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, para. 40.

697 Council of Europe, Committee of Ministers, Rec(94)5E, 21 June 1994 *on guidelines to inspire practices of the member States of the Council of Europe concerning the arrival of asylum-seekers at European airports*.

698 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 460.

> 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.

Therefore, it is necessary for a State party to provide an actual remedy, i.e. one that is available in law and in practice, that is personally accessible to the individual, allowing a competent national authority to deal with the substance of a claim under the Convention within a reasonable period of time and enabling it to grant appropriate relief.[699] Providing an effective remedy is primarily the responsibility of the national authorities, and not of the European Court of Human Rights, irrespective of the fact that the Convention's control system needs also to be effective.[700]

Article 13 of the Convention does not specify a particular form of remedy or when a national authority is competent to provide an effective remedy.[701] In general, it becomes clear from the Court's case law that the authority need not necessarily be judicial and that the effectiveness does not necessarily have to come from a single authority but may come from an aggregate of remedies.[702] In other words, the State as a whole is responsible through its comprehensive system of, for example, an initial assessment by an institution which is part of the executive branch of government and appeal procedures at administrative, quasi-judicial or judicial institutions. The effectiveness of the remedy also does not depend on the certainty of a favourable outcome for the applicant.[703] What is relevant is the powers and procedural guarantees an authority possesses in law and practice, the accessibility, effectiveness and adequacy of the remedy directly redressing the alleged violation of the Convention.[704] The Court has not formulated any general rules in this regard, but decides this on a case-by-case basis.[705] *Salah Sheekh v the Netherlands* (2007), in which the applicant had not exhausted the domestic Dutch remedies as he could have lodged a further appeal with the Dutch Administrative Jurisdiction Division of the Council of State, is interest-

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699 For a comprehensive analysis of Article 13 of the Convention see: Boeles 1997, pp. 270-268, Van Dijk & Van Hoof 1998, pp. 696-710 and Barkhuysen 1998, pp. 113-151.

700 Council of Europe, Committee of Ministers, *Declaration on the protection of Human Rights in Europe, Guaranteeing the long-term effectiveness of the European Court of Human Rights*, 8 November 2001, para. 3; Council of Europe, Steering Committee for Human Rights (CDDH), *Guaranteeing the long-term effectiveness of the European Court of Human Rights*, 8 April 2003, CM(2003)55 and referred to by Bruin 2003, p. 573 (footnote 8).

701 ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 122.

702 ECtHR, *Golder v United Kingdom*, 21 February 1975, Appl. No. 4451/70, para. 33; ECtHR, *Klass and Others v Germany*, 6 September 1978, Appl. No. 5029/71, para. 67; ECtHR, *Leander v Sweden*, 26 March 1987, Appl. No. 9248/81, paras. 77 and 83. See also Boeles 1997, pp. 272, 273 and 277.

703 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 122; ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 122. See also Van Dijk & Van Hoof et al 1998, p. 706 and Boeles 1997, p. 272.

704 ECtHR, *Klass and Others v Germany*, 6 September 1978, Appl. No. 5029/71, para. 67; ECtHR, *Selmouni v France*, 28 July 1999, Appl. No. 25803/94, para. 75; ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 121.

705 Boeles 1997, p. 278.

ing in this regard. The applicant argued that in view of the case law of that Division of the Council of State such an appeal would not have stood any chance of success. The ECtHR considered that:

> 'the obligation to exhaust domestic remedies is, however, limited to making use of those remedies which are likely to be effective and available in that their existence is sufficiently certain and they are capable of redressing directly the alleged violation of the Convention. An applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail'.[706]

Consequently, I would say, a remedy is not effective if in practice, to use the Court's words, it 'would have stood virtually no prospect of success', even though in theory the appeal may have been capable of reversing the decision.[707] It can be concluded from this case that the effectiveness requires a factual, case-specific assessment, (not a general legal assessment) in which the burden of proof lies on the applicant to prove that a remedy is not effective. It is the applicant who must provide relevant case law or other evidence which shows that the remedy is bound to fail or has virtually no prospect of success; a very high standard of near certainty. In *Salah Sheekh* the applicant produced consistent case law on the appeal's authority with regard to two substantive issues, i.e. the risk criterion and the internal protection alternative, whereby he convincingly showed that his appeal would have stood virtually no prospect of succes.[708]

According to the Court, an effective remedy is guaranteed under Article 13 of the Convention only when the individual has an arguable claim that, in the context of protection from refoulement, expulsion will be in breach of Article 3.[709] An arguable claim should not be interpreted so as to allow for any grievance an individual may have under the Convention no matter how 'unmeritorious' it may be, but a Convention issue needs to be raised which merits further examination.[710] According to the European Court the 'arguability-test' should in principle have the same threshold as is applied for declaring claims manifestly ill-founded under Article 35(3) of the

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706 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 121; ECtHR, *NA. v United Kingdom*, 17 July 2008, Appl. No. 25904/07, para. 89.

707 Ibid., para. 123 (see for the Court's views on why an appeal would have stood virtually no prospect of success, paras. 123 and 124).

708 Ibid., paras. 123 and 124.

709 The 'arguability test' under Article 13 of the Convention was introduced by the Court in ECtHR, *Silver and Others v United Kingdom*, 25 March 1983, Appl. Nos. 947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, para. 113. With respect to the 'arguability test' under Article 13 in relation to a claim that expulsion will be in breach of Article 3 of the Convention see, for example, ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 117, ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 121.

710 ECtHR, *Boyle and Rice v United Kingdom*, 27 April 1988, Appl. Nos. 9659/82 and 9658/82, para. 52. See Arai 2006, p. 1001.

Convention. This means that a claim is not arguable when it is incompatible with the Convention or its Protocols or when it is an abuse of the right of application. The reason for this is, according to the Court, that 'it is difficult to conceive how a claim that is "manifestly ill-founded" can nevertheless be "arguable", and vice versa'.[711] Having said that, the Court, however, continued by considering that this does not mean that – in the former dual enforcement system of the European Commission and Court – the Court was bound by manifestly ill-founded decisions of the European Commission.[712] Apparently, it was not so difficult for the Court to conceive that a claim could be manifestly ill-founded and still arguable. Even after the dual enforcement system was changed and the European Commission had ceased to exist, the Court accepted the arguability of a claim while in the end deciding it to be manifestly ill-founded. In *T.I. v the United Kingdom* (2000) the Court considered a claim under Article 3 of the Convention to be arguable and yet declared the complaint manifestly ill-founded.[713] In the *T.I.* case, importantly a claim involving refoulement protection under Article 3, the claim was arguable because it raised concerns about the risk faced after expulsion, which included both material concerns, i.e. with respect to a real risk being subjected to proscribed ill-treatment, and procedural ones, i.e. with respect to the possibility of being returned to a country of risk, for example, in cases involving indirect refoulement.[714] Contrary to the Court's statement that it is difficult to conceive how a claim which is manifestly ill-founded can nevertheless be arguable, the Court has recognised in its case law – at least in the context of Article 3 – that it can.[715] In this context a more recent (in)admissibility decision, in *Ramadan and Ramadan-Ahjredini v the Netherlands* (2005), is surprising as the Court seems to return to its original statement that manifestly ill-founded complaints cannot be arguable. The Court considered in this case that when a 'complaint under Article 3 is manifestly ill-founded, it follows that the applicants do not have an "arguable claim" and this complaint does not attract the guarantees of Article 13'.[716] I find it difficult to conclude that manifestly ill-founded complaints cannot be arguable and that the non-arguability follows from the complaint being manifestly ill-founded, in particular when at the same time the Court, to a large extent, addresses in many of its inadmissibility

711 ECtHR, *Boyle and Rice v United Kingdom*, 27 April 1988, Appl. Nos. 9659/ 82 and 9658/82, para. 54; ECtHR, *Powell and Rayner v United Kingdom*, 21 February 1990, Appl. No. 9310/81, para. 33. Note that these judgments related to the old Article 27(2) of the Convention regarding manifestly ill-founded complaints, the wording of which is similar to the current Article 35(3) of the Convention. See also Boeles 1997, p. 271 and Vermeulen, Battjes & Spijkerboer 2002, p. 88.

712 ECtHR, *Boyle and Rice v United Kingdom*, 27 April 1988, Appl. Nos. 9659/ 82 and 9658/82, para. 54; ECtHR, *Powell and Rayner v United Kingdom*, 21 February 1990, Appl. No. 9310/81, para. 33.

713 In ECtHR, *T.I. v United Kingdom*, 7 March 2000, Appl. No. 43844/98 (admissibility decision), the Court considered that it 'is satisfied that in the present case the substance of the applicant's complaint under the Convention … did fall within the scope of examination of the courts'.

714 ECtHR, *T.I. v United Kingdom*, 7 March 2000, Appl. No. 43844/98 (admissibility decision).

715 Mole 2000, p. 36.

716 ECtHR, *Ramadan and Ramadan-Ahjredini v Netherlands*, 10 November 2005, Appl. No. 35989/03 (admissibility decision).

decisions the substance of a claim, as it did in its (in)admissibility decision in *Ramadan and Ramadan-Ahjredini v the Netherlands* (2005). As becomes clear from the analysis of the Court's case law above the Court has applied different standards for arguablity and manifestly ill-foundedness in the past. Furthermore, to me *Ramadan* may be manifestly ill-founded the claim was still arguable. In dispute in this case was the gravity of the applicants' mental health and the need for and availibility of medical and social care in their country of origin. Since the Court has acknowledged the possibility that Article 3 of the Convention may apply in such cases (see section 3.3.2.3) and the fact that no nonsense was presented by the applicants the claim was in my view arguable. In addition, various scholars seems to argue along the same lines. Boeles argues that:

> 'given the widespread practice of the Commission of also declaring applications manifestly ill-founded in cases where it has rejected a claim by an applicant which was perfectly arguable, this view held by the Court amounts to a serious restriction of the scope of application of Article 13 ECHR'.[717]

Boeles' arguments were formulated under the former dual enforcement system, consisting of a European Commission and a European Court. According to Boeles 'an effective remedy should be available to everyone who complains of a violation of a human right, and is not thereby proposing obvious nonsense'.[718] As he rightly points out, legal remedies against violations of human rights should not be interpreted restrictively.[719] And as I pointed out in section 3.1.4 the provisions of the ECHR should be interpreted liberally or progressively and not restrictively. Two former judges of the European Court have also called for a less restrictive interpretation of the arguability test under Article 13 of the Convention. According to Martens, 'the Convention institutions need only be satisfied that the claim is "arguable" in the sense that it finds support in demonstrable facts and is not clearly excluded by national law'.[720] And according to Bernhardt:

> 'whenever a person complains that one of the provisions of the Convention itself or any similar guarantee or principle contained in the national legal system is violated by a national (administrative or executive) authority, Article 13 is in my view applicable and some remedy must be available'.[721]

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717 Boeles 1997, p. 271.
718 Ibid., p. 271.
719 Ibid., p. 271.
720 Concurring opinion of Judge Martens in ECtHR, *Salerno v Italy*, 12 October 1992, Appl. No. 11955/86, para. 3.3.
721 Concurring opinion of Judge Bernhardt in ECtHR, *Abdulaziz, Cabales and Balkandai v United Kingdom*, 28 May 1985, Appl. Nos. 9214/80, 9473/81 and 9774/81.

In line with Boeles I would say that a claim is already arguable if it is supported by demonstrable facts and not manifestly lacking in any ground in law.[722]

When it comes to the protection from refoulement under Article 3 of the Convention, the Court considers the special importance of remedies, because of the irreversible nature of the harm which may occur and the importance the Court, in general, attaches to Article 3.[723] A particular discussion has evolved around the effectiveness of 'judicial review' before national courts. In the refoulement cases of *Soering v the United Kingdom* (1989), *Vilvarajah and Others v the United Kingdom* (1991), *D. v the United Kingdom* (1997) and *Hilal v the United Kingdom* (2001) the Court considered judicial review to be effective enough to meet the requirements of Article 13 of the Convention in the context of Article 3. In *Soering v the United Kingdom* (1989) the Court concluded that the judicial review proceedings in the United Kingdom were effective enough because they entailed a review of the reasonableness of an extradition decision, i.e. whether the decision is legally, rationally and procedurally proper, in light of the facts of the case and in the context of Article 3 of the Convention.[724] This conclusion was repeated by the Court in *Vilvarajah and Others v the United Kingdom* (1991), involving the expulsion of aliens, in which the Court added that 'the courts have stressed their special responsibility to subject administrative decisions in this area to the most anxious scrutiny where the applicant's life or liberty may be at risk'.[725] Similar reasoning was used by the Court in *D. v the United Kingdom* (1997).[726] And again in *Hilal v the United Kingdom* (2001) the Court reiterated that judicial review was an effective remedy in relation to complaints raised under Article 3 of the Convention, in particular because it was satisfied that 'English courts could effectively control the legality of executive discretion on substantive and procedural grounds and squash decisions as appropriate'.[727] Interestingly, judicial review in the United Kingdom was considered not to be effective within the meaning of Article 13 of the Convention in cases not involving the expulsion of aliens.[728] In *Smith and Grady v the United Kingdom* (1999), involving a claim under Article 8 of the Convention (right to respect for private life), the Court considered that the irrationality test as part of the judicial review in the United Kingdom was not effective because:

722 Boeles 1997, p. 271.
723 ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, para. 50.
724 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 121.
725 ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, paras. 125 and 126.
726 ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96, paras. 70 and 71.
727 ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99, para. 77.
728 ECtHR, *Smith and Grady v United Kingdom*, 27 September 1999, Appl. Nos. 33985/96 and 33986/96, paras. 135-139; ECtHR, *Hatton and Others v United Kingdom*, 2 October 2001, Appl. No. 36022/97, paras. 113-116.

> 'a court was not entitled to interfere with the exercise of an administrative discretion on substantive grounds save where the court was satisfied that the decision was unreasonable in the sense that it was beyond the range of responses open to a reasonable decision-maker',

which is too high a threshold.[729] And in *Hatton and Others v the United Kingdom* (2001), also involving a claim under Article 8 of the Convention, the Court considered:

> 'the scope of the domestic review in the Vilvarajah case, which concerned immigration, was relatively broad because of the importance domestic law attached to the matter of physical integrity. It was on this basis that judicial review was held to comply with the requirements of Article 13. In contrast, however, in its judgment in the case of Smith and Grady v. the United Kingdom of 27 September 1999 (§§ 135 to 139, ECHR 1999-VI [Section 3]), the Court concluded that judicial review was not an effective remedy on the grounds that the domestic courts defined policy issues so broadly that it was not possible for the applicants to make their Convention points regarding their rights under Article 8 of the Convention in the domestic courts'.[730]

Apparently, in judicial review in the United Kingdom different standards are applied for different claims.[731] A different conclusion with respect to the effectiveness of judicial review was also reached by the Court in *Jabari v Turkey* (2000) and *D. and Others v Turkey* (2006), involving the expulsion of aliens. In *Jabari* the Court considered that:

> 'the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned'.[732]

In this case, the applicant could request judicial review of the rejected asylum claim only before the Ankara Administrative Court, which considered only whether or not the rejected asylum claim was made in accordance with Turkish law, without consider-

729 ECtHR, *Smith and Grady v United Kingdom*, 27 September 1999, Appl. Nos. 33985/96 and 33986/96, para. 137.

730 ECtHR, *Hatton and Others v United Kingdom*, 2 October 2001, Appl. No. 36022/97, para. 114.

731 Boeles points out that a less optimistic understanding is possible with respect to which British courts make the most of their powers of judicial review in cases involving a refoulement claim under Article 3 of the Convention. Boeles points to the partly dissenting opinion of Judge Walsh in ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, in which Walsh states that: ' in the present case the facts were in dispute. Judicial review does not exist to resolve such disputed issues. … An examination of the merits could only have been undertaken for the purposes of dealing with any claim that the immigration decision fitted within the criteria of unreasonableness or outrage referred to in the English cases cited above. That "would require something overwhelming" and nobody has claimed that any such overwhelming evidence of unreasonableness or outrageousness exists in the present case': Boeles 1997, p. 275, footnote 759.

732 ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, para. 50.

ing its merits and providing suspensory effect.[733] Accordingly, the European Court concluded that in this case the judicial review proceedings before a national court did not satisfy the requirements of Article 13. With reference to the *Jabari* case the same conclusion was reached by the Court in *D. and Others v Turkey* (2006).[734] The obvious difference here from *Soering, Vilvarajah, D.* and *Hilal* is that the State party in these cases was the United Kingdom and in *Jabari* and *D. and Others* it was Turkey. Whether or not judicial review satisfies the requirements of Article 13 in the context of Article 3 of the Convention depends on the State party and the contents of such proceedings in the particular case.[735] In the four refoulement cases involving the United Kingdom the Court was satisfied with the effectiveness of the judicial review proceedings because they basically included a full review, both of law and of its substance. This was different for British judicial review proceedings outside the context of refoulement or Article 3 of the Convention as those proceedings did not include a review on substantive grounds. And with regard to the Turkish cases, the Court was for the same reasons not satisfied with the effectiveness of the Turkish review proceedings. They did not include a full review. This makes sense because the Court does not allow itself any restrictions when it comes to scrutinising claims under Article 3 of the Convention, in particular refoulement claims. One can argue that national courts should at least apply similar scrutiny or a similar assessment to that applied by the ECtHR.[736] In *Salah Sheekh v the Netherlands* (2007) the Court was particularly clear about the need for full or rigorous scrutiny of cases concerning the expulsion or extradition of aliens and involving a claim under Article 3 of the

733 Ibid., para. 49, in which the Court considered that: 'Admittedly the applicant was able to challenge the legality of her deportation in judicial review proceedings. However, this course of action entitled her neither to suspend its implementation nor to have an examination of the merits of her claim to be at risk. The Ankara Administrative Court considered that the applicant's deportation was fully in line with domestic law requirements. It would appear that, having reached that conclusion, the court felt it unnecessary to address the substance of the applicant's complaint …'.

734 ECtHR, *D. and Others v Turkey*, 22 June 2006, Appl. No. 24245/03, para. 54, in which the Court considered that: '*A cet égard, la Cour note d'emblée et avec satisfaction que le Gouvernement s'est jusqu'à ce jour interdit de procéder à l'expulsion forcée des requérants, dans l'attente de l'issue de la procédure d'opposition déclenchée le 6 mai 2003. Rien ne laisse à penser que cette procédure pourrait déboucher sur une décision expéditive, sans examen approprié des assertions de la requérante concernant le sort qui pourra lui être réservé en Iran, étant entendu que les autorités administratives turques disposent actuellement suffisamment d'éléments pour éviter ou redresser la violation alléguée contre elles …. Cependant, pour les mêmes motifs indiqués dans l'affaire Jabari c. Turquie et en l'absence d'arguments qui justifient qu'on se départe de la solution adoptée dans cette affaire, la Cour n'est pas convaincue qu'en l'espèce, la requérante puisse effectivement contester devant les tribunaux administratifs la légalité d'une mesure d'expulsion qui pourra finalement être prise à son encontre, pareil recours ne pouvant déboucher sur un sursis à l'exécution de cette mesure, ni sur un réexamen au fond des allégations de l'intéressée (Jabari, précité, §§ 49 et 50)*'.

735 The Court has acknowledged that the scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint, but must at least be effective in practice as well as in law: ECtHR, *Benediktov v Russia*, 10 May 2007, Appl. No. 106/02, para. 28.

736 Bruin 2003, p. 576. See Spijkerboer's comment in '*Jurisprudentie Vreemdelingenrecht*' 2005, No. 304 on ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02; Spijkerboer 2007, p. 386.

Convention (see section 3.3.2.5).[737] It seems that the Court in this case directly and critically responded to the review or appellate system existing in the Netherlands, which had adopted a marginal judicial review procedure.[738] Of particular concern to the Court was the fact that the assessment made by the State was inadequately and insufficiently supported by the evidence. The Court made it absolutely clear that the State at every moment in the domestic procedure must use up-to-date information from a variety of reliable and objective national and international sources, including its own agencies, agencies of the United Nations and reputable non-governmental organisations.[739] Arguably, the State as a whole has the responsibility to guarantee Article 3 protection in full, i.e. both substantively and procedurally. Every individual claim under Article 3 ECHR must necessarily be rigorously scrutinised.[740] The primary responsibility for this lies with the executive branch of Government. Then, it is the responsibility of national courts, within a State's remedial system, to monitor the State's executive body in this regard. And where the ECtHR allows itself rigorously to scrutinise a claim under Article 3 when reasonable grounds have been presented that casts doubt on the accuracy of the information on which the State relied,[741] it should first and foremost be for the national judicial system to conduct a rigorous review when doubts have arisen about the initial assessment made by the Government. Moreover, the ECtHR has 'only' a subsidiary responsibility.[742] An individual should not be dependent on the European Court but should be able to obtain an effective remedy within the domestic judicial system which involves the possibility of a rigorous scrutiny or full assessment of the executive's decision on the basis of all circumstances of both fact – based on a variety of sources – and law, and where the ex nunc character of the assessment requires the appellate body to take into account changes in the situation in the receiving country. The argument that national courts should at least apply a similar scrutiny or assessment to that of the ECtHR when it assesses Article 3 claims also follows from the fact that the Court has not declared *Salah Sheekh v the Netherlands* (2007) inadmissible notwithstanding the availability of an appeal in the Netherlands. Instead the Court considered the merits of the case by adopting a full ex nunc assessment because the appeal would have stood virtually no prospect of succes, and thus de facto acted as an appelate court.[743] In other words, it is not the legal possibilities of appellate proceedings which count, but their concrete application in specific cases. Thus, it may be argued that in both the initial determination procedure and the appeal proceedings rigorous review must be possible.

In more general terms, in *Al-Nashif v Bulgaria* (2002), involving procedural safeguards in expulsion cases under Article 13 in conjunction with Article 8 of the Convention, the Court considered that:

737 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 136.
738 Spijkerboer 2007, p. 385.
739 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 136.
740 ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, para. 39.
741 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 136.
742 Spijkerboer 2007, p. 386.
743 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 123.

> 'the Convention requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality'.[744]

In this case the Court acknowledged that 'the scope of the obligation under Article 13 varies according to the nature of the applicant's complaint under the Convention'.[745] The complaint in this case concerned Article 8 of the Convention, not Article 3, and involved issues of national security. Where national security is at stake, this does not mean that the authorities may be free from effective control by the domestic courts, even though certain limitations may be justified.[746] In *Chahal v the United Kingdom* (1996), involving a refoulement claim under Article 3, the Court acknowledged that a more effective form of judicial control may then be adopted 'which both accommodate[s] legitimate security concerns about the nature and sources of intelligence information and yet accord[s] the individual a substantial measure of procedural justice'.[747] And in *Al-Nashif v Bulgaria* (2002) the Court reiterated this statement by considering that:

> 'even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information (…). The individual must be able to challenge the executive's assertion that national security is at stake …'.[748]

In 1998 the Committee of Ministers of the Council of Europe acknowledged the right to an effective remedy in accordance with Article 13 of the Convention for rejected asylum-seekers who have an arguable claim that they will be subjected to proscribed ill-treatment once the expulsion decision is implemented.[749] According to the Committee of Ministers a remedy before a national authority is considered effective

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744 ECtHR, *Al-Nashif v Bulgaria*, 20 June 2002, Appl. No. 50963/99, para. 133.

745 Ibid., para. 136. See also ECtHR, *Kudla v Poland*, 26 October 2000, Appl. No. 30210/96, para. 157.

746 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 131; ECtHR, *Al-Nashif v Bulgaria*, 20 June 2002, Appl. No. 50963/99, para. 136.

747 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 131.

748 ECtHR, *Al-Nashif v Bulgaria*, 20 June 2002, Appl. No. 50963/99, paras. 123 and 124. See also Bruin & 2003, pp. 21 and 22.

749 Council of Europe, Committee of Ministers, Rec(98)13E, 18 September 1998 *on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights*, para. 1, according to which it is recommended that Member States ensure that 'an effective remedy before a national authority [is] provided for any asylum seeker, whose request for refugee status is rejected and who is subject to expulsion to a country about which that person presents an arguable claim that he or she would be subjected to torture or inhuman or degrading treatment or punishment'.

when that authority is judicial or, if it is a quasi-judicial or administrative authority, it is clearly identified and composed of members who are impartial and who enjoy safeguards of independence; that authority has the competence both to decide on the existence of the conditions provided for by Article 3 of the Convention and to grant appropriate relief; the remedy is accessible to the rejected asylum-seeker; and the execution of the expulsion order is suspended until a decision on the asylum request is taken.[750]

A final issue which I will discuss briefly here is the question of the suspensive effect of a remedy. It has long been unclear whether or not Article 13 requires the remedy to have suspensory effect.[751] This issue is of particular relevance in refoulement cases under Article 3 of the Convention because of the importance attached to this provision and the irreversible nature of the harm which may occur if the applicant is removed and the risk of proscribed ill-treatment materialises. For those reasons the Court, in *Jabari v Turkey* (2000), stated that Article 13 requires the possibility of suspending the implementation of an expulsion order.[752] And in *Conka v Belgium* (2002), the Court considered that:

> 'the notion of an effective remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible …. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention'.[753]

In *Gebremedhin v France* (2007) the Court went even further and ended any potential controversy by clearly considering that, for a remedy to be effective in a refoulement situation, it must have automatic suspensive effect ('*recours de plein droit suspensif*').[754] Although States are afforded some discretion as to the manner in which they implement their obligations under Article 13 ECHR, the remedy must be able to prevent the execution of measures which are contrary to the Convention before the national authorities examine whether they are compatible with the Convention.[755]

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750 Ibid., para. 2.

751 Boeles 1997, pp. 306-309 and Barkhuysen 1998, pp. 124-125.

752 ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, para. 50.

753 ECtHR, *Conka v Belgium*, 5 February 2002, Appl. No. 51564/99, para. 79.

754 ECtHR, *Gebremedhin [Gaberamadhien] v France*, 26 April 2007, Appl. No. 25389/05, para. 66: '*Compte tenu de l'importance que la Cour attache à l'Article 3 de la Convention et de la nature irréversible du dommage susceptible d'être causé en cas de réalisation du risque de torture ou de mauvais traitements, cela vaut évidemment aussi dans le cas où un Etat partie décide de renvoyer un étranger vers un pays où il y a des motifs sérieux de croire qu'il courrait un risque de cette nature: l'Article 13 exige que l'intéressé ait accès à un recours de plein droit suspensif*'. Reneman questions whether or not this means that in every asylum case in which an arguable claim under Article 3 is made the remedy must have an automatic suspensive effect, because other elements may have been relevant in the *Gebremedhin* case which made the Court come to this conclusion, for example, the fact that in the initial assessment by the French authorities the applicant had little opportunity to substantiate his claim, and the fact that France in reality expels aliens before judicial review has taken place, Reneman in her comment on the *Gebremedhin* case in *NAV* 2007/29.

755 ECtHR, *Conka v Belgium*, 5 February 2002, Appl. No. 51564/99, para. 79.

For example, if ordinary appeal proceedings do not have automatic suspensory effect the applicant must at least be able to use an urgent procedure to prevent the execution of a deportation order and await the outcome of the ordinary appeal. In this regard it should also be noted that, according to the Court, a request for suspension of expulsion in accordance with Rule 39 of the Court's Rules of Procedure while an individual complaint is pending before the Court in accordance with Article 34 of the Convention is binding on the State party concerned in order to avoid irreparable harm. Failure to comply with such a request for an interim measure would be in breach of Article 34 of the Convention.[756]

3.4.2.3c Additional procedural safeguards for the expulsion of lawfully resident aliens (Article 1 Protocol 7 ECHR)

Article 1 of Protocol No. 7 to the ECHR provides additional procedural safeguards for the expulsion of aliens lawfully resident in the territory of a State party.[757] In general, Article 1 of Protocol 7 prohibits the expulsion of lawfully resident aliens. This phrase forms a crucial limitation on the application of the Article. In particular the word 'resident' excludes aliens who have arrived at the border or other entry point and have not yet passed through immigration control; aliens who are in transit; aliens who have been allowed to enter for a limited period for a non-residential purposes; and aliens who are awaiting a decision on a request for a residence permit.[758] Clearly, aliens whose status in the territory of the State party has not (yet) been regularised fall outside the scope of this Article.[759] According to the Council of Europe's Explanatory Report on Protocol 7 the term 'lawfully' refers to the domestic law of the State concerned, and not to international law.[760] States have a discretion to grant aliens leave to remain in their territory. Until that time the alien has not entered the territory lawfully.[761] Consequently, aliens who claim protection from refoulement under Article 3 ECHR but who have entered illegally or who have entered legally for a limited period of time and for non-residential purpose are exempted from the

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756 ECtHR, *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. Nos. 46827/99 and 46951/99, paras. 110 and 111; ECtHR, *Aoulmi v France*, 17 January 2006, Appl. No. 50278/99, paras. 110 to 112.

757 Article 1 of Protocol 7 ECHR: '1.An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: a. to submit reasons against his expulsion, b. to have his case reviewed, and c. to be represented for these purposes before the competent authority or a person or persons designated by that authority. An alien may be expelled before the exercise of his rights under paragraph 1(a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.'

758 Explanatory Report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 117, para. 9. See also Flinterman 2006, p. 966.

759 Explanatory Report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 117, para. 9.

760 Ibid., para. 9.

761 ECtHR, *Saadi v United Kingdom*, 29 January 2008, Appl. No. 13229/03, para. 44.

safeguards provided by Article 1 of Protocol 7 ECHR. Also, aliens who have not yet reached the territory of a State party are exempted from Article 1 of Protocol 7.

Article 1 of Protocol 7 does apply to aliens who are allowed to enter and remain in the territory of a State party for residential purposes. It is not nessecary for the alien to be immediately granted a indefinite residence permit, but that he has a legitimate expectation that he is permitted to stay. In *Bolat v Russia* (2006) the applicant was issued with a residence permit, which was subsequently extended. He was eligible for further extensions of the residence permit for five years and he had applied for an extension before the expiry of his valid residence permit, but his application was not processed under various formal pretexts.[762] According to the Court:

> 'Although the Ministry of the Interior had annulled the applicant's residence permit on 30 May 2003, implementation of the order was suspended by the Town Court pending a review of the lawfulness of that measure. Having regard to the fact that on 7 August 2003 the suspensive effect of the measure was still in force, the Court is unable to find that the applicant was not lawfully resident in Russia on that date. Nor did the Government claim that the applicant's residence was unlawful. It follows that the applicant was "lawfully resident" in the Russian Federation at the material time'.[763]

Aliens lawfully residing in the territory of a State party may be expelled or otherwise removed only in pursuance of a decision reached in accordance with the law. Whether or not a decision to expel is made in accordance with the law is determined by the domestic law of the State party concerned and includes both the substantive and the procedural requirements of the law.[764] Once such a decision is made, the alien concerned is to be allowed to submit reasons against the expulsion; is allowed to have his case reviewed; and to be represented. The right to submit reasons against expulsion is to be allowed in the first phase of the procedure as well as in the review proceedings.[765] The right to review does not necessarily refer to appeal proceedings, but only to a process whereby a competent authority must review the case in the light of the reasons submitted by the alien against his expulsion.[766] The review authority can be administrative or judicial.[767] Only when expulsion is necessary for reasons of national security or in the interests of public order may expulsion take place before this procedural safeguard can be exercised.[768] Note that expulsion in such situations does not exclude the right to invoke the procedural safeguards referred to in Article 1(a), (b) and (c) of Protocol 7 ECHR, albeit that it is difficult to exercise them. Article 1 of Protocol 7 does not require the alien or his representative to be physically

762 ECtHR, *Bolat v Russia*, 5 October 2006, Appl. No. 14139/03, para. 77.
763 Ibid., para. 78.
764 Explanatory Report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 117, para. 11.
765 Ibid., para. 13.1.
766 Ibid., para. 13.2.
767 Ibid., para. 13.3.
768 Article 1(2) of Protocol 7 ECHR.

present when his case is considered. The whole procedure may be a written procedure with no oral hearing.[769]

3.4.2.3d Applicability of Article 6(1)

Article 6(1) of the Convention also entails procedural safeguards. The question is whether these safeguards are applicable in cases concerning the prohibition on refoulement. According to the European Court the answer is no.[770] Under Article 6(1) ECHR certain procedural safeguards are provided for everyone in the determination of his or her civil rights and obligations or any criminal charge against him or her. Such safeguards include a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, the adversarial character of the proceedings and the principle of 'equality of arms'. In *Maaouia v France* (2000) the Court ruled out the applicability of Article 6(1) of the Convention in cases involving 'decisions regarding the entry, stay and deportation of aliens'.[771] The Court provided several arguments for this conclusion. First, it referred to the opinion of the former European Commission on this matter, stating that the Commission 'has consistently expressed the opinion that the decision whether or not to authorise an alien to stay in the country of which he is not a national does not entail any determination of his civil rights … within the meaning of Article 6 para. 1 of the Convention'.[772] Secondly, the Court refered to Article 1 of Protocol No. 7, which provides procedural safeguards for the expulsion of aliens lawfully residing in the State party, stating that 'by adopting Article 1 of Protocol No. 7 … the States clearly intimated their intention not to include such proceedings within the scope of Article 6 para. 1 of the Convention'.[773] And, thirdly, the Court found Article 6(1) of the ECHR not to be applicable in proceedings for the rescission of an expulsion order, which was the subject matter in the *Maaouia* case, as such subject does not concern the determination of a civil right within the meaning of Article 6(1) of the Convention.[774]

I am not convinced by the Court's arguments. The reference made to Article 1 of Protocol No. 7 can be disputed in cases involving the prohibition on refoulement under Article 3 of the Convention. As outlined above the individuals concerned in such cases will not necessarily reside lawfully within the State party, making Article 1 of Protocol No. 7 not automatically applicable in refoulement cases.[775] And with respect to the Court's third argument I would argue that the *Maaouia* case concerned

769 Explanatory Report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 117, para. 14.

770 ECtHR, *Maaouia v France*, 5 October 2000, Appl. No. 39652/98, paras. 37 to 40.

771 Ibid., para. 40. Spijkerboer in his comment on this case in '*Rechtspraak Vreemdelingenrecht 1974-2003*', no. 51, p. 341, argues that this does not necessarily imply that Article 6 of the Convention is not applicable in cases involving aliens but not relating to refoulement. See also Boeles in his comment in '*Jurisprudentie Vreemdelingenrecht*', 2000, no. 264, p. 1008.

772 ECtHR, *Maaouia v France*, 5 October 2000, Appl. No. 39652/98, para. 35.

773 Ibid., paras. 36 and 37.

774 Ibid., para. 38.

775 Under Article 3 ECHR a State does not have the obligation to issue a residence permit: see section 3.4.2.1.

a complaint about the length of the proceedings in France with respect to the rescission of an expulsion order. The complaint did not concern a real risk assessment with respect to the expulsion order.

Unfortunately, the Court leaves little or no room for believing that Article 6(1) ECHR would be applicable. The Court ends its judgment in the *Maaouia* case by concluding 'that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights (…) within the meaning of Article 6 para. 1 of the Convention'.[776] Non-applicability of Article 6(1) of the Convention may be even more unfortunate, as this Article contains various fundamental safeguards which, so far, have not been explicitly read into Article 13 of the Convention. But when applying the rules of interpretation outlined in sections 1.2.1 and 3.1.4, and given the special importance of remedies with respect to claims under Article 3 of the Convention, a remedy can hardly be called effective if it does not include such fundamental principles as fairness, independence and impartiality, as entailed in Article 6(1) of the Convention.[777]

3.5 Other prohibitions on refoulement under the European Convention on Human Rights

3.5.1 Non-derogable provisions, in particular Articles 2, 1 of Protocol No. 6 and 1 of Protocol No. 13

The prohibition on refoulement developed by the Court under Article 3 of the Convention stems in particular from the fundamental values protected by Article 3 and the absolute character of the provision.[778] Arguably, other provisions containing equally important fundamental values and also having an absolute character may therefore, by analogy, also contain a prohibition on refoulement.[779] In particular, I would argue, those provisions for which no exceptions or derogations are permitted under

776 ECtHR, *Maaouia v France*, 5 October 2000, Appl. No. 39652/98, paras. 37-40. Spijkerboer in his comment on this case in '*Rechtspraak Vreemdelingenrecht 1974-2003*', 2004, no. 51, p. 341, argues that this does not necessarily imply that Article 6 of the Convention is not applicable in cases involving aliens but not relating to refoulement. See also Boeles' comment in '*Jurisprudentie Vreemdelingenrecht*' 2000, no. 264, p. 1008.

777 Boeles 1997, p. 274, in which he argues that it should also include assistance of advocates and interpreters, the examination of witnesses and the principle of equality of arms. See also Boeles' comment on ECtHR, *Maaouia v France*, 5 October 2000, Appl. No. 39652/98 in '*Jurisprudentie Vreemdelingenrecht*' 2000, no. 264, p. 1008. Contrary to the view of Boeles see Barkhuysen 1998, p. 145. The right to have a fair and full asylum procedure has been accepted by the Committee of Ministers of the Council of Europe in Council of Europe, Committee of Ministers, Rec(99)12E, 18 May 1999 *on the return of rejected asylum-seekers*, preamble.

778 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 88; ECtHR, *Vilvarajah and Others v United Kingdom*, 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 108.

779 Lawson 1999-2, p. 245.

Article 15(2) of the Convention, i.e. Article 2 (the right to life), Article 4(1) (prohibition on slavery and servitude), Article 7 (no punishment without law), Article 1 of Protocol No. 6 (abolition of the death penalty with the exception of acts committed in time of war or imminent threat of war), Article 4 of Protocol No. 7 (right not to be tried or punished twice; ne bis in idem) and Article 1 of Protocol No. 13 (complete abolition of the death penalty).

In many cases when a claim is made that expulsion will put the individual in danger of being subjected to treatment contrary to Article 3 of the Convention, a similar claim is made under other provisions of the Convention, in particular under Article 2, that expulsion would put the applicant's life in danger. The Court does not rule out that analogous considerations to Article 3 may apply to Article 2 of the Convention and often considers that the complaints raised under Article 2 are indissociable from the substance of the complaint under Article 3 of the Convention and that it is not necessary to examine the complaint separately under Article 2 but more appropriate to deal with it under Article 3.[780] Similar reasoning is given by the Court in complaints under Article 1 of Protocol 6[781] and Article 1 of Protocol 13[782] (fearing imposition of the death penalty upon return). A notable exception is *Bader and Others v Sweden* (2005), in which the Court assessed the claim under Articles 2 and 3 of the Convention simultaneously. In this case the applicants complained that if they were to be deported to Syria, the first applicant would face a real risk of being arrested and executed, as a death sentence imposed on him in Syria had gained legal force.[783] The Court concluded that the risk of being executed, the absence of assurances that the first applicant would be given a new trial in which the death penalty would not be sought or imposed, and the fear and anguish caused by the fact that the death

780 ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96, para. 59; ECtHR, *S.R. v Sweden*, 23 April 2002, Appl. No. 62806/00 (admissibility decision); ECtHR, *Venkadajalasarma v Netherlands*, 9 July 2002, Appl. No. 58510/00 (admissibility decision); ECtHR, *Tekdemir v Netherlands*, 1 October 2002, Appl. No. 49823/99 (admissibility decision); ECtHR, *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. Nos. 46827/99 and 46951/99, para. 57; ECtHR, *Razaghi v Sweden*, 11 March 2003, Appl. No. 64599/01 (admissibility decision); ECtHR, *Ndangoya v Sweden*, 22 June 2004, Appl. No. 17868/03 (admissibility decision); ECtHR, *F. v United Kingdom*, 22 June 2004, Appl. No. 17341/03 (admissibility decision); ECtHR, *Kandomabadi v Netherlands*, 29 June 2004, Appl. Nos. 6276/03 and 6122/04 (admissibility decision); ECtHR, *Salkic and Others v Sweden*, 29 June 2004, Appl. No. 7702/04 (admissibility decision); ECtHR, *Said v Netherlands*, 5 October 2004, Appl. No. 2345/02 (admissibility decision); ECtHR, *Bello v Sweden*, 17 January 2006, Appl. No. 32213/04 (admissibility decision).

781 ECtHR, *S.R. v Sweden*, 23 April 2002, Appl. No. 62806/00 (admissibility decision); ECtHR, *Tekdemir v Netherlands*, 1 October 2002, Appl. No. 49823/99 (admissibility decision); ECtHR, *Razaghi v Sweden*, 11 March 2003, Appl. No. 64599/01 (admissibility decision); ECtHR, *B v Sweden*, 26 October 2004, Appl. No. 16578/03 (admissibility decision). A similar reasoning may also be given by the Court under Article 1 Protocol No. 13, regulating the absolute abolition of the death penalty.

782 ECtHR, *Bello v Sweden*, 17 January 2006, Appl. No. 32213/04 (admissibility decision); ECtHR, *Gomes v Sweden*, 7 February 2006, Appl. No. 34566/04 (admissibility decision); ECtHR, *Ayegh v Sweden*, 7 November 2006, Appl. No. 4701/05 (admissibility decision).

783 ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04, para. 33.

sentence followed an unfair trial would give rise to violations of Articles 2 and 3 of the Convention if deportation of the applicants to Syria were implemented.[784]

The prohibition on refoulement based on the risk of being sentenced to death and executed is a relatively new development. The text of Article 2 of the Convention does not literally prohibit the death penalty being lawfully imposed and consequently does not prohibit removal to a country to face the death penalty.[785] With the adoption and entry into force of Protocol No. 6 to the European Convention an absolute prohibition on the death penalty in times of peace was accepted. Protocol No. 6 has been signed by all States parties to the European Convention and ratified by all but one (Russia). Protocol No. 13 goes even further and provides for a complete prohibition on the death penalty. This Protocol entered into force on 1 July 2003 and, as of April 2007, has been signed by 44 out of 46 Member States of the Council of Europe and ratified by 38 States. In *Öcalan v Turkey* (2005) the Court considered that, with the signing of Protocol No. 6 by all Member States of the Council of Europe, the death penalty must be regarded as an unacceptable form of punishment in peacetime which is not only prohibited under Protocol No. 6, but also no longer permissible under Article 2 of the Convention.[786] This was later confirmed by the Court in *Bader and Others v Sweden* (2005).[787] Interestingly, this is different from the Court's findings in *Shamayev and 12 Others v Georgia and Russia* (2005) in which the Court considered that 'a Contracting State which has not ratified Protocol No. 6 and has not acceded to Protocol No. 13 is authorized to apply the death penalty under certain conditions, in accordance with Article 2 § 2 of the Convention'.[788] It is hard to believe that the time at which these judgments were delivered can explain the difference. The judgment in *Shamayev and 12 Others v Georgia and Russia* was delivered in April 2005, the *Öcalan* judgment was delivered in May 2005 and the *Bader and Others* judgment in November 2005. Because the Court considered in the *Shamayev* case that under certain conditions the death penalty was still authorised, the Court assessed the case under Articles 2 and 3 of the Convention separately. The risk of being sentenced to death and of ill-treatment following extradition was assessed under Article 3.[789] The risk of extra-judicial execution was assessed under Article 2.[790]

A complete prohibition on the death penalty under Article 2 of the Convention, as contained in Protocol No. 13, is not (yet) absolute. Arguably, for Article 2 of the Convention to be interpreted in that way all Member States of the Council of Europe must have signed Protocol No. 13 or have expressed their consent to be bound by

784 Ibid., paras. 45-48.

785 According to Article 2 of the ECHR: 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'.

786 ECtHR, *Öcalan v Turkey*, 12 May 2005, Appl. No. 46221/99 (Grand Chamber), paras. 58 and 59.

787 ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04, para. 42.

788 ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, para. 333.

789 Ibid., para. 333.

790 Ibid., paras. 371 and 372.

the Protocol. Only then will all Member States be obliged to refrain from acts which would defeat the object and purpose of the Protocol in accordance with Article 18 of the Vienna Convention on the Law of Treaties. It is notable that all Member States except Russia have adopted a complete prohibition on the death penalty in their national laws. Russia has declared a moratorium on the death penalty. The Council of Europe is a small step away from a complete abolition of the death penalty.

With regard to other non-derogable rights listed in Article 15(2) of the Convention the Court has so far largely been silent on whether or not such rights may contain a prohibition on refoulement. In *Ould Barar v Sweden* (admissibility decision, 1999) the Court considered that a separate issue might be raised under Article 4 of the Convention, i.e. a risk of being subjected to slavery. The claim was, however, not substantiated and therefore declared inadmissible, at least leaving open the possibility of a refoulement claim under Article 4 of the Convention.[791]

3.5.2 Article 6, the right to a fair trial

In *Soering v the United Kingdom* (1989) the Court accepted the possibility that a prohibition on refoulement existed under Article 6 of the Convention (the right to a fair trial). However, it made clear that such an obligation exists only in exceptional circumstances involving a risk of 'suffering a flagrant denial of a fair trial' in the country of return.[792] Clearly, a 'normal' violation of the right to a fair trial is not enough. This differs from cases involving Article 3 ECHR. One may speculate on the Court's reasons for such a difference. It could be because Article 6, contrary to Article 3 of the Convention, is not an absolute provision and allows for derogations in times of war and public emergencies under Article 15. Nevertheless, Article 6 of the Convention does formulate minimum requirements for a fair trial, leaving room for exceptions only with regard to the presence of the press and public during a trial and in times of war or public emergency under Article 15 of the Convention. Indeed the Court has acknowledged that Article 6 holds a prominent place in a democratic society.[793] The Court is of the opinion though that the very essence of the right to a fair trial must be protected as it considered in its (in)admissibility decision in *Al-Moayad v Germany* (2007) that 'even the legitimate aim of protecting the community as a whole from serious threats it faces by international terrorism cannot justify measures which extinguish the very essence of a fair trial as guaranteed by Article 6'.[794] When the essence of the right to a fair trial is breached a flagrant denial

791 ECtHR, *Ould Barar v Sweden*, 19 January 1999, Appl. No. 42367/98 (admissibility decision).

792 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 113.

793 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 113; ECtHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99 (Grand Chamber), para. 88; ECtHR, *Al-Moayad v Germany*, 20 February 2007, Appl. No. 35865/03, para. 101 (admissibility decision).

794 ECtHR, *Al-Moayad v Germany*, 20 February 2007, Appl. No. 35865/03, para. 101 (admissibility decision).

of that right exists. The question remains when the essence of the right to a fair trial is at stake or what constitutes a flagrant denial of the right to a fair trial.

The existence of a prohibition on refoulement under Article 6 of the Convention was acknowledged by the Court in several other cases, including *Drozd and Janousek v France and Spain* (1992), *Einhorn v France* (admissibility decision, 2001), *Mamatkulov and Askarov v Turkey* (2003; Grand Chamber 2005), *Razaghi v Sweden* (admissibility decision, 2003), *F. v the United Kingdom* (admissibility decision, 2004), and *Bader and Others v Sweden* (2005).[795] In these cases the Court repeated that an issue might exceptionally be raised under Article 6 of the Convention by an expulsion decision in circumstances in which the person being expelled had suffered or risked suffering a flagrant denial of a fair trial in the receiving country.[796] In none of these cases though did the Court conclude that the prohibition on refoulement in accordance with Article 6 had been violated. In the *Mamatkulov* case (2005) the Grand Chamber of the Court concluded that the applicants had not been flagrantly denied a fair trial after their extradition, even though at the time of extradition there might have been reasons for doubting that the applicants would receive a fair trial because of the impossibility of choosing their own legal representatives.[797] In the (in)admissibility decision in *Einhorn v France* (2001) the Court considered that an issue would be likely to be raised under Article 6 of the Convention if there were substantial grounds for believing that the applicant would be unable to obtain a retrial in the receiving country and would be imprisoned there in order to serve the sentence passed on him in absentia. One may derive from the *Mamatkulov* case that a violation of the freedom to choose one's own legal representation does not amount to a flagrant denial. Whereas one may conclude from the *Einhorn* decision that a breach of the right to obtain a retrial after being sentenced to imprisonment in absentia may result in a flagrant denial of the right to a fair trial.

It is difficult to understand how the Court interprets a 'flagrant denial of fair trial' or what constitutes the essence of that right. In a joint partly dissenting opinion attached to the Grand Chamber judgment of the Court in *Mamatkulov and Askarov*

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795 ECtHR, *Drozd and Janousek v France and Spain*, 26 June 1992, Appl. No. 12747/87, para. 110; ECtHR, *Einhorn v France*, 16 October 2001, Appl. No. 71555/01 (admissibility decision); ECtHR, *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. Nos. 46827/99 and 46951/99, para. 85 (Grand Chamber judgment, 4 February 2005); ECtHR, *Razaghi v Sweden*, 11 March 2003, Appl. No. 64599/01 (admissibility decision); ECtHR, *F. v United Kingdom*, 22 June 2004, Appl. No. 17341/03 (admissibility decision), in which it was also raised that expulsion could lead to a risk of arbitrary detention in breach of Article 5 of the Convention. The Court did not deny the possibility of such a claim under Article 5, but stated that in this case such a claim was even less clear than a claim under Article 6 of the Convention: ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04, para. 42.

796 ECtHR, *Mamatkulov and Askarov v Turkey*, 6 February 2003, Appl. Nos. 46827/99 and 46951/99, para. 85; ECtHR, *Razaghi v Sweden*, 11 March 2003, Appl. No. 64599/01 (admissibility decision); ECtHR, *F. v United Kingdom*, 22 June 2004, Appl. No. 17341/03 (admissibility decision); ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04, para. 42.

797 ECtHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99 (Grand Chamber), para. 91.

v Turkey (2005), Judges Bratza, Bonello and Hedigan defined 'flagrant' as 'a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article'.[798] *Bader and Others v Sweden* (2005) involved the possible expulsion of the first applicant and his family to Syria where he would await the imposition of the death penalty for a crime of which he was convicted by a Syrian court. In this case the Court considered that:

> 'it transpires from the Syrian judgment that no oral evidence was taken at the hearing, that all the evidence examined was submitted by the prosecutor and that neither the accused nor even his defence lawyer was present at the hearing. The Court finds that, because of their summary nature and the total disregard of the rights of the defence, the proceedings must be regarded as a flagrant denial of a fair trial'.[799]

In *Al-Moayad v Germany* (admissibility decision, 2007) the Court made it absolutely clear that a flagrant denial of a fair trial:

> 'occurs where a person is detained beceause of suspicions that he has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release'.[800]

Furthermore, a flagrant denial of the right to a fair trial exists when there is 'a deliberate and systematic refusal of access to a lawyer to defend oneself, especially when the person concerned is detained in a foreign country'.[801] Clearly, it is important for the Court that anyone charged with a criminal offence is granted his rights in order properly to defend himself, in particular his right to receive a fair and public hearing at which he will be able to provide oral evidence, and to have access to an independent and impartial tribunal.

Finally, I want to note that from the Court's admissibility decision in *Al-Maoyad v Germany* (2007) it becomes clear that the procedural safeguards for people detained in Guantanamo Bay may involve a flagrant denial of fair trial.[802] Hence, any extradition of an alleged terrorist by a State party to Guantanamo Bay or any other detention facility outside the USA may be in breach of Article 6 of the Convention.[803]

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798 ECtHR, *Mamatkulov and Askarov v Turkey*, 4 February 2005, Appl. Nos. 46827/99 and 46951/99 (Grand Chamber), Joint Partly Dissenting Opinion of Judges Bratza, Bonello and Hedigan, para. 14.

799 ECtHR, *Bader and Others v Sweden*, 8 November 2005, Appl. No. 13284/04, para. 47.

800 ECtHR, *Al-Moayad v Germany*, 20 February 2007, Appl. No. 35865/03, para. 101 (admissibility decision).

801 Ibid., para. 101.

802 Ibid., paras. 101 to 103 (admissibility decision). See also Condorelli & De Sena 2004, pp. 107-120. Fletcher 2004, pp. 121-132.

803 See also Spijkerboer in '*Rechtspraak Vreemdelingenrecht 1974-2003*', 2004, p. 359.

3.5.3 Other provisions, in particular Articles 5, 8 and 9

The question whether or not other provisions of the ECHR contain a prohibition on refoulement is even less clear. Although the Court does not seem to rule out the possibility of other provisions of a less fundamental nature containing an implicit prohibition on refoulement, the Court, in *F. v the United Kingdom* (admissibility decision, 2004), made it clear that, 'on a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention'.[804] In this case the Court repeated that the States parties' responsibility for protection from refoulement under Articles 2 and 3 is based on the fundamental importance of these provisions, the guarantees of which it is imperative to put into effect in practice and that such compelling consideration do not automatically apply under the other provisions of the Convention.[805] Besides complaining under Articles 2 and 3 of the Convention, the applicant also complained that upon his return to Iran he would face a risk of being arbitrarily detained in breach of Article 5 of the Convention, being given an unfair trial in breach of Article 6 of the Convention and being penalised for adult consensual homosexual acts under Iranian criminal law in breach of his right to private life under Article 8 of the Convention. The Court distinguished between the claims under Articles 2 and 3, Articles 5 and 6 and Article 8 of the Convention. With respect to Articles 5 and 6 of the Convention the Court did not reject the possibility of such a claim but considered that 'an issue might exceptionally be raised under Article 6' (see section 3.5.2), but:

> 'whether an issue could be raised by the prospect of arbitrary detention contray to Article 5 is even less clear. However, the applicant's submissions do not disclose that he faces such a risk under either provision [the Court considered the claim under Article 5 together with a claim under Article 6 of the Convention], as there is no concrete indication that the applicant would face arrest or trial on any particular charge'.[806]

With respect to the complaint under Article 8 of the Convention the Court considered that 'in the circumstances of this case that it has not been established that the applicant's moral integrity would be substantially affected to a degree falling within the scope of Article 8 of the Convention'.[807] The Court referred to the conclusion that it had not been shown that there was a real risk of ill-treatment proscribed under Article 3 of the Convention upon his return and that the responsibility for States parties in expelling people who are at risk of certain treatment is different when it involves Articles 2 and 3 of the Convention or when it involves Article 8, even though the Court acknowledged that the applicant on his return to Iran would have to live under

804 ECtHR, *F. v United Kingdom*, 22 June 2004, Appl. No. 17341/03 (admissibility decision).
805 Ibid.
806 ECtHR, *Tomic v United Kingdom*, 14 October 2003, Appl. No. 17837/03 (admissibility decision); ECtHR, *F. v United Kingdom*, 22 June 2004, Appl. No. 17341/03 (admissibility decision).
807 ECtHR, *F. v United Kingdom*, 22 June 2004, Appl. No. 17341/03 (admissibility decision).

a ban against consensual homosexual relations between adults which would in Contracting States disclose a violation of Article 8 of the Convention. The Court's findings in this case do leave open the possibility of accepting a prohibition on refoulement under Article 8 of the Convention when the rights contained therein will be substantially affected.

A refoulement claim under Article 9 of the Convention (freedom of religion) was made in three individual cases.[808] Two claims were declared inadmissible, albeit importantly on different grounds, and one partly inadmissible. In *Razaghi v Sweden* (admissibility decision, 2003) the Court considered:

> 'as regards the applicant's right to freedom of religion, the Court observes that, in so far as any alleged consequence in Iran of the applicant's conversion to Christianity attains the level of treatment prohibited by Article 3 of the Convention, it is dealt with under that provision. The Court considers that the applicant's expulsion cannot separately engage the Swedish Government's responsibility under Article 9 of the Convention'.[809]

Consequently, the complaint was declared incompatible *ratione materiae* with the provisions of the Convention. Hence, as den Heijer rightly points out, Article 9 of the Convention seems to be unable – independently – to offer protection in expulsion cases. Only when there is a risk the right to freedom of thought, conscience and religion contained in Article 9 will amount to ill-treatment as proscribed by Article 3 of the Convention will there be an obligation for States parties to offer protection in expulsion cases.[810] A similar conclusion was reached by the Court in its (partial) inadmissibility decision in *Gomes v Sweden* (2004).[811]

In its (in)admissibility decision in *Z and T v the United Kingdom* (2006) the Court reaffirmed this position, inter alia, arguing that:

> 'where however an individual claim that on return to his own country he would be impeded in his religious worship in a manner which falls short of those proscribed levels, the Court considers that very limited assistance, if any, can be derived from Article 9 by itself. Otherwise it would be imposing an obligation on Contracting States effectively to act as indirect guarantors of freedom of worship for the rest of the world'.[812]

The Court again made it clear that in order for a breach of the Article 9 standards to come within the ambit of refoulement protection the breach must amount to conduct prohibited by Article 3 of the Convention, as the Court considers that:

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808 ECtHR, *Razaghi v Sweden*, 11 March 2003, Appl. No. 64599/01 (admissibility decision); ECtHR, *Gomes v Sweden*, 12 October 2004, Appl. No. 34566/04 (partial (in)admissibility decision); ECtHR, *Z and T v United Kingdom*, 28 February 2006, Appl. No. 27034/05 (admissibility decision).

809 ECtHR, *Razaghi v Sweden*, 11 March 2003, Appl. No. 64599/01 (admissibility decision).

810 Den Heijer 2008, p. 284.

811 ECtHR, *Gomes v Sweden*, 12 October 2004, Appl. No. 34566/04 (partial (in)admissibility decision).

812 ECtHR, *Z. and T. v United Kingdom*, 28 February 2006, Appl. No. 27034/05 (admissibility decision).

> 'if, for example, a country outside the umbrella of the Convention were to ban a religion but not impose any measure of persecution, prosecution, deprivation of liberty or ill-treatment, the Court doubts that the Convention could be interpreted as requiring a Contracting State to provide the adherents of that banned sect with the possibility of pursuing that religion freely and openly on their own territories'.[813]

Interestingly in the following sentence the Court seems to open up – at least theoretically – the possibility of Article 9 containing an independent prohibition on refoulement, as it considers that:

> 'while the Court would not rule out the possibility that the responsibility of the returning State might in exceptional circumstances be engaged under Article 9 of the Convention where the person concerned ran a real risk of flagrant violation of that Article in the receiving State, … it would be difficult to visualise a case in which a sufficiently flagrant violation of Article 9 would not also involve treatment in violation of Article 3 of the Convention'.[814]

In addition, the Court declared this case manifestly ill-founded because:

> 'even assuming that Article 9 of the Convention is in principle capable of being engaged in the circumstances of the expulsion of an individual by a Contracting State, the applicants have not shown that they are personally at such risk (...) of a flagrant violation of Article 9 of the Convention'.[815]

In other words, when a real risk of a flagrant denial of the standards set out in Article 9 of the Convention exists expulsion may be prohibited.

3.6 Conclusion

The removal of a person by a State party to the ECHR may give rise to an issue under Article 3 of the Convention if substantial grounds have been shown for believing that that person has a real, personal and foreseeable risk of being subjected to ill-treatment as proscribed by Article 3 in the country to which he is to be removed. The reasoning behind it is based on the idea that a State is violating Article 3 if its act of removal constitutes a crucial link in the chain of events leading to torture or inhuman treatment or punishment. States parties to the Convention have a responsibility to provide protection from refoulement to everyone who is within their jurisdiction in accordance with Article 1. This responsibility is irrespective of the legal status of the person concerned or his nationality and is determined by the territorial and extra-territorial scope of the Convention. Extra-territorial responsibility is engaged either because the

813 Ibid.
814 Ibid.
815 Ibid.

State has effective overall control over a foreign territory or, more incidentally, because of extra-territorial conduct which is attributable to the State, which brings the person involved under the actual control of the State and which affects one or more rights guaranteed under the Convention. The extra-territorial scope of the Convention is of particular importance when people are seeking protection from refoulement at the embassy of a State party, when they are trying to reach the territory of a State party or when they are received in centres located outside the territory of the State party.

The protection from refoulement under Article 3 ECHR includes protection against torture and other forms of inhuman and degrading treatment or punishment, as proscribed by Article 3 ECHR. In order for such treatment or punishment to amount to proscribed ill-treatment it must attain a minimum level of severity. Although all forms of ill-treatment referred to in Article 3 are prohibited in equal terms and the Court often does not explicitly distinguish between inhuman treatment on the one hand and degrading treatment on the other, the distinction between torture, inhuman and degrading treatment is one of gravity or severity. Torture requires the highest level of severity, and degrading treatment the lowest. An element of intent is not required, except, in most cases at least, when ill-treatment is to be qualified as torture. The question whether or not certain treatment or punishment amounts to proscribed ill-treatment is relative and depends on the facts and circumstances of the case. The Court is reluctant to include economic, social and cultural rights within the scope of Article 3.

Although the source of ill-treatment or the risk of it is, in principle, irrelevant, the Court is very reluctant to accept cases where the alleged future harm would emanate from a naturally occurring illness and the lack of sufficient resources to deal with it in the country of origin. Only in very exceptional circumstances involving a terminally ill person whose situation is likely to deteriorate and who will have no social or medical care in his own country is the Court willing to accept a claim under Article 3. Instead, the risk should emanate from intentional acts or omission of public authorities or non-State actors.

It is not an issue whether or not different standards apply for treatment to fall within the scope of Article 3 ECHR when it comes to situations of refoulement compared to situations outside the context of refoulement. Neither the text of Article 3 ECHR nor its object and purpose or case law indicates that a different standard applies or should apply. Certain judgments of the Court not involving refoulement give cause to question whether or not the concept of degrading treatment has been streched too far.

In essence, one has a right to be protected from refoulement in accordance with Article 3 ECHR if substantial grounds have been shown for believing that there is a real, personal and foreseeable risk of being subjected to ill-treatment proscribed by Article 3 in the country of origin. The element of risk is an objective requirement. In general real risk is defined as a foreseeable or likely risk which exceeds a mere possibility, but does not need to be certain or highly probable. Real risk is primarily determined by a set of distinct personal facts and circumstances. In addition, general information regarding the receiving country may be relevant, in particular to confirm

the individual facts presented. In exceptional circumstances the risk can depend on the single fact of belonging to a group, in particular when this group is targeted on a systematic, widespread or endemic scale. And in extreme situations the risk can even be based on a situation of general violence. The risk can depend on facts and circumstances created in the country of origin, but also on events which have taken place in the country of origin after the individual concerned has left his country, and also on circumstances created by the individual after having left his country of origin. What set of distinct personal facts and circumstances in the end determines the existence of a real risk is difficult to sum up in general. No doubt the higher the profile of the individual concerned the sooner a foreseeable risk will be established. Each individual case stands on its own merits and is determined by the specific facts and circumstances of that particular case.

In addition, it is important for the applicant and claim to be credible. The credibility of any claim depends on such factors as comprehensiveness, consistency and plausibility of the facts, as well as on the supporting evidence which is presented. The individual must put forward all relevant facts and evidence as promptly as possible. Delays, inconsistencies, contradictions, gaps, alterations, falsifications of the presentation and of the supporting evidence may all undermine the credibility of the claim, in particular when they relate to essential parts of it and when no plausible explanation is given. Although the initial burden of presenting a credible claim and showing substantial grounds for believing that a real risk exists is on the individual, the State has a responsibility of its own to find and assess relevant information and carefully to assess the possible existence of a real risk. The assessment focuses on the foreseeable consequences of the removal. The risk criterion requires an assessment ex nunc, in which the moment of removal is decisive. This is no different when removal has already taken place. Facts and circumstances which come to light following the removal will be taken into account only in so far as they confirm what was or ought to have been foreseeable at the time of expulsion.

Even though the State is primarily responsible, the ECtHR has an independent power both to gather information and to assess it rigorously. The Court may therefore act as an appellate judicial body, thereby implying that the States parties should do the same.

When the country of origin can provide protection, the individual concerned must seek protection from its own State rather than from another. In this regard, various factors which may reduce the risk to a negligible level are important. Such factors include significant changes in the country of return, compliance of the country of return with legal obligations under various human rights treaties, and the availability of an internal protection alternative. It will be difficult to expect an internal protection alternative to be available when the risk of proscribed ill-treatment emanates from (local) State authorities. It may be easier to expect an internal protection alternative to be available in situations where the risk of ill-treatment does not emanate from State authorities but from private persons. In such situations it must be shown that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection. An internal protection alternative may be available even in

a situation where no clear State entity exists. The State will have to show that protection can be obtained, for example, from entities such as ethnic clans which control an area that can therefore be regarded as safe. The availability of an internal protection alternative depends on the safety, accessibility and durability of the alternative area. The Court links the issue of safety to Article 3 of the European Convention, implying that the conditions in an internal protection area must at least meet the standards entailed in that Article. Regarding the question of accessibility and durability of the internal protection alternative the Court considers that the person who is to be expelled must be able to travel to the area concerned and to gain admittance there, and that it is guaranteed that he will be allowed or enabled to stay and settle there. When this is not the case an issue under Article 3 ECHR may be raised when, in the absence of these guarantees, the possibility exists that the person concerned may end up in an unsafe area where he may be subjected to ill-treatment, i.e. when he is vulnerable to 'indirect refoulement'.

The risk may also be reduced to negligible proportions when diplomatic assurances are obtained from the country of origin guaranteeing the person's safety after removal. In extradition cases it is often clear what can be expected; it is clear what criminal charges are made and what sentence is sought. Consequently, it is easy to determine the value and effectiveness of the assurances given. In cases involving the expulsion of aliens seeking 'asylum' protection it is much more difficult to value the assurances given. Assurances are either too vague or general or may lack any effect on the individual concerned because of the endemic targeted nature of the violence. Futhermore, what is worrying with respect to the findings of the ECtHR in its case law in the context of diplomatic assurances is that nothing is said about the obligation on States parties to implement an effective system of close and independent monitoring.

The fact that the receiving country is a State party to a human rights treaty does not automatically absolve the removing State from its obligations under the human rights treaties to which it is bound. In fact, in many refoulement cases the receiving countries in question are party to one or more human rights treaties, but have a poor record of implementation and enforcement. The fact that the receiving country is a party to the ECHR may be of more value and is certainly an element to be taken into account, albeit with great care. While in principle a State may in good faith rely on other States parties to honour their European Convention obligations, this may not result in an automatic expulsion or extradition.

The prohibition on refoulement contained in Article 3 ECHR is absolute. No exceptions are allowed for such reasons as public order, health, morals or national security, and no derogation is allowed in times of war or other public emergencies threatening the life of the nation. Clearly and unequivocally, Article 3 ECHR leaves no room whatsoever for a balancing act between, for example, the national security of a State and the protection needs and rights of the individual in expulsion cases.

If it is determined that a person is entitled to be protected from refoulement in accordance with Article 3 ECHR and a State is responsible for ensuring such protection because the person is within the State's jurisdiction, the State will have a certain obligation effectively to guarantee protection from refoulement. What concrete obliga-

tions a State will have depends on the facts and circumstances of the case. In general, such obligations are either negative, i.e. a State must refrain from action, or positive, i.e. a State must take action in order to ensure effective protection.

The main obligation on States will be to refrain from removing a person to a country where he has a real risk of being subjected to proscribed ill-treatment. It is irrelevant in what legal setting the removal takes place. The prohibition on refoulement covers all forms of forced removal, including the extradition of a criminal and the expulsion or deportation of an alien as well as rejection at the border. It has also been acknowledged by the Court that this includes a prohibition on indirect refoulement, i.e. the prohibition on removing a person to a third country from where he or she may be removed to the country where he or she runs a real risk. The prohibition on removal exists as long as there is a real risk of proscribed ill-treatment.

As has been said, in certain situations when a State is responsible for ensuring effective protection from refoulement it may have positive obligations. The prohibition on refoulement contained in Article 3 ECHR does not include a right to political asylum, in the sense that it contains a right to be granted a residence permit. Yet the State has to tolerate the presence of the person concerned on its territory, or may find a third country which is willing to accept and protect the individual, provided he is protected against direct and indirect refoulement in the third country. If the State is responsible for protecting the person against refoulement and he is not on its territory, it will be obliged to allow the person to enter its territory if he is at its de facto frontier. Such an obligation does not necessarily exist when the person is within an embassy compound of the State or within a regional reception centre, as long as he is effectively protected from refoulement.

A State may also have obligations to the individual after his removal, when that removal is in violation of the prohibition on refoulement contained in Article 3 ECHR. This must at least include an acknowledgment that Article 3 has been violated. In addition, it may include obligations aimed at preventing subjection to ill-treatment or to undo the removal.

When a person is within the jurisdiction of a State party the State has an obligation to assess the claim for protection from refoulement. No legal or practical limitations shall be imposed to prevent the person from having access to the State's assessment procedure. The State must necessarily conduct an individual and rigorous scrutiny of the claim. The Court has formulated only some requirements, in particular with respect to the period in which the assessment must be conducted. No other requirements have been formulated by the Court regarding how to organise and institutionalise the assessment procedure. However, the condition that the claim must be rigorously scrutinised indicates that States do not have complete freedom in this respect.

If the person is not satisfied with the outcome of the assessment he must have the ability to challenge the State's decision under national law. Article 13, together with Article 3, of the Convention requires States to provide, when the individual has an arguable claim, an effective remedy under domestic law, which is available in law and practice, accessible to the individual, allowing a competent national authority to deal with the substance of the claim within a reasonable time and enabling it to

grant appropriate relief. The national authority dealing with the claim may be judicial, quasi-judicial or even administrative, as long as it is impartial and independent of the initial decision makers and, importantly, has the prerogative fully and rigorously to assess the initial decision on both substantive and procedural grounds, taking into account all the circumstances of both fact and law.

Besides Article 3 of the European Convention, Articles 2 of the Convention (right to life) and 1 of Protocol No. 6 (partial abolition of the death penalty) also contain a prohibition on refoulement. Any claim under these Articles is commonly examined by the Court under Article 3. It is unclear whether or not other absolute provisions of the Convention, such as Articles 4(1) (prohibition of slavery and servitude) and 7 (no punishment without law), Article 4 of Protocol No. 7 (ne bis in idem) and Article 1 of Protocol No. 13 (complete abolition of the death penalty) also entail a prohibition on refoulement. The European Court has hitherto not accepted this. In my opinion, it would be logical to accept it, as these provisions contain fundamental values as important as those in Article 3 and have a similar absolute character.

The Court has accepted a prohibition on refoulement under Article 6 (the right to a fair trial) when there is a risk of suffering a flagrant denial of the rights contained therein. With respect to some other provisions the Court seems to leave the door open for accepting a claim for refoulement protection, but has so far not accepted such claim. These provisions include Articles 5 (prohibition of arbitrary detention) and 8 (the right to private and family life). For a violation of Article 9 ECHR standards (freedom of religion) to come within the ambit of refoulement protection the breach must amount to conduct prohibited by Article 3 of the Convention. Article 9 seems to be unable – independently – to offer protection in expulsion cases, but only through Article 3 whereby breach of the freedom of thought, conscience and religion must amount to ill-treatment as proscribed by Article 3 ECHR.

4 1966 International Covenant on Civil and Political Rights

4.1 Introduction

4.1.1 Prohibition(s) on refoulement under the ICCPR

This chapter covers the prohibition(s) on refoulement contained in the United Nations International Covenant on Civil and Political Rights (ICCPR or Covenant).[1] This Covenant does not contain an explicit prohibition on refoulement. However, in particular under Articles 6 (the right to life) and 7 ICCPR (the prohibition on torture and other cruel, inhuman or degrading treatment or punishment) the Human Rights Committee (the Committee or HRC) has acknowledged and developed the existence of a prohibition on refoulement. It is unclear whether or not other provisions of the Covenant may also entail such a prohibition. The focus of this chapter will be on Article 7 ICCPR, and to a lesser extent on Article 6. In section 4.5 I will briefly discuss other potential prohibitions on refoulement contained in the Covenant.

According to Article 7 ICCPR:

> 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'.

According to Article 6 ICCPR:

> '1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
> 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

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1 UN GA res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, which entered into force on 23 March 1976.

> 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
> 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
> 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.'

In its first General Comments on Articles 6 and 7 in 1982 the Human Rights Committee did not discuss a prohibition on refoulement.[2] However, in its second General Comment on Article 7 in 1992, the Committee explicitly stated that:

> 'States parties must not expose individuals to the danger of torture, cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'.[3]

In the decade between these two General Comments the Human Rights Committee had already acknowledged the existence of a prohibition on refoulement under Articles 6 and 7 ICCPR. In March 1989 the Committee had declared *Torres v Finland* (1990) admissible. This case involved a Spanish national who complained that his extradition by Finland to Spain would be in breach of Article 7 ICCPR because he would be at risk of being subjected to treatment contrary to Article 7 ICCPR.[4] In a decision on the merits of an individual complaint the prohibition on refoulement was for the first time confirmed by the Human Rights Committee in *Kindler v Canada* (1993). This time the case concerned both Articles 6 and 7 ICCPR. The Committee held:

> 'If a State extradites a person within its jurisdiction in circumstances such as that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant'.[5]

And in its General Comment Number 31 (2004) on general legal obligations imposed on States parties to the Covenant the Human Rights Committee considered that States parties have:

> 'an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed'.[6]

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2 HRC, General Comment No. 6 (1982). HRC, General Comment No. 7 (1982).
3 HRC, General Comment No. 20 (1992), para. 9.
4 HRC, *Torres v Finland*, 5 April 1990, no. 291/1988. In the end, the Committee found, however, that Mr. Torres had not sufficiently substantiated his fears of torture.
5 HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, para. 13.2.
6 HRC, General Comment No. 31 (2004), para. 12.

Over the years the Human Rights Committee has developed a prohibition on refoulement under the Covenant, in particular under Articles 6 and 7 ICCPR. In this chapter I will analyse the scope and content of the prohibition as it has been developed under those Articles and the character of the obligations for States parties derived therefrom. The analysis will focus on the views of the Human Rights Committee. This first section (4.1) will be an introduction to the ICCPR and the role of the Human Rights Committee in the interpretation, implementation and enforcement of the Covenant and of Articles 6 and 7 in particular. Section 4.2 will briefly outline to whom the States parties to the Covenant are responsible for ensuring protection from refoulement. The content of the prohibition on refoulement under Articles 6 and 7 ICCPR will be analysed in section 4.3. The key elements of this analysis will be the prohibited conduct (arbitrary deprivation of life, torture and other forms of cruel, inhuman or degrading treatment or punishment), the element of risk involved in the prohibition and the prohibition's absolute character. The character of the obligations on the State deriving from the prohibition on refoulement will be analysed in section 4.4. Finally, in section 4.5 I will discuss the extent to which other provisions of the Covenant also entail a prohibition on refoulement.

4.1.2 Brief introduction to the ICCPR[7]

4.1.2.1 Object and purpose

The ICCPR was adopted in 1966 and entered into force on 23 March 1976.[8] Together with the Universal Declaration of Human Rights (UDHR)[9] and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)[10] the ICCPR forms the core of the international human rights protection instruments of the United Nations (the so-called International Bill of Human Rights). The ICESCR and ICCPR together give shape to most of the human rights listed in the UDHR. Unlike the UDHR, the ICESCR and ICCPR are treaties and therefore legally binding on the States party to them. The International Bill of Human Rights is supplemented by a number of specialised conventions established under the aegis of the United Nations, for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In addition, the ICCPR is supplemented by two Optional Protocols. The First Optional Protocol grants individuals the right to complain about violations

7 For a comprehensive analysis of the ICCPR I would like to refer to Nowak 2005. Joseph, Schultz & Castan 2000. Joseph, Schultz & Castan 2004.

8 At the end of this research 162 States were party to the ICCPR.

9 UN GA res. 217A (III), U.N. Doc A/810 at 71 (1948).

10 UN GA res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, which entered into force on 3 January 1976.

of their rights.[11] The Second Optional Protocol provides extra protection to the right to life by prohibiting the death penalty.[12]

According to the Human Rights Committee the object and purpose of the Covenant:

> 'is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken'.[13]

The preamble recognises the inherent dignity of a human being as a source of universal, equal and inalienable individual human rights; the interdependence of all human rights; the obligation of States under the United Nations Charter to promote and protect human rights and the duties and responsibilities of individuals. The ICCPR contains civil and political rights, guaranteeing the freedoms of people.[14] Civil rights cover the protection of physical integrity, procedural due process rights and non-discrimination rights. Political rights cover participation in society and politics and include rights such as freedom of expression, assembly and association and the right to vote and be elected to public office.[15] The Covenant is not a web of inter-state obligations, but is designed to safeguard the rights of individual human beings who are under the State's responsibility.[16]

4.1.2.2 Content and structure

The Covenant consists of a preamble and 53 articles divided into six parts. Part I (Article 1) contains the right of self-determination of peoples. Part II (Articles 2 to 5) contains various general provisions in support of the substantive rights listed in Part III (Articles 6 to 27). Part IV (Articles 28 to 45) deals with the establishment and operation of the Human Rights Committee and the monitoring of the implementation and enforcement of the Covenant. Part V contains two specific Articles (46 and 47) regarding interpretation and Part VI (Article 48 to 53) contains final treaty clauses dealing with the signing, accession, ratification and entry into force of the Covenant.

The general provisions of Part II – Articles 2 to 5 – are of great importance for the implementation of the substantive rights of the Covenant. Article 2, which will be further analysed in section 4.2, imposes a general obligation on States parties to implement the substantive rights of the Covenant without discrimination and through

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11 UN GA res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, which entered into force on 23 March 1976.

12 UN GA res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), which entered into force on 11 July 1991.

13 HRC, General Comment No. 24 (1994), para. 7.

14 Nowak 1993, p. XVIII.

15 Joseph, Schultz & Castan 2000, pp. 3-4.

16 HRC, General Comment No. 24 (1994), para. 17.

legislative and other measures; it determines the personal and territorial scope of application of the Covenant and provides for an effective remedy. Article 3 guarantees the equal application of the Covenant to men and women (non-discrimination). Article 4 provides States parties with the ability to derogate from certain obligations under the Covenant in times of public emergency and Article 5 prohibits any conduct which might undermine the enjoyment of the rights of the Covenant by others (see section 4.3.3).

4.1.2.3 Reservations and declarations

The Covenant neither prohibits reservations nor mentions any type of permitted reservations.[17] Only under the Second Optional Protocol on the abolition of the death penalty is it prohibited to make reservations, except for a reservation made at the time of ratification or accession which provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.[18] According to the Human Rights Committee reservations which offend peremptory norms of general international law (*jus cogens* norms) or norms of customary international law are incompatible with the object and purpose of the Convention, and therefore not allowed in accordance with Article 19(c) of the Vienna Convention on the Law of Treaties (see section 1.2.4). Accordingly, according to the Committee:

> 'a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be'.[19]

While the prohibition on refoulement is not explicitly mentioned by the Committee, it is an integral part of the prohibitions on arbitrary deprivation of life and torture and cruel, inhuman or degrading treatment or punishment. Moreover, these prohibitions, including the prohibition on refoulement, are non-derogable. According to

17 Ibid., para. 5.

18 Article 2(1) of the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, UN doc. A/44/49 (1989), which entered into force on 11 July 1991.

19 HRC, General Comment No. 24 (1994), para. 8. Also, the Human Rights Committee does not allow reservations with regard to Article 2(1) of the ICCPR, i.e. the general obligation to respect and ensure the rights of the Covenant: ibid., para. 9 and HRC, General Comment No. 31 (2003), para. 5.

the Committee reservations made with regard to these prohibitions are incompatible with their object and purpose.[20]

A number of reservations and declaration have been made by States parties upon ratification or accession to the Covenant, including on Articles 6 and 7.[21] None of these reservations has a significant effect on the prohibition on refoulement developed under these Articles.[22]

4.1.3 International sources for interpretation of the ICCPR

4.1.3.1 The Human Rights Committee

The Human Rights Committee plays an important role in interpreting the ICCPR on the international level. The Committee is an autonomous treaty body within the United Nations system, established under Article 28 ICCPR. The Committee is created by the States parties to monitor the application and implementation of the Covenant. It consists of 18 members, who all serve in their personal capacity and not as representatives of their respective States. The members shall be of high moral standing with a recognised competence in the field of human rights. The Committee is not a court or tribunal, but an independent body of experts. The legal basis for its activities is found in the Covenant as well as in its First Optional Protocol.

4.1.3.1a The monitoring tools of the Human Rights Committee

The Covenant and the First Optional Protocol contain various monitoring mechanisms. The submission of country reports in accordance with Article 40 ICCPR is mandatory for States parties to the Covenant. The inter-State complaint mechanism (Articles 41 to 43) is optional. The individual complaint mechanism is mandatory for States which have ratified or acceded to the First Optional Protocol.[23] Under Article 40 ICCPR States parties are required to submit reports on the measures they have adopted which give effect to the rights recognised in the Covenant and on the progress made in the enjoyment of those rights. They have to do so within one year of entry into force of the Covenant for them (initial report), and thereafter when so requested by the Human Rights Committee, which is generally every five years (periodic reports).[24]

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20 HRC, General Comment No. 24 (1994), para. 10.

21 A complete list is available at <www2.ohchr.org/english/bodies/ratification/4_1.htm>.

22 Thailand has made a reservation on Article 6(5) of the ICCPR. Botswana, the Netherlands and the United States of America have made reservations on Article 7 of the ICCPR. None of these reservations affects the prohibition on refoulement.

23 At the end of this research 111 States were party to the First Optional Protocol to the ICCPR.

24 Joseph, Schultz & Castan 2000, p. 11, note 43, referring to an HRC Decision on Periodicity, UN doc. CCPR/C/19/Rev.1, 26 August 1982, para. 2. On the reporting obligations of States parties under Article 40 ICCPR see: HRC, General Comment No. 30 (2002). For reporting guidelines see: HRC, Consolidated guidelines for State reports under the International Covenant on Civil and Political Rights, 26 February 2001, UN doc. CCPR/C/66/GUI/Rev.2.

Each report shall be considered and studied by the Committee.[25] The Committee comments directly on these reports through Concluding Observations.[26] The Committee also has a mandate to issue General Comments regarding the interpretation and implementation of the Covenant as it considers appropriate.[27] In addition, the Human Rights Committee may convey its comments, together with the country reports it has received, to the Economic and Social Council of the United Nations.[28] In turn, the States parties may submit any observations on the comments made directly by the Committee or through General Comments.[29] To follow up the Concluding Observations, the Human Rights Committee shall employ a procedure for staying in contact with the State party by appointing a Special Rapporteur.[30] In reality, States parties submit their mandatory initial reports, but are seriously behind in submitting the requested periodic reports.[31]

Under Article 41 ICCPR the Human Rights Committee may receive and consider inter-State complaints, provided the States parties have recognised the competence of the Committee to do so. To date this procedure has not been used.

Finally, under Article 1 of the First Optional Protocol the Committee may receive and consider communications from individuals who, subject to the jurisdiction of a State party, claim to be victims of a violation by that State party. For this individual complaint mechanism to function the State must have become a party to the Optional Protocol to the ICCPR.

4.1.3.1b The status of the Committee's views

As a result of the monitoring mechanisms a large number of documents have been issued by the Human Rights Committee. For a comprehensive analysis of the international legal understanding of the Covenant, and in particular of the prohibition on refoulement developed there under, the various documents of the Human Rights Committee are of great importance. This concerns the Committee's General Comments, various Concluding Observations and a range of individual complaints.

The views of the Human Rights Committee set out in the various documents are of a high authority. They are, however, not legally binding.[32] The Covenant or the First Optional Protocol neither explicitly confer interpretative authority on the Committee nor provide for an enforcement mechanism. The Committee is nevertheless competent to interpret the Covenant in so far as is required for the performance of its functions, which interpretation affects the conduct of States parties. According to Article 28 ICCPR the Committee shall carry out the functions set out in the Covenant.

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25 Article 40(2) and (4) of the ICCPR.
26 Article 40(4) of the ICCPR.
27 Ibid.
28 Ibid.
29 Article 40(5) of the ICCPR.
30 HRC, General Comment No. 30 (2002), para. 5.
31 Ibid., para. 2.
32 Nowak 1993, p. XXIV. Meron 1986, p. 85. Ghandhi 1990, p. 776.

The term 'shall' indicates a clear duty or authority to do what is instructed.[33] Furthermore, when a State voluntarily adheres to the individual complaints procedure under the First Optional Protocol, it does so in good faith, thereby undertaking to honour the views of the Committee.[34] According to Rule 51 of the Rules of Procedure of the Human Rights Committee decisions shall be made by a majority vote. However, a footnote to Rule 51 adds that the Committee shall make every effort to reach a consensus before voting.[35] There are of course disadvantages and advantages to this kind of decision-making process. On the one hand, consensus can be time-consuming and the outcome can be vague or difficult to apply. On the other hand, consensus provides greater legitimacy to the outcome of the decision-making process and increases the credibility and authority of the decision-making body.[36] Although the Committee is not expressly bound by any doctrine or precedent, it, nevertheless, has followed its own decisions on numerous occasions, thereby enhancing its authority.[37] In the individual case of *Judge v Canada* (2003) the Committee explicitly recognised that it should ensure both consistency and coherence in its jurisprudence.[38]

In Concluding Observations the Committee has addressed positive aspects of measures taken by the State concerning the implementation and enforcement of the Covenant as well as expressing its concerns. The Committee refrains from giving explicit conclusions regarding violations of the Covenant but gives recommendations for improvement. In many of its Concluding Observations the Committee refers to the prohibition on refoulement and makes recommendations for the implementation and enforcement of the prohibition.

In General Comments the Human Rights Committee gives its general views on the interpretation and application of the various rights and obligations entailed in the Covenant. These General Comments are not scholarly studies or secondary legislative acts, but general and abstract interpretations of Covenant provisions based on the practice of the Committee and constituting a 'jurisprudential commitment', thereby making it difficult for the Committee to take a different view later.[39] Several General Comments are relevant for the prohibition on refoulement developed under the Covenant. The Comments provide important general guidelines on the interpretation and application of the prohibition.

The views of the Committee in individual communications or complaints are issued in a 'judicial spirit', emphasising their importance.[40] The views containing considerations on the merits of a complaint include a conclusion on a breach or non-breach of the Covenant by a State party in a specific case. In addition, an appropriate remedy

33 Young 2002, p. 38.
34 De Zayas 1991, p. 29.
35 HRC, Rules of Procedure of the Human Rights Committee, 24 April 2001, UN doc. CCPR/C/3/Rev.6. See also Boerefijn 1999, pp. 55-57.
36 Young 2002, pp. 48-55.
37 Joseph, Schultz & Castan 2000, pp. 18-19.
38 HRC, *Judge v Canada*, 20 October 2003, no. 829/1998, para. 10.3.
39 Boerefijn 1999, pp. 294-295.
40 Joseph, Schultz & Castan 2000, p. 14.

is often recommended by the Committee. Although the Committee's views in individual cases can be highly beneficial to a better understanding of the prohibition on refoulement only a very few cases have, in substance, been considered by the Committee. At the end of this research (August 2008) the Human Rights Committee had considered the merits of a complaint under Article 6 and/or 7 ICCPR, involving a situation of refoulement, in only 11 cases. Five of these cases involved extradition. In the remaining six the Committee concluded that removal was or would be in breach of Article 6 and/or 7.[41]

The specific role of the Human Rights Committee in assessing the prohibition on refoulement in individual cases will be analysed in section 4.3.2.4.

4.1.4 Rules of interpretation of the ICCPR

The ICCPR is a human rights treaty for which the general rules of treaty interpretation as codified in the Vienna Convention on the Law of Treaties are applicable. They are discussed in section 1.2.1. In accordance with Article 31 of the Vienna Convention, the Human Rights Committee has considered that attention should be paid – in good faith – to the ordinary meaning of each element of the relevant Article involved, in its context and in light of its object and purpose.[42] Thus, the terms and concepts used in the Covenant are independent of any particular national system of law and of all dictionary definitions.[43] Secondly, recourse should be had to supplementary means of interpretation in accordance with Article 32 of the Vienna Convention.[44]

Interpretation of the ICCPR involves four important characteristics. First, like all human rights, the rights and freedoms of the ICCPR should be interpreted liberally with restrictions being narrowly interpreted. In his dissenting opinion in *Stewart v Canada* (1996) Bhagwati, a member of the Committee, asked the rhetorical question: 'are we going to read human rights in a generous and purposive manner or in a narrow and constricted manner?'. He then continued,

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41 HRC, *Torres v Finland*, 5 April 1990, no. 291/1988 (extradition; no violation). HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991 (extradition; no violation). HRC, *Chitat Ng v Canada*, 7 January 1994, no. 469/1991 (extradition; violation). HRC, *Cox v Canada*, 9 December 1994, no. 539/1993 (extradition; no violation). HRC, *A.R.J. v Australia*, 11 August 1997, no. 692/1996 (expulsion; no violation). HRC, *G.T. v Australia*, 4 December 1997, no. 706/1996 (expulsion; no violation). HRC, *C. v Australia*, 13 November 2002, no. 900/1999 (expulsion; violation). HRC, *Judge v Canada*, 20 October 2003, no. 829/1998 (extradition; violation). HRC, *Ahani v Canada*, 15 June 2004, no. 1051/2002 (expulsion; violation). HRC, *Byahuranga v Denmark*, 9 December 2004, no. 1222/2003 (expulsion; violation). HRC, *Alzery v Sweden*, 10 November 2006, no. 1416/2005 (expulsion; violation).

42 For example: HRC, *Zwaan-de Vries v the Netherlands*, 9 April 1987, no. 182/1984, para. 12.3. HRC, *Judge v Canada*, 20 October 2003, no. 829/1998, para. 10.4.

43 HRC, *Van Duzen v Canada*, 7 April 1982, no. 50/1979, para. 10.2.

44 HRC, *J.B. et al v Canada*, 18 July 1986, no. 118/1982, para. 6.3.

> 'Let us not forget that basically, human rights in the International Covenant are rights of the individual against the State; they are protections against the State and they must therefore be construed broadly and liberally'.[45]

Secondly, human rights, including the provisions of the ICCPR, should be interpreted dynamically or evolutively.[46] According to the Human Rights Committee, 'the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions'.[47] Thirdly, the preparatory works of the Covenant should be used with great care, only to confirm an established interpretation.[48] In the documents of the Human Rights Committee the importance of the preparatory works of the Covenant and the intention of the drafters seem to be minimal. In *J.B. et al. v Canada* (1986) a majority of the Human Rights Committee concluded on the basis of the travaux préparatoires, together with the argument that Article 8(1)(d) of the ICESCR explicitly provides for a right to strike, that the drafters of the Covenant did not intend that the right to strike be included in the right to freedom of association (Article 22 ICCPR).[49] A minority of five Committee members, however, concluded that the travaux préparatoires were not determinative in the issue at hand and called for their limited application. In later cases, regarding extradition, the Committee declared itself competent to decide on the merits of the case even though the drafters of the Covenant explicitly excluded extradition cases from the jurisdiction of the Human Rights Committee.[50] Fourthly, interpretation can be supplemented by a comparative analysis of other – global and regional – human rights conventions.[51] For example, in *Kindler v Canada* the Human Rights Committee referred to the case law of the European Court of Human Rights, in particular *Soering v United Kingdom* (1989), in determining whether the imposition of capital punishment could constitute a violation of Article 7 ICCPR.[52] And, in *Sarma v Sri Lanka* (2003) the Human Rights Committee referred to the definition of forced disappearances contained in Article 7(2)(i) of the 1998 Rome Statute of the International Criminal Court to determine whether such disappearances constitute a violation of various provisions in the Covenant.[53] In this case the Committee also referred to the Draft Articles on Responsibilities of States for Internationally Wrongful Acts to determine Sri Lanka's responsibility under Article 2(3) of the Covenant, even though these Articles were (and are) still in draft form.[54] Finally, in *Judge v Canada* (2003) the Human Rights Committee referred to factual and legal developments and

45 HRC, *Stewart v Canada*, 16 December 1996, no. 538/1993, dissenting opinion of Committee member Bhagwati.
46 Section 1.2.1. McGoldrick 1991, p. 372. Nowak 1993, p. 129.
47 HRC, *Judge v Canada*, 20 October 2003, no. 829/1998, para. 10.3.
48 Section 1.2.1.
49 HRC, *J.B. et al v Canada*, 18 July 1986, No. 118/1982, paras 6.3-6.4.
50 HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, paras 9.2, 12.2 and 12.3.
51 Nowak 1993, p. xxiii.
52 HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, para. 15.3.
53 HRC, *Sarma v Sri Lanka*, 31 July 2003, no. 950/2000, para. 9.3.
54 Ibid., para. 9.2.

changes in international opinion in general regarding the abolishment of the death penalty.[55]

4.2 Personal and (extra-)territorial scope of the ICCPR, in particular with respect to the prohibition on refoulement

The responsibility of States parties to the ICCPR to protect individuals from refoulement is not determined just by Articles 6 and 7 but also by Article 2(1). According to Article 2(1):

> 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

This Article regulates to whom a State party is responsible for guaranteeing the rights listed in the Covenant. In other words, this Article determines the personal and territorial scope of the Covenant, including Articles 6 and 7. In this section I will first analyse personal scope in section 4.2.1, and then in section 4.2.2 territorial and extra-territorial scope. Finally, in section 4.2.3 I will outline the relevance of the personal, territorial and extra-territorial scope of the Covenant for the protection from refoulement in accordance with Articles 6 and 7 ICCPR.

4.2.1 Personal scope

The words 'all individuals' in Article 2(1) ICCPR imply no limitation as to the protected persons' nationality or legal status. According to the Human Rights Committee:

> 'the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves under the territory or subject to the jurisdiction of the State Party'.[56]

Furthermore, the Article leaves no room for any sort of distinction. The political, social or legal status of the individual concerned is irrelevant.

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55 HRC, *Judge v Canada*, 20 October 2003, no. 829/1998, para. 10.3.

56 HRC, General Comment No. 31 (2003), para. 9. See also, HRC, General Comment No. 15 (1986), para. 1.

4.2.2 Territorial and extra-territorial scope of the ICCPR

The limitation to the scope of the responsibility of the States parties to guarantee the rights of the Covenant is provided by the phrase 'within its territory and subject to its jurisdiction' in Article 2(1) of the ICCPR. Clearly, there are two relevant criteria for determining the territorial scope of the Covenant, i.e. the State party's territory and its jurisdiction.

The interpretation and application of these criteria are complicated by the word 'and' in Article 2(1). The use of this word may indicate that both criteria are to be met cumulatively. A strict textual interpretation would mean that a State party was obliged to protect only an individual who was present within its territory and at the same time subject to its jurisdiction. Therefore, individuals who were outside the territory of a State party would not be protected.[57] There is, however, not much support for such a restrictive textual interpretation. Such interpretation is not in line with the view taken by the Human Rights Committee and by many respected scholars. Also, a restrictive interpretation is in contrast with the text of the First Optional Protocol. Moreover, a restrictive and cumulative interpretation would lead to strange consequences. For example, when citizens of a State party try to enter their own country they cannot invoke Article 12 (4) ICCPR – the right to enter one's own country – when they are outside the territory of their State party.[58]

In General Comments as well as in many individual cases the Human Rights Committee has acknowledged a more liberal reading of the word 'and' in Article 2(1) ICCPR. In General Comment Number 23 (1994) the Committee referred to Article 2(1) as applying 'to all individuals within the territory *or* under the jurisdiction of the State'.[59] This was reiterated by the Committee in General Comment Number 31 (2004) specifically dealing with the nature of the general legal obligation imposed on States parties to the Covenant.[60] Also, in a number of individual cases involving Uruguay and the refusal by Uruguayan diplomatic personnel to issue passports to Uruguayan citizens living abroad, the Committee concluded that Article 2(1) cannot be interpreted as limiting the obligations of Uruguay under Article 12(2) to citizens within their own country.[61] Furthermore, in individual cases involving the kidnapping of people by State agents outside the territory of that State a similar interpretation

57 Noll, Fagerlund & Liebaut 2002, pp. 40-41.

58 Concurring opinion by Tomuschat in HRC, *Celiberti de Casariego v Uruguay*, 29 July 1981, no. 56/1979. Nowak 1993, p. 41. For example, it would also mean that a person who availed himself of the right to leave his country (Article 12(2) of the ICCPR) gave up all the other rights of the Covenant or that the prohibition on in absentia criminal trials (Article 14(3)(d) of the ICCPR) would be applied only when the defendant was within the territory of the State party.

59 HRC, General Comment No. 23 (1994), para. 4 (emphasis added).

60 HRC, General Comment No. 31 (2004), para. 10.

61 HRC, *Vidal Martins v Uruguay*, 23 March 1982, no. 57/1979, para. 7. HRC, *Lichtensztejn v Uruguay*, 31 March 1983, no. 77/1980, para. 8.3. HRC, *Montero v Uruguay*, 31 March 1983, no. 106/1981, para. 9.4. HRC, *Nunez v Uruguay*, 22 July 1983, no. 108/1981, para. 6.1.

was given. For example, in *De Lopez v Uruguay* (1981) and *Celiberti de Casariego v Uruguay* (1981) the Committee held:

> 'Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it ... in line with this, it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'.[62]

Various scholars have stated that a restrictive interpretation of Article 2(1) would not be beneficial to the protection of human rights. Such an interpretation would mean a serious limitation of human rights protection in situations in which agents of a State operated in foreign territories and would be contrary to the object and purpose of the Covenant.[63] According to Meron the established jurisprudence of the Human Rights Committee provides clear guidance and should discourage a narrow territorial construction of the Covenant.[64] According to Buergenthal, Article 2(1) should be read so that each State party will have assumed the obligation to respect and ensure the rights recognised in the Covenant both to 'all individuals within its territory' and to 'all individuals subject to its jurisdiction'.[65] Nowak is also of the opinion that Article 2(1) should not be interpreted restrictively, limiting the application of the Covenant only to the territory of States parties. According to Nowak, States parties are also responsible for actions taken on foreign territory that violates the rights of people subject to their sovereign authority. Failing to hold States responsible for such actions would be contrary to the purpose of the Covenant.[66]

Moreover, a more liberal interpretation of Article 2(1) ICCPR is supported by Article 1 of the First Optional Protocol. Contrary to Article 2(1) the words 'within its territory' are not included in Article 1 of the First Optional Protocol.[67] The Human Rights Committee has stated that the words 'individuals subject to its jurisdiction' in Article 1 of the First Optional Protocol refer:

> '(...) not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred'.[68]

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62 HRC, *De Lopez v Uruguay*, 29 July 1981, no. 52/1979, para. 12.3. HRC, *Celiberti de Casariego v Uruguay*, 29 July 1981, no. 56/1979, para. 10.3.

63 Nowak 1993, pp. 41-43. Meron 1995, pp. 78-82. Meron 1986, pp. 106-109. Buergenthal 1981, p. 74. Zwart 1983, pp. 458-461.

64 Meron1995, p. 82.

65 Buergenthal 1981, p. 74.

66 Nowak 1993, p. 42.

67 Meron1986, pp. 106-107.

68 HRC, *De Lopez v Uruguay*, 29 July 1981, no. 52/1979, para. 12.2.

Finally, during the discussions in the drafting process on the words 'within its territory' the view was expressed that a State should not be relieved of its obligations under the Covenant to people who remained within its jurisdiction merely because they were not within its territory.[69] According to Tomuschat in his concurring opinion in *Celiberti de Casariego v Uruguay* (1981):

> 'the formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only tools of diplomatic protection ... It was the intention of the drafters, whose sovereign decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would likely to encounter exceptional obstacles. Never was it envisaged, however, to grant State parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens abroad'.[70]

It can be concluded that a State party to the ICCPR is responsible for guaranteeing the rights of the Covenant to individuals who are within the territory of the State, and to those who are outside the State's territory but within its jurisdiction; in other words where the State wields effective authority and control over individuals.[71]

4.2.2.1 Territorial scope

A State party to the ICCPR is responsible for respecting and ensuring the rights of the Covenant to all individuals within its territory. What, according to general international law, belongs to the territory of a State has already been outlined in section 1.2.3.2. In addition, according to Article 50 ICCPR 'the provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions'.

4.2.2.2 Extra-territorial scope

If an individual is outside the territory of a State party that State can still be responsible for guaranteeing the individual's right under the Covenant because he is within its jurisdiction. The general meaning of the term 'jurisdiction' in this context has been outlined in section 1.2.3.3. In *De Lopez v Uruguay* (1981) the Human Rights Committee indicated that the term 'jurisdiction' refers to the relationship between the State party and the individual who is claiming his or her right.[72] The relevant question is how that relationship is determined.

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69 Bossuyt 1987, p. 53.

70 Concurring opinion by Tomuschat in the HRC case of *Celiberti de Casariego v Uruguay*, 29 July 1981, no. 56/1979.

71 Cassese 2004, p. 874. Condorelli & De Sena 2004, pp. 111 and 112.

72 HRC, *De Lopez v Uruguay*, 29 July 1981, no. 52/1979, para. 12.2.

In a number of individual cases the Committee held Uruguay responsible for the conduct of its agents performed outside its territory. This included Uruguayan diplomatic personnel refusing to issue passports to Uruguayan citizens living abroad,[73] and Uruguayan agents kidnapping people on foreign soil.[74] All these cases involved Uruguayan State agents acting outside Uruguayan territory and whose conduct affected one or more of the Covenant rights of Uruguayan nationals. It is important to note that it is not necessary for the person affected to be a national of the State responsible. To require the relationship between the affected individual and the State responsible to be based on the individual's nationality would be contrary to the text of Article 2(1) ICCPR. In *Ibrahima Gueye et al. v France* (1989) involving Senegalese retired soldiers of the French military forces and their pension rights in comparison to those of their French retired colleagues, the Human Rights Committee stated that the authors 'rely on French legislation in relation to the amount of their pension rights'.[75]

In addition to these individual cases the Human Rights Committee has commented on situations of States occupying or controlling parts of foreign territory. In its Concluding Observations on Israel's initial report in 1998 the Committee expressed its deep concern that Israel continued to deny its responsibility fully to apply the Covenant in the occupied territories. Here the Committee pointed to the:

> 'long-standing presence of Israel in these territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein'.[76]

The Committee repeated this view in its Concluding Observations on Israel's second periodic report in 2003 and further stated that:

> 'the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law'.[77]

These views of the Human Rights Committee were confirmed by the International Court of Justice in its Advisory Opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory. Importantly, the Court considered that:

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73 HRC, *Vidal Martins v Uruguay*, 23 March 1982, no. 57/1979, para. 7. HRC, *Lichtensztejn v Uruguay*, 31 March 1983, no. 77/1980, para. 8.3. HRC, *Montero v Uruguay*, 31 March 1983, no. 106/1981, para. 9.4. HRC, *Nunez v Uruguay*, 22 July 1983, no. 108/1981, para. 6.1.

74 HRC, *De Lopez v Uruguay*, 29 July 1981, no. 52/1979, para. 12.3. HRC, *Celiberti de Casariego v Uruguay*, 29 July 1981, no. 56/1979, para. 10.3.

75 HRC, *Ibrahima Gueye et al v France*, 6 April 1989, no. 196/1985, para. 9.4. See also Scheinin 2004, pp. 75 and 76.

76 HRC, Concluding Observations on Israel, 18 August 1998, UN doc. CCPR/C/79/Add.93, para. 10.

77 HRC, Concluding Observations on Israel, 21 August 2003, UN doc. CCPR/CO/78/ISR, para. 11.

> 'the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'.[78]

In its Concluding Observation on Croatia (1992) the Human Rights Committee acknowledged the responsibility of Croatia for the deplorable conditions in places of detention in Bosnia and Herzegovina, which were under the control of the Croatian army or local Croatian military factions which received the backing of Croatia.[79] Finally the Human Rights Committee has also considered that a State is responsible for the conduct of its military forces performed as part of a United Nations peacekeeping operation. In its Concluding Observations on Belgium (1998) the Committee expressed its concerns about the behaviour of Belgian soldiers in Somalia under the United Nations UNOSOM II operation and acknowledged the applicability of the Covenant.[80] Similar consideration was given by the Committee to the United Kingdom and its military presence in Afghanistan and Iraq.[81]

In general the Committee has confirmed that:

> 'a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. (…) The enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals (…) who may find themselves in the territory or subject to the jurisdiction of the State party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation'.[82]

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78 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), 9 July 2004, ICJ Reports 2004, p. 136, para. 111.

79 HRC, Concluding Observations on Croatia, 28 December 1992, UN doc. CCPR/C/79/Add.15, para. 9.

80 HRC, Concluding Observations on Belgium, 19 November 1998, UN doc. CCPR/C/79/Add.99, para. 14. Also, regarding peacekeeping missions and NATO missions, HRC, Concluding Observations on Belgium, 12 August 2004, UN doc. CCPR/CO/81/BEL, para. 6.

81 HRC, Concluding Observations on the United Kingdom of Great Britain and Northern Oreland, 30 July 2008, UN doc. CCPR/C/GBR/CO/6, para. 14: 'The State party should state clearly that the Covenant applies to all individuals who are subject to its jurisdiction or control. The State party should conduct prompt and independent investigations into all allegations concerning suspicious deaths, torture or cruel, inhuman or degrading treatment or punishment inflicted by its personnel (including commanders), in detention facilities in Afghanistan and Iraq. The State party should ensure that those responsible are prosecuted and punished in accordance with the gravity of the crime. The State party should adopt all necessary measures to prevent the recurrence of such incidents, in particular by providing adequate training and clear guidance to its personnel (including commanders) and contract employees, about their respective obligations and responsibilities, in line with articles 7 and 10 of the Covenant. The Committee wishes to be informed about the measures taken by the State party to ensure respect of the right to reparation for the victims'.

82 HRC, General Comment No. 31 (2004), para. 10. See also HRC, Concluding Observations on the United States of America, 18 December 2006, UN doc. CCPR/C/USA/CO/3/Rev.1, para. 10.

The Human Rights Committee is of the opinion that States parties are responsible for ensuring the human rights of individuals over which they have power or effective control. Thus, it is essential that the State has effective control over the person and not necessarily over a foreign territory. Nevertheless, controlling or occupying foreign territory, including in the context of multilateral or international peace-keeping operations, does create the presumption that the foreign occupying State has presumed control over the entire population, and is therefore responsible for guaranteeing the rights in the Covenant.[83] But what in essence remains decisive is the relationship between the individual and the State; a relationship that is determined by the conduct of the State and the effect of such conduct on the Covenant rights of the individual concerned.[84] Thus, it is important that the conduct has affected the individual and his rights, and can be attributed to the State. A State is responsible for the conduct of its agents as well as others as codified in the Draft Articles on Responsibilities of States for Internationally Wrongful Acts (see section 1.2.3.3b). This includes responsibility for conduct performed by a State agent which exceeds his authority, is contrary to his instructions, or of which his superiors were unaware.[85]

4.2.3 The relevance of the territorial and extra-territorial scope of the ICCPR for the prohibition on refoulement

Having concluded that in general the Covenant has both a territorial and an extra-territorial reach the next question concerns the relevance of this conclusion for the prohibition on refoulement developed under the Covenant. According to the Human Rights Committee:

> 'the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed'.[86]

A State party is responsible for all individuals who are present within its territory. This includes people who are at the de jure border of the State but are de facto within

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83 Meron considered the United States, after its invasion of Haiti in 1994 and Iraq, to be responsible for ensuring the rights of the Covenant for those residing in Kuwait during the Iraqi occupation of Kuwait in 1990/1991: Meron 1995, pp. 78-80.

84 HRC, *De Lopez v Uruguay*, 29 July 1981, no. 52/1979, para. 12.2. See also Scheinin 2004, p. 76. Scheinin argues that effective control is determined by a contextual assessment of the state's factual control in respect of facts and events which allegedly constitute a violation of a human right.

85 HRC, *Sarma v Sri Lanka*, 31 July 2003, no. 950/2000, para. 9.2. The Committee refers to Article 7 of the Draft Articles on Responsibilities of States for Internationally Wrongful Acts, section 1.2.3.3b.

86 HRC, General Comment No. 31 (2004), para. 12.

the territory. The responsibility is irrespective of whether or not they have lawfully entered or are lawfully present within the territory of the State. More problematic is the determination of the relevance of the extra-territorial scope of the Covenant. In the above quotation the Committee confirms the extra-territorial scope of the Covenant as a whole, but appears to limit its applicability to the prohibition on refoulement. According to the Committee, while States are responsible for guaranteeing the rights of the Covenant to all individuals under their control when it comes to the prohibition on refoulement the State has an obligation only not to remove those individuals from its territory. This would imply that no obligations exist towards people who are not within the State party's territory. This would, for example, exclude individuals who were at the de facto border of State, individuals seeking asylum at the embassy of a State party and, in general, individuals who were under the control of agents of a state party but were outside the territory of that State party and were being removed by these State agents to a country where there was a real risk of being subjected to irreparable harm. In this latter example, when applying a strict interpretation of the given quotation, the State party will be responsible for respecting and ensuring the rights of the Covenant, but will have no obligation regarding the risk of subjection to irreparable harm the individual may have suffered upon removal. In its Concluding Observations on the United States of America (2006) the Human Rights Committee made it clear that such a territorial restriction on the prohibition on refoulement was not intended. In response to the USA's restrictive interpretation of Article 7 ICCPR that 'it is not under any international obligation to respect a non-refoulement rule in relation to persons it detains outside its territory', the Committee stated:

> 'The State party should take all necessary measures to ensure that individuals, including those it detains outside its own territory, are not returned to another country by way of inter alia, their transfer, rendition, extradition, expulsion or refoulement if there are substantial reasons for believing that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment'.[87]

Arguably, the prohibition on refoulement developed under the Covenant is applicable to individuals who are within the territory of a State party as well as to individuals who are outside such territory but within the actual control of the State, including individuals who are at the border of the State and those seeking asylum at diplomatic representations of the State.

87 HRC, Concluding Observations on the: United States of America, 18 December 2006, UN doc. CCPR/C/USA/CO/3/Rev.1, para. 16.

4.3 The content of the prohibition on refoulement under Articles 6 and 7 of the ICCPR

According to the Human Rights Committee States parties shall not remove a person to another country where there are substantial grounds for believing that there is a real risk of irreparable harm such as contemplated by Article 6 and 7 ICCPR.[88] While reference to irreparable harm may imply a broad spectrum of harm from which a person is protected (section 4.5), the harm proscribed by Articles 6 and 7 ICCPR is of particular importance. As such, the material scope or content of the prohibition on refoulement developed under the Covenant are largely determined by the treatment which is prohibited by both Articles and the existence of a risk that such treatment may occur.

In this section the material scope or content of the prohibition on refoulement developed under Articles 6 and 7 ICCPR will be analysed. Section 4.3.1 will discuss the harm from which a person is protected. Section 4.3.2 will analyse the element of risk and section 4.3.3 the absolute character of the prohibition on refoulement.

4.3.1 The harm from which a person is protected

Article 6 of the Covenant protects the right to life and proscribes the arbitrary deprivation of life. In addition, the Article regulates the imposition of the death penalty. Article 7 proscribes acts of torture and other forms of cruel, inhuman or degrading treatment or punishment. The prohibition on refoulement developed under the Covenant aims primarily to protect people from being subjected to these proscribed forms of harm. Most important is harm prohibited by Article 7 of the Covenant. In addition, the risk of being sentenced to death and executed, regulated by Article 6 ICCPR, has played an essential role in several extradition cases. So far, the prohibition on arbitrary deprivation of life has played no role in cases involving refoulement.

In section 4.3.1.1 I will first discuss the death penalty and the so-called death row phenomenon. This will be followed in section 4.3.1.2 by a general and brief outline of what amounts to arbitrary deprivation of life under Article 6 ICCPR. In section 4.3.1.3 I will provide a concise analysis of what amounts to torture and other forms of proscribed ill-treatment. Finally, in section 4.3.1.4 I will focus on the harm from which a person is protected in the specific context of refoulement.

4.3.1.1 Death penalty and the death row phenomenon

4.3.1.1a Death penalty

The death penalty is not prohibited under the Covenant as such, though its use is subjected to severe restriction under Article 6(2) ICCPR. The death penalty may not be imposed for crimes of a less serious character, such as crimes of a political or

88 HRC, General Comment No. 31 (2004), para. 12.

economic nature or crimes that do not result in loss of life.[89] Article 6(2) may, under certain circumstances, also be breached when a death sentence is imposed following judicial proceedings which do not comply with standards of fair trial enumerated in Article 14 of the Covenant.[90] With the adoption of the Second Optional Protocol to the ICCPR in 1989, and its entry into force in 1991, the death penalty was largely abolished.[91] According to Article 1 no one within the jurisdiction of a State party to the Second Optional Protocol shall be executed and each State party shall take all necessary measures to abolish the death penalty in its jurisdiction. In accordance with Article 2(1) of the Second Optional Protocol to the ICCPR no reservation is admissible, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

Initially imposition of the death penalty was not in breach of the Covenant, even in extradition cases where the extraditing State had abolished the death penalty, but the receiving State had not.[92] The Human Rights Committee discussed the method of execution in the context of the death penalty. In *Chitat Ng v Canada* (1994) the Committee considered that execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible.[93] The Committee concluded that:

> 'execution by gas asphyxiation is contrary to internationally accepted standards of humane treatment, and that it amounts to treatment in violation of article 7 of the Covenant'.[94]

However, execution by lethal injection does not violate Article 7 ICCPR according to the Committee.[95] Furthermore, executions taking place in public do not necessarily breach Article 6 or 7 ICCPR. However, the Human Rights Committee has expressed

89 Joseph, Schultz & Castan 2000, p. 120 (para. 8.21) also lists robbery, traffic in toxic or dangerous wastes, abetting suicide, drug-related offences, property offences, multiple evasion of military service, apostasy, committing a third homosexual act, embezzlement by officials, theft by force, adultery, corruption.

90 Joseph, Schultz & Castan 2000, p. 121 (para. 8.23).

91 Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), which entered into force on 11 July 1991.

92 HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, paras 14.2 and 14.3. HRC, *Chitat Ng v Canada*, 7 January 1994, no. 469/1991, paras 15.2 and 15.3. HRC, *Cox v Canada*, 9 December 1994, paras 16.1 and 16.2. In these cases the Human Rights Committee was confronted with the issue whether extradition from a country which had abolished the death penalty, Canada, to a country which had not, the United States of America, would be prohibited under Article 6 of the ICCPR. Although acknowledging the desire of the Covenant and its States parties to abolish the death penalty, Article 6 of the ICCPR still allowed for the imposition of the death penalty, in accordance with the law, only for the most serious crimes and carried out pursuant to a final judgment delivered by a competent court.

93 HRC, *Chitat Ng v Canada*, 7 January 1994, no. 469/1991, paras 16.1-16.4.

94 Ibid., para 16.1.

95 HRC, *Cox v Canada*, 9 December 1994, no. 539/1993, para. 17.3.

its regrets over public executions which took place in Iran.[96] In 2003 the Committee explicitly recalled its earlier jurisprudence on this issue of extradition to face the death penalty. In *Judge v Canada* (2003) the Human Rights Committee considered that:

> 'Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author's rights to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out'.[97]

4.3.1.1b Death row phenomenon

The death row phenomenon refers to prolonged detention while awaiting execution of a death sentence. Waiting on death row causes ever increasing anxiety over one's impending death. The Human Rights Committee has consistently concluded that the death row phenomenon does not amount to cruel, inhuman or degrading treatment or punishment.[98] Only where compelling circumstances, such as imputable delays in the administration of justice and specific conditions of imprisonment and its psychological impact, have been substantiated will death row amount to a violation of Article 7 ICCPR.[99] The length of the period on death row *per se* is not in breach of Article 7 ICCPR.[100] This is different in situations of unreasonably long detention in a *death cell* after the issue of a warrant for execution.[101] Furthermore, according to the Human Rights Committee:

> 'undue restrictions on visits and correspondence and the failure to notify the family and lawyers of the prisoners on death row of their execution are incompatible with the Covenant'.[102]

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96 HRC, Concluding Observations on Iran (Islamic Republic of), 3 August 1993, UN doc. CCPR/C/79/Add.25, para. 8.

97 HRC, *Judge v Canada*, 20 October 2003, no. 829/1998, para. 10.6.

98 HRC, *Barret and Sutcliffe v Jamaica*, 6 April 1992, nos. 270 and 271/1988, para. 8.4. HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, para. 15.3. HRC, *Simms v Jamaica*, 3 April 1995, no. 541/1993, para. 6.5. HRC, *Rogers v Jamaica*, 4 April 1995, no. 494/1992, para. 6.2. HRC, *Johnson v Jamaica*, 5 August 1996, no. 588/1994, paras 8.1-8.6. HRC, *Hylton v Jamaica*, 18 November 1996, no. 600/1994, para. 8.

99 HRC, *Francis v Jamaica*, 3 August 1995, no. 606/1994, paras 9.1 and 9.2: compelling circumstances included the failure of the Jamaican Court to issue a written judgment for more than 13 years, the serious deterioration in the author's mental health and regular beatings, ridicule and strain.

100 HRC, *Jonhson v Jamaica*, 5 August 1996, no. 588/1994, paras 8.3 and 8.4.

101 HRC, *Pratt and Morgan v Jamaica*, 7 April 1989, nos. 210/1986 and 255/1987, para. 13.7, where a delay of 20 hours after the issue of a warrant for execution and before informing the authors of a stay of their executions was considered to be in breach of Article 7 of the ICCPR.

102 HRC, Concluding Observations on Japan, 19 November 1998, UN doc. CCPR/C/79/Add.102, para. 21.

4.3.1.2 Arbitrary deprivation of life

Article 6(1) ICCPR protects the right to life and proscribes the arbitrary deprivation of life.[103] The concept of arbitrariness is broader than unlawful and means that life must not be taken in unreasonable or disproportionate circumstances, even though the situation in which the life was taken was lawful under national law.[104] In general, the provision contains both negative and positive obligations. States are prohibited from arbitrarily taking a person's life, but also are required to take measures to protect life.[105] States parties also have a duty to investigate killings and to punish the perpetrators of arbitrary killings; to train relevant personnel; to protect detainees; and to control private entities.[106] On a grand scheme States parties have an obligation to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life; they must prevent disappearances and should take positive steps to reduce infant mortality and increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.[107] In that regard Article 6(1) ICCPR must be interpreted broadly to include socio-economic aspects and the right to life.[108] Nevertheless, the Human Rights Committee seems to be reluctant to accept a violation of Article 6(1) in individual cases in the context of social or economic situations, in particular because of the difficulty of holding a State accountable for poor socio-economic situations.[109] The Committee seems to be more inclined to express concern about the general situation regarding infant mortality rates and life expectancy figures than accepting individual breaches of the Covenant.[110]

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103 According to the Human Rights Committee the right to life is the supreme right: HRC, General Comment No. 6 (1982), para. 1.

104 Joseph, Schultz & Castan 2000, p. 110 (para. 8.04). For example, in situations of law enforcement the use of lethal force may be required, but only in self-defence, the execution of an arrest, or the prevention of an escape: HRC, *Suarez de Guerrero v Colombia*, 31 March 1982, no. 45/1979, para. 13.2.

105 For example, unintentional killings can amount to arbitrary deprivation of life if a State has failed to take effective measures to protect the life of the victim: HRC, *Burrel v Jamaica*, 1 August 1996, no. 546/1993, para. 9.5.

106 Joseph, Schultz & Castan 2000, pp. 114-118 (paras 8.08-8.17) and pp. 128-130 (paras 8.33-8.38).

107 HRC, General Comment No. 6 (1984).

108 Joseph, Schultz & Castan 2000, p. 131 (para. 8.39).

109 Ibid., p. 133 (para. 8.42).

110 HRC, Concluding Observations on Canada, 7 April 1999, UN doc. CCPR/C/79/Add.105, para. 12, in which the Committee expressed concern that homelessness had led to serious health problems and even to death, and recommended States parties to take positive measures in that regard; HRC, Concluding Observations on Nepal, 10 November 1994, UN doc. CCPR/C/79/Add.42, para. 8, in which the Committee expressed concern about the life expectancy rate of women; HRC, Concluding Observations on Jordan, 10 August 1994, UN doc. CCPR/C/79/Add.35, para. 3, in which the Committee commended Jordan on achievements made in the field of life expectancy and the reduction of child mortality; HRC, Concluding Observations on Romania, 5 November 1993, UN doc. CCPR/C/79/Add.30, paras 11 and 16, in which the Committee expressed concern about the increasing rate of infant mortality.

4.3.1.3 Torture and other cruel, inhuman or degrading treatment or punishment

The prohibition on refoulement developed under Article 7 ICCPR prohibits States parties from exposing individuals to the danger of torture, cruel, inhuman or degrading treatment or punishment, and in particular from subjecting them without their free consent to medical or scientific experimentation.[111] According to the Human Rights Committee the object of this prohibition is to protect the dignity and the physical and mental integrity of the individual.[112] No definition of torture or the other forms of proscribed ill-treatment or punishment is provided in the Covenant.[113] All forms of treatment or punishment referred to in Article 7 ICCPR are prohibited in equal terms. Article 7 ICCPR prohibits both inhumane treatment and punishment. The term 'treatment' has a broader meaning, indicating conduct that can be inflicted for all kinds of reasons, whereas the term 'punishment' refers to conduct inflicted for disciplinary purposes.[114] The Human Rights Committee does not consider it relevant to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment.[115] Nevertheless, the Committee does consider that there is a distinction between the various forms of prohibited treatment depending on their nature, purpose and severity.[116] It is commonly accepted that torture requires the highest level of severity.[117] It remains unclear though what level of severity is required. Furthermore, it is clear that torture requires a purposive element. The other forms of proscribed ill-treatment do not necessarily require a purpose.[118]

For an act to be prohibited by Article 7 ICCPR it must cause physical or mental pain or suffering.[119] Mental suffering has been interpreted broadly by the Human Rights Committee. For example, it may include 'the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts'.[120]

It is unclear whether or not Article 7 ICCPR requires an element of intent. In an individual opinion in *Rojas Garcia v Colombia* (1996) Committee members Ando and Shearer stated that 'ordinarily article 7 requires an intent on the part of an actor

111 HRC, General Comment No. 20 (1992), para. 9.

112 Ibid., para. 2.

113 On several occasions the Human Rights Committee has called upon States to introduce a legal definition of torture compatible with Article 7 ICCPR. See Concluding Observations on Barbados, 11 May 2007, UN doc. CCPR/C/BRB/CO/3, para. 11. HRC, Concluding Observations on Botswana, 24 April 2008, UN doc. CCPR/C/BWA/CO/1, para. 15. HRC, Concluding Observations on Sudan, 29 August 2007, UN doc. CCPR/C/SDN/CO/3, para. 16 (d).

114 Joseph, Jenny Schultz & Castan 2000, p. 140.

115 HRC, General Comment No. 20 (1992), para. 4.

116 Ibid., para. 4. According to McGoldrick the meaning and boundaries of the various 'levels' are complex, fluid and may change over time: McGoldrick 1991, p. 371.

117 Nowak 2005, p. 160 (para. 4).

118 Joseph, Schultz & Castan 2004, p. 213 (para. 9.32), note 33.

119 HRC, General Comment No. 20 (1992), para. 5.

120 HRC, *Quinteros v Uruguay*, 21 July 1983, no. 107/1981, para. 14. See also, HRC, *Sarma v Sri Lanka*, 31 July 2003, no. 950/2000, para. 9.5. See also the various cases mentioned by Joseph, Schultz & Castan 2004, p. 219 (para. 9.47).

as to the possible effects of his/her act'.[121] In this case the Columbian police had raided a house as part of a murder investigation. They acted with force in good faith, expecting to find strong resistance, until they realised they had entered the wrong house. Ando and Shearer concluded that in these circumstances the search was conducted in accordance with the law and without the intent of harming the author's family. The Committee however, concluded that the treatment received by the author's family did violate Article 7 ICCPR; no mention was made of intent on the part of the police.[122] Anguish and stress caused to a person by the fate of family members may amount to proscribed ill-treatment without requiring intent on the part of the perpetrators.[123]

Acts prohibited by Article 7 ICCPR can be inflicted 'by people acting in their official capacity, outside their official capacity or in a private capacity'.[124] Furthermore, it is not just the perpetration of acts that potentially breaches Article 7 ICCPR, but also the encouraging, ordering and tolerating of such acts.[125] Importantly, the involvement of a public official is not required for an act to amount to ill-treatment proscribed by Article 7 ICCPR, including torture.

Rarely does the Committee specify which form of ill-treatment listed in Article 7 ICCPR has been breached or was considered to be applicable.[126] The Human Rights Committee has adopted a factual approach, i.e. assessing the specific facts and circumstances of each individual case in terms of treatment prohibited under Article 7 ICCPR, rather than clearly conceptualising the terms mentioned in Article 7 ICCPR.[127] Thus, the Committee has accepted that personal factors such as sex, age and the person's state of health can aggravate the effects of the acts, bringing them within the scope of Article 7 ICCPR.[128]

The principle of proportionality also plays a role in determining what conduct amounts to proscribed ill-treatment and what not. Joseph, Schultz and Castan use the example of the amputation of a limb. Such an act could be in breach of Article 7 ICCPR as it can cause severe physical and mental pain or suffering. However, if the

121 HRC, *Rojas Garcia v Colombia*, 16 May 2001, no. 687/1996, individual opinion of Ando and Shearer.

122 Ibid., para. 10.5.

123 HRC, *Quinteros v Uruguay*, 21 July 1983, no. 107/1981, the Human Rights Committee concluded that there had been a violation of Article 7 ICCPR by reason of the anguish and stress caused to a mother because of the disappearance of her daughter. See also HRC, *Titiahonjo v Cameroon*, 13 November 2007, no. 1186/2003, para. 6.4: anguish was caused to a wife because of the uncertainty of her husband's fate and continued imprisonment. See also Joseph, Schultz & Castan 2004, pp. 210 (para. 9.24) and 219 (para. 9.46). See also Nowak & McArthur 2008, p. 73 (para. 106).

124 HRC, General Comment No. 20 (1992), para. 2 (see also para. 13). Nowak 1993, p. 130.

125 HRC, General Comment No. 20 (1992), para. 13.

126 Joseph, Schultz & Castan 2004, p. 208 (para. 9.20).

127 Ghandhi 1990, p. 766.

128 HRC, *Vuolanne v Finland*, 2 May 1989, no. 265/1987, para. 9.2, in which the Committee stated, 'what constitutes inhuman or degrading treatment falling within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim'. See also Joseph, Schultz & Castan 2004, p. 211 (para. 9.27).

amputation is done to save a person's life it would not be considered inhumane treatment prohibited under Article 7 ICCPR.[129] Thus, an element of the reasonableness of an act, however painful or humiliating the suffering may be, must be taken into account. Furthermore, disproportionate or excessive violence used by police officers in performing their work is also in violation of Article 7 ICCPR; 'proportionate violence' is not.[130] It should be noted that the principle of proportionality, however, does not play a role in justifying ill-treatment. Once an act is qualified as torture or as another form of proscribed ill-treatment no justifications for it can be raised.

Article 7 ICCPR is often invoked in situations of arrest and detention. While an arrest or detention in itself is not in breach of Article 7 it may involve treatment that comes within the scope of the Article. In cases involving detention the Human Rights Committee considers that the victim must demonstrate an additional exacerbating factor or factors beyond the usual incidents of detention.[131] Such factors include incommunicado detention,[132] being severely and systematically beaten during interrogation,[133] the threat of being tortured, deprivation of food and drink, being kept in a cell for several days without the possibility of recreation, being kept in an overcrowded cell.[134] The prolonged solitary confinement of a detainee may also amount to proscribed ill-treatment; although it remains unclear when.[135] In addition to protection offered by Article 7, Article 10 of the Covenant guarantees that all people deprived of their liberty are to be treated with humanity and with respect for their dignity. Article 10 is a derogable right, applying when conditions of detention are generally poor and prohibiting a less serious form of treatment than that prohibited

129 Joseph, Schultz & Castan 2004, pp. 212 and 213 (para. 9.32).

130 HRC, Concluding Observations on Portugal, 5 July 2003, CCPR/CO/78/PRT, para. 8. HRC, Concluding Observations on Switzerland, 12 November 2001, CCPR/CO/73/CH, para. 13.

131 For example, HRC, *Jensen v Australia*, 2 April 2001, no. 762/1997, para. 6.2.

132 Incommunicado detention per se does not breach Article 7 ICCPR. According to the Human Rights Committee in General Comment No. 20 (1992), para. 6, 'prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7'. Individual cases involving incommunicado detention under Article 7 ICCPR include: HRC, *Laureano v Pery*, 16 April 1996, no. 540/1993. HRC, *Tshishimbi v Zaire*, 16 April 1996, no. 542/1993. HRC, *Polay Campos v Peru*, 9 January 1998, no. 577/1994. HRC, *Shaw v Jamaica*, 4 June 1998, no. 704/1996. HRC, *El Hassy v the Libyan Arab Jamahiriya*, 13 November 2007, no. 1422/2005, para. 6.2.

133 HRC, *El Hassy v the Libyan Arab Jamahiriya*, 13 November 2007, no. 1422/2005, para. 6.3.

134 HRC, *Martinez Portorreal v Dominican Republic*, 5 November 1987, no. 188/1984, paras 9.2 and 11. HRC, *Mukong v Cameroon*, 10 August 1994, no. 458/1991, para. 9.4. See also HRC, *Edwards v Jamaica*, 19 August 1997, no. 529/1993, para. 8.3. HRC, *Brown v Jamaica*, 11 May 1999, no. 775/1997, para. 6.13. HRC, *Smith and Stewart v Jamaica*, 12 May 1999, no. 668/1995, para. 7.5. HRC, Concluding Observations on Japan, 19 November 1998, UN doc. CCPR/C/79/Add.102, para. 27.

135 HRC, General Comment No. 20 (1992), para. 6. It remains unclear when solitary confinement may breach Article 7. See HRC, *Kang v Republic of Korea*, 23 July 2003, no. 878/1999, para. 7.3, in which the author was held in solitary confinement for 13 years, leading to a breach of Article 10(1) ICCPR; no complaint was made under Article 7 of the ICCPR. See also Joseph, Schultz & Castan 2004, pp. 252 and 253 (para. 9.97) and 284 (para. 9.151).

by Article 7.[136] The Human Rights Committee has not developed a prohibition on refoulement under this Article.

In several cases involving detention the Human Rights Committee explicitly concluded that there had been torture.[137] The acts of torture in these cases included: electric shocks, repeated immersions in a mixture of blood, urine, vomit and excrement (*submarino*), the insertion of bottles or the barrels of automatic rifles into the anus while standing, hooding and handcuffing with a piece of wood thrust into the mouth for several days and nights, solitary confinement, lack of food, harassment and severe beating, extended hanging from hand and/or leg chains, near asphyxiation, threats of torture and violence against friends and family, and mock amputation, beatings, and mock execution during incommunicado detention. Another case in which the Human Rights Committee explicitly considered the existence of torture was *Massera v Uruguay* (1979).[138] It was alleged that one of the victims in this case, while in detention, had been forced to remain standing, hooded, for long hours; he lost his balance, fell down and broke his leg, which was not immediately treated, resulting in permanent physical damage. The Human Rights Committee concluded that there had been a violation of Article 7 ICCPR by torture, as a result of which the victim suffered permanent physical damage. The threshold applied by the Committee in this case seems to have been low, i.e. a combination of 'wall-standing', 'hooding' and permanent physical damage.[139] In other cases involving similar treatment the Human Rights Committee was less clear and concluded that there had been both torture and inhuman treatment without making a distinction.[140] And in yet another group of

136 Joseph, Schultz & Castan 2004, pp. 275 (para. 9.132) and 277 (para. 9.139).

137 See, for example, HRC, *Grille Motta v Uruguay*, 29 July 1980, no. 11/1977, para. 2, 16. HRC, *Lopez Burgos v Uruguay*, 29 July 1981, no. 52/1979, para. 2.3, 13. HRC, *Sendic Antonaccio v Uruguay*, 28 October 1981, no. 63/1979, para. 2.3, 20. HRC, *Angel Estrella v Uruguay*, 23 March 1983, no. 74/1980, paras 1.6, 8.3, 10. HRC, *Quinteros v Uruguay*, 21 July 1983, no. 107/1981, para. 12.3. HRC, *Muteba v Zaire*, 24 July 1984, no. 124/1982, paras 10.2, 12. HRC, *Arzuda Gilboa v Uruguay*, 1 November 1985, no. 147/1983, paras 13.2, 14. HRC, *Miango Muiyo v Zaire*, 27 October 1987, no. 194/1985, para. 8.2. HRC, *Acosta v Uruguay*, 25 October 1988, no. 162/1983, paras 10.2-11.

138 HRC, *Massera v Uruguay*, 15 August 1979, no. 5/1977.

139 Compare HRC, *Barret and Sutcliffe v Jamaica*, 6 April 1992, nos. 270-271/1988, which had almost identical facts and circumstances, i.e. the victim was beaten unconscious and then left without medical attention despite various injuries. The HRC, however, held that there was cruel and inhuman treatment rather than torture. Compare also ECtHR, *Ireland v United Kingdom*, 18 January 1978, App. No. 5310/71, para. 167, in which 'wall-standing' and 'hooding' were only two of five techniques which were considered by the ECtHR to constitute inhuman and degrading treatment, but not torture because the technique 'did not occasion suffering of the particular intensity and cruelty implied by the word torture'.

140 HRC, *Herrera Rubion v Colombia*, 2 November 1987, no. 161/1983, paras 1.2, 10.2, 11. HRC, *Lafuente Penarrieta et al v Bolivia*, 2 November 1987, no. 176/1984, paras 1.3, 15.2 and 16. HRC, *Berterretche Acosta v Uruguay*, 25 October 1988, no. 162/1983, paras 10.1, 10.2, 11. HRC, *Kanana Tshiongo a Minanga v Zaire*, 8 November 1993, no. 366/1989, para. 5.3. HRC, *Domukovsky et al v Georgia*, 29 May 1998, no. 623, 624,626, 627/1995, para. 18.6. See also McGoldrick 1991, pp. 369-370.

cases involving similar treatment the Human Rights Committee concluded that the treatment amounted 'only' to cruel and inhuman treatment.[141]

It is not only situations of detention which can amount to proscribed ill-treatment, but also their consequences. In *C v Australia* (2002) the Committee concluded that the prolonged detention of the author on immigration (almost two years) which had caused a psychiatric illness of which the State party was aware but had failed to take the necessary steps to ameliorate amounted to a violation of Article 7 ICCPR.[142]

The text of Article 7 ICCPR mentions one form of prohibited treatment explicitly, i.e. subjection, without free consent, to medical or scientific experimentation. The Human Rights Committee considers such special protection to be necessary for:

> 'persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health'.[143]

Furthermore, according to the Committee:

> 'when there is doubt as to the ability of a person or a category of persons to give such consent, e.g. prisoners, the only experimental treatment compatible with article 7 would be treatment chosen as the most appropriate to meet the medical needs of the individual'.[144]

The Committee has also expressed its concern about minors and mentally ill patients being subject to medical research.[145]

Degrading treatment or punishment requires the lowest level of severity of suffering proscribed by Article 7 ICCPR. In *Vuolanne v Finland* (1989) the Human Rights Committee expressed the view that with regard to degrading punishment 'the humiliation or debasement involved must exceed a particular level and must, in any event,

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141 HRC, *Linton v Jamaica*, 22 October 1992, no. 255/1987. HRC, *Bailey v Jamaica*, 12 May 1993, no. 334/1988. HRC, *Hylton v Jamaica*, 21 July 1994, no. 407/1990. HRC, *Deidrick v Jamaica*, 4 June 1998, no. 619/1995.

142 HRC, *C. v Australia*, 13 November 2002, no. 900/1999, para. 8.4.

143 HRC, General Comment No. 20 (1992), para. 7. Prohibited medical experimentation includes research on the basis of surrogate consent: HRC, Concluding Observations on the United States of America, 3 October 1995, UN doc. CCPR/C/79/Add.50, para. 286. Note that a prohibition on medical experimentation is narrower than a prohibition on medical treatment. Such treatment needs to meet a certain level of severity in order to fall within the scope of Article 7 ICCPR, for example, the sterilization of disabled women without consent (HRC, Concluding Observations on Japan, 19 November 1998, UN doc. CCPR/C/79/Add.102, para. 31). Joseph, Schultz & Castan 2000, p. 174. Nowak 1993, p. 139.

144 HRC, Concluding Observations on the United States of America, 18 December 2006, UN doc. CCPR/C/USA/CO/3/Rev.1, para. 31.

145 HRC, Concluding Observations on the United States of America, 3 October 1995, UN doc. CCPR/C/79/Add.50, para. 286. HRC, Concluding Observations on the Netherlands, 27 August 2001, UN doc. CCPR/CO/72/NET, para. 7.

entail other elements beyond the mere fact of deprivation of liberty'.[146] Issues of proportionality and personal circumstances play an important part in the qualification of an act or situation as degrading.[147] Cases in which the Human Rights Committee explicitly concluded that there was just degrading treatment are limited. In one case the victim was assaulted by soldiers and warders, who beat him, pushed him with a bayonet, emptied a urine bucket over his head and threw his food and water on the floor and his mattress out of the cell.[148] In another case certain arbitrary prison practices aimed at humiliating prisoners and making them feel insecure by repeated solitary confinement, subjection to cold and persistent relocation to different cells was considered by the Committee to constitute degrading treatment within the meaning of Article 7 ICCPR.[149] Other cases involved beating with riffle butts and the refusal of medical treatment for consequent injuries,[150] detention in a tiny cell and allowing only few visitors and assault by prison wardens, the theft of personal effects and the repeated soaking of his bed.[151] Furthermore, displaying a person to the press in a cage also amounted to degrading treatment according to the Human Rights Committee.[152] Finally, the failure of a State to redress the serious mental deterioration of a death row detainee also amounted to degrading treatment.[153]

In addition to the above general remarks the abundant views of the Human Rights Committee have identified numerous acts as amounting to proscribed ill-treatment in accordance with Article 7 ICCPR without specifying the applicable level of ill-treatment or punishment. These include corporal punishment, not necessarily including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.[154] Furthermore, in its Concluding Observations on Israel in 1998 the Committee noted that the methods of handcuffing, hooding, shaking and sleep deprivation, either alone or in combination, were also in violation of Article 7 ICCPR.[155] Other acts include incommunicado detention with solitary confinement where the victim was chained to a bed spring for three and a half months with minimal clothing and food, followed by a further month's incommunicado detention in a tiny

146 HRC, *Vuolanne v Finland*, 2 May 1989, no. 265/1987, para. 9.2.

147 Nowak 2005, p. 165 (para. 14). Joseph, Schultz and Castan ask the question without providing the answer: 'would the "mere" detention of an extremely claustrophobic person, for no reason other than to break his or her will, breach article 7?'. Joseph, Schultz & Castan 2000, p. 150 (para. 9.22).

148 HRC, *Victor Francis v Jamaica*, 12 May 1993, no. 320/1988, para. 12.4.

149 HRC, *Conteris v Uruguay*, 17 July 1985, no. 139/1983, paras 1.6, 9.2.

150 HRC, *Thomas v Jamaica*, 19 October 1993, no. 321/1988, para. 9.2.

151 HRC, *Young v Jamaica*, 17 December 1997, no. 615/1995, paras 3.6 and 5.2.

152 HRC, *Polay Campos v Peru*, 9 January 1998, no. 577/1994, para. 8.5.

153 HRC, *Williams v Jamaica*, 17 November 1997, no. 609/1995, para. 6.5.

154 HRC, General Comment No. 20 (1992), paras 5-7. Reference to 'excessive chastisement' by the Committee might imply that corporal punishment per se was not in violation of Article 7 of the ICCPR. However, in its Concluding Observations on Cyprus, 6 August 1998, UN doc. CCPR/C/79/Add.88, para. 16, the Committee reaffirmed 'its position that corporal punishment is prohibited under the Covenant' without mentioning any aggravating element; see also Joseph, Schultz & Castan 2004, pp. 248 and 249 (paras 9.89 and 9.90) and HRC, Concluding Observations on Lesotho, 8 April 1999, UN doc. CCPR/C/79/Add.106, para. 20.

155 HRC, Concluding Comment on Israel, 18 August 1998, UN doc. CCPR/C/79/Add.93, para. 19.

cell, followed by more detention in a three by three metre cell without external access for 18 months.[156] Another case involved the rubbing of salt water into the victim's nasal passages and a night spent handcuffed to a chair without being given as much as a glass of water.[157] Other forms of prohibited treatment include the beating of a person on the head by prison officers so severely that he required several stitches,[158] flogging,[159] being blindfolded and dunked in a canal by soldiers,[160] as well as ritual abuse and humiliation of new army recruits[161] and forced disappearances.[162] Forced sterilisation,[163] female genital mutilation,[164] rape,[165] 'honour crimes'[166] and domestic violence[167] have also been considered to be in violation of Article 7 ICCPR.[168]

156 HRC, *Wight v Madagascar*, 1 April 1985, no. 115/1982, paras. 15.2 and 17. Article 10(1) of the ICCPR places additional obligations on States parties to the Covenant as 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.

157 HRC, *Canon Garcia v Ecuador*, 12 November 1991, no. 319/1988, para. 5.2.

158 HRC, *Henry v Trinidad and Tobago*, 10 February 1999, no. 752/1997, paras 2.1 and 7.1.

159 HRC, Concluding Observations on Libyan Arab Jamahiriya, 6 November 1998, UN doc. CCPR/C/79/Add.101, para. 11. HRC, Concluding Observations on Iraq, 19 November 1997, CCPR/C/79/Add.84, para. 12.

160 HRC, *Vicente et al v Colombia*, 19 August 1997, no. 612/1995, para. 8.5.

161 HRC, Concluding Observations on Poland, 29 July 1999, UN doc. CCPR/C/79/Add.110, para. 15. HRC, Concluding Observations on Ukraine, 28 November 2006, UN doc. CCPR/C/UKR/CO/6, para. 13, in which reference was made to the abusive practice of 'hazing'.

162 HRC, *Sarma v Sri Lanka*, 31 July 2003, no. 950/2000, para. 9.3 (the HRC refers to forced disappearances as defined in Article 7(2)(i) of the Rome Statute of the International Criminal Court).

163 HRC, Concluding Observations on Japan, 19 November 1998, UN doc. CCPR/C/79/Add.102, para. 31. HRC, Concluding Observations on Peru, 15 November 2000, UN doc. CCPR/CO/70/PER, para. 21. HRC, Concluding Observations on Slovakia, 22 August 2003, UN doc. CCPR/CO/78/SVK, para. 12.

164 HRC, Concluding Observations on Sudan, 19 November 1997, UN doc. CCPR/C/79/Add.85, para. 10. HRC, Concluding Observations on Senegal, 19 November 1997, UN doc. CCPR/C/79/Add.82, para. 12. HRC, Concluding Observations on Lesotho, 8 April 1999, UN doc. CCPR/C/79/Add.106, para. 12. HRC, Concluding Observations on Cameroon, 4 November 1999, UN doc. CCPR/C/79/Add.116, para. 12. HRC, Concluding Observations on Yemen, 26 July 2002, UN doc. CCPR/CO/75/YEM, para. 6. HRC, Concluding Observations on the Netherlands, 27 August 2001, CCPR/CO/72/NET, para. 11.

165 HRC, Concluding Observations on Cambodia, 27 July 1999, UN doc. CCPR/C/79/Add.108, para. 13.

166 HRC, Concluding Observations on Morocco, 1 November 1999, UN doc. CCPR/C/79/Add.113, para. 14. HRC, Concluding Observations on Sweden, 24 April 2002, UN doc. CCPR/CO/74/SWE, para. 8.

167 For example, HRC, Concluding Observations on Ukraine, 28 November 2006, UN doc. CCPR/C/UKR/CO/6, para. 10.

168 With regard to the prohibition on violence against women see also HRC, General Comment No. 28 (2000) in which reference is made to prohibited ill-treatment such as rape (paras. 8 and 11), life-threatening clandestine abortions (para. 10), female infanticide (para. 10), the burning of widows (para. 10), dowry killings (para. 10), domestic violence (para. 11), female genital mutilation (para. 11) and honour crimes (para. 31).

The prohibited forms of treatment and punishment in Article 7 ICCPR include a broad range of acts, but, according to the drafters of the Covenant, do not cover inhuman or degrading situations arising from socio-economic conditions.[169]

4.3.1.3a Torture under the ICCPR and CAT

It may be expected that the Human Rights Committee's views on torture are consistent with those of the Committee Against Torture, its counterpart under the Convention against Torture (chapter 5).[170] Both Conventions were adopted within the framework of the United Nations. The Convention against Torture was adopted by the United Nations General Assembly to fill a gap in the prevention of and protection against torture.[171] Meron stated that it is of interest to observe that, rather than aiming at amending the ICCPR under Article 51, the void was filled by a new instrument.[172] While it may be argued that the Convention Against Torture can be seen as a *lex specialis* of Article 7 ICCPR, the United Nations do not provide a single legal order in which one Convention can – automatically – be regarded as a *lex specialis* of another Convention. The Human Rights Committee has so far, in individual cases, been rather silent in its views on the relationship between the two Conventions.[173] This is different in the Committee's Concluding Observations on country reports. For example, in 2003 in its Concluding Observations on Egypt regarding torture it explicitly referred to the obligations of Egypt under the Convention against Torture.[174] In 2003, in its Concluding Observations on Sri Lanka, the Human Rights Committee considered a definition of torture formulated in the Sri Lankan Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994 'that the restrictive definition of torture in the 1994 Convention against Torture Act continues to raise problems in light of article 7 of the Covenant'.[175] The definition of torture in the Sri Lankan Act, meant to implement the Convention against Torture in Sri Lankan municipal law, is similar to that in Article 1 of the Convention against Torture (section 5.3.1); except for the lawful sanctions exception.[176] Arguably, the Human Rights Committee has not interpreted torture in

169 Bossuyt 1987, p. 150 (UN Doc. A/2929, Chap. VI, para. 13): 'it was observed that the word 'treatment' should not apply to degrading situations which might be due to general economic and social factors [E/CN.4/365 (PI)]'. Nowak 1993, p. 126.

170 Joseph, Schultz & Castan 2004, p. 195. For an analysis of the definition of torture in Article 1 of the Convention against Torture see section 5.3.1.

171 Joseph, Schultz & Castan 2000, p. 140.

172 Meron 1986, pp. 112 and 113.

173 HRC, *Cox v Canada*, 9 December 1994, no. 539/1993, para. 9.4, in spite of a reference made by the author's counsel to the Convention Against Torture, the Committee remained silent.

174 HRC, Concluding Observations on Egypt, 4 November 2003, UN doc. CCPR/CO/76/EGY/Add.1, paras 15 and 30.

175 HRC, Concluding Observations on Sri Lanka, 10 November 2003, UN doc. CCPR/CO/79/LKA, para. 9.

176 Article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22, 20 December 1994, published as a Supplement to Part II of the Gazette of the Democratic Socialist Republic of Sri Lanka of 23 December 1994, L.D.-08/94 says: '"torture" with its grammatical variations and cognate expressions. means any act which causes severe pain,

line with the definition contained in Article 1 of the Convention against Torture. Contrary to this definition, the Human Rights Committee has acknowledged the possibility of torture being committed by private persons, which is contrary to Article 1 of the Convention against Torture.[177] Nevertheless, in accordance with Article 32 of the Vienna Convention on the Law of Treaties, the definition of torture in Article 1(1) of the Convention against Torture can be a useful supplementary tool of interpretation.[178] Interestingly enough, with regard to other terms, the Human Rights Committee refers to definitions in other treaties. For example, regarding the term 'forced disappearances' the Committee refers to the definition in Article 7(2)(i) of the 1998 Rome Statute of the International Criminal Court.[179]

4.3.1.4 Harm from which a person is protected in the context of refoulement

4.3.1.4a Defining the harm in the context of refoulement

The limited case law of the Human Rights Committee provides little additional guidance on the specific harm a person is protected from in the context of refoulement. The importance of Article 6 ICCPR in the context of refoulement is mainly found in the context of extradition in order to face the death penalty. Several cases concerning the death penalty have already been discussed in section 4.3.1.1a. The death row phenomenon, discussed in section 4.3.1.1b, is another important element in the context of extradition to face the death penalty, but is considered under Article 7 ICCPR. Other possible violations of Article 6 of the ICCPR have so far played no role in individual cases brought before the Human Rights Committee. Nevertheless, it is important to note that Article 6(1) protects people from becoming victims of war and general violence, in particular in situations where the State is unable or unwilling to provide adequate protection. In that regard a situation of general or indiscriminate violence may be serious enough to invoke the prohibition on refoulement under Article 6.[180] Arguably, of less relevance will be socio-economic situations, because the Committee has so far not accepted a violation in that regard in individual cases.

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whether physical or mental, to any other person, being an act which is – (a) done for any of the following purposes that is to say –(i) obtaining from such other person or a third person, any information or confession; or (ii) punishing such other person for any act which he or a third person has committee, or is suspected of having committed ; or (iii) intimidating or coercing such other person or a third person; or done for any reason based on discrimination, and being in every case, an act which is done by, or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity', also published in *Article 2* Vol. 1 (August 2002) No. 1 (<www.article2.org>).

177 HRC, General Comment No. 20 (1992), para. 2 (see also para. 13). Nowak 2005, p. 161 (para. 7).

178 Nowak 1993, p. 129.

179 HRC, *Sarma, v Sri Lanka*, 31 July 2003, no. 950/2000, para. 9.3.

180 Compare with Article 15 of the EU Qualification Directive 'serious harm consists of: … (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.

Harm which has been explicitly mentioned in individual cases in the context of refoulement concerns forms of corporal punishment.[181] Other harm from which a person is protected by Article 7 ICCPR includes persecution as defined by the Refugee Convention. In *C. v Australia* (2002) the Committee attached significant weight to the fact that the complainant had been granted refugee status in Australia based on a well-founded fear of persecution in Iran as an Assyrian Christian. According to the State party, factors such as discrimination experienced in employment, education and housing, difficulties in practising his religion and the deteriorating human rights situation in Iran at the time were considered in granting the complainant's application for refuge status.[182] By referring to the State party's granting of refugee status and the fact that the State party had not established that the current circumstances in Iran were such that the refugee status was no longer valid the Committee concluded that the author could not be deported.[183] This does not, however, mean that persecution can be equated with harm proscribed by Article 7. In this case the Committee not only attached significant weight to the granting of refugee status, but also found important the lack of effective medication in Iran for his psychiatric illness; an illness which, at least in part, was the result of unlawful detention in Australia.[184]

Specific reference is made by the Committee to gender-specific violations of the Covenant, in particular of Articles 6 and 7. This includes to the following forms of proscribed ill-treatment: life-threatening clandestine abortions, forced abortions, female infanticide, the burning of widows, dowry killing, rape, forced sterilisation and genital mutilation.[185] In its Concluding Observations on the Netherlands (2001) the Human Rights Committee expressed its concern:

> 'that a well-founded fear of genital mutilation or other traditional practices in the country of origin that infringe the physical integrity or health of women (article 7 of the Covenant) does not always result in favourable asylum decisions, for example when genital mutilation, despite a nominal legal prohibition, remains an established practice to which the asylum-seeker would be at risk'.[186]

From the limited number of views of the Human Rights Committee involving refoulement it can be concluded that removal to a State where the person concerned has a risk of being subjected to the death penalty, corporal punishment and persecution within the meaning of the Refugee Convention, including such atrocitious acts as female genital mutilation, is prohibited under the Covenant. This list is not exhaustive and may include other conduct which amounts to arbitrary deprivation of life in

181 HRC, *G.T. v Australia*, 4 December 1997, no. 706/1996, para. 8.6 (regarding canning). HRC, *A.R.J. v Australia*, 11 August 1997, no. 692/1996, para. 6.14 (regarding lashes).
182 HRC, *C. v Australia*, 13 November 2002, no. 900/1999, para. 4.13.
183 Ibid., para. 8.5.
184 Ibid., para. 8.5.
185 HRC, General Comment No. 28 (2000), para. 17 in conjunction with paras 10 and 11.
186 HRC, Concluding Observations on the Netherlands, 27 August 2001, UN doc. CCPR/CO/72/NET, para. 11.

accordance with Article 6 ICCPR or to proscribed ill-treatment in according with Article 7.

4.3.1.4b State versus non-State perpetrators of the harm

Little can be said about the Committee's views on a distinction between harm perpetrated by the State and that perpetrated by non-State actors. In general, the Committee does not distinguish between the perpetrators and allows for both public and private individuals to commit acts of proscribed ill-treatment (section 4.3.1.3). In its Concluding Observation on France (1997) the Committee expressed its concern about France's restrictive definition of the concept of persecution under the Refugee Convention. France said that persecution emanating from non-State actors would not come within the scope of the Refugee Convention.[187] The Committee recommended that it adopt a wider interpretation of 'persecution' to include non-State actors.[188] Analogous reasoning means that the Human Rights Committee adopts an equally broad concept of refoulement protection under the Covenant.

4.3.2 The element of risk

4.3.2.1 Defining and determining the risk

In the first two refoulement cases, involving extradition to the United States of America, it was considered that treatment contrary to the Covenant was certain in the country of origin.[189] This concerned *Kindler v Canada* (1993) and *Chitat Ng v Canada* (1994). In a third and similar extradition case, *Cox v Canada* (1994), again involving the USA, no reference was made to the 'certainty' consideration.[190] There is an interesting difference in the three extradition cases. In the *Kindler* case the author had been tried and convicted in the United States for first-degree murder and the jury had recommended the death penalty; a binding recommendation. In the *Chitat Ng* case the author was charged with 19 offences, including kidnappings and 12 murders, for which he could face the death penalty. However, he had not yet been convicted, sentenced or even tried for his crimes. In the *Cox* case, the author was charged with

187 Section 2.3.1.4. Note that France has altered its views and laws in this regard. According to Article 6 of the EU Qualification Directive actors of persecution include States as well as parties or organizations controlling those States or a substantial part of their territory State, and non-State actors.

188 HRC, Concluding Observations on France, 4 August 1997, UN doc. CCPR/C/79/Add.80, para. 21.

189 HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, para. 6.2 and HRC, *Chitat Ng v Canada*, 7 January 1994, no. 469/1991, para. 6.2, in which cases the Committee stated ' if a State party takes a decision relating to a person within its jurisdiction, and the *necessary and foreseeable consequence* is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is *certain* or is the very purpose of the handing over' (emphasis added).

190 HRC, *Cox v Canada*, 9 December 1994, no. 539/1993, para. 16.1.

two first-degree murders. He also had not yet been tried or convicted. Furthermore, two of Cox's accomplices had been sentenced to life imprisonment and not to death. Arguably, of these three men Kindler was perhaps most certain of his subjection to the death penalty. The Committee however concluded that extradition would not be in violation of Article 6 because it considered the death penalty to be lawfully imposed, nor of Article 7 because the death row phenomenon did not amount to proscribed ill-treatment.[191] In *Chitat Ng v Canada* (1994) neither the author's conviction nor his sentence was certain. Nevertheless, the Committee was of the opinion that the necessary level of risk of proscribed ill-treatment upon return to the USA existed; the Committee concluded that the author's extradition would be in breach of Article 7 by reason of the method of execution.[192] In *Cox v Canada* (1994) subjection to the death penalty was even less certain. The Committee concluded that extradition would not be in breach of the Covenant for reasons similar to those in the *Kindler* case.[193] In *Kindler* and *Cox* the Committee did not specifically consider the risk criterion. In *Chitat Ng v Canada* (1994) the Committee considered that 'Canada … could reasonably foresee that Mr Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7'.[194] No doubt there was a real risk that Mr Ng would be tried and the death penalty would be sought by the prosecutor. However, it was not certain that the author would be exposed to treatment contrary to Article 7 ICCPR. Herndl, a member of the Human Rights Committee, argued that for this reason the risk criterion had not been met in this case. The applicant had not yet been tried, let alone sentenced.

In general, the Committee has fairly consistently formulated its risk criterion as a real risk, so treatment contrary to the Covenant must be a necessary and foreseeable consequence of the removal.[195] The risk criterion is not formulated as a probability calculus, but focuses on the facts presented, the credibility of the author and claim and plausibility in the light of the general human rights situation in the country of origin. There is however little guidance in the Committee's case law on how the risk criterion is applied. No doubt the three extradition cases described above created a high threshold for extradition to be in breach of the prohibition on refoulement developed in Articles 6 and 7 ICCPR. In another extradition case involving Canada and the United States, *Judge v Canada* (2003), the author had already been convicted and sentenced to death in the United States, making his subjection to the death penalty a near certainty.[196] From a textual point of view it seems rather strange to define the risk criterion as the certain consequences of extradition. The word 'risk' inherently

191 HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, paras 14.3 and 15.3.
192 HRC, *Chitat Ng v Canada*, 7 January 1994, no. 469/1991, para. 16.4.
193 HRC, *Cox v Canada*, 9 December 1994, no. 539/1993, paras 16.1 and 17.2.
194 HRC, *Chitat Ng v Canada*, 7 January 1994, no. 469/1991, para. 16.1, according to the Committee execution of the death penalty by way of gas asphyxiation was contrary to internationally accepted standards of humane treatment.
195 Only in HRC, *Byahuranga v Denmark*, 9 December 2004, no. 1222/2003, para. 11.2 did the Committee not use the word 'necessary'.
196 HRC, *Judge v Canada*, 20 October 2003, no. 829/1998.

presupposes a level of uncertainty. From a contextual point of view it may however be understandable. Extradition cases, in particular the four with which the Committee was confronted, involve transparent criminal proceedings, so that it is by and large known what will happen to the authors after their extradition.

The first non-extradition case involving a refoulement issue was *A.R.J. v Australia* (1997). In general, the Human Rights Committee confirmed that there needs to be a real risk, with reference to the necessary and foreseeable consequences of the deportation.[197] *A.R.J.* concerned the deportation of an Iranian national to his country of origin. He claimed that if deported he feared the death penalty for drug-related offences, and corporal punishment, contrary to Article 7 ICCPR. The author had already been convicted and sentenced in Australia for the drug-related offences. According to the Committee the risk of subjection to the death penalty or to corporal punishment was not real for several reasons:

> 'Firstly and most importantly, the State party has argued that the offence of which he was convicted in Australia does not carry the death penalty under Iranian criminal law .... Secondly, the State party has informed the Committee that Iran has manifested no intention to arrest and prosecute the author on capital charges, and that no arrest warrant against Mr. J. is outstanding in Iran. Thirdly, the State party has plausibly argued that there are no precedents in which an individual in a situation similar to the author's has faced capital charges and been sentenced to death'.[198]

With the exception of some general remarks the author had failed to contradict the State party's arguments.[199]

In *G.T. v Australia* (1997) the complainant had been convicted in Australia for drug-related offences and faced deportation to Malaysia. He feared, amongst other things, the death penalty and up to nine years' detention awaiting execution. Malaysia had provided assurances to Australia that the complainant would not be prosecuted for charges relating to his offences committed overseas.[200] Furthermore, the Australian authorities had investigated the possibility of the imposition of the death penalty on the complainant and had concluded that in similar cases no prosecution had occurred.[201] Consequently, according to the Committee there was no real risk (that is a necessary and foreseeable consequence) of treatment contrary to Articles 6 and 7 ICCPR.[202] In an individual dissenting opinion Committee members Klein and Kretzmer stated that the death penalty was mandatory in Malaysia for the offence committed by the author. This created the presumption that the death penalty would

197 HRC, *A.R.J. v Australia*, 11 August 1997, no. 692/1996, para. 6.8. Also, *G.T. v Australia*, 4 December 1997, no. 706/1996, para. 8.1.
198 HRC, *A.R.J. v Australia*, 11 August 1997, no. 692/1996, paras 6.12 and 6.14.
199 Ibid., paras 3.1 and 3.2.
200 HRC, *G.T. v Australia*, 4 December 1997, no. 706/1996, para. 8.4 in conjunction with 4.2.
201 Ibid., para. 8.4
202 Ibid., paras 8.1 and 8.4-8.6.

be imposed.[203] Furthermore, the Malaysian authorities had indicated that they might charge the author with an offence committed in Malaysia.[204] Again, the threshold was high and the Committee put significant weight on the information provided by the State party. In *C. v Australia* (2002) the Committee did not refer to its risk criterion but attached significant weight to the fact that the complainant had originally been granted refugee status. In addition, the Committee attached importance to the fact that it was unlikely that the complainant would receive effective medication and treatment in Iran.[205] Interestingly, the reference to a well-founded fear and the unlikely availability of medication and treatment may indicate a less restrictive risk criterion than was perhaps implied by the earlier cases. In *Byahuranga v Denmark* (2004) the Committee took note of the author's detailed account of his fear of being subjected to proscribed ill-treatment upon his return to Uganda. The author had been granted asylum in Denmark because he had been unlawfully detained and tortured several times. In addition, before the Committee he had submitted a letter clearly showing that the Ugandan authorities were aware of his political activities. The Committee, referring to its criterion of a real and foreseeable risk, concluded that the author had made out a prima facie case that he had a risk of subjection to proscribed ill-treatment upon his return to Uganda.[206] In *Alzery v Sweden* (2006) the Committee noted that the State party itself had conceded that there was a risk of ill-treatment upon the author's return to Egypt, but that Sweden relied on diplomatic assurances for its belief that the risk was sufficiently reduced to avoid breaching the prohibition on refoulement.[207] Thus, the Committee's assessment focussed on the diplomatic assurances rather than the risk itself, and it concluded that the diplomatic assurances were insufficient because they contained neither mechanisms for monitoring their enforcement nor arrangements for effective implementation (see section 4.3.2.5b).[208] *C v Australia* (2002) and *Byahuranga v Denmark* (2004) show the importance the Human Rights Committee attaches to a person's refugee or asylum status granted to him by the State party, and *Alzery v Sweden* (2006) the importance it attaches to the risk assessment made by the State party. In such cases the risk criterion may be less strict than that applied in the earlier extradition cases, but arguably only because the Committee relied heavily on the State party's assessment.

While the Committee on the one hand applies a strict risk criterion and relies heavily on the assessment made by the State it is on the other hand also concerned about the protection of refugees. In the Concluding Observations on Tanzania (1998) the Human Rights Committee held:

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203 Ibid., Individual opinion by Committee members Klein and Kretzmer (dissenting), para. 3.
204 Ibid., para. 4.
205 HRC, *C. v Australia*, 13 November 2002, no. 900/1999, para. 8.5.
206 HRC, *Byahuranga v Denmark*, 9 December 2004, no. 1222/2003, para. 11.2.
207 HRC, *Alzery v Sweden*, 10 November 2006, no. 1416/2005, para. 11.4.
208 Ibid., para. 11.5.

> 'no refugee be returned to another State unless it is certain that, once there, he or she shall not be executed or subjected to torture or other form of inhuman treatment (arts. 6, 7 and 13)'.[209]

Clearly, once it has been determined that a person is a refugee certainty is required that he will not be subjected to proscribed ill-treatment if returned. In other words, even if there is the slightest indication or suspicion of subjection to proscribed ill-treatment in the country of origin, the refugee may not be returned. The Committee is concerned about ensuring an adequate assessment of a refugee's, or refugee claimant's, right to be protected from refoulement. It is important to note that in 1996 Tanzania was confronted with a mass influx of people seeking refuge. These people were admitted as refugees on a group basis. Tanzania wanted these people to return to their country of origin en masse, without an individual assessment of their asylum claims.[210] It may very well be that the Human Rights Committee considered that these refugees might not be returned as long as their individual asylum claim had not been assessed or Tanzania had ascertained that these refugees would not be executed or subjected to torture or other forms of inhuman treatment.

The Human Rights Committee has had little opportunity to define and assess the risk involved in situations of refoulement. To date it has considered only a small number of cases. From these cases it can be concluded that the Committee has adopted a very strict risk criterion whereby the State party plays a decisive role in assessing the risk. With regard to issues such as the individualisation requirement, membership of a particular group or a risk *sur place*, the Committee has vouchsafed no views.

4.3.2.2 Standard and burden of proof

In order for an individual to be granted protection from refoulement under the Covenant substantial grounds must exist for believing that there is a real risk of irreparable harm, such as contemplated by Articles 6 and 7 of the Covenant.[211] Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the State.[212] The case law of the Human Rights Committee indicates a high threshold. A central role is given to the State and important weight is put on the assessment done by the State party. In several individual cases the Committee noted the thorough examination conducted by the national authorities and their subsequent rejection of the author's asylum application. According to the Committee in these cases the author had not shown sufficiently why the decision was contrary to the prohibition on refoulement developed under the Covenant. The complaints were

209 HRC, Concluding Observations on Tanzania, 18 August 1998, UN doc. CCPR/C/79/Add.97, para. 17.
210 Van Anken 2003, pp. 131-156.
211 HRC, General Comment No. 31 (2004), para. 12.
212 HRC, *Alzery v Sweden*, 10 November 2006, no. 1416/2005, para. 11.3.

declared inadmissible.[213] In *Truong v Canada* (2003) the State party had provided credible information from the UNHCR that Vietnamese returnees were well treated upon their return. This was not refuted by the author and the complaint was also declared inadmissible.[214] In *A.R.J. v Australia* (1997) and *G.T. v Australia* (1997) the Committee was convinced by the information provided by the State party and the risk assessment it had made; no violation of the Covenant was found.[215] The central role of the State party also becomes clear in cases where the State has concluded that the individual concerned is a refugee or is in need of international asylum protection. It is then the State party's duty to substantiate the fact that such a conclusion is no longer valid.[216] The State party must allow for close scrutiny of the claim.[217]

4.3.2.2a Burden of proof

In general, the Human Rights Committee has considered that the burden of proof cannot rest with the author of a communication alone, especially considering that the author and the State party do not always have equal access to the evidence and that frequently only the State has access to the relevant information.[218] It may be expected that the author will submit detailed information regarding his claim, and will not just refer to reports on human rights conditions in general.[219] Several refoulement complaints have been declared inadmissible because the author has failed to substantiate his claim.[220] In its turn, it is the State party's responsibility to assess the claim and

213 HRC, *Khan v Canada*, 10 August 2006, no. 1302/2004, para. 5.4. HRC, *Daljit Singh v Canada*, 28 April 2006, no. 1315/2004, para. 6.3. HRC, *P.K. v Canada*, 3 April 2007, no. 1234/2003, para. 7.2. HRC, *Soto and Others v Australia*, 28 April 2008, no. 1429/2005, para. 6.3

214 HRC, *Truong v Canada*, 5 May 2003, no. 743/1997, paras 4.3 and 7.5.

215 HRC, *A.R.J. v Australia*, 11 August 1997, no. 692/1996, paras 6.12 and 6.14. HRC, *G.T. v Australia*, 4 December 1997, no. 706/1996, para. 8.4.

216 HRC, *C. v Australia*, 13 November 2002, no. 900/1999, para. 8.5. HRC, *Byahuranga v Denmark*, 9 December 2004, no. 1222/2003, para. 11.3.

217 HRC, *Ahani v Canada*, 25 June 2004, no. 1051/2002, para. 10.6.

218 For example, HRC, *Bleier v Uruguay*, 29 March 1982, no. 30/1978, para. 13.3. HRC, *Conteris v Uruguay*, 17 July 1985, no. 139/1983, para. 7.2. HRC, *Mukong v Cameroon*, 10 August 1994, no. 458/1991, para. 9.2.

219 HRC, *De Lopez v Uruguay*, 29 July 1981, no. 52/1979, paras 11.2-11.3. HRC, *Mukong v Cameroon*, 10 August 1994, para. 9.2. HRC, *Bailey v Jamaica*, 17 September 1999, no. 709/1996 in which a minority of 4 members of the Committee took the view that 'the author has not given specific details of this claim, other than to refer in his submission to a report from Amnesty International based on a 1993 visit and a report called 'Prison Conditions in Jamaica' (1990). These reports ... cover a period during which the author was held at St Catherine's District Prison. Having regard to the Committee's earlier views in which it has found the conditions on death row in St Catherine's District Prison to violate article 10 (1) of the Covenant, and to the failure of the State party to respond to the author's allegations, I am of the view that the author's claim under article 10 (1) is sufficiently substantiated (...) to support a finding of a violation of this provision'.

220 HRC, *M.F. v the Netherlands*, 2 November 1984, no. 173/1984. HRC, *V.M.R.B. v Canada*, 26 July 1988, no. 236/1987. HRC, *Truong v Canada*, 5 May 2003, no. 743/1997. HRC, *Bakhtiyari and Bakhtiyari v Australia*, 6 November 2003, no. 1069/2002. HRC, *Khan v Canada*, 10 August 2006, no. 1302/2004. HRC, *P.K. v Canada*, 3 April 2007, no. 1234/2003.

submit substantive grounds for its position. Thus, the State cannot merely refer to the outcome of the assessment made by its own authorities, but it must comment on the individual's statement.[221] The Human Rights Committee has not made any further comments on the burden of proof in refoulement cases.

4.3.2.3 At what point in time must the risk be assessed?

The assessment of the risk focuses on the necessary and foreseeable consequences of the removal. Thus, an assessment ex nunc is required from the State, and in this the moment of removal is decisive. In *Bakhtiyari and Bakhtiyari v Australia* (2003) the Committee observed:

> 'that as the authors have not been removed from Australia, the issue before the Committee is whether such removal if implemented at the present time would entail a real risk of treatment contrary to article 7 as a consequence'.[222]

Every time a State wants to remove a person it must evaluate the risk existing at that time.[223] Consequently, information which comes to light after the initial assessment must also be taken into account. Arguably, the moment of removal will remain decisive when removal has already taken place and the case comes before a court. However, no guidelines have been adopted by the Committee in this regard. Therefore, it remains an open question how events which come to light or have occurred since the removal should be assessed.

4.3.2.4 The role of the Human Rights Committee in the risk assessment

The assessment of the risk is the responsibility of the State party. In section 4.3.2.2 I have already outlined the central role of the State party in assessing the facts and applying the law in cases involving refoulement. In most cases the Committee relied fully on the assessment made by the State party. The Human Rights Committee allows itself only a limited role in the assessment of facts and evidence. In principle, the Committee allows itself a prominent role only when there is bad faith, abuse of power or other arbitrariness on the part of the State.[224] This principle is, however, not always strictly applied by the Committee. In *Alzery v Sweden* (2006) the Committee relied on the risk assessment made by the State party, and subsequently assessed the diplomatic assurances provided by the complainant's country of origin (Egypt) re-

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221 HRC, *Byahuranga v Denmark*, 9 December 2004, no. 1222/2003, para. 11.3.

222 HRC, *Bakhtiyari and Bakhtiyari v Australia*, 6 November 2003, no. 1069/2002, para. 8.4.

223 In fact, in cases where asylum has been denied and local remedies have been exhausted but no expulsion order has been issued, it is, according to the Committee, not yet inevitable that a deportation will take place; accordingly, such a claim will be declared inadmissible: HRC, *Khadje v the Netherlands*, 15 November 2006, no. 1438/2005, para. 6.3.

224 HRC, *Maroufidou v Sweden*, 8 April 1981, no. 58/1979, para. 10.1. HRC, *Ahani v Canada*, 15 June 2004, no. 1051/2002, para. 10.5. HRC, *P.K. v Canada*, 3 April 2007, no. 1234/2003, para. 7.3.

garding his safety. While there was no bad faith, abuse of power or arbitrariness on the part of Sweden, the Committee was not convinced about the effect of the assurances on the existing level of risk. Thus, the Committee allowed itself an assessment on this matter.[225]

4.3.2.5 Protection from the country of origin (national protection)

In general, when the country of origin of the individual concerned is able and willing to provide adequate protection, so that the individual will be neither subjected to torture or other forms of proscribed ill-treatment nor arbitrarily deprived of his life, no obligation will exist under the prohibition on refoulement. The issue of national protection in general, including the question who can be regarded as actors of protection, has not been addressed by the Human Rights Committee. In general, as outlined in section 4.2.2.2, the Committee has accepted the possibility of military forces of foreign States and UN peacekeeping forces being responsible for guaranteeing the rights of the Covenant to people within their effective control. Thus, such forces are deemed to be able to provide effective protection. Similarly, the Human Rights Committee has held the United Nations Interim Administration Mission in Kosovo to be responsible for the human rights situation in that part of Serbia.[226] The specific issue of the availability of an internal protection alternative has had only very minimal attention from the Committee. Far more attention was given by the Committee to the issue of diplomatic assurances. Below I will first briefly discuss the issue of an internal protection alternative, followed by analyses of the Committee's views regarding diplomatic assurances.

4.3.2.5a Internal protection alternative

A specific form of national protection is the concept of an internal protection alternative. This means that the individual can be removed to an area in his country of origin, not being his original area of residence, where he is safe. In two individual cases Canada referred to the possibility of an internal protection alternative for the complainant in the country of origin. The Committee did not address this issue specifically. Both cases were declared inadmissible because the claim had been insufficiently substantiated.[227]

In its Concluding Observations on Norway (2006) the Committee noted with concern that:

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225 HRC, *Alzery v Sweden*, 10 November 2006, no. 1416/2005, paras 11.3-11.5.

226 HRC, Concluding Observations on Kosovo (Serbia), 14 August 2006, UN doc. CCPR/C/UNK/CO/1. The responsibility of the United Nations Interim Administration in Kosovo for the protection and promotion of human rights in Kosovo is based on the UN Security Council resolution 1244, 10 June 1999, UN doc. S/RES/1244 (1999), para. 11 (j).

227 HRC, *Daljit Singh v Canada*, 28 April 2006, no. 1315/2004, para. 4.8. HRC, *P.K. v Canada*, 3 April 2007, no. 1234/2003, para. 6.3.

> 'asylum requests may be rejected on the basis of the assumption that the persons concerned can find protection in a different part of their country of origin even in cases, where information, including recommendations by UNHCR, is available indicating that such alternatives might not be available in the specific case or country of origin'.[228]

According to the Committee:

> 'The State party should apply the so-called internal relocation alternative only in cases where such alternative provides full protection for the human rights of the individual'.[229]

The Committee seemed to consider that an internal protection alternative must be actually available to the individual concerned. Arguably, he must be able to travel to the area, have access to it, and be able to remain in it. Moreover, it seems that the individual must be guaranteed full protection of the human rights listed in the Covenant. Whether or not this conclusion will hold water is difficult to determine. The concept of the internal protection alternative has had little attention from the Committee. Therefore, caution should be used in drawing conclusions on the Committee's views regarding the interpretation and application of an internal protection alternative.

4.3.2.5b Diplomatic assurances to guarantee safety

Assurances regarding a person's treatment and safety play a prominent role in extradition cases, in particular regarding the death penalty. Notably, the failure to ensure that the death penalty will not be carried out when there is a real risk of the author being sentenced to death will be in breach of the prohibition on refoulement under Article 6 ICCPR.[230]

Assurances to guarantee a person's safety can also be sought outside the context of extradition. In *G.T. v Australia* (1997) Australia had received assurances from the Malaysian Government that:

> 'any Malaysian national who had committed and being sentenced overseas on the charge of any offence committed overseas will not be prosecuted upon his return to Malaysia for a charge or charges relating to his offence committed overseas. As such, the question of double jeopardy will not arise. Nevertheless, a Malaysian national may be charged by the Malaysian authorities due to other offences that he might had committed in Malaysia'.[231]

Although it was comforting for the author to know that the question of double jeopardy might not arise, he could still be charged with other offences: for example, possession of heroin prior to his journey to Australia, a criminal offence carrying the death penalty

228 HRC, Concluding Observations on Norway, 25 April 2006, UN doc. CCPR/C/NOR/CO/5, para. 11.
229 Ibid., para. 11.
230 HRC, *Judge v Canada*, 20 October 2003, no. 829/1998, para. 10.5.
231 HRC, *G.T. v Australia*, 4 December 1997, no. 706/1996, para. 4.2.

under Malaysian law.[232] The Committee concluded that the assurances given by the Malaysian Government did not as such preclude the possibility of the author's prosecution. However, nothing in the information before the Committee pointed to any intention on the part of the Malaysian authorities to prosecute the author. In addition, information provided by Australia indicated that in similar cases no prosecution had occurred.[233]

The cases described above all concern assurances sought in the context of imposing or carrying out legal sentences. In such cases the assurances can have a clear influence on the expected treatment and can have the obvious result of negating a risk of proscribed ill-treatment. This is much more complicated in cases not involving legal sentences, but the risk of subjection to extra-judicial treatment prohibited by Articles 6 and 7 ICCPR; i.e. in cases of the expulsion of asylum-seekers. According to the Human Rights Committee, diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of the existence of a real risk of proscribed ill-treatment.[234] In order for diplomatic assurances to be effective they must sufficiently reduce the level of risk to avoid breaching the prohibition on refoulement.[235] In its Concluding Observations on Sweden in 2002 the Human Rights Committee expressed its concerns regarding security requirements following the terrorist attacks on the United States of America on 11 September 2001 and the expulsion of asylum-seekers suspected of terrorism. The Committee wrote that it is:

> 'concerned at cases of expulsion of asylum-seekers suspected of terrorism to their countries of origin. Despite guarantees that their human rights would be respected, those countries could pose risks to the personal safety and lives of the persons expelled, especially in the absence of sufficiently serious efforts to monitor the implementation of those guarantees (two visits by the embassy in three months, the first only some five weeks after the return and under the supervision of the detaining authorities)'.[236]

232 This argument was raised by the author of the claim: HRC, *G.T. v Australia*, 4 December 1997, no. 706/1996, para. 6.1.

233 HRC, *G.T. v Australia*, 4 December 1997, no. 706/1996, para. 8.4. Committee members Klein and Kretzmer argued in their dissenting opinion that not much weight should be ascribed to the assurances given by the Malaysian Government because it remained wide open to the Government to charge the author for an offence committed in Malaysia: HRC, *G.T. v Australia*, 4 December 1997, no. 706/1996, Individual opinion by Committee members Klein and Kretzmer, para. 4.

234 HRC, *Alzery v Sweden*, 10 November 2006, no. 1416/2005, para. 11.3.

235 Ibid., para. 11.4.

236 HRC, Concluding Observations on Sweden, 24 April 2002, UN doc. CCPR/CO/74/SWE, para. 12. See also HRC, Concluding Observations on New Zealand, 7 August 2002, UN doc. CCPR/CO/75/NZL, para.11.

Therefore, the Committee recommended:

> 'when a State party expels a person to another State on the basis of assurances as to that person's treatment by the receiving State, it must institute credible mechanisms for ensuring compliance of the receiving State with these assurances from the moment of expulsion'.[237]

In 2006, in its Concluding Observations on the United States of America, the Human Rights Committee again expressed its concerns about the use of diplomatic assurances. According to the Committee:

> 'The State party should exercise the utmost care in the use of diplomatic assurances and adopt clear and transparent procedures with adequate judicial mechanisms to monitor scrupulously and vigorously the fate of the affected individuals'.[238]

Furthermore, the Committee stated that:

> 'The State party should further recognise that the more systematic the practice of torture or cruel, inhuman or degrading treatment or punishment, the less likely it will be that a real risk of such treatment can be avoided by such assurances, however stringent any agreed follow-up procedures may be'.[239]

In Alzery v Sweden (2006) the Committee emphasised the need, for diplomatic assurances to be effective, that they include arrangements providing for effective implementation and mechanisms enabling the monitoring of their enforcement.[240] In this case the diplomatic assurances provided by Egypt to Sweden were, according to the Committee, insufficient to reduce the level of risk to avoid breaching the prohibition on refoulement.[241] The written assurances provided by the Egyptian authorities promised Alzery a fair trial; they promised that he would not be subjected to torture or other forms of proscribed ill-treatment, that he would not be sentenced to death, or that such a sentence would not be executed if it had already been imposed, and that his wife and children would in no way be persecuted or harassed.[242] Furthermore, it appeared that Sweden would be allowed to be present at any new trials taking place in Egypt.[243] The Committee did not address the contents of the assurances,

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237 HRC, Concluding Observations on Sweden, 24 April 2002, UN doc. CCPR/CO/74/SWE, para. 12(b).

238 HRC, Concluding Observations on the United States of America, 18 December 2006, UN doc. CCPR/C/USA/CO/3/Rev.1, para. 16. See also Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, 30 July 2008, UN doc. CCPR/C/GBR/CO/6, para. 12. HRC, Concluding Observations on France, 31 July 2008, UN doc. CCPR/C/FRA/CO/4, para. 20.

239 HRC, Concluding Observations on the United States of America, 18 December 2006, UN doc. CCPR/C/USA/CO/3/Rev.1, para. 16. See also HRC, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, 30 July 2008, UN doc. CCPR/C/GBR/CO/6, para. 12. HRC, Concluding Observations on France, 31 July 2008, UN doc. CCPR/C/FRA/CO/4, para. 20.

240 HRC, *Alzery v Sweden*, 10 November 2006, no. 1416/2005, para. 11.5.

241 Ibid., para. 11.4.

242 Ibid., para. 3.6.

243 Ibid., para. 4.10.

but focussed on the monitoring by the Swedish authorities of the implementation of the assurances. According to the Committee, the visits by the Swedish ambassador and his staff commenced five weeks after the complainant's return to Egypt, thereby neglecting a period of five weeks of possible exposure to ill-treatment. Furthermore, Sweden had insisted neither on private access to the complainant while in detention nor on the inclusion of appropriate medical and forensic expert evidence, even after substantial allegations of ill-treatment emerged.[244]

To conclude, the Human Rights Committee accepts the possibility of diplomatic assurances guaranteeing a person's safety upon removal or at least reducing the level of risk to avoid breaching the prohibition on refoulement. However, the Committee is concerned about the actual effect on a person's safety, in particular with regard to people suspected of terrorism and in relation to countries in which systematic practices of torture or other forms of proscribed ill-treatment occur. Moreover, it is essential to include arrangements for the effective implementation of assurances and mechanisms for the immediate and effective monitoring of the functioning of the assurances.

4.3.3 The absolute character of the prohibition on refoulement

Articles 6(1) and 7 ICCPR are formulated in absolute terms. The text of these provisions does not allow any exceptions or limitations for reasons such as public order, public health or national security. Furthermore, in times of public emergency threatening the life of the nation Articles 6 and 7 ICCPR cannot be derogated from.[245] The absolute character of Article 7 has been acknowledged by the Human Rights Committee in its General Comment Number 20. According to the Committee no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 ICCPR for any reason.[246] The non-derogability of Articles 6 and 7 was again confirmed by the Human Rights Committee in General Comment Number 29 concerning States of Emergency (2001).[247]

The absolute character of Articles 6 and 7 prohibits, for example, authorisation under national law to use moderate physical and psychological pressure while interrogating suspected terrorists. Israel considered such techniques to be crucial to the protection of life. However, according to the Human Rights Committee, these techniques amount to a violation of Article 7 in any circumstances. Stressing the non-derogable character of Article 7, the Committee considered that no justification for

244 Ibid., para. 11.5.
245 Article 4(2) of the ICCPR.
246 HRC, General Comment No. 20 (1992), para. 3.
247 HRC, General Comment No. 29 (2001), para. 7.

torture or other cruel, inhuman or degrading treatment or punishment could be made.[248] Therefore, the principle of proportionality could not justify the use of inhumane treatment. Likewise, economic circumstances or budgetary considerations can also not be a justification for appalling prison conditions which amount to treatment prohibited by Article 7 or 10 ICCPR.[249]

In relation to the prohibition on refoulement its absolute character was acknowledged by the Human Rights Committee in various views. For example, in its Concluding Observations on Canada in 1999 the Committee expressed its concerns:

> 'that Canada takes the position that compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture or cruel, inhuman or degrading treatment. The Committee … recommends that Canada revise this policy in order to comply with the requirements of article 7 and to meet its obligation never to expel, extradite, deport or otherwise remove a person to a place where treatment or punishment that is contrary to article 7 is a substantial risk'.[250]

And in its Concluding Observations on Portugal in 2003, with reference to asylum seekers who were excluded from refugee status under Article 1F of the Refugee Convention, the Committee considered that:

> 'The State party should ensure that persons whose applications for asylum are declared inadmissible are not forcibly returned to countries where there are substantial grounds for

248 HRC, Concluding Comment on Israel, 18 August 1998, UN doc. CCPR/C/79/Add.93, para. 19: 'The Committee is deeply concerned that, under the guidelines for the conduct of interrogation of suspected terrorists authority may be given to the security service to use "moderate physical pressure" to obtain information considered crucial to the "protection of life". The Committee notes that the part of the report of the Landau Commission that lists and describes authorized methods of applying pressure remains classified. The Committee notes also the admission by the State party delegation that the methods of handcuffing, hooding, shaking and sleep deprivation have been and continue to be used as interrogation techniques, either alone or in combination. The Committee is of the view that the guidelines can give rise to abuse and that the use of these methods constitutes a violation of article 7 of the Covenant in any circumstances. The Committee stresses that article 7 of the Covenant is a non-derogable prohibition of torture and all forms of cruel, inhuman or degrading treatment or punishment'. This was confirmed by the Committee in its Concluding Observations on Israel, 21 August 2003, UN doc. CCPR/CO/78/ISR, para. 18. See also HRC, Concluding Observations on Libyan Arab Jamahiriya, 6 November 1998, CCPR/C/79/Add.101, para. 11: 'the Committee recalls that flogging, which is recognised in the Libyan Arab Jamahiriya as a penalty for criminal offences, is incompatible with article 7 of the Covenant. The imposition of such punishment should cease immediately and all laws and regulations providing for its imposition should be repealed without delay'. Joseph, Schultz & Castan 2000, pp. 151 and 170.

249 HRC, *Mukong v Cameroon*, 10 August 1994, no. 458/1991, para. 9.3.

250 HRC, Concluding Observations on Canada, 7 April 1999, UN doc. CCPR/C/79/Add.105, para. 13 and repeated in its Concluding Observations on Canada, 20 April 2006, UN doc. CCPR/C/CAN/CO/5, para. 15. See also HRC, Concluding Observations on Lithuania, 4 May 2004, UN doc. CCPR/CO/80/LTU, para. 7. HRC, Concluding Observations on Morocco, 1 December 2004, UN doc. CCPR/CO/82/MAR, para. 13. HRC, Concluding Observations on Yemen, 9 August 2005, UN doc. CCPR/CO/84/YEM, para. 13.

believing that they would be in danger of being subjected to arbitrary deprivation of life or to torture or ill-treatment (…)'.[251]

In *Ahani v Canada* (2004) the Committee reiterated the absolute character of Article 7 and the prohibition on refoulement it entails. The Committee did this in response to a judgment of the Supreme Court of Canada in which the Court had stated that deportation of an individual where a substantial risk of torture had been found to exist was not necessarily precluded in all circumstances; the Committee made it clear that it was.[252] In *C. v Australia* (2002) the author had been convicted of aggravated burglary and threats to kill, for which he was sentenced to three-and-a-half years' imprisonment. For this reason Australia wanted to deport him in spite of his refugee status. The Committee remained silent about the author's criminal conviction and concluded that he could not be deported because he had a real risk of being subjected to proscribed ill-treatment.[253] In two other individual cases involving refoulement, the Human Rights Committee remained silent about the fact that the authors had been convicted of various crimes and posed a threat to the State party's public order and/or national security; albeit that in these cases expulsion would not be in breach of the prohibition on refoulement.[254] Clearly, criminal conviction is not a material consideration for the Committee with regard to the prohibition on refoulement.

4.4 The character and contents of States' obligations deriving from the prohibition on refoulement under Articles 6 and 7 of the ICCPR

In general, the rights of the Covenant are effectively guaranteed by a combination of State forbearance (i.e. negative obligations) and the State's duty to perform (i.e. positive obligations).[255] According to Article 2(1) ICCPR every State party undertakes to respect and to ensure the rights and freedoms of the Covenant. While the language is general, the word 'respect' indicates a negative obligation, i.e. States parties must refrain from taking action, thereby restricting the exercise of the rights of the Covenant where such is not expressly allowed.[256] The word 'ensure' on the other hand implies a positive obligation by the State, i.e. to take whatever measures are necessary to enable individuals to enjoy or exercise the rights guaranteed in the Covenant.[257] According to the Human Rights Committee Article 2(1) includes the

251 HRC, Concluding Observations on Portugal, 5 July 2003, UN doc. CCPR/CO/78/PRT, para. 12.
252 HRC, *Ahani v Canada*, 15 June 2004, no. 1051/2002, para. 10.10. The Judgment of the Supreme Court of Canada to which the Committee referred in this case was *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, 11 January 2002.
253 HRC, *C. v Australia*, 13 November 2002, no. 900/1999.
254 HRC, *A.R.J. v Australia*, 11 August 1997, no. 692/1996 (drug-related offences). HRC, *G.T. v Australia*, 4 December 1997, no. 706/1996 (drug-related offences).
255 Nowak 1993, p. xviii.
256 Ibid., p. 36.
257 Buergenthal 1981, p. 77. Nowak 1993, pp. 36-37.

requirement for States parties to respect and ensure the prohibition on refoulement developed under the Covenant, in particular under Articles 6 and 7 ICCPR.[258] The character of the State's obligations under the ICCPR to guarantee protection from refoulement are both negative and positive in character. In section 4.4.1 I will first discuss the various negative obligations. In section 4.4.2 I will discuss the positive obligations that can be derived from the prohibition on refoulement developed under the Covenant.

4.4.1 Negative obligations

4.4.1.1 Prohibition on removal

The prohibition on refoulement developed under Articles 6 and 7 ICCPR primarily entails a negative obligation on States parties, whereby they are prohibited from forcibly removing a person to an area where he runs a risk of proscribed ill-treatment. It is irrelevant in what legal setting the removal takes place. The prohibition on refoulement covers all forms of forced removal, including extradition of a criminal, expulsion or deportation of an alien.[259] The prohibition on forcibly removing a person continues to exist for as long as a real risk of subjection to harm proscribed by Articles 6 and 7 ICCPR exists.[260]

The Human Rights Committee has used various formulations to describe the area removal to which is prohibited. In General Comment Number 20 (1992) the Committee refers to 'another country'.[261] In *Kindler v Canada* (1993) the Committee refers to 'another jurisdiction'.[262] In its Concluding Observations on Canada (1999) the Committee refers to 'a place'.[263] In its General Comment Number 31 (2004) the Committee refers to 'any country';[264] and in its Concluding Observations to the Hong Kong Special Administrative Region reference is made to 'locations'.[265] Clearly, it does not matter to the Human Rights Committee what the legal status, or any other qualification, is of the area to where the individual is removed.

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258 HRC, General Comment No. 31 (2004), para. 12.

259 HRC, General Comment No. 20 (1992), para. 9 and HRC, General Comment No. 31 (2004), para. 12. See also HRC, Concluding Observations of the Human Rights Committee: United States of America, 18 December 2006, UN doc. CCPR/C/USA/CO/3/Rev.1, para. 16: removal is prohibited 'by way of inter alia, their transfer, rendition, extradition, expulsion or refoulement'.

260 This is implied by HRC, *C. v Australia*, 13 November 2002, no. 900/1999, para. 8.5, in which the Committee attached weight to the fact that the author had been granted refugee status and that the State party had not established that the current circumstances in the country of origin were such that the grant of refugee status was no longer valid.

261 HRC, General Comment No. 20 (1992), para. 9.

262 HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, para. 13.2.

263 HRC, Concluding Observations on Canada, 7 April 1999, UN doc. CCPR/C/79/Add.105, para. 13.

264 HRC, General Comment No. 31 (2004), para. 12.

265 HRC, Concluding Observations on the Hong Kong Special Administrative Region, 21 April 2006, UN doc. CCPR/C/HKG/CO/2, para. 10.

4.4.1.2 Prohibition on extradition

Extradition is explicitly prohibited by the Committee where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 ICCPR.[266] In several cases in the early 1990s it was argued by the State party that extradition was beyond the scope of the Covenant.[267] Here reference was made to the travaux préparatoires, revealing that the drafters of the Covenant had specifically considered and rejected a proposal to deal with extradition in the Covenant.[268] The Human Rights Committee declared the complaint admissible and considered that it raised new and complex questions with regard to the compatibility of the Covenant with extradition to face capital punishment. Importantly, the Committee noted that the author did not claim that extradition as such would be in violation of the Covenant, but rather that the circumstances related to the effects of extradition.[269] It is now well established that extradition falls within the scope of the Covenant when there is a real risk that the individual's rights under the Covenant will be violated upon his extradition.[270]

In cases where the Covenant prohibits extradition on the basis of the prohibition on refoulement and an extradition treaty may oblige a State party to extradite the person concerned a conflict of treaty obligations may arise. This issue was addressed in general in section 1.3.2.6. A conflict of treaty obligations in this regard will arise only when the prohibition on refoulement prohibits removal to areas where there is a real risk of harm other than harm which amounts to torture. The issue of a conflict of treaty obligations has been addressed to some extent by the Committee. For example, in *Kindler v Canada* (1993) the Committee referred to Article 6 of the Canada–United States Extradition Treaty which says that Canada may seek assurances of the USA that a capital sentence shall not be imposed. When such assurances are not received Canada may refuse extradition.[271] The Canada–USA Extradition Treaty provided an Article resolving a possible conflict of treaty obligations. In the absence of such a treaty Article, or an Article prioritising the prohibition on refoulement developed under the ICCPR, other rules of international treaty law as outlined in section 1.3.2.6 apply. The Human Rights Committee clearly prioritises the right to life and the prohibition on the imposition of and subjection to the death penalty under Article 6(1) ICCPR in the context of the prohibition on refoulement over obligations to extradite a person in cases in which the State party has abolished the death penalty

266 HRC, General Comment No. 31 (2004), para. 12.

267 HRC, *Torres v Finland*, 5 April 1990, no. 291/1988, para. 4.1. HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, paras 4.4 and 9.2. HRC, *Chitat Ng v Canada*, 7 January 1994, no. 469/1991, paras 4.4 and 9.2. HRC, *Cox v Canada*, 9 December 1994, no. 539/1993, para. 5.1.

268 HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, para. 9.2. HRC, *Chitat Ng v Canada*, 7 January 1994, no. 469/1991, para. 9.2.

269 HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, para. 6.1.

270 In *Judge v Canada* (2003) the State party did not question the applicability of the Covenant in this extradition case: HRC, *Judge v Canada*, 20 October 2003, no. 829/1998.

271 HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, para. 6.7.

and there is no assurance that the death penalty will not be carried out or when the death penalty is carried out in an inhumane manner as proscribed by Article 7 ICCPR.[272]

4.4.1.3 Prohibition on indirect refoulement

The prohibition on indirect refoulement was acknowledged by the Human Rights Committee in its General Comment Number 31 (2004), in which it stated that the prohibition on refoulement applied both in situations where there was a real risk 'in the country to which the removal is to be effected or in any country to which the person may subsequently be removed'.[273] The Human Rights Committee has provided no guidelines on the interpretation and application of the prohibition on indirect refoulement. In *Bakhtiyari and Bakhtiyari v Australia* (2003) the authors claimed that when deported by Australia to Pakistan they would be returned from Pakistan to Afghanistan. The Committee did not address this issue; the claim was found to be unsubstantiated and was declared inadmissible.[274]

4.4.1.4 Prohibition on rejection at the frontier and beyond

As I have already outlined in section 4.2.3 the prohibition on refoulement developed under the Covenant is applicable to individuals who are under the actual control of the State, including those who are at the State's factual border. In general, States are prohibited from exposing an individual to a risk of torture and other forms of proscribed ill-treatment. Furthermore, the Human Rights Committee has acknowledged that in certain circumstances States are prohibited from denying an alien entry to their territory.[275] Arguably, when rejection at the frontier results in the individual being exposed to a risk of proscribed ill-treatment his rejection is prohibited.[276] In its Concluding Observations on France (1997) the Human Rights Committee expressed its concerns 'at the reported instances of asylum seekers not being allowed to disembark from ships at French ports'.[277] The logical consequence would then be for the State

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272 HRC, *Judge v Canada*, 20 October 2003, no. 829/1998, para. 10.6 on the imposition of the death penalty. HRC, *Chitat Ng v Canada*, 7 January 1994, no. 469/1991, on the inhumane execution of the death penalty.

273 HRC, General Comment No. 31 (2004), para. 12.

274 HRC, *Bakhtiyari and Bakhtiyari v Australia*, 6 November 2003, no. 1069/2002, paras 3.1. and 8.4.

275 HRC, General Comment No. 15 (1986), para. 5.

276 See also HRC, Concluding Observations on Lithuania, 4 May 2004, UN doc. CCPR/CO/80/LTU, para. 15, in which the Committee stated that '[t]he State party should take measures to secure access for all asylum-seekers … to the domestic asylum procedure, in particular when applications for asylum are made at the border'. HRC, Concluding Observations on Italy, 24 April 2006, UN doc. CCPR/C/ITA/CO/5, para. 15, in which the Committee expressed its concern 'that some asylum-seekers may have been denied the right to apply for asylum'.

277 HRC, Concluding Observations on France, 4 August 1997, UN doc. CCPR/C/79/Add.80, para. 20; interestingly, the Committee considered such practices to be incompatible with Article 12 (2) ICCPR, i.e. the right to leave a country including one's own.

to allow the individual to enter its territory. The obligation on a State to admit an alien in the context of refoulement is further discussed in section 4.4.2.1.

The prohibition on exposing an individual to a risk of proscribed ill-treatment is arguably also applicable in situations further away from its territory, when the State has actual control over the individual and his right to be protected from refoulement. Unfortunately, in none of the individual cases involving the prohibition on refoulement did the Human Rights Committee have to deal with a person claiming protection at the – de facto – border of a State party or even further away from its territory.

4.4.2 Positive obligations

4.4.2.1 Obligation to admit (a right to enter and remain)

According to the Human Rights Committee:

> 'The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise'.[278]

Arguably, effective implementation of the prohibition on refoulement may oblige States parties to admit the individual concerned to their territory and allow him to remain there for as long as the prohibition on refoulement applies. Not only will a State then be obliged to guarantee effective protection from refoulement, but the State will also be obliged to respect and to ensure the other rights of the Covenant provided they apply to all and are not restricted to the legal status of the person concerned.

In the long run States may be obliged to promote the further integration of aliens lawfully residing in its country. This is implied by the Committee's Concluding Observations on Latvia (2003) in which it expressed its concerns about:

> 'the large proportion of non-citizens in the State party, who by law are treated neither as foreigners nor as stateless persons but as a distinct category of persons with longstanding and effective ties to Latvia'.[279]

Obligations regarding integration for aliens who have resided in a State party for a considerable period of time are further implied by the Committee's views in *Stewart v Canada* (1996) and *Canepa v Canada* (1997). The question in these cases concerned whether a person who enters a given State under that State's immigration laws, and subject to the conditions of those laws, can regard that State as his own country, as

278 HRC, General Comment No. 15 (1986), para. 5.
279 HRC, Concluding Observations on Latvia, 6 November 2003, UN doc. CCPR/CO/79/LVA, para. 18.

mentioned in Article 12(4) of the ICCPR, when he has not acquired its nationality and continues to retain the nationality of his country of origin. The Committee considered that 'the answer could possibly be positive were the country of immigration to place unreasonable impediments on the acquiring of nationality by new immigrants'.[280] Thus, a State may not place unreasonable impediments on the acquiring of nationality on aliens who have entered and remain in the territory of a State party lawfully.

In relation to refugees the Human Rights Committee has expressed its concern, for example regarding Panama, that many refugees live in precarious economic and legal situations. Accordingly, the Committee has stated that the 'State party should adopt legislation that will allow refugees to enjoy their rights under the Covenant'.[281] The question whether or not in due time, when the risk continues to exist and the individual continues to remain within the territory of the State party, the State will have a positive obligation to issue a residence permit has not been addressed by the Committee.

4.4.2.2 Obligations after removal

Because States parties to the Covenant have a right to control the entry, residence and expulsion of aliens no obligation will arguably exist after the State has removed an alien, unless the removal may give rise to issues of refoulement developed under the Covenant. If such issues do arise and the removal is in violation of the State party's obligations under the prohibition on refoulement the State is required to make reparation in accordance with Article 2(3) of the ICCPR.[282] In general, reparation entails appropriate compensation, but may include other forms of reparation, such as restitution, rehabilitation, measures of satisfaction, public apologies, public memorials, guarantees of non-repetition, changes in relevant laws and practices and the bringing to justice of the perpetrators of human rights violations.[283] Arguably, as a minimum the State should acknowledge that the removal was in breach of its obligations under the prohibition on refoulement. But more may be required. If the removal is in breach of the prohibition on refoulement but the individual concerned has not yet been subjected to the harm from which he has a right to be protected a State should do whatever is possible to prevent the individual from being subjected to irreparable harm and to provide appropriate reparation, in the form of compensation and rehabilitation, if he is.[284] In three individual cases the Committee found a violation of the prohibition on refoulement after the removal of the individual concerned. In *Chitat Ng v*

280 HRC, *Stewart v Canada*, 16 December 1996, no. 538/1993, para. 12.5. HRC, *Canepa v Canada*, 20 June 1997, no. 558/1993, para. 11.3. The HRC also noted that 'while in the drafting of Article 12, paragraph 4, of the Covenant the term "country of nationality" was rejected, so was the suggestion to refer to the country of one's permanent home'.

281 HRC, Concluding Observations on Panama, 17 April 2008, UN doc. CCPR/C/PAN/CO/3, para. 14.

282 HRC, General Comment No. 31 (2004), para. 16, with reference to Article 2(3) of the ICCPR.

283 HRC, General Comment No. 31 (2004), para. 16.

284 Boeles 1997, pp. 110-111.

Canada (1994) the author had been extradited before the Committee held that his extradition was in breach of Article 7 ICCPR. The Committee requested:

> 'the State party to make such representations as might still be possible to avoid the imposition of the death penalty and appeals to the State party to ensure that a similar situation does not arise in the future'.[285]

In *Ahani v Canada* (2004) the Committee explicitly stated that, since the expulsion of the author was in violation of the prohibition on refoulement, the State party was under the obligation:

> '(a) to make reparation to the author if it comes to light that torture was in fact suffered subsequent to deportation, and (b) to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party'.[286]

In *Alzery v Sweden* (2006) the Committee concluded that the State party was under an obligation to provide an effective remedy, including compensation.[287] No further statements were made by the Committee regarding any additional obligations on Sweden. Perhaps it was taken into account that Alzery had been released in October 2003 without charge; that he had completed university studies, that he was married and that he had built a small farm.[288]

The Committee is not given any explicit power to enforce its views. Article 5(4) of the First Optional Protocol merely states that 'the Committee shall forward its views to the State Party concerned and to the individual'. In general, in cases where the Committee has found a violation of the Covenant, the Committee expresses its wish to receive information from the State party about the measures taken to give effect to its views and to request the State party to publish them.[289] In accordance with its Rules of Procedure the Committee shall designate a Special Rapporteur to follow up the Committee's views and for the purpose of ascertaining the measures taken by States parties to give effect to the views.[290]

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285 HRC, *Chitat Ng v Canada*, 7 January 1994, no. 469/1991, para. 18.

286 HRC, *Ahani v Canada*, 15 June 2004, no. 1051/2002, para. 12.

287 HRC, *Alzery v Sweden*, 10 November 2006, no. 1416/2005, para. 13. Alzery was granted compensation by Sweden for his unlawful expulsion in the sum of Skr 3 million (approximately US$502,000). He remains in Egypt. See Associated Press, 'Sweden pays $502,000 in compensation to exonerated terror suspect', *Jerusalem Post,* Online edition 4 July 2008 (<www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1214726210102>).

288 HRC, *Alzery v Sweden*, 10 November 2006, no. 1416/2005, para. 3.18.

289 For example, HRC, *C. v Australia*, 13 November 2002, no. 900/1999, para. 11. HRC, *Judge v Canada*, 20 October 2003, no. 829/1998, para. 13.

290 Rule 101 of the Rules of Procedure of the Human Rights Committee, 22 September 2005, UN doc. CCPR/C/3/Rev.8.

4.4.2.3 Obligations to install procedural safeguards

4.4.2.3a The initial determination procedure

In general, States parties are obliged to respect and ensure the rights of the Covenant. This includes the right to be protected from refoulement and entails the obligation on States parties to ensure that each claim for protection is individually processed, irrespective of the individual's country of origin.[291] According to the Human Rights Committee States parties have an obligation to allow asylum seekers to apply for asylum and to enter the domestic asylum procedure, even where large numbers arrive in the State.[292] People without documents must also be allowed to apply for asylum.[293] Furthermore, according to the Committee, asylum seekers should have access to early and free legal aid and to translators.[294]

With respect to the institutionalisation and organisation of the initial determination procedure the Human Rights Committee has provided little guidance. In general, individuals are bound by procedural rules such as filing deadlines, provided that the restrictions are reasonable.[295] According to the Human Rights Committee 'all individuals subject to deportation orders have an adequate period to prepare an asylum application'.[296] Some concerns have been raised by the Committee regarding the time constraints in initial determination procedures. In its Concluding Observations on Latvia (2003) the Committee expressed its concerns about the short time limits under the accelerated procedure, in particular for the submission of an appeal.[297] Furthermore, in its Concluding Observations on Russia (2003) the Committee expressed its concerns about the long delay in the processing of asylum claims – more than two years – before an individual is able to formally initiate the application procedure. According to the Committee timely access to a determination procedure must be ensured.[298]

The Human Rights Committee has given special consideration to women and children who are seeking protection from refoulement. In its Concluding Observations on Austria (2007) the Human Rights Committee noted with concern that asylum-seeking women were not automatically interviewed by female asylum officers and

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291 HRC, Concluding Observations on Estonia, 15 April 2003, UN doc. CCPR/CO/77/EST, para. 13. HRC, Concluding Observations on Italy, 24 April 2006, UN doc. CCPR/C/ITA/CO/5, para. 15.

292 HRC, Concluding Observations on Italy, 24 April 2006, UN doc. CCPR/C/ITA/CO/5, para. 15. HRC, Concluding Observations on Lithuania, 4 May 2004, UN doc. CCPR/CO/80/LTU, para. 15.

293 HRC, Concluding Observations on France, 31 July 2008, UN doc. CCPR/C/FRA/CO/4, para. 20.

294 Ibid. HRC, Concluding Observations on Ireland, 30 July 2008, UN doc. CCPR/C/IRL/CO/3, para. 19, according to which the State party should 'ensure that asylum-seekers have full access to early and free legal representation'. See also HRC, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, 30 July 2008, UN doc. CCPR/C/GBR/CO/6, para. 21.

295 HRC, *Bhullar v Canada*, 13 November 2006, no. 982/2001, para. 7.3.

296 HRC, Concluding Observations on France, 31 July 2008, UN doc. CCPR/C/FRA/CO/4, para. 20.

297 HRC, Concluding Observations on Latvia, 6 November 2003, UN doc. CCPR/CO/79/LVA, para. 9.

298 HRC, Concluding Observations on Russian Federation, 6 November 2003, UN doc. CCPR/CO/79/RUS, para. 25.

assisted by female interpreters, and that children were treated in the same way as adults. Accordingly, the Committee considered that:

> 'the State party should adopt a gender- and age-sensitive approach to refugee status determination by automatically assigning female interviewers and interpreters to asylum-seeking women and by issuing guidelines for the first instance asylum officers on the treatment of separated children'.[299]

With regard to unaccompanied children claiming protection, their best interests must be ensured and there specific needs must be addressed, for example by appointing a legal guardian.[300]

4.4.2.3b Appeal procedures: effective legal remedies offered by Article 2(3) of the ICCPR

If a claim for protection from refoulement has been assessed and, according to the State, no substantial grounds exist for believing that there is a real risk of irreparable harm, the individual has a right to challenge the decision. The right to appeal exists when the forced removal is inevitable.[301] In accordance with Article 2(3) ICCPR States parties undertake to ensure that a 'person whose rights or freedoms as herein recognised are violated shall have an effective remedy'.[302] There should be an opportunity for effective, independent review of the decision to expel.[303] In addition, States parties shall undertake that such a remedy is:

> 'determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy'.[304]

Primacy is given to a legal remedy by a competent and independent judicial authority established by law, but it cannot be ruled out that administrative authorities can be

299 HRC, Concluding Observations on Austria, 30 October 2007, UN doc. CCPR/C/AUT/CO/4, para. 18.

300 HRC, Concluding Observations on Slovenia, 25 July 2005, UN doc. CCPR/CO/84/SVN, para. 15. HRC, Concluding Observations on Greece, 25 April 2005, UN doc. CCPR/CO/83/GRC, para. 17. HRC, Concluding Observations on the Russian Federation, 6 November 2003, UN doc. CCPR/CO/79/RUS, para. 25

301 In general, this means when a deportation order has been issued. See HRC, *Khadje v the Netherlands*, 15 November 2006, no. 1438/2005, para. 6.3. HRC, Concluding Observations on Ukraine, 28 November 2006, UN doc. CCPR/C/UKR/CO/6, para. 9.

302 Article 2(3)(a) of the ICCPR. See also HRC, Concluding Observations on the Hong Kong Special Administrative Region, 12 November 1999, UN doc. CCPR/C/79/Add.117, para. 14, in which the Committee stated that '[i]n order to secure compliance with articles 6 and 7 in deportation cases, the HKSAR [Hong Kong Special Administrative Region] should ensure that their deportation procedures provide effective protection against the risk of imposition of the death penalty or of torture or inhuman, cruel or degrading treatment'.

303 HRC, *Alzery v Sweden*, 10 November 2006, no. 1416/2005, para. 11.8.

304 Article 2(3)(b) of the ICCPR. HRC, *Judge v Canada*, 20 October 2003, no. 829/1998, para. 10.9.

equally competent.[305] The decision on appeal must be binding on the State in order to be effective.[306] Importantly, the remedy must be effective and available. It remains unclear what this entails. In its Concluding Observations on France (2008) the Human Rights Committee expressed its concern about the right to appeal which is subject to, inter alia, a 48-hour time limit for lodging an appeal.[307] In its Concluding Observations on Ireland and the United Kingdom (2008) the Committee in general stated that asylum-seekers must have full access to early and free legal representation so that their rights under the Covenant receive full protection.[308] Arguably this relates not only to the initial determination but also to the appeal procedure.[309]

An effective remedy in accordance with Article 2(3) ICCPR in refoulement cases must have suspensive effect.[310]According to the Committee:

> 'By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning'.[311]

In *Alzery v Sweden* (2006) the complainant had no real time to appeal the decision to deport him; he was expelled only hours after the decision to expel him was taken.[312] Consequently, the Committee concluded that the absence of any opportunity for effective, independent review of the decision to expel amounted to a breach of Article 7 read in conjunction with Article 2 ICCPR.[313]

In several Concluding Observations the Committee has indicated that an effective remedy with suspensive effect must also be ensured for applications which have been declared inadmissible or manifestly ill-founded. In its Concluding Observations on

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305 Boeles 1997, p. 109. An exception would be, according to Boeles and based on the travaux preparatoires, 'if the nature of the violation of a human right and the character of the national legal system in a certain case imply that intervention by a competent administrative or legislative authority, or another competent authority provided for by the legal system of the State, offers a *more* adequate legal remedy'.

306 Boeles 1997, p. 109.

307 HRC, Concluding Observations on France, 31 July 2008, UN doc. CCPR/C/FRA/CO/4, para. 20.

308 HRC, Concluding Observations on Ireland, 30 July 2008, UN doc. CCPR/C/IRL/CO/3, para. 19. HRC, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, 30 July 2008, UN doc. CCPR/C/GBR/CO/6, para. 21.

309 Boeles 1997, pp. 148 to 153 on the issue of legal representation and assistance by an interpreter.

310 HRC, Concluding Observations on Estonia, 15 April 2003, CCPR/CO/77/EST, para. 13. HRC, Concluding Observations on Lithuania, 4 May 2004, UN doc. CCPR/CO/80/LTU, para. 7. HRC, Concluding Observations on Belgium, 12 August 2004, UN doc. CCPR/CO/81/BEL, paras 21 and 23. HRC, Concluding Observations on Uzbekistan, 26 April 2005, UN doc. CCPR/CO/83/UZB, para. 12. HRC, Concluding Observations on Thailand, 8 July 2005, UN doc. CCPR/CO/84/THA, para. 17. HRC, Concluding Observations on Libyan Arab Jamahiriya, 15 November 2007, UN doc. CCPR/C/LBY/CO/4, para. 18. HRC, Concluding Observations on France, 31 July 2008, UN doc. CCPR/C/FRA/CO/4, para. 20.

311 HRC, *Alzery v Sweden*, 10 November 2006, no. 1416/2005, para. 11.8. Also, Boeles 1997, p. 112.

312 Ibid., para. 3.10.

313 Ibid., para. 11.8.

Estonia (2003) the Committee expressed its concerns about the application of the 'principle of safe country of origin' and reminded the State party 'that a decision declaring an application inadmissible should not have restrictive procedural effects such as the denial of suspensive effect of appeal'.[314] Similarly, applications for refugee status deemed inadmissible under Article 1F of the Refugee Convention must have a right to an effective remedy.[315] And applications declared manifestly ill-founded must have a right to an effective remedy, including suspensive effect.[316] As a minimum the complainant must be able to put forward an arguable claim. Although the Committee is not particularly clear on what is meant by an arguable claim, it must arguably be supported by demonstrable facts and not manifestly lacking any ground in law.[317]

4.4.2.3c Additional procedural safeguards for the expulsion of lawful aliens (Article 13 ICCPR)

Article 13 ICCPR regulates the procedure for the expulsion of aliens who are lawfully within the territory of a State party.[318] According to Article 13 ICCPR an alien lawfully within the territory of a State party may be expelled from that territory:

> 'only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority'.

The limitation 'lawfully within the territory' implies that the scope of Article 13 is determined by the State's territory and – in part – by the State's national and international legal obligations.[319] Lawful presence requires some form of legal entitlement

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314 HRC, Concluding Observations on Estonia, 15 April 2003, UN doc. CCPR/CO/77/EST, para. 13. Also, HRC, Concluding Observations on Finland, 2 December 2004, UN doc. CCPR/CO/82/FIN, para. 12.

315 HRC, Concluding Observations on Portugal, 5 July 2003, UN doc. CCPR/CO/78/PRT, para. 12. Notably, the HRC does not address the fact that Portugal apparently considers inadmissible applications for refugee protection to which Article 1F of the Refugee Convention applies. To declare such applications inadmissible is contrary to the Refugee Convention: see, for example, section 2.4.2.7b.

316 HRC, Concluding Observations on Finland, 2 December 2004, UN doc. CCPR/CO/82/FIN, para. 12.

317 Boeles 1997, pp. 112-113, also referring to jurisprudence of the ECtHR: see section 3.4.2.3b.

318 HRC, General Comment No. 15 (1986), para. 10. See also Boeles 1997, p. 105. Article 13 of the ICCPR: 'An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.'

319 HRC, General Comment No. 15 (1986), para. 9. HRC, General Comment No. 27 (1999), para. 4. See also Boeles 1997, pp. 120 and 121.

under domestic or international law to be in the territory of a State.[320] Lawful presence needs to be interpreted broadly. Article 13 applies to aliens requesting protection from refoulement who are inside the State's de facto territory. The Committee has stated that:

> 'if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13'.[321]

The situation for aliens who are outside the State party's de facto territory is more problematic. According to the Human Rights Committee:

> 'the question whether an alien is "lawfully" within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations'.[322]

The last phrase, 'provided they are in compliance with the State's international obligations', is important because it ensures that aliens who are outside the State's de facto territory, including those who are at the State's de facto border, have a right to be protected from refoulement if they are under the actual control of the State party (section 4.2.3). In such a situation the State party may be obliged to allow the alien to enter in order to provide effective protection from refoulement, including protection under Article 13 of the Covenant.

The relevant question in the context of this study is whether a dispute over a person's right to be protected from refoulement in accordance with the Covenant is a dispute over the legality of the person's entry or stay. The question is answered affirmative by the Human Rights Committee. In *V.M.R.B. v Canada* (1988) the author had illegally entered Canada and applied for asylum. According to the Committee the author had not been lawfully in the territory of Canada. Nevertheless, the Committee did assess Article 13 ICCPR and observed that the procedures for deporting the author had respected the safeguards provided for in Article 13.[323] In *Kindler v Canada* (1993) the author had entered Canada illegally; he was arrested and his extradition was requested by the USA. According to the Committee Article 13 applied.[324] In *Ahani v Canada* (2004) the Committee observed that 'article 13 is in principle applicable to the Minister's decision on risk of harm, being a decision leading to expulsion'.[325] Notably, in this case the author had entered Canada illegally and had applied for asylum. It was determined by the Canadian authorities that the

320 Nowak 2005, p. 293 (para. 7). See also Persaud 2006, p. 10.
321 HRC, General Comment No. 15 (1986), para. 9.
322 HRC, General Comment No. 27 (1999), para. 4.
323 HRC, *V.M.R.B. v Canada*, 26 July 1988, no. 236/1987, para. 6.3.
324 HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, para. 6.6.
325 HRC, *Ahani v Canada*, 15 June 2004, no. 1051/2002, para. 10.8.

author was a refugee, but that he could not be admitted to Canada for reasons of national security.

The aim of Article 13 is to prevent the arbitrary expulsion of aliens and entitles each alien to an individual decision in his own case.[326] Furthermore, collective expulsions are not allowed.[327] Article 13 provides a fair procedure for aliens in expulsion proceedings, which includes important procedural safeguards.[328] It gives dual protection to lawfully present aliens.[329] First, a decision to expel lawful aliens must be reached in accordance with the law. Whether or not expulsion is in accordance with the law is determined by the domestic law of the State party concerned, and includes both the substantive and the procedural requirements of the law.[330] Of course, according to the Committee, the relevant provisions of domestic law must be compatible with the provisions of the Covenant.[331] Secondly, once such a decision is made the alien is allowed to submit reasons against expulsion and to have his case reviewed by a competent authority, except where compelling reasons of national security require otherwise. The Committee has emphasised the effectiveness and availability of the remedy. According to the Committee, 'an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one'.[332] Consequently, a lawful alien must be able and have ample opportunity to submit his reasons against expulsion; he must therefore be provided with sufficient notice of the reasons for the decision to expel him, including to be informed of the substance of the evidence used in this regard; and, importantly, an expulsion decision must be suspended.[333] Furthermore, the alien must be able to have his case reviewed, by a competent authority, and have assistance from a representative.[334] The competent authority referred to in Article 13 does not need to be a court, but may be an administrative authority.[335] In line with the requirements under Article 2(3) primacy should arguably be given to a judicial authority.[336]

326 HRC, General Comment No. 15 (1986), para. 10.
327 Boeles 1997, p. 119.
328 Heckman 2004, p. 97.
329 Boeles 1997, p. 118. Also, Heckman 2004, p. 98.
330 HRC, *Maroufidou v Sweden*, 8 April 1981, no. 58/1979, para. 9.3.
331 Ibid., para. 9.3.
332 HRC, General Comment No. 15 (1986), para. 10.
333 Nowak 2005, p. 299 (para. 18). Heckman 2004, p. 98. See also HRC, *V.M.R.B. v Canada*, 26 July 1988, no. 236/1987, para. 6.3 and HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, para. 6.6 concerning ample opportunity to present arguments and make submissions.
334 Boeles 1997, p. 151. Nowak argues that while there is no clear entitlement to legal counsel, 'because an expulsion normally represents a serious interference in the life and human rights sphere of the person concerned, and aliens are usually in particular need of legal counsel, the right to representation by a freely selected attorney is of fundamental importance': Nowak 2005, p. 300 (para. 20).
335 Boeles 1997, pp. 122 and 123. See also Heckman 2004, p. 99. Nowak 2005, p. 297 (para. 16).
336 Boeles 1997, p. 124, according to whom Articles 2(3) and 13 ICCPR should be mutually complementary and strengthening the effect of one another. If not, according to Boeles, the bizarre result would be that the minimum level of legal remedies for lawfully present aliens would be lower (i.e. not necessarily access to a judicial authority) than that of unlawfully present aliens (preferable access to a judicial authority).

In addition to the text, the Committee has provided little guidance on what can be regarded as effective in accordance with Article 13. In *V.M.R.B. v Canada* (1988) the Committee was satisfied with the proceedings and the opportunities provided to the author, including an oral hearing and witness evidence.[337] It cannot be deduced from this case that these requirements are minimum guarantees. To be allowed to submit reasons against expulsion does not necessarily require a personal appearance.[338]

With regard to invoking the exception of 'compelling reasons of national security' States parties have a 'very wide discretion' notwithstanding the textually implied high threshold for invoking this exception.[339] In *Alzery v Sweden* (2006) the Committee concluded that 'the State party had at least plausible grounds for considering, at the time, the case in question to present national security concerns'.[340] In general, the Committee has considered that 'it is not for the Committee to test a sovereign State's evaluation of an alien's security rating'.[341] Consequently, Article 13 seems to be of little use in refoulement cases in which the individual concerned poses an alleged risk to the State party's national security. Notwithstanding this conclusion, the Committee has made important references to Article 13 in refoulement cases in which the complainant did pose a threat to the State party's national security. These include *V.M.R.B. v Canada* (1988), *Kindler v Canada* (1993) and *Ahani v Canada* (2004).[342] Most importantly in this regard is *Ahani v Canada* (2004), in which the Committee concluded that Article 13 had been violated in spite of the fact that he posed an alleged threat to Canada's national security because he was accused of being trained as an assassin.[343] According to the Committee the complainant had not been allowed to submit reasons against his removal and to have such complete submissions reviewed by a competent authority.[344]

4.4.2.3d Applicability of Article 14(1) ICCPR

According to the first sentence of Article 14(1) ICCPR 'all persons shall be equal before the courts and tribunals'. This sentence has a broader scope than the rest of Article 14 because it does not specify the areas of law mentioned in the remainder of Article 14. According to the Committee the first sentence 'sets out a general guarantee of equality before courts and tribunals that applies regardless of the nature

337 HRC, *V.M.R.B. v Canada*, 26 July 1988, no. 236/1987, para. 6.3, in which the Committee referred to both Articles 13 and 14(1) of the ICCPR.
338 Nowak 2005, p. 297 (para. 15).
339 HRC, *Alzery v Sweden*, 10 November 2006, no. 1416/2005, para. 11.10.
340 Ibid.
341 HRC, *J.R.C. v Costa Rica*, 3 April 1989, no. 296/1988, para. 8.4. HRC, *V.M.R.B. v Canada*, 26 July 1988, no. 236/1987, para. 6.3.
342 HRC, *V.M.R.B. v Canada*, 26 July 1988, no. 236/1987, para. 6.3. HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, para. 6.6. HRC, *Ahani v Canada*, 15 June 2004, no. 1051/2002, para. 10.8.
343 Ibid., para. 2.2.
344 Ibid., para. 10.8.

of proceedings before such bodies'.[345] The right to equality before courts and tribunals guarantees equal access and equality of arms.[346] Furthermore, according to the Committee, it 'encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit of law'.[347] Ambiguity remains whether or not the first sentence of Article 14(1) applies to refoulement cases. As Boeles pointed out, the first sentence of Article 14(1) entails a provision of general application.[348] No restriction is introduced in relation to a certain area or the particular subject matter of a dispute. The Human Rights Committee has not provided a clear answer. It seems that the first sentence of Article 14(1) is applicable in extradition cases. In its General Comment No. 32 regarding Article 14 the Human Rights Committee makes it clear that this sentence must also be respected whenever domestic law entrusts a judicial body with a judicial task. In a footnote the Committee refers to *Everett v Spain* (2004) which concerns extradition.[349] Unfortunately, the Committee's findings in *Everett* are not completely clear. The Committee considered that:

> 'provisions, including articles 6, 7, 9 and 13, are necessarily applicable in relation to extradition. Particularly, in cases where, as in the current one, the judiciary is involved in deciding about extradition, it must respect the principles of impartiality, fairness and equality, as enshrined in article 14, paragraph 1, and also reflected in article 13 of the Covenant'.[350]

This finding implies that Article 14(1) is not directly applicable, but some of the principles it entails, such as the principles of impartiality, fairness and equality, are. The Committee provided more clarity in *Ahani v Canada* (2004), in which the Committee noted:

> 'that as article 13 speaks directly to the situation in the present case and incorporates notions of due process also reflected in article 14 of the Covenant, it would be inappropriate in terms of the scheme of the Covenant to apply the broader and general provisions of article 14 directly'.[351]

In other words, the Committee considers Article 13 ICCPR to be a *lex specialis* of Article 14(1).[352] Thus, while the Committee considers it inappropriate to apply

345 HRC, General Comment No. 32 (2007), para. 3.
346 Ibid., para. 8.
347 Ibid., para. 9. See also HRC, *Bahamonde v Equatorial Guinea*, 10 November 1993, no. 468/1991, para. 9.4, in which the Committee stated 'that the notion of equality before the courts and tribunals encompasses the very access to the courts, and that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of article 14, paragraph 1'.
348 Boeles 1997, p. 101.
349 HRC, General Comment No. 32 (2007), para. 7.
350 HRC, *Everett v Spain*, 26 August 2004, no. 961/2000, para. 6.4
351 HRC, *Ahani v Canada*, 15 June 2004, no. 1051/2002, para. 10.9.
352 Boeles 2008, p. 105. See also Persaud 2006, p. 10.

Article 14(1) directly, it does allow for important notions of due process entailed in it to apply to refoulement cases involving the expulsion of lawfully present aliens. These include the principles of impartiality, fairness and equality, in particular when it comes to access to an independent and impartial review authority and equality of arms. In that regard Article 14(1) can provide important additional safeguards for the appeal procedure in cases concerning refoulement. This includes the right to have legal assistance and the prohibition on imposing fees which would de facto prevent access to justice.[353] For example, in *Dranichnikov v Australia* (2007) the author had claimed that Article 14(1) had been violated because the Refugee Review Tribunal in Australia was allegedly not independent and objective as it deliberately delayed the review of her husband's case concerning his application for a protection visa.[354] The Committee addressed the issue of independence and impartiality only very briefly under Article 14(1) and found that the facts did not disclose a violation of this provision. Importantly, the Committee did not declare the complaint inadmissible *ratione materiae*, thereby not ruling out the applicability of Article 14(1) in asylum cases and with regard to the question of the independence and impartiality of the review tribunal.[355]

To conclude, the basis for the procedural safeguards in cases involving refoulement is found in Article 2(3) ICCPR. In addition, safeguards can be found in Article 13. Moreover, important principles of impartiality, fairness and equality as developed under Article 14(1) are also applicable in refoulement cases.

4.5 Other prohibitions on refoulement under the ICCPR

In *Kindler v Canada* (1993) the Human Rights Committee considered:

> 'If a State extradites a person within its jurisdiction in circumstances such as that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant'.[356]

The complaint concerned both Articles 6 and 7 ICCPR. Nevertheless, this quotation from the *Kindler* case might imply that the Committee was willing to accept a prohibition on refoulement under any of the Covenant rights. This is further implied by the Committee's statement in General Comment Number 31 (2004). There, the Committee considered that:

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353 HRC, General Comment No. 32 (2007), para. 10, in which the Committee stated that 'while article 14 explicitly addressed the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so'. On the imposition of fees see HRC, General Comment No. 32 (2007), para. 11.

354 HRC, *Dranichnikov v Australia*, 16 January 2007, no. 1291/2004, para. 7.2.

355 On the applicability of Article 14(1) of the ICCPR in refoulement cases see Boeles 2008, pp. 113-115.

356 HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, para. 13.2.

> 'an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed'.[357]

The use of the words 'such as' indicates that the prohibition on refoulement includes at least Articles 6 and 7 ICCPR, but is not necessarily limited to these rights.[358] This statement extends the prohibition on refoulement to any form of irreparable harm. The meaning of the words 'irreparable harm' is unclear. Arguably, they should not be interpreted in the sense that the harm should literally not be possible to repair. It seems likely that the words must be interpreted in the light of Articles 6 and 7 ICCPR and presumable mean harm that is the result of serious human rights violations. In its Concluding Observations on the Hong Kong Special Administrative Region (2006) the Human Rights Committee used the words 'grave human rights violations', thereby again referring to Articles 6 and 7 ICCPR.[359] A distinction between grave and other human rights violations could be made by looking at Article 4(2) ICCPR, which distinguishes between derogable and non-derogable rights.[360] These non-derogable rights include the right to life, the prohibition on torture and other cruel, inhuman or degrading treatment or punishment, the prohibition on slavery and servitude, the prohibition on imprisonment merely for inability to fulfil a contractual obligation, the prohibition on retroactive criminal laws, the right to recognition as a person before the law and the right to freedom of thought, conscience and religion.[361] As I discussed in section 2.3.1.1 a distinction between derogable and non-derogable rights to define the harm from which a person is protected is not flawless. The reason certain rights are derogable and others are not is not to establish a hierarchy of rights but to allow States to take action when the survival of their nation is at stake.[362] Furthermore, while certain rights may be non-derogable that does not mean that they are absolute, and they may still be limited provided that such limitations are prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[363] Moreover, limiting 'irreparable harm' or 'grave human rights violations' to non-derogable rights will exclude cumulat-

357 HRC, General Comment No. 31 (2004), para. 12.
358 Persaud 2006, p. 7.
359 HRC, Concluding Observations on the Hong Kong Special Administrative Region, 21 April 2006, UN doc. CCPR/C/HKG/CO/2, para. 10.
360 Persaud 2006, p. 8.
361 The non-derogable rights listed in Article 4(2) of the ICCPR include: the right to life (Article 6), the prohibition on torture and other cruel, inhuman or degrading treatment or punishment (Article 7), the prohibition on slavery and servitude (Article 8(1) and (2)), the prohibition on imprisonment merely for inability to fulfil a contractual obligation (Article 11), the prohibition on retroactive criminal laws (Article 15), the right to recognition as a person before the law (Article 16), and the right to freedom of thought, conscience and religion (Article 18).
362 Den Heijer 2008, pp. 296-297.
363 For example, Article 18(3) of the ICCPR regarding the right to manifest one's religion or belief.

ive violations of derogable rights, which may, as a result of their accumulation, be serious or grave enough to warrant protection from refoulement. This is the essence of the prohibition on refoulement, including that formulated and developed under the ICCPR. Thus, the terms 'irreparable harm' and 'grave human rights violations' mentioned by the Human Rights Committee must be defined in terms of the seriousness or severity of the suffering caused by the harm, and not so much by delineating the harm to specific human rights violations.

While irreparable harm or grave human rights violations should not be limited to non-derogable rights, or any other rights for that matter, violations of, at least some, non-derogable rights may be severe enough to be qualified as grave, warranting protection from refoulement. These include, in my opinion, violations of the prohibition on slavery and servitude (Article 8(1) and (2) ICCPR). Such violations would amount to inhuman treatment within the meaning of Article 7 ICCPR. Less clear, in my opinion, are violations of other non-derogable rights. Nevertheless, as soon as such violations attain a certain level of severity they may warrant protection from refoulement.

The Human Rights Committee seems to accept a prohibition on refoulement under Article 14 – the right to a fair trial – of the Covenant. In *A.R.J. v Australia* (1997) the author claimed that, if he was deported to Iran, Article 14 ICCPR would be breached by Australia because he allegedly would not receive a fair trial in Iran.[364] The Committee discussed the merits of this complaint under Article 14, but considered that the author had failed to provide material evidence in substantiation of his claim that, if deported, he would not have a fair trial in accordance with Article 14(1) and (3) and that he would have no right of appeal. The Committee took into account information provided by Australia that there was a provision in Iranian law for legal representation before the tribunals as well as a provision for review.[365]

4.6 Conclusion

An obligation not to remove a person exists where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of the Covenant. The basis for the prohibition on refoulement developed under the ICCPR is the general obligation on States parties to respect and to

364 HRC, *A.R.J. v Australia*, 11 August 1997, no. 692/1996, para. 3.4: according to the author he would stand trial before the Islamic revolutionary Tribunals, who allegedly do not observe internationally accepted rules of due process, who would not grant him a right to appeal or be represented by counsel.

365 HRC, *A.R.J. v Australia*, 11 August 1997, no. 692/1996, para. 6.15. As early as in *Cox v Canada* (1994) allegations were made by the author that, if extradited, he would be exposed to a real and present danger of a violation of Articles 14 and 26 of the Covenant. According to the Committee 'the evidence submitted did not substantiate, for purposes of admissibility, that such violations would be a foreseeable and necessary consequence of extradition': HRC, *Cox v Canada*, 9 December 1994, no. 539/1993, para. 10.4.

ensure the rights of the Covenant to all those who are within the State's territory and all those who are outside the State's territory but under its control, as well as the substantive provisions of the Covenant, in particular the right to life and the prohibition on torture and cruel, inhuman or degrading treatment or punishment. As such, the prohibition on refoulement is an integral part of the right to life and that on torture and other forms of proscribed ill-treatment. The Human Rights Committee has not ruled out the possibility of a prohibition on refoulement existing in relation to other provisions of the Covenant, but has failed to substantiate this.

The prohibition on refoulement applies to all irrespective of their nationality or legal status, and to all those who are within the territory of the State and those who are outside that territory but under the effective authority or control of the State. No territorial limitations are implied.

The prohibition on refoulement developed under the Covenant protects people from being subjected to arbitrary deprivation of life, in certain circumstances from facing the death penalty, and from torture and other forms of cruel, inhuman or degrading treatment or punishment. Importantly, torture has a broader meaning than provided by the definition in Article 1 of the Convention against Torture, in particular because it includes acts being committed by private persons. The exact scope of the harm from which a person is protected under the Covenant remains unclear. For example, where Article 6 of the Covenant includes obligations on States to improve socio-economic conditions, no individual cases have been accepted, let alone has it been accepted by the Human Rights Committee that people may not be returned to a country which is in a poor socio-economic state.

In order to be protected from refoulement there needs to be a real risk of an individual being subjected to irreparable harm in the sense that it must be a necessary and foreseeable consequence of the individual's removal that he will be subjected to harm proscribed in particular by Articles 6 and 7 ICCPR. The use of the words 'necessary' and 'foreseeable' implies a high threshold. Unfortunately, the views of the Human Rights Committee provide little guidance on the exact meaning or application of this risk criterion. It is clear that the application of the risk criterion depends heavily on the facts presented by the individual concerned, the credibility of the claim and the plausibility of the facts in the light of the general situation in the country of origin. Thus, the Committee relies heavily on the assessment made by States parties. With regard to the risk assessment the moment of removal at which an assessment ex nunc must be made is decisive. It remains unclear how events which have come to light or have occurred following a removal must be assessed. Because of the principal role of States in the risk assessment the Human Rights Committee allows itself only a limited role in assessing a claim for protection from refoulement.

Little guidance has been given by the Committee on the issue of national protection. Only in one Concluding Observations report has the Committee given an indication of how to apply the concept of an internal protection alternative. Concerns were raised by the Committee about the availability and the level of protection. The Committee recommended that States should ensure full protection for the human rights of the individual in the alternative area.

More direction has been given by the Committee on the issue of diplomatic assurances. While the Committee does not reject the possibility of diplomatic assurances reducing the level of risk to avoid breaching the prohibition on refoulement, it is concerned about the actual working of assurances, in particular with regard to people suspected of terrorist activities and in relation to countries in which systematic practices of torture or other forms of proscribed ill-treatment occur. Therefore, it is essential that diplomatic assurances include arrangements for their effective implementation and mechanisms which allow for the immediate and effective monitoring of the functioning of the assurances.

The prohibition on refoulement developed under Articles 6 and 7 of the Covenant is absolute. No restrictions, for example for reasons of national security, or derogations are allowed.

The prohibition on refoulement entails primarily a negative obligation for States, which are prohibited from forcibly removing a person to an area where he has a risk of being subjected to irreparable harm. This includes all forms of forced removal, including the extradition of a criminal and deportation of an alien in any form. The Human Rights Committee prioritises the prohibition on refoulement over legal obligations to extradite a person. In addition, the prohibition on refoulement includes removal to a country from which the person may subsequently be removed to a country where there is a risk of being subjected to irreparable harm (indirect refoulement).

In addition to negative obligations the prohibition on refoulement also includes positive obligations on States. This includes an obligation to admit a person to their territory and allow him to remain in order to ensure effective protection from refoulement. In the long run States may even be obliged to promote further integration of aliens. Positive obligations may also exist when removal was in breach of the prohibition on refoulement. State are obliged to provide appropriate compensation, including the acceptance of a breach and financial compensation, and also to take the necessary steps to prevent the person concerned from being actually subjected to irreparable harm. Finally, States are obliged to install various procedural safeguards to guarantee the effective implementation of the prohibition on refoulement. These include an initial procedure to determine whether or not the person concerned has a right to be protected from refoulement, as well as an appeal procedure. Such safeguards follow from the prohibition on refoulement directly as well as from other provisions of the Covenant, such as Articles 2(3), 13 and Article 14(1) ICCPR.

5 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

5.1 Introduction

5.1.1 Prohibition(s) on refoulement under the Convention against Torture

This chapter covers the prohibition(s) on refoulement as contained in the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the Convention against Torture).[1] The Convention against Torture contains an explicit prohibition on refoulement in Article 3, paragraph 1, according to which:

> '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'.

The adoption of an explicitly formulated prohibition on refoulement was inspired by case law which had emerged under Article 3 of the European Convention on Human Rights.[2] In addition, the prohibition was, in part, based on Article 33 of the Refugee Convention, in particular the terms 'return' and 'refouler'.[3] Article 3 of the Convention is limited to acts of torture and does not refer to other acts of cruel, inhuman or degrading treatment or punishment. Article 16 of the Convention prescribes the prevention of such acts in general terms. This Article does not contain a prohibition on refoulement; at least in explicit terms. Some confusion has arisen in this regard. This will be discussed in section 5.5.

In this chapter I will analyse the scope and content of the prohibition on refoulement contained in Article 3 of the Convention against Torture, in particular as it has been interpreted and applied by the Committee against Torture. This first section (5.1)

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1 UN G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

2 Note that it concerns the emerging case law of the European Commission on Human Rights on a prohibition against expulsion or extradition where there is a serious risk that the person concerned would be subjected to treatment contrary to Article 3 ECHR in the country of origin: see Burgers & Danelius 1988, p. 35.

3 Ibid., p. 50.

will be an introduction to the Convention against Torture itself and the role of the Committee against Torture in the interpretation, implementation and enforcement of it and of Article 3 in particular. Section 5.2 will briefly outline with respect to whom the States parties to the Convention are responsible to ensure protection from refoulement. In section 5.3 the content of the prohibition on refoulement under Article 3 of the Convention will be analysed. The key elements of this analysis will be the definition of torture as laid down in Article 1 of the Convention, the element of risk involved in the prohibition on refoulement and the absolute character of the prohibition. In section 5.4 the character of the States' obligations deriving from the prohibition on refoulement under Article 3 of the Convention will be analysed. Finally, in section 5.5 Article 16 the Convention will be discussed, in particular the question whether or not this provision contains a prohibition on refoulement.

5.1.2 Brief introduction of the Convention against Torture[4]

5.1.2.1 Object and purpose

The Convention against Torture was adopted by the United Nations General Assembly on 10 December 1984 and entered into force on 26 June 1987.[5] The Convention against Torture is based upon the recognition that torture and other practices of cruel, inhuman or degrading treatment and punishment are already proscribed under international law.[6] The principal aim of the Convention is therefore not to outlaw torture or other acts of inhuman or degrading treatment, but to strengthen such existing prohibitions.[7] Thereby the Convention aspires to create indefinite general norms for the protection of human beings, whereby the States parties have no subjective interest of their own, but a common, objective interest and non-reciprocal obligations to protect the rights of people.[8] The overall object and purpose of the Convention is perhaps best formulated in the Convention's preamble:

> 'The State parties to this Convention desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment and punishment throughout the world.'

4 For a more comprehensive analysis of the Convention against Torture see for example: ibid. Boulesbaa 1999. Ingelse 2001. Nowak & McArthur 2008.

5 At the end of this research period 145 States were party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

6 For example, in Article 5 of the Universal Declaration of Human Rights (UDHR), Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and the 1975 United Nations General Assembly Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

7 Burgers & Danelius 1988, p. 1.

8 See for further explanation section 1.2.2.

The measures the preamble is referring to are: the prohibition on refoulement (Article 3), the prosecution of persons having committed torture (Articles 4 to 9), the obligation to educate and train law enforcement personnel and any other persons who may be involved in the arrest, detention or imprisonment of people (Article 10), the obligation systematically to review interrogations rules, instructions, methods and practices (Article 11), the obligation to investigate alleged practices of torture (Article 12 and 13), the right of victims of torture to obtain redress and fair and adequate compensation (Article 14), the exclusion of evidence resulting from torture (Article 15), a general obligation to prevent other acts of cruel, inhuman or degrading treatment or punishment (Article 16) and various monitoring mechanisms made available to the Committee against Torture (Articles 19 to 22).

5.1.2.2 Content and structure

The Convention against Torture consists, in total, of 33 Articles divided into three parts. Part I (Articles 1 to 16) contains the substantive provisions of the Convention, entailing various obligations for States parties as well as a general definition of torture (Article 1). Part II (Articles 17 to 24) contains implementation provisions and those regarding the establishment and operation of the Committee against Torture, and Part III of the Convention (Articles 25 to 33) contains a variety of final treaty clauses.

The wording of the provisions of the Convention is directed to States. The Convention creates first and foremost obligations for States parties rather than rights for individuals. Nevertheless, the Convention against Torture is a human rights treaty, establishing individual rights that correspond with the explicitly formulated State obligations. Some of the State obligations clearly correlate with individual rights, for example, the prohibition on refoulement.[9]

Finally, it should be noted that on 18 December 2002 an Optional Protocol to the Convention against Torture was adopted by the United Nations General Assembly with the objective of further preventing torture by establishing a system, on both a national and an international level, of regular visits to places where people are deprived of their liberty. The Optional Protocol entered into force on 22 June 2006.[10]

5.1.2.3 Reservations and declarations

The Convention against Torture does not prohibit reservations. Few reservations or declarations have been made in regard to Article 3 of the Convention against Torture.[11] Upon ratification Germany declared Article 3, as well as the other provisions

9 See for an abstract analysis of States' obligations correlating with individual rights De Hoogh 1995, pp. 18-19.

10 UN G.A. res. A/RES/57/199, entered into force June 22, 2006 [reprinted in] 42 I.L.M. 26 (2003).

11 A complete list is available at Office of the United Nations High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations (<www2.ohchr.org/english/bodies/ratification/9.htm#reservations>).

of the Convention, exclusively to establish State obligations that are met by the Federal Republic of Germany in conformity with the provisions of its domestic law which is in accordance with the Convention. More important is the reservation made by the United States of America with regard to Article 3 of the Convention:

> 'the United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture', as used in article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured'.[12]

The compatibility of this reservation with Article 3 of the Convention will briefly be discussed in section 5.3.2.

The United States of America also made several reservations with regard to Article 1 of the Convention.[13] The following reservations were made:

> '(a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.
> (b) That the United States understands that the definition of torture in article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.
> (c) That with reference to article 1 of the Convention, the United States understands that 'sanctions' includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.
> (d) That with reference to article 1 of the Convention, the United States understands that the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.
> (e) That with reference to article 1 of the Convention, the Unites States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture'.[14]

12 Office of the UN High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, United States of America (<www2.ohchr.org/english/bodies/ratification/9.htm#reservations>).

13 Ibid.

14 Ibid.

With reference to Article 1 of the Convention important declarations were made by Luxembourg and the Netherlands with regard to the wording 'lawful sanctions'. Both States understood this phrase to mean sanctions which are lawful not only under national law but also under international law.[15] The compatibility of the reservations and declarations made with regard to Article 1 of the Convention will be briefly discussed in section 5.3.1.

5.1.3 International sources for interpretation of the Convention against Torture

5.1.3.1 The Committee against Torture

The Committee against Torture plays an important role in interpreting the Convention against Torture at the international level. The Committee is an autonomous treaty body within the United Nations system, established under Article 17 of the Convention. The Committee is created by the States parties to monitor the implementation and enforcement of the Convention. The Committee consists of ten members, who all serve in their personal capacity and not as representatives of their respective States. The members are to be of a high moral standing with recognised competence in the field of human rights. According to the Committee itself, it is not 'an appellate, a quasi-judicial or an administrative body, but rather a monitoring body created by the States parties themselves with declaratory powers only'.[16]

The legal basis for the Committee's activities can be found in Part II of the Convention; in Articles 17 to 24. According to these Articles the Committee has various monitoring mechanisms. Only one mechanism is mandatory for States parties, i.e. the submission of country reports in accordance with Article 19 of the Convention against Torture. The other three mechanisms are optional, and include an inquiry mechanism (Article 20), a State-complaint mechanism (Article 21) and an individual complaint mechanism (Article 22). These four mechanisms will be briefly explained below.

5.1.3.1a The monitoring tools of the Committee against Torture

Under Article 19 of the Convention, States parties are required to submit reports on the measures taken by them that give effect to the Convention. They have to do so within one year after the entry into force of the Convention (initial report) and thereafter every four years (periodic reports) and when so requested by the Committee. Under the third paragraph of Article 19 of the Convention each report shall be considered by the Committee.[17] The Committee may then make such general comments

15 Office of the United Nations High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, Luxembourg and the Netherlands, (<www2.ohchr.org/english/bodies/ratification/9.htm#reservations>).

16 ComAT, General Comment No. 1 (1997), para. 9.

17 States are often late fulfilling their reporting obligations. See Ingelse 2001, p. 137.

on the report as it considers appropriate and shall forward these to the State party concerned. The State party may then again respond. The Committee may give its views on the measures taken by the State party in the implementation and enforcement of the Convention and can engage in a dialogue with the State. The wording of Article 19 (3) of the Convention seems to imply that the Committee may only make comments based on the country report submitted by the State. It could therefore be argued that it is not authorised to address comments to all States parties collectively based on the examination of a number of reports. According to Burgers and Danelius this is something the drafters of the Convention had not intended.[18] In practice the Committee against Torture comments directly on the country reports through its Concluding Observations or Comments on specific country reports. In addition, the Committee has adopted two General Comments addressed to all States parties collectively. Both are important for this study. General Comment No. 1, adopted in 1997, provides general guidelines for individuals and States parties concerning individual complaints involving Article 3 of the Convention made in accordance with Article 22 of the Convention.[19] General Comment No. 2, which was adopted on 22 January 2008, concerns the implementation of Article 2 of the Convention and may have some relevance for Article 16 (see section 5.5).[20] Furthermore, under Article 19 (4) of the Convention the Committee may decide to include its Concluding Observations and General Comments in its published Annual Reports (Article 24 of the Convention).

Under Article 20 of the Convention the Committee may initiate an inquiry into the occurrence of a systematic practice of torture in the territory of a State party.[21] This inquiry is confidential, although at the end the Committee may decide, after consultation with the State party concerned, to include a summary account of the results of the proceedings in its Annual Report. Because of confidentiality it is not known how many inquiries have been conducted by the Committee, however, five inquiry reports have been made public. These concern Turkey, Egypt, Peru, Sri Lanka and Mexico.[22] It is required that States parties explicitly recognise the competence of the Committee to initiate an inquiry.[23]

Under Article 21 of the Convention the Committee may receive and consider communications to the effect that a State party claims that another State party is not fulfilling its obligations under the Convention. This inter-State complaints mechanism can be initiated only when the States parties involved have recognised the competence of the Committee in this regard. To date this procedure has not been used.

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18 Burgers & Danelius 1988, p. 159.
19 ComAT, General Comment No. 1 (1997).
20 ComAT, General Comment No. 2 (2008).
21 Burgers & Danelius 1988, pp. 160-162. Ingelse 2001, pp. 17-175.
22 ComAT, Inquiry Report on Turkey, UN doc. A/48/44/Add.1. ComAT, Inquiry Report on Egypt, 3 May 1996, UN doc. A/51/44, paras. 180-222. ComAT, Inquiry Report on Peru, 16 May 2001, UN doc. A/56/44, para.144-193. ComAT, Inquiry Report on Sri Lanka, 17 May 2002, UN doc. A/57/44, para.117-195. ComAT, Inquiry Report on Mexico, 26 May 2003, UN doc. CAT/C/75.
23 Article 28 (1) Convention against Torture.

Finally, under Article 22 of the Convention the Committee may receive and consider communications from individuals or on behalf of individuals who, subject to the jurisdiction of a State party, claim to be the victim of a violation of that State party. For this individual complaint mechanism to function it is necessary for the State party to have recognised the competence of the Committee to receive and consider individual complaints. A large number of individual complaints have been lodged, in particular regarding Article 3 of the Convention. By May 2008 a total of 338 individual complaints were dealt with by, or were under the consideration of, the Committee against Torture.[24]

5.1.3.1b The status of the Committee's views

As a result of the monitoring mechanisms the Committee against Torture has issued a large number of documents, which include Concluding Observations on country reports, Annual Reports, Communications resulting from individual complaints and two General Comments. For a comprehensive analysis of the international legal understanding of the Convention the various documents issued by the Committee are of great importance. They provide an authoritative interpretation of the Convention's provisions and will be used in this chapter as the main source for analysing the prohibition on refoulement contained in Article 3 of the Convention against Torture. These documents, including the decisions of the Committee in individual cases, are, however, not legally binding.[25] The Committee itself considers its views to be of a declaratory nature.[26] In general, this means that the Committee has the power to declare whether or not States parties have sufficiently implemented and enforced the Convention, including declaring the occurrence of a violation by a State party. The Convention does not explicitly confer interpretative authority on the Committee or provide for an enforcement mechanism for its views. At most the Committee will give recommendations regarding what action a State party should take, as it does in its Concluding Observations to country reports. In individual cases concerning Article 3 the Committee will satisfy itself with a conclusion regarding a violation of the Convention and recommend the State party not to deport the individual if that would be in breach of Article 3. In accordance with its Rules of Procedure the Committee will generally invite the State party concerned to inform the Committee of the action taken in conformity with the Committee's decisions, and it may designate one or more rapporteur(s) to follow up the Committee's decisions.[27] This does not give the decisions in individual cases binding character. Furthermore, the term 'view' in Article 22

24 Updated on 21 May 2008 according to a statistical overview of the individual complaints dealt with by the Committee against Torture, which can be found at (<www2.ohchr.org/english/bodies/cat/stat3.htm>).

25 Vermeulen in Steenbergen et al 1999, p. 199. Boulesbaa 1999, p. 63. David 2003, p. 774.

26 ComAT, *Aemei v Switzerland*, 29 May 1997, no. 34/1995, para. 11.

27 Rule 112, para. 5, and Rule 114, Committee against Torture, Rules of Procedure, 9 August 2002, CAT/C/3/Rev.4, available via (<www.unhchr.ch/tbs/doc.nsf>).

(7) of the Convention implies an opinion of law rather than a fact of law.[28] A Committee's request for interim measures under Article 22 of the Convention in cases involving Article 3 cannot be ignored by the State party. According to the Committee:

> 'By failing to respect the request for interim measures made to it, and to inform the Committee of the deportation of the complainant, the State party committed a breach of its obligations of cooperating in good faith with the Committee, under article 22 of the Convention'.[29]

Views of other United Nations treaty bodies under similar mechanisms, such as the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR), are also not legally binding.[30] The Committee is competent to interpret the Convention in so far as is required for the performance of its functions. Its views are authoritative in interpreting the Convention on an international level. According to Article 17 of the Convention it shall carry out the functions provided for in the Convention, indicating a duty or authority to do what is instructed.[31] Moreover, when a State voluntarily adheres to the individual complaint procedure under Article 22 of the Convention, it does so in good faith, thereby undertaking to honour the views of the Committee,[32] which generally a State does.[33]

The authority bindingly to interpret the Convention is given to the International Court of Justice in Article 30 (1) of the Convention. However, so far the ICJ has not had the opportunity to give its views on the Convention.

5.1.3.1c Individual applications

As already mentioned above, a large number of individual complaints have been lodged in accordance with Article 22 of the Convention. In most cases these complaints concerned, amongst others, Article 3. By May 2008 a total of 338 individual complaints had been dealt with by, or were under the consideration of, the Committee against Torture.[34] In 207 of these cases the Committee had reached a decision[35]

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28 Ingelse 2001, p. 196. The argument put forward by Ingelse that the binding nature of the Committee's views stems from Article 14 of the Convention does not seem valid to me. Article 14 of the Convention against Torture contains the obligation for States parties to ensure that a victim of torture obtains redress and an enforceable right to fair and adequate compensation. Like Vermeulen, I do not see how this can imply a binding character of views of the Committee against Torture: see Vermeulen in Steenbergen et al 1999, p. 199.

29 ComAT, *Nadeem Ahmad Dar v Norway,* 16 May 2007, no. 149/2004, para. 16.3.

30 See section 4.1.3.1b.

31 See for similar reasoning under Article 28 ICCPR Young 2002, p. 38.

32 Lawson 1999, p. 86. See also Article 26 of the Vienna Convention on the Law of Treaties and section 1.2.1.

33 See for similar reasoning under the First Optional Protocol to ICCPR De Zayas 1991, p. 29.

34 Updated on 21 May 2008 according to a statistical overview of the individual complaints dealt with by the Committee against Torture, which can be found at (<www2.ohchr.org/english/bodies/cat/stat3.htm>).

35 According to Rule 112 (4) of the Committee's Rules of Procedure, 'The Committee's findings on the merits shall be known as "decisions"'.

on either the admissibility or the merits of the case.[36] Unfortunately, the statistical overview provided on the Office of the High Commissioner for Human Rights' website does not include information on the specific Articles of the Convention which were involved in these cases. However, based on a list of 191 cases provided on the United Nations Treaty Body Database's website at least 168 cases involved a decision concerning Article 3 of the Convention.[37] If a decision is reached on the merits in such a case, the Committee will either conclude that the removal of the complainant will not or did not constitute a violation by the State party of Article 3 of the Convention or, on the contrary, that the removal would or did constitute such a violation. Of the total of 168 decisions concerning Article 3, a violation was found in 27 cases and a non-violation in 98. The remaining 43 cases were declared inadmissible.

If a decision on the admissibility or merits is reached, this will be issued by the Committee in a communication.[38] In these communications the facts as submitted by the complainant are presented as well as the actual complaint and the State party's observations on issues of admissibility and/or the merits. Often this will be followed by a response from the author's counsel and the State. Finally, the Committee will give its considerations and decision.

The Committee's considerations are often brief and poorly reasoned. The Committee often uses standard considerations and limits its explanations to how they are applied in a specific case. Consequently, it is difficult to understand why and how the Committee comes to its conclusion in a specific case and to deduce general guidelines on how to interpret and apply Article 3.

Although the Committee is not officially bound by its decisions it does refer to previous decisions in many cases, implying that they have the quality of precedent.

The specific role of the Committee against Torture in assessing a prohibition on refoulement in individual cases will be analysed in detail in section 5.3.2.4.

When referring to a specific case I will use the name of the complainant (or author) and the respondent State(s) followed by the year in which the case was decided by the Committee in brackets.

5.1.4 Rules of interpretation of the Convention against Torture

The Convention against Torture is a human rights treaty to which the general rules of interpretation as laid down in the Vienna Convention on the Laws of Treaties apply, as discussed in section 1.2.1. Primarily, the Convention is to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty

36 Of the remaining 131 cases, 44 were still under consideration. The other 87 cases were suspended or discontinued.

37 The United Nations Treaty Body database can be found at (<www.unhchr.ch/tbs/doc.nsf>).

38 All communications, as well as all other documents, issued by the Committee against Torture are available via (<www.unhchr.ch/tbs/doc.nsf>).

in their context and in light of their object and purpose'.[39] As a supplementary means of interpretation, recourse may be had to other sources including the travaux préparatoires of the Convention, in order to confirm the meaning resulting from the primary means of interpretation or to determine the meaning when the primary interpretation leaves it ambiguous or obscure or with a result which is manifestly absurd or unreasonable.[40] Burgers and Danelius point out, however, that:

> 'the travaux préparatoires of the Convention cannot be easily studied in UN documents. The principal source materials which have been published are the seven reports submitted by the Working Group to the Commission on Human Rights during the period 1978-1984. No records were made of the deliberations in the Working Group. Most of the proposals tabled in the course of these deliberations had the form of conference room papers that have not been published. Several interesting details of the elaboration of the Convention are registered only in the memories of those who took part in the drafting work'.[41]

Furthermore, the interpretation of human rights treaties involves two main characteristics. First, such treaties call for a dynamic or evolutive interpretation in the light of social and political changes, and, secondly, they call for a liberal interpretation of rights and a narrow interpretation of restrictions.[42] The Convention against Torture should be interpreted in accordance with these rules. Finally, reference to other human rights treaties covering the prohibition on torture and subsequent prohibition on refoulement can also be an important method of interpretation.

It is interesting to note that in interpreting and applying the Convention against Torture the Committee has explicitly referred neither to the general rules of interpretation of treaties, including the travaux préparatoires, nor to other human rights treaties covering the same subject matter in their case law.

5.2 Personal and (extra-)territorial scope of the Convention against Torture, in particular with respect to the prohibition on refoulement contained in Article 3

5.2.1 Personal scope

According to the text of Article 3 of the Convention against Torture no State Party shall expel, return (refouler) or extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture. Protection is irrespective of the person's nationality or legal status. Arguably, protection from

39 Article 31 Vienna Convention on the Law of Treaties.

40 Ibid., Article 32.

41 Burgers & Danelius 1988, pp. v and vi (preface). Burgers' and Danelius' memories, reproduced in this book, are significant. They both were actively involved in the preparation of the Convention against Torture.

42 See section 1.2.1.2.

refoulement under Article 3 of the Convention against Torture is guaranteed to all individuals, including stateless persons and illegal aliens. There is no limitation on the personal scope of Article 3 of the Convention against Torture.

5.2.2 Territorial and extra-territorial scope of Article 3 of the Convention against Torture

A State cannot be held responsible for every person in respect of whom there are substantial grounds for believing he would be in danger of being subjected to torture. It is essential to understand the territorial and extra-territorial scope of Article 3 of the Convention. The Convention against Torture does not contain any general provisions determining the territorial scope of Article 3. There are no phrases to be found in the Convention stating that the States Parties have an obligation to ensure the provisions of the Convention to all individuals within their territory or subject to their jurisdiction. Contrary to the Convention against Torture such phrases can be found in, for example, Article 2(1) of the ICCPR (section 4.2.2) and Article 1 of the ECHR (section 3.2.2). The absence of such provisions or phrases is understandable because the Convention against Torture addresses States and formulates State obligations rather than individual human rights.[43] In that regard it must be noted that Article 2 of the Convention provides for a general obligation on States parties to take measures to prevent acts of torture in any territory under their jurisdiction. In the absence of clear territorial and extra-territorial criteria relating to the prohibition on refoulement it is important to look at the text and context of Article 3 of the Convention and its origins in Article 33 (1) of the Refugee Convention as well as to general international human rights law. I will discuss these components below. Finally, I will make some remarks regarding Article 2 of the Convention against Torture.

According to Article 3 of the Convention against Torture a State party is prohibited from 'expel[ling], return[ing] ("refouler") or extradit[ing] a person to another State'. This phrase has two important consequences. First, it is important to look at the meaning of the verbs 'to expel' and 'to return' (refouler). Secondly, it is relevant to understand the meaning of the phrase 'to another State'. The use of the verbs 'to expel' and 'to return' (refouler) resembles and is inspired by the wording of Article 33 (1) of the Refugee Convention.[44] For the interpretation of the words 'expel' and 'return' it is relevant to look at the literary meaning of both words as well as the relevance and meaning of the word 'refouler' added in both Article 33 (1) of the Refugee Convention and Article 3 (1) of the Convention against Torture. As analysed and concluded in section 2.2.2 the meaning of the terms 'expel', 'return' and 'refouler' combined imply both a territorial and an extra-territorial application of the prohibition

43 See section 1.2.2 on the correlation between individual rights and State obligations.

44 See section 5.1.1 and Burgers & Danelius 1988, pp. 50 and 125. The verb to extradite is not part of the text of Article 33 (1) of the Refugee Convention, but must be understood to be included: see section 2.4.1.2.

on refoulement contained in Article 33 (1) of the Refugee Convention. By analogy a similar interpretation must be applied in regard to Article 3 of the Convention against Torture. Moreover, not allowing an extra-territorial application would effectively authorise Governments to deny protection from refoulement by forcing individuals to go back home, so long as the expulsion occurred before the individuals had reached and entered a State party's territory.[45] It must be noted that the extra-territorial scope of Article 33 (1) of the Refugee Convention is not without controversy. Nevertheless, nowadays there seems to be little support for a narrow territorial interpretation of Article 33 (1). This was extensively discussed in section 2.2.2.

In general, as already outlined in section 1.2.3, the responsibility of States to protect the human rights of individuals is determined by the de facto relationship between the individual and the State, the territory of the State and the conduct of State agents. If the individual is present within the territory of the State, the State has a responsibility regarding that person's human rights, including his right to be protected from refoulement. If the individual is not within the territory of the State, the State may still be responsible because of extra-territorial conduct attributable to it by which the individual is affected. What is relevant is that through such conduct the individual involved is forced to return or go to a State where he would be in danger of being subjected to torture. As discussed in section 2.2.2, there must be a consequential relationship or causal link between the State's conduct and the fact that the person involved is forced to go to a State where he is at risk. The extent by which the State party has actual control or authority over the person involved and the individual's right to be protected from refoulement is essential with regard to extra-territorial responsibility.[46] This will be the case when the State party exercises effective control over foreign territory and when the State party has (de facto) effective control or authority over the person involved and his right to be protected from refoulement. This interpretation is in line with the views of the Committee against Torture. In its Concluding Observations on the United States of America's country report in 2006 the Committee stated:

> 'The State party should recognise and ensure that the provisions of the Convention expressed as applicable to "territory under the State party's jurisdiction" apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.'[47]

And in relation to Article 3 of the Convention the Committee was concerned about the fact that the United States considered the prohibition on refoulement not to be applicable to a person detained outside the USA's territory. Consequently, the Commit-

45 See section 2.2.2.

46 Regarding extra-territorial responsibility general rules of international (human rights) law apply as is discussed in section 1.2.3.3. See also section 2.2.2.

47 ComAT, Concluding Observations on the United States of America, 25 July 2006, UN doc. CAT/C/USA/CO/2, para. 15. Also, ComAT, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, 10 December 2004, UN doc. CAT/C.CR/33/3, para. 4 (ii) (b).

tee recommended that the United States should apply Article 3 to all people in its custody wherever they are located, including in their country of origin.[48] The question remains whether or not this includes protection from refoulement under Article 3 CAT. For example, can a person who is under the control of the US forces in Afghanistan or Iraq and fears being subjected to torture once he is outside the US' custody claim protection under Article 3 CAT from the USA? The above-cited observations of the Committee would provide an affirmative answer. However, looking at the text of Article 3 CAT, the Article prohibits only removal to 'another State'. Literally speaking the person cannot be removed to another State. I would argue that such a restrictive textual interpretation of Article 3 CAT is not correct because it would not be in accordance with the object and purpose of the prohibition on refoulement and its absolute character. As Nowak and McArthur pointed out, 'taking into account the purpose of the absolute prohibition of refoulement, the term "another State" should in fact be interpreted as referring to any transfer of a person from one State jurisdiction to another'.[49]

As I outlined in section 1.2.3 and as becomes clear from my analysis of extra-territorial responsibility under the European Convention on Human Rights and the International Covenant on Civil and Political Rights in chapters 3 and 4 respectively, I would argue that extra-territorial responsibility for the protection of human rights is generally accepted, including the right to be protected from refoulement in accordance with Article 3 of the Convention against Torture. In sum, the prohibition on refoulement contained in Article 3 CAT applies to people who are within the territory of the host State, are at the border of the host State, are in a foreign country which is under the effective control of the host State, who are outside their country of origin and under the effective control of the host State through conduct which can be attributed to the State and has a direct effect on the person's right to be protected from refoulement, and – under similar circumstances of effective control of the host State – are within their country of origin.

A final word regarding Article 2 of the Convention against Torture. One may argue that it implies a territorial limitation of the Convention. According to Article 2 (1): 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'. It may that a view of the Committee against Torture in *Tebourski v France* (2007) supports the argument that Article 2 contains a territorial limitation for the protection from refoulement. According to the Committee in this case, 'article 3 of the Convention offers absolute protection to anyone in the territory of a State party'.[50] It should be noted here that the Committee did not refer to Article 2 and made this remark in the context of whether or not a State party may deviate from its responsibilities under Article 3

48 ComAT, Concluding Observations on the United States of America, 25 July 2006, CAT/C/USA/CO/2, para. 20. Also, ComAT, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, 10 December 2004, UN doc. CAT/C.CR/33/3, para. 4 (ii) (b).

49 Nowak & McArthur 2008, p. 199 (para. 181).

50 ComAT, *Tebourski v France*, 11 May 2007, no. 300/2006, para. 8.3.

when the complainant poses a danger to the State's domestic public order. Neither the case nor the Committee's considerations concerned the explicit question of territorial or extra-territorial scope of the Convention or of Article 3 in particular. Article 2 contains a general obligation on States parties to take all measures possible to prevent the occurrence of acts of torture in any territory under their jurisdiction. This Article does not have an effect on the prohibition on refoulement contained in Article 3 because that prohibition is not meant to prevent acts of torture committed by or occurring in the territory of a State party, but to prevent an individual from being subjected to torture after being expelled or returned by a State party to another State.[51] Burgers and Danelius argue that Article 2 contains the general obligation of each State party to promote the objectives of the Convention.[52] And Ingelse argues that 'Article 3 of the Convention contains one of the more specific extrapolations of the general obligation contained in Article 2 to implement measures to prevent torture'.[53]

5.3 The content of the prohibition on refoulement under Article 3 of the Convention against Torture

The prohibition on refoulement in Article 3 of the Convention against Torture prohibits the return of a person to a country where he or she runs a risk of being subjected to torture. Only when there is a risk of torture may one claim protection under Article 3. Other forms of cruel, inhuman or degrading treatment or punishment are exempted from the prohibition on refoulement under Article 3. A general clause to prevent such acts is formulated in Article 16 of the Convention and will, in the context of protection from refoulement, be discussed in section 5.5.

In this section the material scope or content of the prohibition on refoulement as contained in Article 3 of the Convention against Torture will be analysed. In section 5.3.1 torture will be discussed, being the harm subjection to which is prohibited. In section 5.3.2 the element of risk will be analysed and in section 5.3.3 the absolute character of the prohibition on refoulement.

51 See also ComAT, General Comment No. 2 (2008), para. 19.

52 Burgers & Danelius 1988, p. 123. See also Ingelse 2001, p. 241. Furthermore, in its Concluding Observations on Bulgaria (2004) the Committee recommended ensuring that no person is expelled to a country in breach of Article 3 and that, in accordance with Article 2 (2), no exceptions are allowed, hereby implying the applicability of Article 2 in refoulement cases: ComAT, Concluding Observations on Bulgaria, 11 June 2004, UN doc. CAT/C/CR/32/6, para. 6 (f). ComAT, General Comment No. 2 (2008), para. 7, 15-19.

53 Ingelse 2001, p. 290.

5.3.1 The harm from which a person is protected: torture as defined in Article 1 of the Convention against Torture

Article 3 of the Convention against Torture protects a person from being subjected to torture. Article 1 of the Convention provides a definition of torture, according to which it is:

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

Clearly there is a link between Articles 1 and 3, under which a person is protected if he runs a risk of being subjected to torture as defined in Article 1.[54] It is important to note that Article 1 gives the definition of torture, 'for the purposes of this Convention' only. This implies that the definition is relevant only for this Convention and not for other Conventions. Moreover, Article 1 paragraph 2 makes it clear that the definition of torture in no way affects the protection against torture which can be derived from other international instruments or from national laws of wider application.[55] The definition of torture in Article 1 of the Convention entails various elements concerning the conduct which constitutes torture, the purpose thereof, the intention and identity of the offender and possible exclusions. These elements will be discussed separately below both in general terms and in connection with the prohibition on refoulement under Article 3.

5.3.1.1 Acts which cause severe physical or mental pain or suffering

According to the wording of Article 1 of the Convention against Torture, torture is limited to acts. The term 'act' must not be interpreted too literally, but must be seen in its context and in the light of the Convention's object and purpose.[56] The term

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54 See also, ComAT, *G.R.B. v Sweden,* 15 May 1998, no. 83/1997, para. 6.5. ComAT, *Elmi v Australia*, 25 May 1999, no. 120/1998, para. 6.5. ComAT, *M.P.S. v Australia*, 30 April 2002, no. 138/1999, para. 7.4. ComAT, *H.M.H.I. v Australia*, 1 May 2002, no. 177/2001, para. 6.4. ComAT, *U.S. v Finland,* 15 May 2003, no. 197/2002, para. 7.5. ComAT, *S.S. v the Netherlands*, 19 May 2003, no. 191/2001, para. 6.4.

55 Burgers & Danelius 1988, p. 117. In international law torture is also defined in Article 2 of the 1985 Inter-American Convention to Prevent and Punish Torture and Article 7 (2) (e) of the 1998 Rome Statute of the International Criminal Court. Furthermore, a definition of torture has been developed under general prohibitions of torture, in particular under Article 7 ICCPR and Article 3 ECHR. Joseph, Schultz & Castan 2000, p. 122.

56 Article 31 Vienna Convention on the Law of Treaties. See section 1.2.1.1.

'act' cannot be meant to exclude omissions from the scope of the Article. During the drafting of the Convention no reference was made to this issue. Burgers and Danelius mention that the explicit reference to 'act' in Article 1 does not rule out that in special cases an omission should be assimilated to an act as, for example, in the intentional failure to provide a prisoner with food or drink.[57] Boulesbaa argues that it would be absurd to conclude that the prohibition on torture in the context of Article 1 does not extend to conduct by way of omission. Any failure to extent the definition to omissions would be nothing less than a ploy to help States evade the provisions of the Convention, according to Boulesbaa, and, furthermore, omissions may inflict as much physical and mental pain as actions.[58]

The backbone of the torture definition is that the act needs to inflict pain or suffering, either physical or mental, and must be of a certain severity or gravity.[59] The element of severity separates torture from other acts of inhuman treatment. The term severity is not further defined in the Convention. Boulesbaa cites a definition formulated during the drafting of the Convention for the Prevention and Suppression of Torture, which reads: 'the scope of severe encompasses prolonged coercive or abusive conduct, which in itself, is not severe, but becomes so over a period of time'.[60] Although the text never made it into the Convention, it is, according to Boulesbaa, useful for interpreting the element of severity in Article 1 of the Convention against Torture. However, pain or suffering does not have to be inflicted systematically and its severity does not necessarily encompass conduct inflicted over a certain period of time.[61] Even a single, isolated act can constitute torture.[62] The pain or suffering

57 Burgers & Danelius 1988, p. 118. Boulesbaa 1999, p. 12. See also Boulesbaa 1990, pp. 300-306, in which he extensively argues that, for example, the failure to provide food can be regarded as an act because it is in breach of a legal obligation. It should be noted that although this example is often used in the literature, the Committee against Torture does not consider deprivation of food alone to amount to torture: see ComAT, Concluding Observations on New Zealand, 8 May 1998, UN doc. A53/44, paras.167-178, para. 175, however deprivation of sleep, water and food together is considered torture, ComAT, Inquiry Report on Turkey, 15 November 1993, CAT/48/44/Add.1, para. 52.

58 Boulesbaa 1999, pp. 14-15. Boulesbaa 1990, pp. 305 and 306.

59 Burgers & Danelius 1988, p. 117. Sharvit 1993, p. 153.

60 Boulesbaa 1999, p. 18. Boulesbaa 1990, p. 308.

61 During the drafting of the Convention it was suggested that the words extremely and systematic be added to the definition. These proposals were rejected: see Burgers & Danelius 1988, pp. 41, 45 and 117. It should be noted that the USA made a reservation regarding the interpretation of Article 1 of the Convention declaring that mental pain or suffering refers to prolonged mental harm (complete text of reservation available via <www.unhchr.ch/tbs/doc.nsf>). In its Concluding Observations to the second country report of the USA the Committee against Torture referred to this reservation by stating that: 'The State party should ensure that acts of psychological torture, prohibited by the Convention, are not limited to "prolonged mental harm" as set out in the State party's understandings lodged at the time of ratification of the Convention, but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or its duration': ComAT, Concluding Observation on the United States of America, 25 July 2006, CAT/C/USA/CO/2, para. 13.

62 Burgers & Danelius 1988, p. 118. Miller 2003, p. 302.

inflicted can be physical or mental.[63] To what extent the term 'pain' indicates a subjective element, as some people are less tolerant or more susceptible to pain than others, remains ambiguous.[64] Furthermore, no reference is made in the text, or during its drafting, to personal circumstances of the victim of an act of torture, such as age, sex and state of health. Finally, Tardu argues that limiting torture to pain or suffering of a physical or mental nature 'ignores a whole aspect of the problem: the mind-control techniques – psychological, chemical, electronic or otherwise – whereby the will of man is reduced and his autonomy surrendered, without any conscious pain or fear'.[65] One could perhaps argue that this is a form of unconscious suffering of a mental nature. However, a textual interpretation of Article 1 of the Convention, in accordance with Article 31 of the Vienna Convention on the Law of Treaties, does not provide much room for such an interpretation as the use of truth drugs, which results in the recipient's inability to refrain from divulging information, does not cause pain or suffering in the literal sense of the terms. Such an interpretation would also be in accordance with the travaux préparatoires of the Convention against Torture, as the suggestion to include the use of 'truth drugs' where no physical or mental suffering is apparent was discussed but not adopted during the drafting of the Convention.[66] Nevertheless, as Boulesbaa argues, torture includes the infliction of mental suffering through the creation of a state of anguish and stress by means other than bodily assault.[67] Certainly, the use of mind-control techniques which create a state of complete absence of the mind or when the person concerned has lost control over his own mind and body could amount to torture, because it could be seen as a form of grave mental suffering. According to the United States of America, mental pain or suffering refers to 'prolonged mental harm' which is caused by or results from:

> 1 - the intentional infliction or threatened infliction of severe physical pain or suffering;
> 2 - the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> 3 - the threat of imminent death; or

63 Note that the pain or suffering can be solely psychological and does not have to be accompanied by physical abuse: see Miller 2003, p. 320.

64 Boulesbaa 1999, p. 18. In Lerner 1986, p. 132, the author argues that severity includes a subjective element as it depends 'on the physical condition of he victim, his psychological power of resistance, his understanding of what he is being forced to do or abstain from doing and numerous other circumstances'.

65 Tardu 1987, p. 304.

66 Burgers & Danelius 1988, p. 45. See also Sharvit 1993, pp. 159-160.

67 Boulesbaa 1990, p. 309. Again, it should be noted that the USA made a reservation in this regard declaring that mental pain or suffering caused by 'the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt the senses profoundly or the personality' falls within the scope of Article 1 of the Convention (complete text of reservation available via <www.unhchr.ch/tbs/doc.nsf>).

> 4 - the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.[68]

In almost all individual cases brought before the Committee against Torture concerning Article 3, the kind of conduct to which the complainant in the case may be subjected upon return was not an issue for consideration by the Committee. In most cases in which a violation of Article 3 of the Convention was found the Committee confined itself to saying 'that in the present case substantial grounds exist for believing that the author would be in danger of being subjected to torture', without specifying exactly what it is the author may be subjected to after removal.[69] From some cases it can be deduced what does not amount to torture. For example, in *P.Q.L. v Canada* (1997), the author claimed he would be arrested and retried in China after being returned there for offences committed in Canada, i.e. a risk of 'double jeopardy'. No other claims for repression, torture or other forms of inhuman treatment were made. The Committee concluded that:

> 'even if it were certain that the author would be arrested on his return to China because of his prior convictions, the mere fact that he would be arrested and retried would not constitute substantial grounds for believing that he would be in danger of being subjected to torture'.[70]

And in *I.A.O. v Sweden* (1998) the Committee considered that 'a risk of being detained as such is not sufficient to trigger the protection of Article 3 of the Convention'.[71] These cases imply first and foremost that mere reference to 'double jeopardy' or detention with no other claims made will not be sufficient to meet the necessary level of risk required in accordance with Article 3. It might however, also imply that 'double jeopardy' or detention as such does not amount to torture. Furthermore, the Committee considered in *K.K. v Switzerland* (2003) that the absence of adequate psychiatric treatment in the country of return for post-traumatic stress disorder aggravating the individual's state of health also does not amount to torture.[72] In other documents the Committee has issued it has given clearer indications of what conduct it considers to amount to torture. From inquiry reports, for example, it becomes clear that the following practices are regarded as torture by the Committee: solitary confinement

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68 Office of the UN High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, United States of America, (<www2.ohchr.org/english/bodies/ratification/9.htm#reservations>). See section 5.1.2.3.

69 For example, ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, para. 9.4. ComAT, *Khan v Canada*, 18 November 1994, no. 15/1994, para. 12.4

70 ComAT, *P.Q.L. v Canada*, 17 November 1997, no. 57/1997, paras. 10.4 and 10.5.

71 ComAT, *I.A.O. v Sweden,* 6 May 1998, no. 65/1997, para. 14.5. See also ComAT, *V.X.N. and H.N. v Sweden*, 2 September 2000, no. 130 and 131/1999, para. 13.7.

72 ComAT, *K.K. v Switzerland*, 28 November 2003, no. 186/2001, para. 6.8. Also ComAT, *A.I. v Switzerland*, 17 May 2004, no. 182/2001, para. 6.8.

in cells ('coffins') of 60 by 80 centimetres without light and with inadequate ventilation[73]; hands tied behind a person's back with arms pulled backwards, feet tied together and eyes blindfolded; deprivation of sleep, food and water; the threat of being drowned; mock execution with firearms pointed at the head or fired near the ears; electric shocks, after wetting of the person; threats of harming family members; serious beatings to the body with fists, police weapons or truncheons; plastic bags being placed over the head and tightened around the neck to cause a sensation of asphyxiation; water, often containing irritants such as carbonic acid or chilli powder, being poured into the mouth and/or nose while pressure is applied to the victim's stomach; jumping on he person when he is on the ground and throttling him to cause a feeling of asphyxiation.[74] In the Committee's Concluding Observations on country reports the following practices were also regarded as torture: corporal punishment, including flogging and amputation of limbs; the death penalty; rape and other forms of sexual violence.[75] In its Concluding Observations on Yugoslavia (1998) the Committee explicitly mentioned as acts of torture: beatings with fists and wooden or metallic clubs, mainly on the head, the kidney area and on the soles of the feet, resulting in mutilation and even death in some cases, and the use of electric shocks.[76]

5.3.1.2 Intention

The pain or suffering has to be inflicted intentionally. According to the text of Article 1 of the Convention against Torture, the term 'intentionally' refers to the torturer having the intent of inflicting severe pain or suffering.[77] The term 'intentionally' refers not just to the specific intent, but also to the so-called 'general intent, whereby the torturer knows that a certain conduct will cause severe pain or suffering, even though that is not necessarily his objective. His objective is, for example, to extract information or a confession'.[78] According to the Committee a subjective

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73 ComAT, Inquiry Report on Turkey, 15 November 1993, A/48/44/Add.1, para. 52.

74 ComAT, Inquiry Report on Mexico, 26 May 2003, CAT/C/75, paras. 143 and 144. Similar practices were considered to constitute torture by the Committee in ComAT, Inquiry Report on Peru, 16 May 2001, CAT/56/44, paras. 144-193.

75 ComAT, Concluding Observations on China, 26 June 1993, UN doc.A/48/44, paras.387-429, para. 396 (death penalty). ComAT, Concluding Observations on Saudi Arabia, 12 June 2002, UN doc. CAT/C/CR/28/5, para. 4 (b) (corporal punishment). ComAT, Concluding Observations on Columbia, 4 February 2004, UN doc. CAT/C/CR/31/1, para. 9 (d) (ii) and 10 (f) (rape and other forms of sexual violence).

76 ComAT, Concluding Observations on Yugoslavia, 16 November 1998, UN doc. A54/44, paras. 35-52, para. 47.

77 Joseph, Schultz & Castan 2000, p. 142.

78 Cassese 2004, pp. 875-877. ComAT, Annual Report of the Committee against Torture, Twenty-third session (8-19 November 1999), Twenty-fourth session (1-19 May 2000), UN doc. A/55/44, para. 197a and 180a. This is contrary to the US' understanding of torture that in order to constitute torture an act must be specifically intended to inflict severe physical or mental pain or suffering. Office of the UN High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, United States of America, (<www2.ohchr.org/english/bodies/ratification/9.htm#reservations>), section 5.1.2.3. See

inquiry into the motivations of the perpetrators is not required, but rather an objective determination under the circumstances.[79]

Negligent or accidental infliction of pain or suffering will not fall within the scope of the definition of torture.[80] Furthermore, severe pain or suffering inflicted in the course of fully justified medical treatment, or treatment that otherwise would be beneficial to the recipient, would also not amount to torture. Such pain or suffering would not be inflicted intentionally but would be an unintended side-effect, which the performers of the treatment would endeavour to reduce as far as possible.[81]

5.3.1.3 Purpose

The pain or suffering has to be inflicted not only intentionally, but also for a purpose. Article 1 of the Convention against Torture lists several purposes, such as obtaining information or a confession, punishment, intimidation, coercion or discrimination. This list is not exhaustive as is implied by the terms 'such as' in the text of the Article, but indicative.[82] According to Burgers and Danelius the purposes listed imply that other purposes must have something in common with those explicitly listed. They argue that the purpose element should be understood to be the existence of some – even remote – connection with the interests or policies of the State and its organs, as the primary objective of the Convention is to eliminate torture committed by or under the responsibility of public officials for purposes connected with their public functions.[83] In this way, scientific experimentation without consent can come within the scope of Article 1.[84] It would seem that any act of torture committed for purely

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also US Legal Memorandum dated 1 August 2002 and quoted in a newspaper article in the International Herald Tribune, 'Lawyers gave Bush an out on torture', 9 June 2004: 'if an interrogator knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite intent even though the defendant did not act in good faith'. See U.S. Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, Memorandum for Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. paras. 2340-2340A*, August 1, 2002, Washington D.C.

79 ComAT, General Comment No.2 (2008), para. 9.

80 Burgers & Danelius 1988, p. 118. See also Boulesbaa 1990, p. 310, in which he defines intent as 'deliberately and maliciously'. Also, Nowak & McArthur 2008, p. 73 (para. 106), in which the following example is used: 'when a detainee is forgotten by the prison guards and slowly starves to death, such conduct certainly produces severe pain and suffering, but it lacks intention and purpose and, therefore, can 'only' be qualified as cruel and /or inhuman treatment'.

81 Burgers & Danelius 1988, p. 119.

82 Boulesbaa 1999, p. 21.

83 Burgers & Danelius 1988, pp. 118-119. Boulesbaa 1990, p. 311.

84 Tardu argues this is surprisingly not part of the actual text of Article 1 of the Convention, considering that such experiments in Nazi concentration camps had been met with criminal penalties by several Allied Military Tribunals, that they were condemned by UN resolutions and prohibited in global and general terms by Article 7 of the ICCPR: Tardu 1987, p. 305.

sadistic or otherwise private motives would fall outside the scope of the definition.[85] However, even where a sadistic motive predominates, there is normally also an element of punishment, intimidation or discrimination involved when the act of torture involves State officials, as is required within the meaning of Article 1.[86] Only in exceptional circumstances will the infliction of severe pain or suffering by a public official not constitute torture on the ground that he acted for purely private reasons.[87]

As already mentioned above fully justified medical treatment would not only not amount to torture because it lacks the element of intention, it would also not amount to torture because it does not fall within the scope of the purpose element laid down in Article 1 of the Convention.[88]

5.3.1.4 Infliction, instigation, consent or acquiescence of a public official

A significant limitation in the definition seems to be the requirement that torture has to be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In order for an act to constitute torture some form of official involvement of the State is required. In other words, only torture for which the authorities are somehow responsible, because they acted or refrained from acting, falls within the definition laid down in Article 1 of the Convention. It should be noted that, according to the drafters of the Convention, the inclusion of State involvement is not a judgment on the nature or seriousness of violence by private actors, but rather an assumption and expectation that such violence would be addressed by the normal machinery of justice under the conditions of the domestic legal system.[89]

To determine if and when torture committed by private or non-State actors falls within the scope of Article 3 of the Convention close scrutiny of the requirement that torture has to be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity is called for. In this section special attention will be given to the term 'acquiescence' and the phrase 'other persons acting in an official capacity' in Article 1 and the responsibilities of States in international law.

The most direct form of State involvement is the infliction of pain or suffering by a public official. This implies the direct involvement of a public official, i.e. the

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85 Tardu argues that the purpose requirement in Article 1 of the Convention only deals with conscious motivations and neglects other basic subconscious motivations of torturers, often related to inferiority feelings, anomie, alienation, and the consequent craving for power over victims or personal motivations of jealousy or revenge: ibid., p. 305.

86 Burgers & Danelius 1988, p. 119. Sharvit 1993, p. 164. See also Lerner 1986, p. 133, in which he states that torture is not necessarily instrumental but can be an end in itself, implying a broad purpose concept.

87 Burgers & Danelius 1988, p. 119. Joseph, Schultz and Castan express their hope that any act with a malevolent purpose will fall within the scope of Article 1 of the Convention against Torture: Joseph, Schultz & Castan 2000, p. 142.

88 Sharvit 1993, pp. 162-163.

89 Burgers & Danelius 1988, p. 120.

commission of the actual conduct of torture. A lower level of involvement is 'instigation'. To instigate means to bring about, to incite or to encourage, to induce or to solicit, to help or support. It implies both a direct and an indirect involvement and the participation of a public official in the perpetration of torture. Arguably, if the State makes use of private groups who are engaged in activities which constitute torture, such as paramilitary forces or death squads, the State is instigating torture.[90] Acquiescing implies only an indirect form of State involvement. The ordinary meaning of the term 'acquiescence' is to agree, to accept or to give in, often unwillingly, but without complaining or arguing; to accept quietly.[91] The ordinary meaning of the word implies the indirect involvement of the State in the act of torture, most likely in the form of an omission. In other words, when the State refrains from acting where it should have acted, it can be held responsible. This reasoning is supported by the travaux préparatoires of the Convention, as most States agreed during the drafting that the Convention should be applicable not only to acts committed by public officials, but also to acts for which the public authorities could otherwise be considered to have some responsibility.[92] During the drafting of the Convention, the United States of America further developed the term acquiescence. Although it is not within the scope of this study to analyse, in detail, the understanding of the United States of America of the term acquiescence, it can nevertheless be helpful in clarifying the meaning and scope of the term. The United States reflected its understanding of the term 'acquiescence' in Article 1 in an official reservation to the Convention.[93] According to the United States the term acquiescence requires that a public official prior to the activity constituting torture is aware of such activity and thereafter breaches his legal responsibility to intervene and to prevent it. Awareness includes both having actual knowledge of an activity that might constitute torture and 'wilful blindness' i.e. deliberately turning a blind eye to what would otherwise have obviously been an activity constituting torture.[94] This interpretation made by the United States is in accordance with the ordinary meaning of the term 'acquiescence' as outlined above. If the State knows, could have known or ought to have known an act of torture was about to be committed or has been committed by a non-State actor it has a legal responsibility to act to the fullest extent of its de facto capabilities and in accordance with its legal obligations. Even though the United States of America did not further specify to what legal responsibilities it referred, arguably both national and inter-

90 Anker argues that the State is then acquiescing in torture rather than instigating it: Anker 1999, p. 503.

91 Longman's Dictionary of Contemporary English and Cobuild's English Dictionary. This meaning concurs with the French and Russian authentic languages of the Convention.

92 Burgers & Danelius 1988, p. 45.

93 Office of the UN High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, United States of America, (<www2.ohchr.org/english/bodies/ratification/9.htm#reservations>). See for a detailed analysis of the US interpretation of acquiescence, for example, Rosati 1998, pp. 533-577. Miller 2003, pp. 299-323. David 2003, pp. 769-806.

94 Rosati 1998, p. 538. Boulesbaa 1999, pp. 26-27.

national legal obligations apply regarding the prohibition on torture, in particular the obligations entailed in the Convention against Torture. Therefore, if a State fails to penalise torture in all its varieties, investigate allegations of torture, prosecute and punish torturers and provide redress for the victims of torture where it is able to do so, it is acquiescing in torture in accordance with Article 1 of the Convention. This interpretation is also in accordance with Article 2 according to which States parties have the obligation 'to take effective legislative, administrative, judicial or other measures to prevent acts of torture'. This includes the prevention of torture by non-State actors, as the drafters of the Convention assumed and expected that violence by private actors would be addressed by the State on a domestic level.[95] Consequently, practices such as domestic violence, female genital mutilation by tribes or other private groups, sexual violence by private persons (including rape) and excessive violence at work or in schools, severe enough to amount to torture, have to be properly addressed by the State in all its functions and powers in accordance with its legal obligations. Failure to do so amounts to acquiescing in the practices of torture.[96] Such failure may even increase the risk of ill-treatment.[97] Moreover, this interpretation is in accordance with the concept of state responsibility in international law, whereby responsibility is imposed on a State because of an action or omission which is attributable to the State and in breach of its legal obligations.[98] The Committee's views on the term acquiescence are limited. The term was explicitly discussed by the Committee against Torture only in *Hajrizi Dzemakl and Others v Yugoslavia* (2002) in regard to Article 16 of the Convention and concerning other acts of cruel, inhuman or degrading treatment or punishment. In this case the inhuman acts were committed by non-State agents. The authorities did not provide adequate protection. The Committee considered that the lack of protection by the State was in violation of Article 16. The Committee found:

> 'that the complainants have sufficiently demonstrated that the police (public officials), although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to protect the complainants, thus implying "acquiescence" in the sense of Article 16 of the Convention. (...) Although the acts referred to by the complainants were not committed by public officials themselves, the Committee considers that they were committed with

95 Burgers & Danelius 1988, p. 120.

96 For example, in the 1986 report of the Special Rapporteur on Torture it is noted that customs such as female genital mutilation committed by tribes or others within a quasi-public setting may be considered consent or acquiescence if the State fails to intervene in such instances, especially if they are not treated as criminal offences: Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN doc. E/CN.4/1986/15 (1986), 19 February 1986, para. 38, available online at (<ap.ohchr.org/documents/E/CHR/report/E-CN_4-1986-15.pdf>).

97 ComAT, *V.L. v Switzerland,* 22 January 2007, no. 262/2005, para. 8.10.

98 Draft Article 2 of the Draft Articles on Responsibilities of States for Internationally Wrongful Acts, adopted by the International Law Commission of the United Nations on 31 May 2001, 53rd session, UN doc. A/56/10, available via (<www.un.org/law/ilc>). Miller 2003, pp. 304-306. For further explanation see Crawford 2002.

> their acquiescence and constitute therefore a violation of Article 16, paragraph 1, of the Convention by the State party'.[99]

In this case the individuals' houses were burned down and their property was destroyed by a group of private persons while local police watched, moved their cars to a safe distance and only sought to persuade some of the attackers to calm down. After the damage was done an official investigation was launched, but all charges against the attackers were dropped due to lack of evidence. At the time of the Committee's consideration a new investigation was still pending as were civil proceedings for damages.[100] Apparently the Committee was not convinced by the investigations and the pending civil proceedings for damages, which is in accordance with the State obligations under the Convention (Articles 12, 13 and 14). There is speculation why the Committee was not convinced. Perhaps because of the seriousness of the acts, the wilful blindness of the local authorities and the opportunity for them to respond directly when the inhuman acts were committed as well as the fact that:

> 'the Committee has reiterated on many instances its concerns about inaction by police and law-enforcement officials who fail to provide adequate protection against racially motivated attacks when such groups have been threatened'.[101]

Though *Hajrizi Dzemakl and Others* relates to Article 16 of the Convention, a similar analogous reasoning can be applied to the term acquiescence in Article 1 of the Convention. The interpretation of the term acquiescence as outlined above is important for the scope of the protection afforded under Article 3 of the Convention. The Committee has made it clear that:

> 'an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a private person, without the consent or acquiescence of the State, falls outside the scope of Article 3 of the Convention'.[102]

Therefore, if a risk of torture emanates from non-State actors it will fall within the scope of Article 3 of the Convention only if the government acquiesces in torture committed by non-State actors. In other words, the government must have known, ought to or could have known about acts of torture, it had the ability to act, but was unwilling to take appropriate steps in accordance with its legal obligations against

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99 ComAT, *Hajrizi Dzemajl et al v Yugoslavia*, 2 December 2002, no. 161/2000, para. 9.2.

100 Ibid., paras. 2.1-2.7.

101 Ibid., para. 9.2, in which the Committee refers to its Concluding Observations on Slovakia, 11 May 2001, UN doc. A/56/44 paras. 99-105, para. 104, Czech Republic, 14 May 2001, UN doc. A/56/44 paras. 106-114, para. 113 and Georgia, 7 May 2001, UN doc. A/56/44 paras. 77-82, para. 81.

102 ComAT, *V.X.N. and H.N. v Sweden,* 2 September 2000, no. 130 and 131/1999, para. 13.8.

these practices of torture and provide adequate protection in terms of prevention, punishment and redress.[103]

5.3.1.4a The absence of a State authority

But what if the State is willing to abide by its legal obligations, but is unable to do so, because it lacks the power, the authority or the control over the practices of torture committed by non-State actors? And what happens when no functioning State apparatus exists? The former situation will occur when the State no longer has effective control over part of its territory and population. That part is then controlled by private or non-governmental entities. During the drafting of the Convention it was suggested that these entities be included in the definition. This suggestion was, however, not accepted, but the reasons for this remain unknown.[104] The latter situation, one of a complete breakdown in governmental authority in a country, was not discussed at all during the drafting of the Convention. In both situations it is no longer a matter of acquiescing in torture by the State, but a matter of private torturers being regarded as State officials, albeit quasi ones. Both situations are important for the applicability of Article 3 of the Convention. In many cases people flee a country which has experienced a partial or complete breakdown in its central government because of an internal armed conflict between armed opposition groups and the official authorities. These situations have been considered by the Committee against Torture in a number of individual cases. In analysing these situations with regard to Article 3 of the Convention I will look at the case law of the Committee and at the concept of State responsibility in international law. According to the Committee against Torture in situations in which the risk of torture emanates from non-State actors the Convention will not be applicable unless the risk of torture emanates from non-State actors who occupy part of a State's territory and exercise quasi-governmental authority over the territory to which the individual is likely to be returned.[105] The Committee distinguishes between two situations. First, if a central government exists, the Committee made it clear that Article 3 of the Convention would not be applicable if the risk of torture emanated from non-State actors.[106] Unless, of course, the central government is somehow involved. Secondly, if no central government exists, Article 3 of the Convention can apply only if the non-State actors can be regarded as a de facto government or persons acting in an official capacity. The phrase 'other person acting

103 Rosati 1998, p. 538. See also Joseph, Schultz & Castan 2000, p. 143. Copelon 1994, p. 141 in which it is stated that 'the concept of acquiescence encompasses private violations against women to which the State has not responded adequately in a preventive or punitive way'.

104 Sharvit 1993, p. 166.

105 ComAT, *S.S. v Netherlands*, 19 May 2003, no. 191/2001, para. 6.4 (Sri Lanka).

106 This situation occurred in a case involving Peru as the country of return, where the risk emanated from a non-governmental entity, the opposition group Sendero Luminoso, and, initially, in cases involving Sri Lanka, where the risk emanated from the opposition Tamil Tigers organisation LTTE, ComAT, *G.R.B. v Sweden*, 15 May 1998, no. 83/1997, para. 6.5 (Peru). ComAT, *S.V. et al v Canada*, 15 May 2001, no. 49/1996, para. 9.5 (Sri Lanka). ComAT, *M.P.S. v Australia*, 30 April 2002, no. 138/1999, para. 7.4 (Sri Lanka).

in an official capacity' mentioned in Article 1 CAT was inserted in the text to meet concerns regarding non-State actors whose authority is comparable to government authority.[107] This latter situation occurred in *Elmi v Australia* (1999). In this case the author was threatened with being returned to Mogadishu where he would run the risk of being tortured by the Hawiye clan. The Committee considered Article 3 to apply because 'Mogadishu is under the effective control of the Hawiye clan, which has established quasi-governmental institutions and provides a number of public services'.[108] According to the Committee the Convention was applicable, and it noted that:

> 'for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase "public officials or other persons acting in an official capacity" contained in article 1'.[109]

The situation in *Elmi v Australia* (1999) was, however, regarded by the Committee as exceptional. This became clear in *H.M.H.I. v Australia* (2002) in which the Committee considered that:

> 'Somalia currently possesses a State authority in the form of the Transitional National Government, which has relations with the international community in its capacity as central Government, though some doubts may exist as to the reach of its territorial authority and its permanence. Accordingly, the Committee does not consider this case to fall within the exceptional situation in Elmi, and takes the view that acts of such entities as are now in Somalia commonly fall outside the scope of Article 3 of the Convention'.[110]

Therefore, from the moment some form of central government seems to exist, even if it is a transitional government with no clear or limited reach for its territorial authority and permanence as acknowledged by the Committee, the risk of torture by actors not belonging to this central government does not fall within the scope of Article 3.[111] A similar finding was made by the Committee in *S.V. et al. v Canada* (2001) and *M.P.S. v Australia* (2002), both involving Sri Lanka. The Committee held:

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107 Nowak & McArthur 2008, pp. 42 (para. 35) and 78 (para. 118).

108 ComAT, *Elmi v Australia*, 25 May 1999, no. 120/1998, para. 6.7.

109 Ibid., para. 6.5.

110 ComAT, *H.M.H.I. v Australia*, 1 May 2002, no. 177/2001, para. 6.4.

111 Notably, the territorial authority and permanence of the Transitional National Government (TNG) of Somalia do not become clear from the text of the Committee's decision in this case, only that the TNG's authority is based on its relations with the international community.

> 'that the issue of whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of Article 3 of the Convention'.[112]

Then again one year later, in 2003, in *S.S. v Netherlands*, also regarding Sri Lanka, the Committee gave the exact same ruling, with reference to its previous decisions, however, this time adding the clause:

> 'unless the non-governmental entity occupies and exercises quasi-governmental authority over the territory to which the complainant would be returned'.[113]

Within three years the Committee dealt with three similar cases and decided in the final case not to make a distinction between States with and without a central government. Thus it implied that if a person was threatened to be returned to a country where part of the territory was under the control of a rebel group which could be regarded as a quasi-governmental authority Article 3 of the Convention would be applicable. I would argue that with such an approach the Committee adopts a dynamic and liberal interpretation of the Convention in accordance with its object and purpose and a functional interpretation of the phrase 'other persons acting in an official capacity' in Article 1.[114] It should, however, be noted that it is – hitherto – only in *S.S. v Netherlands* (2003) that the Committee has not made a distinction between States with and without a central government. Also, this was the last case before the closing of this research in which the Committee had to deal with the issue of non-state actors, making it difficult to conclude that the Committee has created a precedent. Rosati argued that in such a situation 'private groups practicing torture may have been acting "in an official capacity" in the region in which the victim was tortured', so that these private groups can be regarded as public officials in terms of Article 1 of the Convention.[115] I would argue that this interpretation is in accordance with the concept of State responsibility in international law. According to Article 9 of the Draft Articles on the Responsibilities of States for Internationally Wrongful Acts:

> 'a conduct of a person or group of persons shall be considered an act of a State under international law if the person is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority'.

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112 ComAT, *S.V. at al v Canada,* 15 May 2001, no. 49/1996, para. 9.5. ComAT, *M.P.S. v Australia*, 30 April 2002, no. 138/1999, para. 7.4.

113 ComAT, *S.S. v Netherlands*, 19 May 2003, no. 191/2001, para. 6.4.

114 David 2003, pp. 774, 776 and 784.

115 Rosati 1998, p. 539.

This Article contains three requirements.[116] First, that non-State actors are effectively exercising elements of governmental authority, and it is the nature of their conduct that is relevant rather than any formal link between the actors and the organisation of the State. Secondly, it requires the official State authority to be non-existent or proven to be unable to exercise its authority. This covers both a total and partial collapse of the State apparatus. Thirdly, the circumstances must be such that the exercise of elements of governmental authority is called for; i.e. the circumstances must justify an attempt to exercise governmental authority. Non-state actors acting as a quasi-governmental entity may appear during a revolution, an armed conflict or a total or partial occupation of the territory or a situation where official authority is gradually being restored.

Furthermore, I would argue that this interpretation is in accordance with international humanitarian law. An analysis of international humanitarian law on this issue is relevant, first, because protection from refoulement will often be called for in a situation of armed conflict to which international humanitarian law is applicable, and in particular when the risk emanates from non-State actors. Arguably, in the individual cases in which the Committee had to deal with this issue an internal armed conflict was taking place.[117] And, secondly, it is relevant to achieve further coherence between international human rights law and international humanitarian law. In a situation of internal armed conflict, armed non-State entities involved in the conflict have a legal obligation not to torture and are liable under international law if they do, so that some non-State actors are given special status under international law implying that they can act in an official capacity.[118] Finally, this interpretation is

116 A more detailed explanation can be found in the Commentaries of the International Law Commission of the United Nations on Article 9 of the Draft Articles on the Responsibilities of States for Internationally Wrongful Acts, adopted by the International Law Commission of the United Nations on 31 May 2001, 53rd session, UN doc. A/56/10, available via (<www.un.org/law/ilc>).

117 Arguably in the cases involving Sri Lanka (i.e. ComAT, *S.V. et al v Canada*, 15 May 2001, no. 49/1996. ComAT, *M.P.S. v Australia*, 30 April 2002, no. 138/1999. ComAT, *S.S. v Netherlands*, 19 May 2003, no. 191/2001) and Somalia (i.e. ComAT, *Elmi v Australia*, 25 May 1999, no. 120/1998. ComAT, *H.M.H.I. v Australia*, 1 May 2001, no. 177/2001) as the country of origin an internal armed conflict was in progress between the Sri Lankan security forces and the armed wing of the LTTE respectively between various armed factions or clans in Somalia. This was perhaps less clear in the case involving Peru (between the government and the Sendero Luminoso) as the country of origin (i.e. ComAT, *G.R.B. v Sweden*, 15 May 1998, no. 83/1997), although both Amnesty International and Human Rights Watch mentioned the regular occurrence of armed attacks by anti-governments guerrilla forces, in particular the Sendero Luminoso (Amnesty International Annual Report 1999, Peru, available via (<www.amnesty.org>) and Human Rights Watch World Report 1999, Peru, available via (<www.hrw.org >)).

118 Common Article 3 of the Geneva Conventions of 1949, i.e. Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in the Field, Geneva Convention II for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva Convention III Relative to the Treatment of Prisoners of War and Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War; Article 4 of the 1977 Additional Protocol II to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-Inter national Armed Conflicts. Articles 3 and 5 of the 1993 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory

also in accordance with international criminal law. Under Article 8 of the 1998 Rome Statute of the International Criminal Court torture is an international crime – a crime against humanity – irrespective of who has committed the act of torture and whether or not the State was in any way involved.[119]

The question remains what makes a rebel or opposition group or any non-governmental entity into a quasi-governmental authority. According to Article 9 of the Draft Articles on the Responsibilities of States for Internationally Wrongful Acts outlined above, a quasi-governmental authority is any person or group of people exercising elements of governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority. The International Law Commission, in its commentary on Article 9, gives some examples of such authority, which include immigration, customs and policing.[120] This is in accordance with the approach taken by the Committee against Torture in its case law. In *Elmi v Australia* (1999) the Committee refers to the establishment by these entities of quasi-governmental institutions and a common administration, the fact that the entities are serving as interlocutors for the people and have been accepted as the negotiating partner of the international community. However, it remains unclear to exactly what institutions and prerogatives the Committee is referring.[121] In *S.S. v Netherlands* (2003) it was implied by the Committee that the LTTE could also be seen as a quasi-governmental authority.[122] Unfortunately, the Committee did not address the issue explicitly and did not indicate why the LTTE might be regarded as a quasi-governmental authority. Nevertheless, the Committee does refer to several sources with regard to the general human rights situation in Sri Lanka, including its Concluding Observations on Sri Lanka's initial country report (1998),

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of the Former Yugoslavia since 1991 (torture is a crime against humanity as well as a violation of the laws and customs of war: see ICTY, *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), 2 October 1995, IT-94-1-AR72. Article 4 of the 1994 Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994; Article 8 of the 1998 Rome Statute of the International Criminal Court.

119 Miller 2003, p. 316.

120 Commentaries of the International Law Commission of the United Nations on Article 9 of the Draft Articles on the Responsibilities of States for Internationally Wrongful Acts, adopted by the International Law Commission of the United Nations on 31 May 2001, 53rd session, UN doc. A/56/10, available via (<www.un.org/law/ilc>).

121 Vermeulen in his commentary on *Elmi v Australia*, 25 May 1999, no. 120/1998, *Rechtspraak Vreemdelingenrecht* 1999, no. 19, p. 96.

122 ComAT, *S.S. v Netherlands*, 19 May 2003, no. 191/2001, para. 6.4 in which the Committee considered 'that the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention, unless the non-governmental entity occupies and exercises quasi-governmental authority over the territory to which the complainant would be returned. Since the complainant can be returned to territory other than under the control of LTTE, the issue, on which he bases part of his claim, that he would suffer retribution from the LTTE upon his return to Sri Lanka cannot be considered by the Committee'.

its Annual Report of 2002 and two reports by Amnesty International, which make it clear that the LTTE is a major political and military organisation involved in a protracted armed conflict with the Sri Lankan security forces, occupying part of the territory of Sri Lanka and regarded as an equal partner in a dialogue with the Sri Lankan government in brokering a peaceful solution to the conflict.[123] I would argue that these are reasons enough to perceive the LTTE as a quasi-governmental authority in a part of Sri Lanka.

It can be concluded that if the risk of torture emanates from non-State actors Article 3 of the Convention is applicable if the State fails to provide protection where it is able to do so in accordance with its legal obligations, because of the term 'acquiescence' in Article 1 of the Convention. If the State, however, is willing but unable to act in accordance with its legal obligations, Article 3 will be applicable only in situations where the risk of torture emanates from a non-governmental entity which is involved in an internal armed conflict, occupies and exercises quasi-governmental authority over the territory to which the complainant would be returned, if it is understood that the non-State entity is acting in an official capacity in accordance with Article 1. This conclusion has two important consequences for protection from refoulement under Article 3. First, if the individual can be returned to another part of the country, where the government is able to provide protection Article 3 will not be applicable. In reality, if a central government still exists in the country of return, and controls parts of the country, an internal protection alternative will often be available unless the risk of torture also emanates from the central government (section 5.3.2.5a). Secondly, if the non-State entity cannot be regarded as a quasi-governmental authority controlling a certain territory Article 3 will also not be applicable. This situation will occur when the risk of torture occurs in the form of domestic violence and acts of torture committed by various criminal groups over which the government has no control, provided that the government has implemented and tried to enforce its legal obligations to ensure adequate protection to the best of its ability, for example, by penalising those acts of violence under its domestic law, prosecuting perpetrators of these national criminal laws, investigating allegations of domestic violence and other forms of private acts of torture and compensating the victims of such violence and acts.[124]

5.3.1.5 Public officials or others acting in an official capacity

Since torture as defined in Article 1 of the Convention requires some involvement of a public official it is relevant to determine who can be regarded as a public official.

123 ComAT, Concluding Observations on Sri Lanka, 19 May 1998, UN doc. A/53/44, paras 243-257. ComAT, Annual Report 2002, UN doc. A/57/44, Chapter IV.B, Summary account of the results of the proceedings concerning the inquiry on Sri Lanka. Amnesty International Report 2002 on Sri Lanka, AI Index POL 10/001/2002. Amnesty International 1999.

124 Miller 2003, p. 318; see also Article 2 of the Convention against Torture by which every State party has the obligation to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.

The Convention against Torture is silent on this matter, despite lengthy discussions during the drafting process.[125] To answer this question it is again relevant to look at the Draft Articles on Responsibilities of States for Internationally Wrongful Acts adopted by the International Law Commission of the United Nations on 31 May 2001, in particular Articles 4 to 11.[126] The question when certain conduct is attributable to the State is discussed in general in section 1.2.3.3b. The issue of others acting in an official capacity and quasi-governmental authorities in the context of Article 3 CAT was discussed in section 5.3.1.4a.

5.3.1.6 Exclusion of pain or suffering arising from lawful sanctions

Article 1 of the Convention excludes pain or suffering 'arising only from, inherent in or incidental to lawful sanctions'. Neither the Convention nor its legislative history gives any indication of the applicable international legal standards in this regard, thereby leaving it to the domestic laws and interpretation of States to determine what is lawful, for example, by legalising torture under national law.[127] During the drafting process of the Convention it was pointed out that it would be unsatisfactory if a State were permitted to continue meting out punishments of such cruelty that they would, by normal standards, be considered to fall within the definition of torture. It was however not possible to reach an agreement on any reference to accepted international standards, as no such standards seemed to exist. What may be lawful in one legal system may not be so in another. For example, the amputation of a hand for the offence of theft is lawful in some Arab States which follow the traditions of Islamic law, but is not in other States.[128] It was left open whether the exception refers only to national law or whether it must also comply with international humanitarian standards.[129] Arguably it cannot be the purpose of the Convention to give *carte blanche* to States to torture by making certain severe conduct a lawful sanction in their national law. In this regard Luxembourg, the Netherlands and the United States of America made relevant reservations or interpretive declarations to Article 1. Luxembourg and the Netherlands declared that:

> 'the term "lawful sanctions" in Article 1, paragraph 1, of the Convention must be understood as referring to those sanctions which are lawful not only under national law but also under international law',[130]

125 Boulesbaa 1999, p. 27.
126 International Law Commission, 53rd session (2001), UN doc. A/56/10, via (<www.un.org/law/ilc>).
127 Boulesbaa 1999, p. 29.
128 Ibid., p. 31.
129 Burgers & Danelius 1988, pp. 46-47.
130 Office of the UN High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, Luxembourg and the Netherlands, (<www2.ohchr.org/english/bodies/ratification/9.htm#reservations>).

and the United States of America stated it understood:

> 'that "sanctions" includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. None the less, the United States understands that a State party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture'.[131]

And in 2008 the United Nations General Assembly condemned any action or attempt by States to legalise torture.[132]

According to Anker, the exception of lawful sanction mentioned in Article 1 CAT is in tension with the prohibition on torture itself, which is absolute.[133] Allowing lawful sanctions of such cruelty that they amount to torture would be contrary to the absolute nature of the protection against torture in international law, contained in, for example, Article 7 ICCPR and Article 3 ECHR. To allow torture as a lawful sanction would be contrary to the Convention's object and purpose, i.e. to make the struggle against torture more effective.[134] Finally, the Convention would be incoherent if torture arising from lawful sanction were allowed under Article 1, while under Article 16 of the Convention States have an obligation to prevent, without any exceptions, other acts of cruel, inhuman or degrading punishment. Regrettably the ambiguous exclusion regarding lawful sanctions was also incorporated into the 1998 Statute for the International Criminal Court.[135] The Committee against Torture has, on several occasions, expressed its view that certain conduct by definition amounts to torture and cannot be excluded from the Convention through the adoption of lawful sanctions. The Committee has limited the scope of this exception and does not want States to have *carte blanche* in this regard.[136] For example, regarding Israel the

131 Office of the UN High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, United States of America, (<www2.ohchr.org/english/bodies/ratification/9.htm#reservations>).

132 UN GA Resolution 62/148 on Torture and other cruel, inhuman or degrading treatment or punishment, UN doc. A/RES/62/148, 4 March 2008, para. 4.

133 Anker 1999, p. 507. See section 5.3.3.

134 Preamble to the Convention against Torture: see section 5.1.2.1. Ingelse 2001, p. 214. See also the ICTY, *Furundzija* case, Trial Chamber, 10 December 1998, IT-95-17/1-T, para. 144.

135 According to Article 7 (2) (e) of the ICC Statute torture means: 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions'. Notably Article 2 of the Inter-American Torture Convention provides for an exception to the exclusion of lawful sanction as it defines torture as: 'any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. *The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article* [emphasis added]'.

136 Ingelse 2001, pp. 231-236.

Committee has several times considered that the use of certain interrogation techniques is in breach of Article 1 of the Convention, even though they were legalised under Israeli national law.[137] In 1997 for the first time the Committee explicitly considered corporal punishment to be in breach of the Convention, regardless of national legislation permitting such punishment.[138] Furthermore, in its Concluding Observations on China (1993) the Committee indicated that it regarded the death penalty to amount to torture.[139] Finally, in its General Comment Number 2 the Committee explicitly considered that it:

> 'rejects absolutely any efforts by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies in these and all other situations'.[140]

The exclusion of practices of torture 'arising only from, inherent in or incidental to lawful sanctions' as laid down in Article 1 of the Convention can also limit the protection from refoulement under Article 3 of the Convention if the receiving State has legalised torture. In individual cases regarding Article 3 of the Convention this issue has not been explicitly addressed by the Committee. It seems that the Committee takes it for granted that any conduct which amounts to torture falls within the scope of Article 3, irrespective of any legalisation under national law. For example, in *A.S. v Sweden* (2001) the Committee considered that the removal of the author would be in violation of Article 3, even though the risk of torture would largely arise from a sanction which is lawful under Iranian national law (i.e. stoning to death for adultery).[141] The Committee did not devote any consideration to the fact that stoning to death is a lawful sanction under Iranian national law. Neither did the State party – Sweden – put this issue forward in this case. As Nowak and McArthur point out, it has so far been impossible to find a meaningful scope of application for the lawful sanction clause; perhaps it is best ignored.[142]

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137 ComAT, Concluding Observations on Israel, 9 May 1997, UN doc. A/52/44, paras. 253-260, para. 257-258, repeated in ComAT, Concluding Observations on Israel, 18 May 1998, UN doc. A/53/44, paras. 232-242, para. 239 and ComAT, Concluding Observations on Israel, 23 November 2001, UN doc. CAT/C/XXVII/Concl.5, para. 6.

138 ComAT, Concluding Observations on Namibia, 6 May 1997, UN doc. A/52/44, paras. 227-252, para. 250. ComAT, Concluding Observations on Saudi Arabia, 12 June 2002, UN doc. CAT/C/CR/28/5, para. 4 (b).

139 ComAT, Concluding Observations on China, 26 June 1993, A/48/44, paras. 387-429.

140 ComAT, General Comment No. 2 (2008), para. 5.

141 ComAT, *A.S. v Sweden,* 15 February 2001, no. 149/1999, paras. 8.4-9. See also ComAT, *K.S.Y. v Netherlands*, 26 May 2003, no. 190/2001, in which the complainant would be tortured upon return to Iran because of his homosexuality, which is a criminal offence under the Iranian Penal Code. This was not explicitly addressed by the Committee; it merely considered that 'there currently is no active policy of prosecution of charges of homosexuality in Iran' (para. 7.4). Notably in its Concluding Observations on Afghanistan, 26 June 1993, UN doc. A/48/44, paras. 50-62, para. 58 and 59, the Committee expressed its concern regarding stoning to death as a lawful punishment for adultery.

142 Nowak & McArthur 2008, pp. 81 to 84 (paras. 124 to 128).

5.3.1.7 *Victims of torture*

Finally, it should be noted that the definition of torture in Article 1 of the Convention against Torture does not contain any particulars as to the victims. The definition simply refers to severe pain or suffering being inflicted 'on a person'. According to Burgers and Danelius the category of victims is not indefinite. They argue that the history of the Convention makes it clear that the victims must be people deprived of their liberty or at least under the factual power or control of the person inflicting the pain or suffering.[143] This is similar to a reservation made by the United States of America on Article 1, according to which torture 'is intended to apply only to acts directed against persons in the offender's custody or physical control'.[144] Such a limitation seems obvious because the infliction of torture by definition takes place while the victim is under the control of the torturer. This limitation should, however, not be interpreted restrictively to apply only in a detention situation. Such limitation can be deduced neither from the text of Article 1 of the Convention nor from the preparatory works. Furthermore, the Committee against Torture has never limited the scope of Article 1 to apply only to people in detention.[145] In *V.L. v Switzerland* (2007) the Committee against Torture considered that it 'believes that the sexual abuse by the police in this case constitutes torture even though it was perpetrated outside formal detention facilities'.[146]

5.3.2 The element of risk

The backbone of the prohibition on refoulement in Article 3 of the Convention is the element of risk. The nature of the State party's responsibility under Article 3 lies in the prohibition on removing a person to another State where he would be in danger of being subjected to torture. The word 'danger' presupposes a certain risk. In order to be granted protection in accordance with Article 3 substantial grounds must exist for believing such a danger or risk exists.[147] Thus, all relevant considerations are to be taken into account, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights.[148]

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143 Burgers & Danelius 1988, p. 120.

144 Office of the UN High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, United States of America, (<www2.ohchr.org/english/bodies/ratification/9.htm#reservations>).

145 See also Report of the Special Rapporteur on the question of torture, Manfred Nowak, 'Civil and Political Rights, Including the Questions of Torture and Detention', UN doc. E/CN.4/2006/6, 23 December 2005, para. 38, note 1.

146 ComAT, *V.L. v Switzerland*, 22 January 2007, no. 262/2005, para. 8.10.

147 The term danger is used in Article 3 (1) Convention against Torture and sometimes in views of the Committee. For example, in ComAT, *Alan v Switzerland*, 8 May 1996, no. 21/1995, para. 11.2. However, in most views the Committee uses the term risk. Both terms are interchangeable.

148 Article 3 (2) Convention against Torture.

There are two sides to the element of risk. First, there is the substantive or material side, indicating what level of probability of being subjected to torture is required. Secondly, there is the evidentiary side, indicating the standard and burden of proof relevant for believing the existence of a risk or danger of being subjected to torture. Although the two sides are interrelated, I will analyse them separately in this section in order to provide some clarity to their role in determining the risk.

In section 5.3.2.1 I will first analyse the risk criterion as it has been defined by the Committee against Torture in its views, in particular in its case law under Article 22 of the Convention. This will include issues such as the individualisation of the risk and the facts and circumstances required to meet the necessary level of risk in order to be afforded protection according to the Committee against Torture. In section 5.3.2.2 I will outline the evidentiary standard, or standard of proof, of showing that substantial grounds exist for believing the person to be in danger of being subjected to torture. This will include issues of credibility and evidence. Furthermore, it will include an analysis of the burden of proof. In section 5.3.2.3 I will discuss at what moment in time the assessment of the risk should take place. In section 5.3.2.4 I will then analyse the role of the Committee against Torture in the risk assessment and, finally, in section 5.3.2.5 I will discuss the issue of national protection, i.e. protection which may be obtained from the individual's country of origin. This will include the concept of an internal protection alternative and diplomatic assurances.

5.3.2.1 Defining the risk

5.3.2.1a Prospectivity and objectivity

Protection from refoulement under Article 3 of the Convention against Torture requires 'substantial grounds for believing that he [a person] would be in danger of being subjected to torture' after removal to another State. The phrase 'would be in danger of' implies the existence of a certain risk. According to the Committee this risk needs to be personal, foreseeable, real and present.[149] The element of risk is an objective requirement. There is no basis for including a subjective fear the individual may feel that he will be tortured.[150] Furthermore, the risk should be realistic and not fictional and must be present after removal.[151] In *R.K. et al. v Sweden* (2008) the Committee explicitly stated that the question is 'whether he *currently* runs a risk of torture if

149 For example, ComAT, *Aemei v Switzerland,* 29 May 1997, no. 34/1995, para. 9.5. ComAT, *Karoui v Sweden,* 25 May 2002, no. 185/2001, para. 8. The Committee does not always use a consistent formulation. For example, in *El Rgeig v Switzerland* (2007) the Committee refers to 'the danger must be personal and present' (ComAT, *El Rgeig v Switzerland*, 22 January 2007, no. 280/2005, para. 7.3). In *V.L. v Switzerland* (2007) the Committee formulates it as 'personally at risk', and 'a particular person would be in danger' (ComAT, *V.L. v Switzerland*, 22 January 2007, no. 262/2005, para. 8.3).

150 Taylor 1994, p. 443. As explained in section 5.3.1, it remains ambiguous to what extent the term torture includes a subjective element.

151 ComAT, *X, T and Z v Sweden*, 6 May 1998, no. 61/1996, para. 11.2. ComAT, *A.L.N. v Switzerland*, 19 May 1998, no. 90/1997, para. 8.3. ComAT, *H.A.D. v Switzerland*, 6 September 2000, no. 126/1999, para. 8.6. ComAT, *V.R. v Denmark*, 21 November 2003, no. 210/2002, para. 6.3.

returned'.[152] The necessary level of risk is defined by the Committee as 'go[ing] beyond mere theory or suspicion, however, the risk does not have to meet the test of being highly probable'.[153] This definition is consistently being used by the Committee in its views, including in its first General Comment.[154] The Committee refrains from formulating the risk criterion in a probability calculus, but focuses on the facts presented, the credibility of the author and claim and the plausibility in light of the situation in the country of origin. In this regard, the probability test formulated by the United States of America in its reservation on Article 3 is incompatible with the view taken by the Committee.[155]

In the first individual case regarding Article 3 of the Convention, *Mutombo v Switzerland* (1994), the Committee used not only the term 'foreseeable' but also the term 'necessary', i.e. torture needed to be the foreseeable and necessary consequence of the return.[156] Since this first case, the Committee has never again used the term 'necessary'. In *Haydin v Sweden* (1998) the Committee pointed out that 'the requirement of necessity and predictability should be interpreted in the light of its general comment on the implementation of Article 3', as quoted above.[157]

In several cases the Committee has caused confusion regarding the applicable level of risk. For example, in *Dadar v Canada* (2005) and *El Rgeig v Switzerland* (2007) the Committee repeated, in its general considerations, its commonly used phrase that the risk must go beyond mere theory and suspicion but does not have to meet the test of being highly probable.[158] When considering the specific merits of the case the Committee then used a less strict formulation. The Committee then considered that the complainant might indeed be tortured upon his return.[159] In *El Rgeig v Switzerland* (2007) the Committee considered 'that the State party has not presented to it sufficiently convincing arguments to demonstrate a complete absence of risk'.[160] In particular this latter formulation can imply the adoption of a lower level of risk. I believe this is not the Committee's intention. The Committee does refer to its commonly used risk criterion. Furthermore, the above-cited phrase comes at the end of its considerations and must be seen in the context of the facts presented and the Committee's assessment thereof. Nevertheless, such formulations are not beneficial

152 ComAT, *R.K. et al v Sweden*, 19 May 2008, no. 309/2006, para. 8.5 [emphasis added].

153 For example, ComAT, *E.A. v Switzerland*, 10 November 1997, no. 28/1995, para. 11.3. Upon ratification the USA made a reservation to the Convention in declaring that the risk requirement of Article 3 of the Convention should be understood to mean 'if it is more likely than not that he would be tortured' (complete text of the reservation is available via (<www.unhchr.ch/tbs/doc.nsf>).

154 ComAT, General Comment No. 1 (1997), paras. 6 and 7.

155 Office of the UN High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, United States of America, (<www2.ohchr.org/english/bodies/ratification/9.htm#reservations>). Section 5.1.2.3.

156 ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, para. 9.4.

157 ComAT, *Haydin v Sweden*, 16 December 1998, no. 101/1997, para. 6.5.

158 ComAT, *Dadar v Canada,* 5 December 2005, no. 258/2004, para. 8.4. ComAT, *El Rgeig v Switzerland*, 22 January 2007, no. 280/2005, para. 7.3.

159 ComAT, *Dadar v Canada*, 5 December 2005, no. 258/2004, para. 8.8.

160 ComAT, *El Rgeig v Switzerland*, 22 January 2007, no. 280/2005, para. 7.4

to a better understanding of the risk criterion and the Committee's determination thereof.[161]

In conclusion, the risk needs to be real, personal and foreseeable, going beyond mere theory or suspicion, and does not need to be certain or highly probable.

5.3.2.1b Individualisation and membership of a particular group

The Committee against Torture has consistently held that:

> 'the aim of the determination (…) is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return'.[162]

The use of the word 'personally' implies that sufficient facts and circumstances directly related to the individual concerned must be put forward to show that he is the possible subject of torture. The individualisation requirement does not exempt people from claiming protection based on the mere fact of belonging to a particular group. In other words, a claim for protection from refoulement may be based solely on the fact that the individual belongs to a group which is targeted on such a scale that there is a risk to all members of the group. Article 3 (2) of the Convention clearly indicates that the personal risk must be assessed in the light of the general human rights situation in the country of origin. In *S.S. and S.A. v Netherlands* (2001) the Committee first addressed the fact that the authors were Tamils before addressing any other individual circumstances, and found that:

> 'the likelihood of torture of Tamils in Colombo who belong to a "high risk" group is not so great that the group as a whole runs a substantial risk of being so exposed. Nor have they demonstrated any inaccuracy in the State party's conclusion that the situation in Sri Lanka is not such that for Tamils in general, even if they are from the north of the country, substantial grounds exist for believing that they risk torture if returned from abroad'.[163]

Apparently the Committee leaves room for the possibility of a prima facie claim based on the fact of belonging to a group which as a whole runs a substantial risk. However, the threshold seems to be high. In spite of belonging to a 'high risk' group of Tamils the complainants did not have a risk of being subjected to torture based on that fact alone. The Committee agreed with the assessment made by the Dutch authorities in this regard: 'the overall situation in Sri Lanka no longer entails particular hardship for returnees', and said that 'the situation in Sri Lanka is not such that for Tamils in general (in particular young men), even if they are (or have recently come) from

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161 See also Spijkerboer in his comments on ComAT, *El Rgeig v Switzerland*, 22 January 2007, no. 280/2005, in: JV 2007/160.

162 ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, para. 9.3. The Mutombo case was the first individual complaint before the Committee regarding Article 3.

163 ComAT, *S.S. and S.A. v Netherlands*, 11 May 2001, no. 142/1999, para. 6.6.

the north, substantial grounds exist for believing that they risk torture if returned'.[164] The Dutch assessment was based on its own country report, in which it was noted that areas of instability and human rights violations existed, which included brief detention of many Tamils in conflict affected areas, but that return to Government controlled areas was not irresponsible.[165] The Committee came perhaps closest to accepting a claim based on membership of a particular group in *Elmi v Australia* (1999). In this case, the Committee based the risk assessment primarily on the general human rights situation in Somalia, in particular the area of Mogadishu, and the fact that the complainant was a member of the Shikal clan, a small, unarmed clan mainly residing in Mogadishu where it remained at the mercy of armed factions of the Hawiye clan.[166] According to general human rights information vulnerability and clan identity were important factors to be taken into account. In addition, however, the Committee considered two further factors making the complainant particularly vulnerable to acts of torture. First, the family of the complainant had in the past been particularly targeted by the majority Hawiye clan, as a result of which his father and brother had been executed, his sister raped and the rest of the family forced to flee and constantly move from one part of the country to another in order to hide. Secondly, his case had received wide publicity and, therefore, if returned to Somalia the author could be accused of damaging the reputation of the Hawiye clan.[167]

The question remains when is a group targeted on such a scale that all individual members, because of that fact alone, run a real risk in accordance with Article 3 of the Convention against Torture. Unfortunately, the Committee against Torture does not answer this question in any of its views.

5.3.2.1c Required facts and circumstances to meet the necessary level of risk

To date the Committee has not believed there was a danger of being subjected to torture based on a single fact. Determining the existence of a risk requires a mixture of personal facts and circumstances in combination with the general human rights situation. This follows from the second paragraph of Article 3, according to which the competent authorities are to 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'. It is consistently held by the Committee that:

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

164 Ibid., paras. 4.5 and 4.7.
165 Ibid., para. 4.4.
166 ComAT, *Elmi v Australia*, 25 May 1999, no. 120/1998, paras. 6.6 and 6.7.
167 Ibid., para. 6.8.

> would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific circumstances'.[168]

This reasoning, with sometimes minor and insignificant changes, has become standard reasoning in the Committee's decisions in individual cases concerning Article 3. It does seem to exempt situations where the general human rights situation is so bad, the violence so extreme, that any removal would breach Article 3. This makes sense because even in the most extreme situations it may not be foreseeable that everyone will be at risk of torture per se as defined in Article 1 of the Convention.

In General Comment number one the Committee stipulated that:

> 'the following information, while not exhaustive, would be pertinent: (a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see art. 3, para. 2)? (b) Has the author been tortured or maltreated by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past? (c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects? (d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered? (e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question? (f) Is there any evidence as to the credibility of the author? (g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?'[169]

The Committee made it clear that a number of elements are to be taken into account when determining the risk. This concerns elements of substance as well as credibility and both facts of a more general nature and those directly related to the person concerned. Looking at the elements mentioned by the Committee in its General Comment the following distinction can be made:

Personal elements of substance include:
- Past experiences of torture of maltreatment;
- Engagement in political or other activities which make the person concerned particularly vulnerable.

General elements of substance include:
- Information regarding a consistent pattern of gross, flagrant or mass violations of human rights in the country of origin;

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168 ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, para. 9.3. The *Mutombo* case was the first individual complaint before the Committee regarding Article 3.

169 ComAT, General Comment No. 1 (1997), para. 8.

- Possible changes in the country of origin, in particular with respect to human rights.

Personal elements of credibility include:
- Medical or other evidence to support a claim of past experiences of torture or maltreatment;
- Evidence as to the credibility of the author;
- Relevant factual inconsistencies in the author's claim.

General elements of credibility include:
- Evidence of a consistent pattern of gross, flagrant or mass violations of human rights in the country of origin.

I will first address the elements of substance. In doing so I make a distinction between personal facts and facts concerning the general (human rights) situation. In section 5.3.2.2 this will be followed by an analysis of the issue of credibility.

5.3.2.1d Personal facts and circumstances

A variety of personal facts and circumstances can play and have played a part in the Committee's risk assessment. The Committee sees as particularly relevant past experiences of human rights violations, in particular torture or other forms of prohibited inhuman treatment, and political or any other activity both within and outside the country of origin which would make the individual particularly vulnerable to torture upon his return.[170] Past experiences of human rights violations, in particular torture and other forms of ill-treatment, are highly relevant. These experiences, of torture, inhuman treatment or even other human rights violations, are indicative of possible subjection to torture upon return. Although in theory past experiences are not a necessary requirement for believing the existence of a real risk, and past experiences alone are not sufficient for protection under the Convention, the absence of any past experience may seriously undermine the risk. For example, in *A.A. v Switzerland* (2007) the Committee noted:

> 'that the complainant has never been subjected to torture or ill-treatment in Pakistan. He was detained for only one day (…), at a police station, and he does not claim to have been a victim of ill-treatment'.[171]

The relevant question remains whether or not the individual would now or in the foreseeable future run a risk of being tortured once removed.[172] In many cases in which the Committee concluded that removal would be in breach of Article 3 of the

170 Ibid.

171 ComAT, *A.A. v Switzerland*, 11 May 2007, no. 268/2005, para. 8.4.

172 ComAT, *X, T and Z v Sweden,* 6 May 1998, no. 61/1996, para. 11.2. ComAT, *A.L.N. v Switzerland*, 19 May 1998, no. 90/1997, para. 8.3. ComAT, *H.A.D. v Switzerland*, 6 September 2000, no. 126/1999, para. 8.6.

Convention past experiences were a relevant fact which was explicitly taken into account.[173]

The Committee considers it also to be relevant when these past experiences of torture or inhuman treatment took place, i.e. in the recent or the distant past.[174] For example, experiences of 20, 17, 15, 13, nine or six years ago were not considered to be recent enough.[175] What is recent enough remains unclear and depends on all the circumstances of the case. In *S.S. v Netherlands* (2003) the Committee held:

> 'that the medical evidence submitted by the complainant confirms physical as well as psychological symptoms, which might be attributed to his alleged maltreatment at the hand of the Sri Lankan army. However, the Committee observes that, even if the complainant's allegations that he was severely tortured during his detention at the Trincomalee military camp in 1996 were sufficiently substantiated, these alleged acts of torture did not occur in the recent past'.[176]

In this case the past experiences of torture took place in 1996, an asylum request was submitted in the Netherlands in August 1997, and the complaint was submitted to the Committee in September 2001 and decided in May 2003. A total of seven years had elapsed between the experiences of torture and the considerations of the Committee. In *Khan v Canada* (1994) the past experiences of torture took place in 1987 and

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173 ComAT, *V.L. v Switzerland*, 22 January 2007, no. 262/2005, paras. 8.6 and 8.10. ComAT, *C.T. and K.M. v Sweden,* 22 January 2007, no. 279/2005, para. 7.5. ComAT, *Dadar v Canada,* 5 December 2005, no. 258/2004, para. 8.6. ComAT, *T.A. v Sweden,* 27 May 2005, no. 226/2003, para. 7.3. ComAT, *Falcon Rios v Canada,* 17 December 2004, no. 133/1999, paras. 8.4 and 8.6. ComAT, *Karoui v Sweden*, 25 May 2002, no. 185/2001, para. 10. ComAT, *Haydin v Sweden*, 16 December 1998, no. 101/1997, para. 6.6. ComAT, *A. v Netherlands*, 13 November 1998, no. 91/1997, para. 6.7. ComAT, *Ayas v Sweden*, 12 November 1998, no. 97/1997, para. 6.5. ComAT, *A.F. v Sweden,* 8 May 1998, no. 89/1997, para. 6.5. ComAT, *Tala v Sweden*, 15 November 1996, no. 43/1996, para. 10.3. ComAT, *Kisoki v Sweden*, 8 May 1996, no. 41/1996, para. 9.3. ComAT, *Alan v Switzerland*, 8 May 1996, no. 21/1995, para. 11.3.

174 ComAT, General Comment No. 1 (1997), para. 8 (b).

175 ComAT, *N.Z.S. v Sweden*, 29 November 2006, no. 277/2005, para. 8.5 (6 years). ComAT, *S.S.S. v Canada*, 5 December 2005, no. 245/2004, para. 8.4 (6 years). ComAT, *B.S.S. v Canada*, 17 May 2004, no. 183/2001, para. 11.4 (13 years). ComAT, *S.G. v Netherlands*, 14 May 2004, no. 135/1999, para. 6.4 (9 years). ComAT, *A.R. v Netherlands*, 21 November 2003, no. 203/2002, para. 7.4 (20 years). ComAT, *K.S.Y. v Netherlands*, 26 May 2003, no. 190/2001, para. 7.2 (17 years). ComAT, *H.A.D. v Switzerland*, 6 September 2000, no. 126/1999, para. 8.6 (15 years).

176 ComAT, *S.S. v Netherlands*, 19 May 2003, no. 191/2001, para. 6.6. The complaint was submitted in 2001. It should be mentioned that the Committee attached great weight in this case to the general human rights situation in Sri Lanka, which had improved at that time with the ongoing peace-process and the cease-fire agreement between the LTTE and the Sri Lankan government. The Committee further referred to the results of its own inquiry under Article 20 of the Convention in which it was concluded that no systematic practice of torture took place in Sri Lanka. Thereby the Committee referred to the fact that a large number of Tamils had returned to Sri Lanka in 2000 and 2001. See also ComAT, *K.K. v Switzerland*, 28 November 2003, no. 186/2001, para. 6.6. The complaint was submitted in 2001 and the alleged torture that led to a post traumatic stress disorder took place in 1996. Again the country of origin is Sri Lanka and the Committee again attached great weight on the improved general human rights situation in that country.

1990, the individual claimed asylum in 1990 in Canada and his complaint was submitted to the Committee in July 1994 and decided in November 1994. In this case a total of four years had elapsed between the last experiences of torture in the country of origin and the decision by the Committee. The past experiences of torture were apparently recent enough. An important difference between *S.S. v Netherlands* (2003) and *Khan v Canada* (1994), besides the actual time which had elapsed and Khan's multiple experiences of torture, is the fact that in *S.S. v Netherlands* (2003) the country of origin was Sri Lanka, a country in which at the time of the decision – 2003 – some significant improvements in the human rights situations had been seen, such as an ongoing peace-process, a cease-fire agreement, no systematic practices of torture and the repatriation of refugees. The Committee emphasised this very clearly in its decision.[177] The country of origin in *Khan v Canada* (1994) was Pakistan, in which at the time of the decision no significant changes were seen. Clearly, it is not just past experiences that determine the risk. In *S.S.S. v Canada* (2005) the Committee considered that:

> 'even if it were assumed that the complainant was tortured by Punjabi police in the past, it does not automatically follow that, six years after the alleged events occurred, he would still be at risk of being subjected to torture if returned to India. In particular, the Committee notes that the political party against which the complainant campaigned is no longer in power in Punjab'.[178]

In *Dadar v Canada* (2005) experiences of torture and imprisonment which had occurred between 1979 and 1987 in Iran were taken into account. This time the Committee considered that the long period between these experiences and the Committee's considerations did not undermine the claim, in particular because the complainant was still involved in the Iranian opposition and the general human rights situation in Iran was still very poor.[179] Finally, no doubt it is relevant to know how much time has elapsed between the experiences of ill-treatment and the moment the individual left his country in search of protection. This may have an influence on the credibility of the author and his claim. Unfortunately, there are no clear guidelines from the Committee in this regard.

Notably, not only is the lapse of time between past experiences of torture or inhuman treatment and the present relevant, but also the number and severity of past experiences as well as the after-effects of such experiences. For example, in *A.A. v Switzerland* (2007) the Committee considered that the complainant had been detained for only one day; that he had not been ill-treated; that the mere risk of being arrested

177 ComAT, *S.S. v Netherlands*, 19 May 2003, no. 191/2001, para. 6.3. Also ComAT, *A.A.C. v Sweden*, 14 December 2006, no. 227/2003, para. 8.3 in which case 'the torture to which the complainant was subjected occurred in 1997 and 1999, which could not be considered recent, as well as in quite different political circumstances, specifically when the BFP, a party the complainant is a member of, was in opposition to the then ruling party, the Awami League'.

178 ComAT, *S.S.S. v Canada*, 5 December 2005, no. 245/2004, para. 8.4.

179 ComAT, *Dadar v Canada*, 5 December 2005, 258/2004, paras. 8.6 and 8.7.

and tried was not sufficient to conclude that there was a risk of torture; and that the general information regarding the human rights situation in Pakistan did not reflect on the complainant's situation.[180]

Regarding the severity of past experiences, being the victim of rape or other forms of sexual abuse is an important element in the Committee's case law. In *C.T. and K.M. v Sweden* (2007) the principal complainant was repeatedly raped while in detention in Rwanda. This fact was convincingly supported by two medical reports which were not taken into account by the State party. In *V.L. v Switzerland* (2007) the complainant had suffered sexual abuse from members of the police in Belarus. This was supported by an authentic medical report from the hospital in Belarus.[181] In both cases the Committee relied heavily on this information. The after-effects of torture were considered relevant in *El Rgeig v Switzerland* (2007). The Committee relied on a medical report from a Geneva hospital indicating post-traumatic stress and stating that the complainant's inability to cope with a forced return would entail a definite risk to his health.[182]

It is not just past experiences of torture or inhuman treatment which have been taken into account by the Committee. Other experiences as well as activities, such as detention, desertion from the army, leaving the country of origin in a clandestine manner and internal exile have also played a role.[183] The reason for this is that these factors may increase the risk of torture.[184] Furthermore, activities, in particular of a political nature, which would make the individual particularly vulnerable to a risk of being tortured are relevant. When it comes to political activities various elements are important, including the level of responsibility and engagement and the type and

180 ComAT, *A.A. v Switzerland*, 11 May 2007, no. 268/2005, paras. 8.4 and 8.5.

181 ComAT, *V.L. v Switzerland*, 22 January 2007, no. 262/2005, para. 8.6.

182 ComAT, *El Rgeig v Switzerland*, 22 January 2007, no. 280/2005, para. 7.4.

183 ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, para. 9.4. ComAT, *Alan v Switzerland,* 8 May 1996, no. 21/1995, para. 1.3. ComAT, *Kisoki v Sweden,* 8 May 1996, no. 41/1996, para. 9.4. ComAT, *Tala v Sweden,* 15 November 1996, no. 43/1996, para. 10.3. ComAT, *A.F. v Sweden,* 8 May 1998, no. 89/1997, para. 6.5 (past detention). ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, para. 9.4 (desertion from the army and leaving the country in a clandestine manner). ComAT, *F.F.Z. v Denmark*, 24 May 2002, no. 180/2001, para. 11 (consequences of unlawful departure). ComAT, *Alan v Switzerland*, 8 May 1996, no. 21/1995, para. 1.3 (internal exile).

184 ComAT, *Dadar v Canada*, 5 December 2005, no. 258/2004, para. 8.7; according to the Committee the possibility of being questioned upon return increases the risk of torture the complainant might face.

scale of activities.[185] Political activity does not just refer to actual political activities but also includes associated political affiliation.[186]

Other personal circumstances which have played a role in individual cases in determining the risk include ethnicity, family ties and sexual orientation.[187] The Committee, however, considered that a claim under Article 3 of the Convention 'arising by virtue of family relationship (…) such family ties, of themselves, are generally insufficient to ground such a claim under Article 3'.[188] In *V.L. v Switzerland* (2007) the claim was largely based on the political activities of the complainant's husband. The Committee observed that the complainant, while now separated from her husband, remained a source of contact for the authorities and a means of pressurising him, in particular because she had not divorced him.[189] In addition to having ties with her (former) husband, the complainant had been participating in the distribution of election propaganda when in Belarus, and, according to general human rights information, cases of harassment of divorced women because of their former husbands' activities were not unknown in Belarus. Finally, it was also considered relevant that she had filed a report against the police in the past making her vulnerable to reprisals anywhere in Belarus.[190] It is not just experiences of the individual that

185 For example, ComAT, *A.A.C. v Sweden*, 14 December 2006, no. 227/2003, para. 8.5. In some cases the individual concerned was a (local) political leader: see ComAT, *Khan v Canada*, 18 November 1994, no. 15/1994, para. 3.2. ComAT, *A.F. v Sweden*, 8 May 1998, no. 89/1997, para. 2.2. In other cases the individual concerned was merely a member of a political organisation, commissioning minor activities such as participating in demonstrations, attending (illegal) meetings (see ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, paras. 2.1 and 9.4), having private sessions with a prominent opposition member (see ComAT, *A. v Netherlands*, 13 November 1998, no. 91/1997, para. 2.2), or only sympathising and distributing leaflets (see ComAT, *Alan v Switzerland*, 8 May 1996, no. 21/1995, paras. 2.1, 2.3 and 11.3. ComAT, *Haydin v Sweden*, 16 December 1998, no. 101/1997, para. 2.1.

186 ComAT, *A. v Netherlands*, 13 November 1998, no. 91/1997, para. 6.7.

187 ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, para. 9.4, ComAT, *Alan v Switzerland*, 8 May 1996, no. 21/1995, para. 11.3, ComAT, *Elmi v Australia*, 25 May 1999, no. 120/1998, para. 6.8 (ethnicity). In ComAT, *Paez v Sweden*, 28 April 1997, no. 39/1996, para. 14.3, the Committee considered that the author came from a politically active family, that one of his cousins had disappeared and another was killed for political reasons, and that his mother and sisters had been granted de facto refugee status by Sweden. See also ComAT, *A.F. v Sweden,* 8 May 1998, no. 89/1997, paras. 2.1 and 6.5, ComAT, *Attia v Sweden,* 24 November 2003, no. 199/2002, para. 12.3 (family ties). ComAT, *K.S.Y. v Netherlands,* 26 May 2003, no. 190/2001, paras. 7.3 and 7.4, ComAT, *E.J.V.M. v Sweden*, 28 November 2003, no. 213/2002, para. 8.7, ComAT, *Elmi v Australia*, 25 May 1999, no. 120/1998, para. 6.8 (sexual orientation);.

188 ComAT, *Attia v Sweden*, 24 November 2003, no. 199/2002, para. 12.3. See also ComAT, *M.V. v Netherlands*, 13 May 2003, no. 201/2002, para. 7.3. ComAT, *K.S.Y. v Netherlands,* 26 May 2003, no. 190/2001, para. 7.2. ComAT, *Z.T. v Australia*, 19 November 2003, no. 153/2000, para. 6.3.

189 ComAT, *V.L. v Switzerland*, 22 January 2007, no. 262/2005, para. 8.6.

190 Ibid. See also ComAT, *T.A. v Sweden*, 27 May 2005, no. 226/2003, para. 7.3, involving a combination of past experiences of persecution, detention, rape and torture, a shift in political power in the country of origin, and the risk of retaliation for the involvement in political activities of the complainant's husband.

can be important, but also family members' experiences of human rights violations have been taken into account by the Committee.[191]

Another relevant factor is recognition as a refugee in accordance with the Refugee Convention.[192] In *Pelit v Azerbaijan* (2007) such recognition remained valid and raised, according to the Committee, real issues under Article 3 of the Convention against Torture.[193] Unfortunately, the Committee has not made it clear why this is a relevant factor. Persecution cannot be equated with torture; it is a much broader concept.[194] Although it is far from certain that those who have a well-founded fear of being persecuted also have a risk of being subjected to torture,[195] such fear may increase the likelihood of being subjected to torture.

Finally, a relevant factor may be the amount of publicity an individual case has received in the country of refuge.[196]

It should be noted that the above list of personal facts and circumstances is not exhaustive. Listed here are those facts that have been considered by the Committee to be relevant in the complaints brought before it. Other facts and circumstances may be of equal relevance if and when put forward in a specific case.

5.3.2.1e General human rights situation

In Article 3(2) of the Convention it is explicitly stated that in determining a claim under Article 3(1) the existence in the country of origin of a consistent pattern of gross, flagrant or mass violation of human rights is to be taken into account. Such a pattern alone will not be sufficient for a conclusion that the existence of a real risk, nor will the absence of such a pattern lead to the conclusion that no risk exists. In *Falcon Rios v Canada* (2004) the Committee recalled its visit to Mexico during the Article 20 inquiry procedure and considered that 'although it might be possible to assert that there still exists in Mexico a pattern of human rights violations, that in itself would not constitute sufficient cause for finding that the complainant was likely to be sub-

191 For example, ComAT, *Paez v Sweden,* 28 April 1997, no. 39/1996, para. 14.3, the Committee took into account the disappearance of one of the complainant's cousins and the killing of another. In ComAT, *Elmi v Australia*, 25 May 1999, no. 120/1998, para. 6.8, the Committee took into account the execution of the complainant's father and brother, the rape of his sister and the constant moving and hiding of the rest of his family. ComAT, *Y.S. v Switzerland*, 17 May 2001, no. 147/1999, para. 6.6, in which the Committee took into account that there was no indication that members of the complainant's family had been sought or intimidated after his departure. See also ComAT, *F.F.Z. v Denmark*, 24 May 2002, no. 180/2001, para. 11.

192 ComAT, *Pelit v Azerbaijan*, 29 May 2007, no. 281/2005, para. 11. See also ComAT, *Dadar v Canada*, 5 December 2005, no. 258/2004, although in this case the Committee did not explicitly take into account the fact that the complainant was recognised as a refugee. Note that it is in principal irrelevant what State has formally recognised the individual as a refugee. Refugee status has a declaratory character: see section 2.2.1.

193 ComAT, *Pelit v Azerbaijan*, 29 May 2007, no. 281/2005, para. 11.

194 Persecution in accordance with the Refugee Convention is discussed in section 2.3.1.

195 See Bruin's comments in NAV 2007/30, para. 5, under ComAT, *Pelit v Azerbaijan*, 29 May 2007, no. 281/2005.

196 ComAT, *Elmi v Australia*, 25 May 1999, no. 120/1998, para. 6.8.

jected to torture on his return to Mexico; additional reasons must exist …'.[197] Thus, situations of serious indiscriminate violence will in themselves not be enough. In its first General Comment the Committee reiterated the importance of the general human rights situation in the country of origin, emphasising, however, that it related only to human rights violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in a official capacity, in accordance with Article 1 of the Convention.[198] Furthermore, changes in the human rights situation in the country of origin are an important element to take into account.[199]

As already mentioned, the general human rights situation is supplementary to the personal facts and circumstances put forward. A poor general human rights situation in itself is insufficient to determine that a person would be at risk. There must be additional grounds relating to the person concerned.[200] In *Elmi v Australia* (1999) the Committee based the risk assessment on the general human rights situation in Somalia. In addition, the Committee took into account two facts specifically relating to the complainant.[201] First, the Committee considered that the complainant's family had been particularly targeted in the past by the majority Hawiye clan, leading to the execution of the complainant's father and brother, the rape of his sister and the internal displacement of the rest of the family. Secondly, the Committee considered that the complainant's case had received wide publicity, making him more vulnerable to reprisals by the Hawiye clan.[202] Undoubtedly, even though these considerations were additional, these two very specific individual facts were significant factors in the Committee's assessment of the risk.

What is regarded by the Committee as relevant evidence of a consistent pattern of gross, flagrant or mass violation of human rights? First and foremost, practices of torture and other forms of prohibited inhuman treatment, including disappearances and summary or arbitrary execution.[203] Secondly, evidence of practices which could

197 ComAT, *Falcon Rios v Canada*, 17 December 2004, no. 133/1999, para. 8.3.

198 ComAT, General Comment No. 1 (1997), paras. 3 and 8(a).

199 Ibid., para. 8(d).

200 ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, para. 9.3.

201 ComAT, *Elmi v Australia*, 25 May 1999, no. 120/1998, para. 6.6-6.8.

202 Ibid., para. 6.8.

203 ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, para. 9.5. ComAT, *Tala v Sweden,* 15 November 1996, no. 43/1996, para. 10.4. ComAT, *Aemei v Switzerland*, 29 May 1997, no. 34/1995, para. 9.9. ComAT, *A.F. v Sweden*, 8 May 1998, no. 89/1997 para. 6.6. ComAT, *A.L.N. v Switzerland*, 19 May 1998, no. 90/1997, para. 8.6. ComAT, *Haydin v Sweden*, 16 December 1998, no. 101/1997, para. 6.4. ComAT, *Chipana v Venezuela*, 16 December 1998, no. 110/1998, para. 6.4. ComAT, *Arana v France*, 5 June 2000, no. 63/1997, para. 11.4. ComAT, *Karoui v Sweden*, 25 May 2002, no. 185/2001, para. 9. ComAT, *U.S. v Finland*, 15 May 2003, no. 197/2002, para. 7.7. ComAT, *S.S. v Netherlands,* 19 May 2003, no. 191/2001, para. 6.3. With regard to systematic practices of torture the Committee occasionally refers to its finding in the inquiry procedure of Article 20 CAT. See, for example, ComAT, *Alan v Switzerland*, 8 May 1996, no. 21/1995, para. 11.5 referring to its inquiry of Turkey (15 November 1993, UN doc. A/48/44/Add.1) and ComAT, *Falcon Rios v Canada*, 17 December 2004, no. 133/1999, para. 8.3 referring to its inquiry into

facilitate the commission of acts of torture or increase the risk of them, such as arbitrary detention, lack of legal assistance to detainees, interrogation of returnees upon arrival in the country of origin and failure to investigate, prosecute and punish perpetrators of torture.[204] Thirdly, other human rights violations are taken into account, in particular violations of civil and political rights.[205]

Other evidence deemed relevant by the Committee, in particular evidence indicating an improvement in the human rights situation, is the possibility of return or repatriation of refugees.[206] The Committee also considers current peace-processes and cease-fire agreements between the government and opposition groups to be relevant.[207] Moreover, significant changes in the government of the country of origin are an important consideration in the risk assessment,[208] as is the establishment of a completely new or transitional government.[209] Based on a combination of a shift in government detrimental for the individual and documented past experiences of persecution, detention, rape and torture, the Committee, in *T.A. v Sweden* (2005), concluded that the complainant would be at risk of being subjected to torture.[210] Political changes are not always

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Mexico (26 May 2003, UN doc. CAT/C/75). Also Nowak & McArthur 2008, pp. 184 to 186 (paras. 145 to 149).

204 ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, para. 9.5. ComAT, *Kisoki v Sweden,* 8 May 1996, no. 41/1996, para. 9.5. ComAT, *Arana v France*, 5 June 2000, no. 63/1997, para. 11.4. ComAT, *G.K. v Switzerland*, 12 May 2003, no. 219/2002, para. 6.3. ComAT, *H.B.H. et al. v Switzerland*, 16 May 2003 no. 192/2001, para. 6.9. ComAT, *V.L. v Switzerland,* 22 January 2007, no. 262/2005, para. 8.10

205 ComAT, *Kisoki v Sweden,* 8 May 1996, no. 41/1996, para. 9.5 (political persecution). Also Nowak & Elizabeth McArthur 2008, pp. 186 and 187 (paras. 150-152).

206 ComAT, *X, Y and Z v Sweden*, 6 May 1998, no. 61/1996, para. 11.5. ComAT, *H.M.H.I. v Australia*, 1 May 2002, no. 177/2001, para. 6.6. ComAT, *U.S. v Finland*, 15 May 2003, no. 197/2002, para. 7.7. ComAT, *S.S. v Netherlands*, 19 May 2003, no. 191/2001, para. 6.3. ComAT, *K.K. v Switzerland*, 28 November 2003, no. 186/2001, para. 6.3 (Sri Lanka).

207 ComAT, *U.S. v Finland,* 15 May 2003, no. 197/2002, para. 7.7. ComAT, *S.S. v Netherlands,* 19 May 2003, no. 191/2001, para. 6.3. ComAT, *K.K. v Switzerland*, 28 November 2003, no. 186/2001, para. 6.3; in these cases the Committee referred to the ongoing peace process and subsequent cease-fire agreement (February 2002) between the Sri Lankan government and the Tamil opposition group LTTE. See also ComAT, *A.L.N. v Switzerland*, 19 May 1998, no. 90/1997, para. 8.6 concerning the peace process in Angola. In ComAT, *M.C.M.V.F. v Sweden*, 12 December 2005, no. 237/2003, para. 6.4 the Committee made clear that the situation in El Salvador had changes significantly since the Peace Accords came into effect in 1992.

208 In several cases in which Bangladesh was the country of origin the change of Government was a decisive factor, in particular when the complainant's political party is in power at the moment of the Committee's considerations: ComAT, *T.M. v Sweden*, 2 December 2003, no. 228/2003, para. 7.3. ComAT, *S.A. v Sweden,* 7 May 2004, no. 243/2004, para. 4.2. ComAT, *M.A.M. v Sweden,* 18 May 2004, no. 196/2002, para. 6.5. ComAT, *M.N. v Switzerland*, 22 November 2006, no. 259/2004, para. 6.6. Also ComAT, *X, Y and Z v Sweden,* 6 May 1998, no. 61/1996, para.11.3 concerning the DR Congo. ComAT, *A.D. v Netherlands*, 24 January 2000, no. 96/1997, para. 7.4 and ComAT, *A.I. v Switzerland*, 17 May 2004, no. 182/2001, para. 6.5 concerning Sri Lanka.

209 ComAT, *Y.H.A. v Australia*, 27 March 2002, no. 162/2000, para. 7.4, in which the Committee referred to the newly composed Transitional government in Somalia, which included members of the complainant's Shikal clan.

210 ComAT, *T.A. v Sweden*, 27 May 2005, no. 226/2003, para. 7.3.

relevant for the individual complainant. In *C.T. and K.M. v Sweden* (2007) the State party had argued that the political situation in Rwanda had undergone significant changes since the 2003 elections.[211] The complainant on the other hand had put forward a letter from the UNHCR stating that members of the party to which the principal complainant belonged continued to be at risk even after 2003.[212] Furthermore, in the light of the continuing ethnic tension in Rwanda there was a likelihood of torture on return.[213]

5.3.2.1f Risk 'sur place'

According to the Committee political or other activities in which the individual has been engaged, both within and outside his country of origin, are relevant. These include not only activities engaged in by the individual in the country of origin, but also activities engaged in elsewhere, including in the country of refuge.[214] In fact, the Committee made it very clear that:

> 'even if the activities of which the author is accused in Iran [country of origin] were insufficient for article 3 to apply, his subsequent activities in the receiving country could prove sufficient for application of that article'.[215]

The Committee did not discuss whether or not continuity is required between the activities in the country of origin and in the country of refuge. It observed:

> 'that the "substantial grounds" for believing that return or expulsion would expose the applicant to the risk of being subjected to torture may be based not only on acts committed in the country of origin, in other words *before* his flight from the country, but also on activities undertaken by him in the receiving country: in fact, the wording of article 3 does not distinguish between the commission of acts, which might later expose the applicant to the risk of torture, *in the country of origin or in the receiving country'*.[216]

211 ComAT, *C.T. and K.M. v Sweden*, 22 January 2007, no. 279/2005, para. 4.10.

212 Ibid., para. 5.3.

213 Ibid., paras. 7.5-7.7. Unfortunately, the Committee did not address the issue of political changes that had occurred in Rwanda since the 2003 elections.

214 ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, 9.4, ComAT, *Khan v Canada*, 18 November 1994, no. 15/1994, para. 12.3 (activities in the country of origin). ComAT, *Kisoki v Sweden,* 8 May 1996, no. 41/1996, para. 9.4, ComAT, *Aemei v Switzerland*, 29 May 1997, no. 34/1995, para. 9.5, ComAT, *X, Y and Z, v Sweden*, 6 May 1998, no. 61/1996, para. 11.4, ComAT, *I.A.O. v Sweden,* 6 May 1998, no. 65/1997, para. 14.4; ComAT, *A.R. v Netherlands*, 21 November 2003, no. 203/2002, para. 7.5 (activities in the country of refuge).

215 ComAT, *Aemei v Switzerland*, 29 May 1997, no. 34/1995, para. 9.5. In this case there were doubts about the individual's political activities in his country of origin, Iran. However, there was no doubt about his activities in Switzerland as an active member of the Armenian and Persian Aid Organisation (APHO), an illegal organisation in Iran, which included the distribution of leaflets, running of APHO stands and participating in demonstrations.

216 Ibid. [emphasis added]. See also Bruin in his comment on ComAT, *A.R. v Netherlands,* 21 November 2003, no. 203/2002, in NAV 2004 No. 8, p. 98.

Activities conducted by the individual after his flight also played an important role in *El Rgeig v Switzerland* (2007). The Committee took into account attestations from organisations of Libyan refugees in Europe of the support the complainant had provided to their organisations, as well as of earlier political activities before he left Libya.[217]

5.3.2.1g Assessing the personal facts in light of the general situation

It is difficult to say in general what facts and circumstances will determine the existence of substantial grounds for believing that the individual is in danger of being subjected to torture upon return. Each case is different and requires an evaluation of all relevant facts and circumstances. The Committee's case law is very case-specific and provides few clues or little guidance for general remarks as to how relevant facts and circumstances must be assessed. In theory, the test is clear. The risk needs to be real, personal and foreseeable, going beyond mere theory or suspicion, and does not need to be certain or highly probable. How this test must be applied depends on each individual case.

Facts and circumstances directly related to the individual are of primary importance and often decisive.[218] If not enough personal facts and circumstances have been shown, examination of the general human rights situation in the country of origin will not be deemed necessary.[219] The general human rights situation is of supplementary importance, strengthening or weakening the individual claim for protection. Reference to the general human rights situation in the country of origin alone will not be enough.[220] However, the graver the general human rights situation in the country of return or as regards a particular group, for example, a specific clan in Somalia or Kurds in Turkey, the more significant the general human rights situation will be in assessing the individual risk.[221] Also, the less serious the human rights situation seems to be the more difficult it will be to establish substantial grounds for believing that a real risk of torture will exist. In *I.A.O. v Sweden* (1998) the author had been detained, had published critical newspaper articles and continued to do so, and had been tortured in the past. In spite of this the Committee considered that there

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217 ComAT, *El Rgeig v Switzerland*, 22 January 2007. no. 280/2005, para. 7.4. The continuous involvement of the complainant with the Iranian opposition when he had already left Iran was also taken into account in ComAT, *Dadar v Canada,* 5 December 2005, no. 258/2004, paras. 8.5 and 8.6.

218 According to the Committee: 'the aim of the determination, however, is to establish whether the individual concerned would be personally at risk'. This is a standard reasoning adopted by the Committee in its first case under Article 3 and used ever since: see ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, para. 9.3. Vermeulen 2001, pp. 211 and 212.

219 ComAT, *V.N.I.M. v Canada*, 19 December 2002, no. 119/1998, para. 8.5. See also ComAT, *K.M. v Switzerland*, 4 July 2000, no. 107/1998, para. 6.7.

220 In ComAT, *Z.Z. v Canada,* 16 May 2001, no. 123/1998, para. 8.5, the author produced only information on the general situation in Afghanistan and claimed that, as a member of the Tajik group, he would face torture upon return to Afghanistan.

221 ComAT, *Elmi v Australia*, 25 May 1999, no. 120/1998 (Somalia). ComAT, *Ayas v Sweden,* 12 November 1998, no. 97/1997 (Turkey). ComAT, *Haydin v Sweden*, 16 December 1998, no. 101/1997 (Turkey).

was no indication that the author was otherwise politically active, that there was no consistent pattern of gross, flagrant or mass violation of human rights, and that opposition periodicals could circulate freely and openly criticise the Government even though journalists were occasionally jailed and intimidated.[222]

In some cases it is not clear why the Committee has concluded that a risk existed. *Tebourski v France* (2007) is interesting. The Committee considered that the expulsion of the complainant was in breach of Articles 3 and 22 of the Convention. In spite of the fact that the Committee considered that it 'must ultimately decide whether there is a risk of torture', it did not do so in this case. It reached its conclusion that the deportation was in breach of Article 3 solely on the fact that, in deporting the complainant, the Committee was presented with 'a fait accompli' and that 'the State party not only failed to demonstrate the good faith required on any party to a treaty, but also failed to meet its obligations under articles 3 and 22 of the Convention'.[223] In *El Rgeig v Switzerland* (2007) it was again unclear what the actual level of risk was that the complainant faced upon his return to Libya. The Committee held:

> 'that the State party has not presented to it sufficiently convincing arguments to demonstrate a complete absence of risk that the complainant would be exposed to torture if he were to be forcible returned to the Libyan Arab Jamahiriya'.[224]

Attestations from organisations of Libyan refugees in Europe indicating the support the claimant had provided to their organisations, and his relations with opposition religious movements banned in Libya whose members were persecuted were decisive for the Committee. In addition, the Committee referred to the fact that representatives of the Libyan consular authorities in Geneva had objected to the complainant's request for political asylum and that the complainant had submitted a copy of a medical certificate indicating that he suffered from post-traumatic stress disorder. These circumstances, in the light of persistent reports concerning the treatment generally meted out to activists such as the complainant when they were forcibly returned to Libya, were sufficient for the Committee.[225] Interestingly, past activities were explicitly left out of the main considerations.[226]

The level of risk is not always an issue. In *Dadar v Canada* (2005) the complainant had been tortured and imprisoned on various occasions between 1979 and 1987 by the Iranian authorities. Ever since he had continued to be involved with the Iranian opposition although the nature and extent of his activities were unclear.[227] In the light of this information and the general human rights situation in Iran the State party had already acknowledged that there was no doubt that the individual would be subjected to questioning if returned to Iran and that he might indeed be tortured upon

222 ComAT, *I.A.O. v Sweden,* 6 May 1998, no. 65/1997, paras. 14.3-14.5.
223 ComAT, *Tebourski v France,* 11 May 2007, no. 300/2006, para. 8.7.
224 ComAT, *El Rgeig v Switzerland*, 22 January 2007, no. 280/2005, para. 7.4.
225 Ibid.
226 Ibid.
227 ComAT, *Dadar v Canada*, 5 December 2005, 258/2004, paras. 8.5 and 8.6.

return. In spite of this risk Canada argued that the complainant posed a threat to Canadian citizens and that that threat should prevail over the complainant's risk upon return.[228] The Committee did not clarify the level of risk but concluded that the deportation of the complainant would amount to a violation of Article 3.

The existence of a risk is not determined just by personal facts and the general circumstances in the country of origin. It is also determined by issues of credibility, plausibility and evidence, as well as by such issues as the relevant time for assessing the risk, the availability of internal protection and obtaining diplomatic assurances. These issues will be discussed below in sections 5.3.2.2 to 5.3.2.5.

5.3.2.2 The standard and burden of proof

In order to be granted protection from refoulement under Article 3 of the Convention against Torture substantial grounds must be shown for believing that a danger of subjection to torture exists upon arrival in the country of origin. This is the essence of the standard of proof required for a refoulement claim under Article 3 and is an – interrelated – matter of credibility, plausibility and evidence.

In this section I will discuss issues of credibility and plausibility, issues of evidence, and the burden of proof.

5.3.2.2a Issues of credibility and plausibility

Showing substantial grounds for believing that the individual is in danger of being subjected to torture is done primarily by presenting facts and circumstances which directly relate to the individual concerned supplemented by information regarding the general human rights situation in the country of origin. It is essential that any claim for protection is credible and that the facts and circumstances put forward are plausible. This means that the claim must be sufficiently detailed, comprehensive, consistent and plausible in light of the general human rights situation.[229] *A.S. v Sweden* (2001) is an example of this. First briefly the facts of this case. The complainant, an Iranian woman, was the widow of a high-ranking officer in the Iranian Air Force who was killed during training and officially declared to be a martyr for the Iranian Islamic Revolution. The complainant was supported and supervised by a foundation, the Committee of Martyrs, which is a powerful authority in Iranian society. As a result, on the one hand the complainant's material living conditions and status rose considerably and on the other hand she now had to submit herself to the rigid rules of Islamic society even more then before. The foundation forced the complainant to remarry a high-ranking Ayatollah. During this marriage she met a Christian man with whom she started a relationship. The complainant was arrested and allegedly sentenced to death by stoning. She provided a detailed and comprehensive account of her ex-

228 Ibid., paras. 2.14 and 8.8.

229 ComAT, *A.S. v Sweden*, 15 February 2001, no. 149/1999, para. 8.6. ComAT, *M.P.S. v Australia*, 30 April 2002, no. 138/1999, para. 7.3. ComAT, *Karoui v Sweden,* 25 May 2002, no. 185/2001, para. 10.

periences. She had presented her identity papers and had provided certified evidence proving her status as the widow of a martyr and a medical certificate indicating that she suffered from post-traumatic stress disorder. Furthermore, she provided an extensive explanation for the lack of further evidence. Notwithstanding all this information and documentation the State party argued that the complainant had not presented sufficient verifiable information and evidence. The Committee, however, considered that sufficient details of the forced marriage and the alleged arrest had been put forward, including the names of people involved, their positions, dates, and addresses, all of which are facts which could be, should be, and to certain extent had been, verified by the State party. All in all it was enough for the Committee to find the claim credible. Furthermore, the Committee found the complainant's story to be plausible. It was in line with what was known about the general human rights situation in Iran. Also, sufficient plausible explanations had been given by the complainant for not providing further details and evidence.[230] It is unclear to what extent it was actually necessary for the complainant to provide explanations for missing details and evidence.[231]

For a successful claim under Article 3 of the Convention it is important to provide an account, as detailed, comprehensive and consistent as possible, of all relevant personal facts and circumstances; to support this with as much information as possible on the general human rights situation and to present as much evidence as possible and provide a plausible explanation for any missing details and evidence. Even then, in some cases the reasoning of the Committee is inscrutable. For example, in *Mutombo v Switzerland* (1994) crucial facts as presented by the complainant were verified by the State party, which concluded that it was highly unlikely that a risk existed. The Committee did not address this, but merely considered that even if there were doubts the security of the complainant had to be ensured, thereby leaving it open what happens if the verification of facts contradicts the complainant's story, as the State party had argued.[232]

Various factors are relevant in determining the credibility of the claim and claimant. These include, in particular, the moment in time when facts and evidence are presented and their consistency. These factors are most commonly addressed in the

230 ComAT, *A.S. v Sweden*, 15 February 2001, no. 149/1999.

231 See also Battjes in his comment on ComAT, *A.S. v Sweden,* 15 February 2001, no. 149/1999, in *Rechtspraak Vreemdelingenrecht* 2001, No. 4, p. 36.

232 ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, paras. 6.5, 6.6 and 9.2, in which verification by the State party of some of the crucial facts resulted in the conclusion that the claim was highly unlikely. This conclusion was based on information gathered by the Swiss embassy in Zaire through an informant who concluded that the complainant did not possess the correct document provided to released prisoners, that the signature on the release order presented by the complainant did not correspond with the signature of the director of the prison in which the complainant allegedly was detained, that his name was not in the detention registers and that the leaders of the subsection of the opposition group UPDS to which the complainant's father belonged had declared the complainant was not a member.

Committee's case law. Other factors may of course also be relevant, such as the truthfulness of the facts put forward.[233]

The moment at which facts and evidence are presented is relevant for determining their credibility. The individual does not have to present all facts and evidence at the moment he lodges his claim. This cannot always be expected of victims of torture. Nevertheless, if facts and evidence are presented at a later stage plausible explanations for the delay should be given.[234] *V.L. v Switzerland* (2007) is an interesting example. In this case the complainant mentioned that she had suffered sexual abuse only when requesting a revision of the Swiss Asylum Review Board's decision.[235] She argued that she had not revealed this information before because it was humiliating, it was an affront to her personal dignity, and she felt psychological pressure from her husband to keep silent.[236] According to the Committee these explanations of the delay in mentioning the sexual abuses were 'totally reasonable' and:

> 'it is well-known that the loss of privacy and prospect of humiliation based on revelation alone of the acts concerned may cause both women and men to withhold the fact that they have been subject to rape and/or other forms of sexual abuse until it appears absolutely necessary. Particularly for women, there is the additional fear of shaming and rejection by their partner or family members. Here the complainant's allegation that her husband reacted to the complainant's admission of rape by humiliating her and forbidding her to mention it in their asylum proceedings adds credibility to her claim. The Committee notes that as soon as her husband left her, the complainant who was then freed from his influence immediately mentioned the rapes to the national authorities …'.[237]

It is nevertheless preferable for all facts and evidence to be provided as early as possible in the risk-assessment procedure.

Not only should sufficient verifiable facts be presented, these facts should also be consistent.[238] Inconsistencies and contradictions may weaken the claim, unless

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233 In *A v Netherlands* (1998) the complainant initially lied about his identity and nationality. He later gave his real identity and nationality: ComAT, *A. v Netherlands*, 13 November 1998, no. 91/1997, para. 6.5.

234 ComAT, *Khan v Canada*, 18 November 1994, no. 15/1994, para. 12.3, in which the Committee noted 'that some of the author's claims and corroborating evidence had been submitted only after his refugee claim had been refused by the Refugee Board and deportation procedures had been initiated; the Committee, however, also notes that this behaviour is not uncommon for victims of torture'. ComAT, *Ayas v Sweden*, 12 November 1998, no. 97/1997, para. 6.5: 'Although the author changed his first version of the facts he gave a logical explanation of his reasons for having done so'. Unfortunately it does not become clear from the Committee's decision in this case what logical explanations were given by the author, except that he suffered from a post-traumatic stress disorder. ComAT, *H.B.H. et al. v Switzerland*, 16 May 2003, no. 192/2001, para. 6.8: 'The Committee considers that the above mentioned documents were produced by the complainants only in response to decisions by the Swiss authorities to reject their application for asylum, and that the complainants have failed to offer any coherent explanation of the delay in making submissions'.

235 ComAT, *V.L. v Switzerland*, 22 January 2007, no. 262/2005, para. 2.3.

236 Ibid., para. 2.5.

237 Ibid., para. 8.8.

238 ComAT, General Comment No. 1 (1997), para. 8 (f) and (g).

they can be explained or are of such a nature that they are not material for the assessment of the risk and do not raise doubts about the general veracity of the claim.[239] As early as in *Mutombo v Switzerland* (1994) the Committee considered that even if there were doubts about the facts presented by the complainant, because of inconsistencies, it must still be ensured that the individual's security was not endangered and thus the claim had to be assessed.[240] Moreover, the Committee has acknowledged that victims of torture, in particular but not necessarily suffering from post traumatic stress disorder, may not always tell a consistent story.[241] For example, in *Kisoki v Sweden* (1996) the complainant had been raped and had, initially, not mentioned this. Furthermore, she had given inconsistent accounts of how often she had been raped. The Committee considered that:

> 'complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims'.[242]

Even if inconsistencies are material, the principle of strict accuracy does not apply as long as they do not raise significant doubts about the 'trustworthiness of the general veracity' of the claim.[243] It is, however, difficult to assess when inconsistencies do not raise such significant doubts. In *Khan v Canada* (1994) the inconsistencies related to the dates of arrests, the lengths of detention and the reasons for the arrests. Apparently these inconsistencies were, according to the Committee, not significant enough as they were not addressed.[244] Notably, the complainant had presented important evidence in support of his claim, such as a copy of an arrest warrant against him and a copy of a letter from the President of the Baltistan Student Federation, to which the complainant belonged, advising him that it would be dangerous to return to Pakistan.[245] In *Haydin v Sweden* (1998) the inconsistencies related to how the

239 For example, ComAT, *Kisoki v Sweden,* 8 May 1996, no. 41/1996, para. 9.3. ComAT, *Alan v Switzerland,* 8 May 1996, no. 21/1995, para. 11.3. ComAT, *Haydin v Sweden*, 16 December 1998, no. 101/1997, para. 6.6. ComAT, *Karoui v Sweden,* 25 May 2002, no. 185/2001, para. 10. ComAT, *A.K. v Australia*, 11 May 2004, no. 148/1999, para. 6.2. ComAT, *S.P.A. v Canada,* 6 December 2006, no. 282/2005, para. 7.5.

240 ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, paras. 6.1 and 9.2. See also ComAT, *Khan v Canada,* 18 November 1994, no. 15/1994, para. 12.3.

241 ComAT, *Kisoki v Sweden*, 8 May 1996, no. 41/1996, para. 9.3. ComAT, *Alan v Switzerland*, 8 May 1996, no. 21/1995, para. 11.3. ComAT, *Tala v Sweden*, 15 November 1996, no. 43/1996, para. 10.3. ComAT, *Haydin v Sweden,* 16 December 1998, no. 101/1997, para. 6.6. ComAT, *K.M. v Switzerland*, 4 July 2000, no. 107/1998, para. 6.5. See also in similar terms ComAT, *I.A.O. v Sweden,* 6 May 1998, no. 65/1997, para. 14.3. ComAT, *E.T.B. v Denmark*, 24 May 2002, no. 146/1999, para. 10. ComAT, *C.T. and K.M. v Sweden*, 22 January 2007, no. 279/2005, para. 7.6. ComAT, *A.F. v Sweden,* 8 May 1998, no. 89/1997, paras. 3.3 and 6.5. ComAT, *Ayas v Sweden,* 12 November 1998, no. 97/1997, paras. 5.6 and 6.5. ComAT, *Falcon Rios v Canada*, 17 December 2004, no. 133/1999, para. 8.5.

242 ComAT, *Kisoki v Sweden*, 8 May 1996, no. 41/1996, para. 9.3.

243 For example, ComAT, *Haydin v Sweden*, 16 December 1998, no. 101/1997, para. 6.7.

244 ComAT, *Khan v Canada*, 18 November 1994, no. 15/1994, paras. 8.3 and 12.3.

245 Ibid., para. 12.4

complainant had obtained political leaflets and posters from the PKK and how the Turkish military authorities had discovered his political activities. The individual explained the inconsistencies by referring to the insignificance of the inconsistent facts, leaving the core of the individual's story intact, and by referring to the general human rights situation regarding PKK members in Turkey as well as to the fact that he suffered from post traumatic stress disorder, which was supported by a medical report from the Centre for Torture and Trauma Survivors in Stockholm.[246] In *N.P. v Australia* (1999) the State party explicitly referred to the Committee's case law concerning inconsistencies and made a distinction between inconsistencies in the complainant's story, which it regarded as minor, and inconsistencies it considered to be more important, i.e. the complainant's many variations on his past experiences of ill-treatment.[247] The Committee considered it to be relevant that the complainant had failed to provide any explanations for the inconsistencies, including medical evidence, and was not persuaded that a risk existed.[248] Clearly, it is important that inconsistencies, especially those concerning significant facts in the claim, are explained. A complainant lying about his identity and nationality will seriously undermine his claim, unless his conduct is explained.[249] In *A v Netherlands* (1998) the complainant lied about his identity and nationality when first requesting asylum. Later, during a follow-up interview, he gave his real name and nationality, explaining that he was too afraid immediately to give the correct information in view of the fact that Tunisia, his country of origin, was a popular tourist destination, and for that reason Tunisians were not granted asylum in Europe.[250] Also, he stated that he would give his real name and nationality only when he was given assurances that he would not be returned to his country of origin.[251] These explanations were apparently enough for the Committee without motivating why.

Also, particular weight is attached by the Committee to the fact that the complainant has been the victim of torture and/or is suffering from post traumatic stress disorder, preferably where there is a medical report.[252] Other relevant factors can also explain disparities, such as the lapse of time between the complainant's initial

246 ComAT, *Haydin v Switzerland*, 16 December 1998, no. 101/1997, paras. 3.2, 4.11, 4.12, 5.2 and 5.3.

247 ComAT, *N.P. v Australia*, 3 June 1999, no. 106/1998, para. 4.7, in which the State party observes 'In the category of minor or irrelevant inconsistencies Australia places the different allegations regarding the year and extent of damage to the family home after shelling by the army in the 1980s; the perpetrators of the alleged arrest of the author in 1987; the means by which the author received confirmation that the police who visited his workplace in early 1997 were in fact looking for him'.

248 Ibid., para. 6.6.

249 ComAT, *A. v Netherlands*, 13 November 1998, no. 91/1997, para. 6.5.

250 Ibid., para. 5.2.

251 Ibid., para. 3.2.

252 Explicitly mentioned by the Committee against Torture in: ComAT, *Tala v Sweden*, 15 November 1996, no. 43/1996, para. 10.3. ComAT, *I.A.O. v Sweden,* 6 May 1998, no. 651997, paras. 2.13 and 14.3. ComAT, *A.F. v Sweden,* 8 May 1998, no. 89/1997, para. 3.3 and 6.5. ComAT, *Ayas v Sweden*, 12 November 1998, no. 97/1997, paras. 5.6 and 6.5. ComAT, *Haydin v Sweden*, 16 December 1998, 101/1997, paras. 3.2 and 6.6. A medical report regarding PTSS was part of the facts submitted by the author in: ComAT, *Kisoki v Sweden*, 8 May 1996, no. 41/1996, para. 2.6.

asylum request and the moment of assessment, difficulties in translation and procedural circumstances.[253]

5.3.2.2b Issues of evidence (in support of the claim)

Showing substantial grounds for believing that an individual is in danger of being subjected to torture requires as much evidence as possible. Of particular relevance is evidence concerning past experiences of torture and other human rights violations, in particular medical evidence, evidence in support of the credibility of the individual and evidence regarding the general human rights situation in the country of origin.[254] Full proof that a risk exists is neither possible nor required.[255] In that regard Burgers and Danelius consider that:

> 'questions of evidence may often be difficult, and while the affirmations of the person concerned must have some credible appearance in order to be accepted, it would often be unreasonable and contrary to the spirit of the Convention to require full proof of the truthfulness of the alleged facts'.[256]

I again refer to *A.S. v Sweden* (2001) as an example of a case in which the complainant had put forward a detailed and comprehensive account of her experiences which was supported by various forms of documentary evidence, including her identity papers, certified evidence and a medical certificate.[257]

There is a variety of evidentiary documentation considered by the Committee which is relevant and reliable to support a claim. This includes, for example, letters of support from non-governmental organisations and from the individual's own organisation.[258] Most important are perhaps medical reports which support alleged experiences of torture or other forms of inhuman treatment.[259] Although the Committee gives particular weight to medical reports they are not always accepted, for

253 ComAT, *V.X.N. and H.N. v Sweden*, 2 September 2000, no. 130 and 131/1999, para. 13.6, in which the complainants referred to interviews with the Swedish authorities in 1991 and 1992 and the fact that they already were accepted as quota refugees and had not applied for asylum in normal circumstances (para. 9.4) and the difference in dialect spoken by the complainants and the interpreter used by the Swedish authorities, as well as the fact that different interpreters were used during the various interviews (para. 9.6).

254 ComAT, General Comment No. 1 (1997), para. 8.

255 ComAT, *H.D. v Switzerland*, 3 June 1999, no. 112/1998, para. 6.4. ComAT, *A.S. v Sweden*, 15 February 2001, no. 149/1999, para. 8.6.

256 Burgers &. Danelius 1988, p. 127.

257 ComAT, *A.S. v Sweden,* 15 February 2001, no. 149/1999.

258 ComAT, *Karoui v Sweden*, 25 May 2002, 185/2001, para. 10, in which the complainant had submitted medical reports, a support letter from Amnesty International and an attestation from the chairman of Al-Nahdha, an opposition group in Tunisia of which the complainant was a member.

259 ComAT, *Falcon Rios v Canada,* 17 December 2004, no. 133/1999, para. 8.4. Notably, the Committee has expressed its concern that medical reports are not taken into account on a regular basis in the Dutch asylum procedures: ComAT, Concluding Observations on the Netherlands, 3 August 2007, UN doc. CAT/C/NET/CO/4, para. 8.

example, when their objectivity and conclusiveness can be questioned[260] or when the reports are inconclusive about post-traumatic stress disorder and the causal link between post-traumatic stress and past experiences of torture.[261] It certainly helps when medical reports are written by experts and identify a causal link between the individual's injury, both physical and mental, and his alleged experiences of ill-treatment.[262] Notably, submitting such a medical report does not necessarily mean that a risk of torture exists upon return. Other factors are of course equally relevant.[263] In some cases the Committee has even ignored medical reports put forward. In *S.L. v Sweden* (2001) the complainant provided several medical certificates, including one from a specialised Centre in Stockholm, all of which concluded that the complainant suffers from post-traumatic stress disorder. The Committee did not even consider these certificates and simply stated that it:

> 'has taken note of the arguments presented by the author and the State party and is of the opinion that it has not been given enough evidence by the author to conclude that the latter would run a personal, real and foreseeable risk of being tortured if returned to his country of origin'.[264]

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260 ComAT, *F.F.Z. v Denmark*, 24 May 2002, no. 180/2001, para. 11. ComAT, *David v Sweden*, 17 May 2005, no. 220/2002, paras. 7.2 and 7.3.

261 ComAT, *Z.K. v Sweden*, 16 May 2008, no. 301/2006, para. 8.4, in which the Committee 'observes that these medical reports, while attesting to the fact that he is "probably suffering from PTSD", do not conclusively state that he was tortured, stating instead that his scars are "discreet and unspecific", and that no exact statement can be made on how the past injuries occurred. Hence, it cannot be definitely concluded from the medical certificates that the complainant was subject to torture'.

262 ComAT, *El Rgeig v Switzerland*, 22 January 2007, no. 280/2005, para. 7.4. See also ComAT, *Tala v Sweden,* 15 November 1996, no. 43/1996, para. 10.3: 'the Committee has noted from the medical evidence that the scars on the author's thighs could only have been caused by a burn and that this burn could only have been inflicted intentionally by a person other than the author himself'. ComAT, *I.A.O. v Sweden*, 6 May 1998, no. 65/1997, para. 14.3. ComAT, *A.F. v Sweden*, 8 May 1998, no. 89/1997, para. 6.5. ComAT, *Haydin v Sweden,* 16 December 1998, no. 101/1997, para. 6.6. See for a comprehensive discussion on the use of medical reports by the Committee against Torture and other supervising bodies Bruin & Reneman 2006, pp. 86-109.

263 See for example, ComAT, *A.H. v Sweden,* 21 November 2006, no. 265/2005, paras. 2.8 and 11.6 in which the complainant had presented a medical report written by the Crisis and Trauma Centre at Danderyd hospital that concluded that the complainant's injuries corresponded to acts of torture suffered in 2001. Nevertheless, based on other grounds the Committee rejected the complaint. See also Bruin's comments on ComAT, *El Rgeig, v Switzerland*, 22 January 2007, no. 280/2005, NAV 2007/22. Another example is ComAT, *S.S.S. v Canada,* 5 December 2005, no. 245/2004, para. 8.4 in which the Committee noted medial reports from a clinic in Canada which concluded that there was sufficient objective physical and psychological evidence that corroborated the subjective account of torture, but that it did not automatically follow that, six years after the alleged events occurred, the complainant would still be at risk of being subjected to torture upon return.

264 ComAT, *S.L. v Sweden,* 11 May 2001, no. 150/1999, paras. 3.2 and 6.4. See also ComAT, *F.F.Z. v Denmark,* 24 May 2002, no. 180/2001, paras. 2.12 and 11, in which the complainant was examined by the Amnesty International's Medical Group, Danish section, which concluded that the complainant had symptoms often seen in people who have been subjected to extreme strains such as acts of war, detention or torture. The Committee considered 'that the Amnesty International medical report provides no objective indication that he was subjected to gross outrages'.

In general, any relevant document can, and should, be brought forward. It goes without saying that faked or forged documents may seriously undermine the credibility of the claim.[265]

Not only should evidence be presented in support of the individual concerned, it is also important to provide evidence regarding the general human rights situation in the country of origin. A variety of sources in this regard is explicitly mentioned and used by the Committee in its case law. This includes information resulting from mechanisms established under the Convention against Torture itself, in particular from the reporting mechanism under Article 19 of the Convention[266] and information resulting from the inquiry mechanism under Article 20.[267] Other United Nations human rights protection mechanisms and agencies are also explicitly mentioned and used as sources of information by the Committee, in particular the various Special Rapporteurs and Representatives established by the former United Nations Human Rights Commission,[268] and information provided by the United Nations High Commissioner for Refugees (UNHCR).[269] The Human Rights Committee is explicitly mentioned only once, in *Arana v France* (2000). In this case the Committee against Torture referred to Concluding Observations of the Human Rights Committee regarding the fourth periodic report submitted by Spain under Article 40 ICCPR.[270] In this case the Committee against Torture also referred to reports of the European Committee for the Prevention of Torture as well as information from some unspecified non-

265 ComAT, *M.B.B. v Sweden*, 21 June 1999, no. 104/1998, para. 6.6.

266 ComAT, *Chipana v Venezuela*, 16 December 1998, no. 110/1998, para. 6.4 (Peru). ComAT, *Arana v France,* 5 June 2000, no.63/1997, para. 11.4 (Spain). ComAT, *Karoui v Sweden*, 25 May 2002, no. 185/2001, para. 9 (Tunisia). ComAT, *G.K. v Switzerland*, 12 May 2003, no. 219/2002, para. 6.3 (Spain).

267 ComAT, *Alan v Switzerland*, 8 May 1996, no. 21/1995, para. 11.5, in which case reference was made to the report on Turkey, ComAT, Activities of the Committee against Torture pursuant to Article 20 of the Convention against Torture: Turkey, 15 November 1993, UN doc. A/48/44/Add.1. ComAT, *U.S. v Finland*, 15 May 2003, no. 197/2002, para. 7.7. ComAT, *S.S. v Netherlands*, 19 May 2003, no. 191/2001, para. 6.3. ComAT, *K.K. v Switzerland*, 28 November 2003, no. 186/2001, para. 6.3. ComAT, *A.I. v Switzerland*, 17 May 2004, no. 182/2001, para. 6.3, in which cases reference was made to the report on Sri Lanka, ComAT, Activities of the Committee under Article 20 of the Convention: Sri Lanka, 17 May 2002, UN doc A/57/44, paras.117-195.

268 ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, para. 9.5 (Special Rapporteur on extrajudicial, summary and arbitrary executions, Special Rapporteur on the question of torture, Working Group on enforced and voluntary disappearances). ComAT, *Tala v Sweden,* 15 November 1996, no. 43/1996, para. 10.4. ComAT, *Aemei v Switzerland,* 29 May 1997, no. 34/1995, para. 9.9. ComAT, *A.F. v Sweden,* 8 May 1998, no. 89/1997, para. 6.6. ComAT, *A.S. v Sweden,* 15 February 2001, no. 149/1999, para. 8.7 (Special Representative on the situation of human rights in Iran). ComAT, *X, Y and Z, v Sweden*, 6 May 1998, no. 61/1996, para. 11.5 (Special Rapporteur of the Commission of Human Rights). ComAT, *A.L.N. v Switzerland*, 19 May 1998, no. 90/1997, para. 8.6 (report by the Secretary-General on the United Nations Observer Mission in Angola). ComAT, *Elmi v Australia*, 25 May 1999, no. 120/1998, para. 6.6 (Independent Expert on the situation of human rights in Somalia).

269 ComAT, *Kisoki v Sweden,* 8 May 1996, no. 41/1996, para. 9.5. ComAT, *X, Y and Z, v Sweden,* 6 May 1998, no. 61/1996, para. 11.5. ComAT, *Korban v Sweden*, 16 November 1998, no. 88/1997, para. 6.5. ComAT, *Haydin v Sweden,* 16 December 1998, no. 101/1997, para. 6.4.

270 ComAT, *Arana v France,* 5 June 2000, no. 63/1997, para. 11.4.

governmental organisations.[271] Non-governmental organisations as a source of information, without further specifying them, were mentioned in a number of other cases.[272] Finally, the Committee gives considerable weight to the findings of national authorities.[273] Of particular importance is information and evidence obtained by States parties' diplomatic missions in the complainant's country of origin.[274]

The sources used by the Committee are mostly of a recent date when compared to the time of the Committee's considerations. Sometimes the Committee refers to a report that is a few years old. In *Karoui v Sweden* (2002), for example, the Committee referred to its Concluding Observation on the second periodic report submitted by Tunisia.[275] The report was submitted on 10 November 1997 and considered by the Committee during its session held on 18 and 20 November 1998.[276] At the time of the decision-making process, May 2002, the Concluding Observations were more than three and a half years old.[277] Even though this may be considered as a considerable time gap there is some logic behind the Committee's reference to this 'old' document. First, the document concerns the most recent official considerations the Committee had given and could have given on the general human rights situation in Tunisia. Secondly, the Committee referred not only to its Concluding Observations, but also to human rights reports from reliable sources of a later date indicating that the same poor human rights situation continued to exist.[278] The sources and types of information outlined above were explicitly mentioned and used by the Committee against Torture in its case law. This does not mean that the Committee has not used and will not use other sources or types of information in assessing the element of risk. In many cases it has simply referred to the fact that it was aware of the human rights situation in the country of origin without specifying its sources or stating that its information came from reliable sources.[279] Neither are there limitations regarding

271 Ibid., paras. 11.4 and 11.5.

272 ComAT, *A.S. v Sweden*, 15 February 2001, no. 149/1999, para. 8.7. ComAT, *H.B.H. et al v Switzerland*, 16 May 2003, no. 192/2001, para. 6.9 (explicitly mentioned Amnesty International). ComAT, *S.S. v Netherlands*, 19 May 2003, no. 191/2001, para. 6.3, footnote 8 (explicitly mentioned Amnesty International). ComAT, *G.K. v Switzerland*, 12 May 2003, no. 219/2002, para. 6.3.

273 ComAT, General Comment No. 1 (1997), para. 9.

274 ComAT, *N.Z.S. v Sweden,* 29 November 2006, no. 277/2005, para. 8.6.

275 ComAT, *Karoui v Sweden*, 25 May 2002, no. 185/2001, para. 9.

276 ComAT, Concluding Observations on Tunisia, 19 November 1998, UN doc. A/54/44, paras.88-105.

277 Battjes and Bruin argue that this is not the most relevant document the Committee could refer to. See Battjes' comment on ComAT, *Karoui v Sweden*, 25 May 2002, no. 185/2001, *Rechtspraak Vreemdelingenrecht* 2002 No. 5, p. 31, who incorrectly states that the Committee refers to the country report where it refers to its Concluding Observations on the report, and René Bruin's comment on ComAT, *Karoui v Sweden,* 25 May 2002, no. 185/2001, NAV 2002, No. 253, p. 594.

278 Ibid., para. 9.

279 ComAT, *Khan v Canada*, 18 November 1994, no. 15/1994, para. 12.3. ComAT, *X v Switzerland*, 9 May 1997, no. 38/1995, para. 10.6. ComAT, *E.A. v Switzerland,* 10 November 1997, no. 28/1995, para. 11.5. ComAT, *P.Q.L. v Canada,* 17 November 1997, no. 57/1996, para. 10.7. ComAT, *I.A.O. v Sweden,* 6 May 1998, no. 65/1997, para. 14.5. ComAT, *G.R.B. v Sweden*, 15 May 1998, no. 83/1997, para. 6.6. ComAT, *K.N. v Switzerland*, 20 May 1998, no. 94/1997, para. 10.5. ComAT, *Ayas v Sweden,* 12 November 1998, no. 97/1997, para. 6.4. ComAT, *A. v the Netherlands*, 13 November

the sources the complainant, the State party or the Committee can use, nor are there any guidelines concerning the reliability of the sources. Rule 62 of the Committee's Rules of Procedure states that:

> 'the Committee may invite specialised agencies, United Nations bodies concerned, regional intergovernmental organisations and non-governmental organisations in consultative status with the Economic and Social Council to submit to it information, documentation and written statements, as appropriate, relevant to the Committee's activities under the Convention'.

Importantly, this rule refers to all mechanisms under the Convention against Torture, including the individual complaint procedure under Article 22.[280] And Rule 112 (2), specifically applying to the individual complaint procedure, states that:

> 'the Committee, the Working Group, or the rapporteur may at any time in the course of the examination obtain any document from United Nations bodies, specialised agencies, or other sources that may assist in the consideration of the complaint'.

An overall conclusion is difficult to draw, unless one states the obvious. It is important to present as much evidence as possible in support of a claim. Of particular relevance is medical evidence indicating past experiences of ill-treatment. No particular guidelines exist as to the sources of evidence or their reliability.

5.3.2.2c Burden of proof

The initial burden of proof rests on the shoulders of the individual. In its first General Comment the Committee against Torture considered that:

> 'the burden is upon the author to present an arguable case. This means that there must be a factual basis for the author's position sufficient to require a response from the State party'.[281]

1998, no. 91/1997, para. 6.4. ComAT, *J.U.A. v Switzerland*, 16 December 1998, no. 100/1997, para. 6.5. ComAT, *Haydin v Sweden*, 16 December 1998, no. 101/1997, para. 6.4. ComAT, *H.D. v Switzerland*, 3 June 1999, no. 112/1998, para. 6.6. ComAT, *N.P. v Australia*, 3 June 1999, no. 106/1998, para. 6.5. ComAT, *S.M.R. and M.M.R. v Sweden*, 11 June 1999, no. 103/1998, para. 9.7. ComAT, *M.B.B. v Sweden,* 21 June 1999, no. 104/1998, para. 6.8. ComAT, *A.D. v Netherlands*, 24 January 2000, no. 96/1997, para. 7.4. ComAT, *K.M. v Switzerland*, 4 July 2000, no. 107/1998, para. 6.7. ComAT, *V.X.N. and H.N. v Sweden*, 2 September 2000, no. 130 and 131/1999, para. 13.7. ComAT, *M.S. v Switzerland*, 13 November 2001, no. 156/2000, para. 6.8. ComAT, *Y.H.A. v Australia*, 27 March 2002, no. 162/2000, para. 7.4. ComAT, *L.M.T.D. v Sweden,* 15 May 2002, no. 164/2000, para. 8. ComAT, *Karoui v Sweden*, 25 May 2002, no. 185/2001, para. 9. ComAT, *K.S.Y. v Netherlands*, 26 May 2003, para. 190/2001, para. 7.4. ComAT, *K.K. v Switzerland*, 28 November 2003, no. 186/2001, para. 6.3.

280 Ingelse 2001, p. 114.

281 ComAT, General Comment No. 1 (1997), para. 5. See also ComAT, *A.S. v Sweden*, 15 February 2001, no. 149/1999, para. 8.6.

Clearly the responsibility for substantiating a claim does not lie solely with the individual; a response from the State is required. The Committee further considers that:

> 'the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited'.[282]

Strangely, the Committee then emphasises the role of the individual by stating that 'the author must establish that he/she would be in danger of being tortured' and then, nevertheless, continues to say that 'all pertinent information may be introduced by either party to bear on this matter'.[283]

In its case law the Committee has made it clear that it is for the complainant to submit sufficient details and to collect and present evidence in support of his account of events as much as possible.[284] Notwithstanding the clear responsibility of the complainant to present evidence the State also has an active role in collecting and presenting evidence and verifying information put forward by the complainant. Consequently, findings of fact made by the State's authorities should be accorded due weight unless it can be demonstrated that such findings are arbitrary or unreasonable.[285] An active role for the State party follows from the text of Article 3 of the Convention against Torture. First, paragraph 1 of Article 3 states that it is necessary for substantial grounds to exist rather than for these grounds to have to be shown. According to Suntinger:

> 'this stresses the already important role of the authorities in the determination and indicates a lower threshold concerning the evidentiary requirements for the individual'.[286]

Secondly, Article 3, paragraph 2 of the Convention states that 'for the purpose of determining whether there are such grounds, the *competent authorities shall take into account* [emphasis added] all relevant considerations'. An active role of the State would also be in accordance with the object and purpose of the Convention and the preventive character of the refoulement prohibition in particular.[287] In *Mutombo v Switzerland* (1994) the Committee considered that it:

> 'is aware of the concerns of the State party that the implementation of Article 3 of the Convention might be abused by asylum seekers. The Committee considers that, even if

282 ComAT, General Comment No. 1 (1997), para. 6.
283 Ibid., para. 7.
284 ComAT, *S.P.A. v Canada,* 6 December 2006, no. 282/2005, para. 7.5. ComAT, *M.Z. v Sweden,* 17 May 2006, no. 256/2004, para. 9.5. ComAT, *S.L. v Sweden,* 11 May 2001, no. 150/1999, para. 6.4.
285 ComAT, *S.S. and S.A. v Netherlands*, 11 May 2001, no. 142/1999, para. 6.6. ComAT, *A.K. v Australia*, 11 May 2004, no. 148/1999, para. 6.4
286 Suntinger 1995, p. 220. Anker 1999, p. 512.
287 Suntinger 1995, p. 220.

> there are doubts about the facts adduced by the author, it must ensure that his security is not endangered'.[288]

And in the case of any doubt, it is the State party concerned, according to the Committee, which has the responsibility to ensure the security of the individual, thereby further implying an active role for the State party in providing evidence.[289] However, not only in cases of doubt is there a shift in the burden of proof. The burden is shifted from the individual to the State party when the individual has submitted sufficient reliable details that could have, and to a certain extent may have, been verified by the authorities.[290] In *A.S. v Sweden* (2001) the Committee was of the view that:

> 'the author has submitted sufficient details regarding her *sighe* or *mutah* marriage and alleged arrest, such as names of persons, their positions, dates, addresses, name of police station, etc., that could have, and to a certain extent have been, verified by the Swedish immigration authorities, to shift the burden of proof. In this context the Committee is of the view that the State party has not made sufficient efforts to determine whether there are substantial grounds for believing that the author would be in danger of being subjected to torture'.[291]

In *El Rgeig v Switzerland* (2007) the complainant had provided a credible claim that was backed by attestations from organisations of Libyan refugees in Europe. Furthermore, he had submitted a copy of a medical certificate identifying a causal link between the complainant's bodily injuries, his mental state and the ill-treatment he had described.[292] Since the State party had made no comment in this regard, but only in regard to the temporal link between the complainant's past detention and his flight from Libya, the Committee considered that the State had not presented sufficient convincing arguments to demonstrate the absence of a risk.[293] The above-mentioned views are different from the Committee's approach in *A.H. v Sweden* (2006). In this case it was undisputed that the complainant was a member of the opposition party ADP (Azerbaijani Democratic Party) in Azerbaijan and that he was subjected to torture in 2001 and 2002, as confirmed by medical reports. However, this was not sufficient for the Committee. The complainant had failed to provide evidence about his high position in the ADP or of his engagement in any political activity that would cause him to have a foreseeable, real and personal risk. He had also failed to disprove some controversy surrounding a wanted notice he had presented to the Swedish author-

288 ComAT, *Mutombo v Switzerland*, 27 April 1994, 13/1993, para. 9.2. See also ComAT, *Khan v Canada*, 18 November 1994, no. 15/1994, para. 12.3.

289 ComAT, *Mutombo v Switzerland*, 27 April 1994, 13/1993, para. 9.2. ComAT, *H.D. v Switzerland*, 3 June 1999, no. 112/1998, para. 6.4. See also Suntinger 1995, p. 220.

290 For example, ComAT, *Karoui v Sweden,* 25 May 2002, no. 185/2001, para. 10. ComAT, *S.P.A. v Canada*, 6 December 2006, no. 282/2005, para. 7.5.

291 ComAT, *A.S. v Sweden,* 15 February 2001, no. 149/1999, para. 8.6 [emphasis added].

292 ComAT, *El Rgeig v Switzerland*, 22 January 2007, no. 280/2005, para. 7.4.

293 Ibid., paras. 7.3 and 7.4.

ities.[294] In *S.P.A. v Canada* (2006) the Committee made it clear that the complainant had not 'submitted sufficient details or corroborating evidence to shift the burden of proof'.[295]

It is noteworthy that in some cases the Committee considered the individual had a more far reaching responsibility to provide the necessary evidence than was required in older cases. For example, in *S.L. v Sweden* (2001) the Committee considered 'that it has not been given enough evidence by the author', even though the complainant had provided detailed information, including names, a authentic verdict concerning a conviction and sentence and several medical certificates indicating that he suffered from post-traumatic stress disorder.[296] And in *F.F.Z. v Denmark* (2002) the Committee put it even more strictly, seemingly placing the burden of proof solely on the individual, by considering 'that the complainant has not proven his claim', even though he had also provided a detailed account of the facts and a medical certificate indicating symptoms consistent with those of victims of torture.[297] It is unclear why the Committee adopted such a far reaching burden of proof for the complainants in these cases. This language does not correspond with that commonly used by the Committee, in that the complainant has to present an arguable case.[298] Another far reaching burden of proof for the individual was considered by the Committee in *Attia v Sweden* (2003), in which the claim was solely based on the relationship of the complainant with her husband and his experiences. The Committee considered that this was 'generally insufficient to ground a claim under Article 3'.[299] Although it seems to make sense to apply a higher standard of proof for the individual if the claim is solely based on family ties, the Committee did not give any further clarification or reasoning.

It can be concluded that the individual and the State party have a combined and co-operative responsibility to prove that substantial grounds exist for believing there is a danger of torture after removal. The individual has the initiative and the State party the responsibility to respond. The exact division of roles between individual and State is difficult to determine in general and depends on each individual case.

5.3.2.3 At what point in time must the risk be assessed?

The assessment of the risk focusses on the foreseeable consequences of the removal. Consequently, the moment of removal is decisive. In most cases removal will not yet have taken place. Therefore, every time a decision is taken to remove a person or a person is threatened with removal an assessment needs to be made of the risk existing at that particular time. All relevant facts and circumstances that are known or ought to be known at that time will have to be taken into account. The consideration

294 ComAT, *A.H. v Sweden,* 21 November 2006, no. 265/2005, para. 11.6.
295 ComAT, *S.P.A. v Canada*, 6 December 2006, no. 282/2005, para. 7.5.
296 ComAT, *S.L. v Sweden*, 11 May 2001, no. 150/1999, para. 6.4.
297 ComAT, *F.F.Z. v Denmark,* 24 May 2002, no. 180/2001, para. 12.
298 See also Bruin's comment on *F.F.Z. v Denmark (*2002) in his comment on ComAT, *Karoui v Sweden*, 25 May 2002, no. 185/2001, NAV 2002, No. 253, p. 595.
299 ComAT, *Attia v Sweden*, 24 November 2003, no. 199/2002, para. 12.3.

requires an assessment ex nunc.[300] This implies that information which comes to light after the initial assessment, for example, during an appeal procedure before a national court, must also be taken into account. In *Attia v Sweden* (2003) the Committee held:

> 'its consistent practice of deciding this question [i.e. risk assessment] as presented at the time of its consideration of the complaint, rather than as presented at the time of submission of the complaint'.[301]

As a consequence the passing of time between the initial claim and assessment and the moment a national court or the Committee finally examines the merits of a case can have a significant influence on its outcome. This may be advantageous or detrimental for the complainant. For example, the human rights situation in the country of origin may have deteriorated or, conversely, improved, which may increase or decrease the risk. Arguably, this is a consistent and justified consequence as the object and purpose of the prohibition on refoulement is to protect individuals from being subjected to torture if such risk exists. If not, no protection has to or should be afforded.

If, however, removal has already taken place, the moment of the removal remains decisive. According to the Committee in *Agiza v Sweden* (2005) the assessment must be made 'in light of the information that was known, or ought to have been known, to the State party's authorities *at the time* of the removal'.[302] However, this does not mean that events subsequent to the removal are not relevant. In the *Agiza* case the Committee continued to consider that 'subsequent events are relevant to the assessment of the State party's knowledge, actual or constructive, at the time of the removal'.[303] In other words, facts and circumstances which come to light after the removal are relevant only in that they may confirm or refute what the State party knew or ought to have known at the time of removal. This becomes clear in *Tebourski v France* (2007) in which the Committee considered that 'subsequent events are useful only for assessing the information which the State party actually had or could have deduced at the time of expulsion'.[304] Neither in *Agiza* nor in *Tebourski* were subsequent events taken into account, at least explicitly. In the Committee's view in the

300 For example, ComAT, *S.S. and S.A. v Netherlands*, 11 May 2001, no. 142/1999, para. 6.7, 'the Committee considers that the authors have failed to demonstrate, generally, that their membership of a particular group, and/or, specifically, that their individual circumstances give rise to a personal, real and foreseeable risk of being tortured if returned to Sri Lanka *at this time* [emphasis added]]'. See also, ComAT, *A.D. v Netherlands*, 24 January 2000, no. 96/1997, para. 7.4.

301 ComAT, *Attia v Sweden*, 24 November 2003, no. 199/2002, para. 12.1.

302 ComAT, *Agiza v Sweden*, 20 May 2005, no. 233/2003, para. 13.2 [emphasis added] published in NAV 2005/135 with comments by Bruin and JV 2005/302 with comments by Wouters. See also ComAT, *Tebourski v France*, 11 May 2007, no. 300/2006, para. 8.1.

303 ComAT, *Agiza v Sweden,* 20 May 2005, no. 233/2003, para. 13.2, published in NAV 2005/135 with comments by Bruin and JV 2005/302 with comments by Wouters. Also ComAT, *Brada v France,* 24 May 2005, no. 195/2002, para. 13.1.

304 ComAT, *Tebourski v France*, 11 May 2007, no. 300/2006, para. 8.1.

Agiza case it was considered that the 'the natural conclusion' from the facts and circumstances known at the time of the expulsion was that a real risk existed.[305] Given the fact, however, that both parties had put forward a large number of subsequent events, mainly related to safety guarantees provided, it is in my opinion very likely that the Committee took them into account, albeit indirectly or implicitly. Furthermore, in considering the safety guarantees in relation to the risk which existed at the time of removal the Committee used the past tense. The Committee considered that the safety guarantees '*did* not suffice to protect against this manifest risk'.[306] In using the past tense the Committee indicated that it took subsequent events into account.[307] A final indication that subsequent events were taken into account by the Committee is that the Committee addressed the differences between its considerations in the *Agiza* case and in that of his wife, *Attia v Sweden* (2003), a year and a half earlier, in which it concluded that no real risk existed for Mrs. Attia.[308] One of the differences pointed out by the Committee was the breach by Egypt of the element of the assurances relating to guaranteeing a fair trial.[309] This breach came to light after the removal of Mr. Agiza.

Unfortunately, no clear answer was given by the Committee as to how to assess subsequent events and whether or not an assessment after removal is strictly ex tunc. For example, in *T.P.S. v Canada* (2000) the individual had been removed to India more than two and a half years before the Committee decided the complaint. The Committee concluded that 'it is unlikely that the author is still at risk of being subjected to acts of torture', thereby taking into account the fact that after his removal the author had no problems in India.[310] The risk was assessed ex nunc by the Committee. Committee member Camara disagreed and argued, in an individual opinion in *T.P.S. v Canada* (2000), that the Committee's ex nunc risk assessment was in violation of Article 3 of the Convention. He argued that the time of removal remains decisive and that at that time there were, in this case, substantial grounds for believing the individual would be subjected to torture, irrespective of the fact that the author did not encounter any problems after his removal.[311] He concluded therefore that Canada had violated Article 3 in expelling the author.[312] I agree with Camara: the moment of removal is decisive. The fact that an individual does not encounter any problems after his removal may influence the obligations on a State (section 5.4.2.2). The question and problem remain as to what is real or foreseeable at the moment of the

305 ComAT, *Agiza v Sweden,* 20 May 2005, no. 233/2003, para. 13.4.

306 Ibid., para. 13.4 (author's emphasis).

307 See also ComAT, *G.K. v Switzerland*, 12 May 2003, no. 219/2002, para. 6.8, in which the Committee noted that, 'subsequent to the complainant's extradition to Spain, it has received no information on torture or ill-treatment suffered by the complainant during *incommunicado* detention. In the light of the foregoing, the Committee finds that the complainant's extradition to Spain did not constitute a violation by the State party of article 3 of the Convention'.

308 ComAT, *Attia v Sweden* 24 November 2003, no. 199/2002.

309 ComAT, *Agiza v Sweden,* 20 May 200, no. 233/2003, para. 13.5.

310 ComAT, *T.P.S. v Canada,* 4 September 2000, no. 99/1997, paras. 15.4 and 15.5.

311 Ibid., para. 16.2.

312 Ibid. para. 16.2.

removal and what influence events that subsequently come to light have on foreseeability. In my opinion, the fundamental character of the prohibition on refoulement calls for subsequent events to be taken into account. If, for example, after removal it comes to light that the country of origin has in the past taken part in practices of torture, this information must be taken into account even though it was not known before. This information relates to practices occurring before removal. It is different if after removal it comes to light that, because of changes in the regime in the country of origin, people are subjected to torture so that the risk to the individual concerned is increased. Such changes could not have been known at the time of removal.

5.3.2.4 The role of the Committee against Torture in the risk assessment

The Committee against Torture is a monitoring body with only declaratory powers. It is not an appellate, quasi-judicial or administrative body.[313] The Committee will therefore give considerable weight to findings of facts made by the State party.[314] Furthermore, where possible new evidence should first be assessed by the State before the Committee examines the case.[315] However, the Committee is not bound by the State's findings, but 'has the power of free assessment of facts based upon the full set of circumstances in every case'.[316] In general, the Committee assumes a subsidiary role and considers the State party to be primarily responsible for the assessment of the facts. In *S.P.A v Canada* (2006) the Committee:

> 'reiterates in this regard that it is for the courts of the State parties to the Convention, and not for the Committee, to evaluate the facts and evidence in a particular case. It is for the appellate courts of States parties to the Convention to examine the conduct of a case, unless it can be ascertained that the manner in which the evidence was evaluated was clearly arbitrary or amounted to a denial of justice, or that the officers had clearly violated their obligations of impartiality'.[317]

313 See section 5.1.3.1.

314 The Committee gives considerable weight to 'findings of fact that are made by organs of the State party concerned; but the Committee is not bound by such findings and instead has the power, provided by Article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case': ComAT, General Comment No. 1 (1997), para. 9. It is important to note that this General Comment was adopted in the context of the individual complaint procedure set forth in article 22 of the Convention and was not meant to outline national procedures.

315 ComAT, *P.M.P.K. v Sweden*, 20 November 1995, no. 30/1995, para. 7. ComAT, *K.K.H. v Canada*, 22 November 1995, no. 35/1995, para. 5. Also Nowak & Elizabeth McArthur 2008, pp. 162 and 163 (para. 105).

316 ComAT, General Comment No. 1 (1997), para. 9.

317 ComAT, *S.P.A. v Canada*, 6 December 2006, no. 282/2005, para. 7.6. See also ComAT, *G.K. v Switzerland,* 12 May 2003, no. 219/2002, para. 6.12. ComAT, *A.K. v Australia*, 5 May 2004, no. 148/1999, paras. 6.2 and 6.4. ComAT, *J.A.M.O. et al. v Canada,* 15 May 2008, no. 293/2006, para. 10.5. ComAT, *P.E. v France,* 19 December 2002, no. 193/2001, para. 6.5, relating to Article 15 of the Convention. For a thorough analysis (in Dutch) see also Bruin NAV 2003, pp. 572-576.

In *S.G. v Netherlands* (2004) the Committee went even further and considered:

> 'it is not in a position to challenge their [i.e. Dutch authorities] findings of fact, nor to resolve the question of whether there were inconsistencies in the complainant's account'.[318]

I consider this finding to be inconsistent with the Committee's role in individual complaint procedures and its common views stipulated in its case law and General Comment number one.[319]

Even more confusing is the Committee's assessment of the claim in *S.S. and S.A. v Netherlands* (2001). In this case the authors first made a prima facie claim for protection based on the fact of their Tamil ethnicity. Subsequently they provided other personal facts and circumstances. The Committee first assessed the prima facie claim marginally and then made a full assessment of the other personal facts and circumstances. The Committee held regarding the prima facie claim:

> 'that the authors have failed to show significant grounds that the evaluation of the State party's authorities was arbitrary or otherwise unreasonable … Nor have they demonstrated any inaccuracy in the State party's conclusion that the situation in Sri Lanka is not such that for Tamils in general, even if they are from the north of the country, substantial grounds exist for believing that they risk torture if returned from abroad'.[320]

The Committee then continued with a full assessment of 'the authors' individual circumstances'.[321] Unfortunately, it does not become clear from the Committee's view why it makes a distinction in how it assesses a prima facie claim on the one hand and a more personal claim on the other hand. In theory, there are, in my opinion, no grounds for such a distinction. In general, a claim for protection from refoulement may be based on all sorts of facts and circumstances, either single or multiple.

Even though the Committee is not an appellate body and is considered to play only a subsidiary role in gathering the facts, it does not necessarily adhere to its own view. The Committee allows itself to gather facts on its own.[322] And in several cases the Committee has conducted a full review of both facts and law. In *Tebourski v France* (2007) the Committee explicitly stated that 'it is the Committee that must ultimately decide whether there is a risk of torture'.[323] Notably the Committee was gravely disappointed by the State party in this case for having deported the complain-

318 ComAT, *S.G. v Netherlands*, 14 May 2004, no. 135/1999, para. 6.6.

319 ComAT, General Comment No. 1 (1997), para. 6 and 9. See also Rule 111 (4) of the Committee's Rules of Procedure according to which the Committee has the power to invite the complainant to provide further clarifications or to answer questions on the merits of the complaint: ComAT, Rules of Procedure, 9 August 2002, CAT/C/3/Rev.4.

320 ComAT, *S.S. and S.A. v Netherlands*, 11 May 2001, no. 142/1999, para. 6.6.

321 Ibid., para. 6.7.

322 ComAT, *El Rgeig v Switzerland*, 22 January 2007, no. 280/2005, para. 7.4.

323 ComAT, *Tebourski v France*, 11 May 2007, no. 300/2006, para. 8.4.

ant while the case was pending.[324] In several cases the Committee has allowed itself to conduct a full assessment of the credibility of the author and claim, in particular, when the State party had failed to take into account important facts or evidence which had been presented by the complainant or when Article 3 was wrongly applied by the State. In *C.T. and K.M. v Sweden* (2007) the State party had failed to take into account the repeated rape of the principal complainant in her country of origin, Rwanda. This fact was supported by two medical reports.[325] In *V.L. v Switzerland* (2007) the credibility of the author was questioned because the allegation of sexual abuse and a supporting medical report were submitted late in the domestic proceedings. The Committee adopted a full assessment of the facts presented and concluded that they were credible.[326] In *Dadar v Canada* (2005) the Committee considered:

> 'While the Committee gives considerable weight to findings of fact made by the organs of the State party, it has the power of free assessment of the facts arising in the circumstances of each case. … The Committee recalls that the prohibition enshrined in article 3 of the Convention is an absolute one. Accordingly, the argument submitted by the State party that the Committee is not a fourth instance cannot prevail, and the Committee cannot conclude that the State party's review of the case was fully satisfactory from the perspective of the Convention'.[327]

The Committee does not consider what particular State organ or power, i.e. the executive or judicial authorities, should have the responsibility for assessing the risk, provided the national assessment proceedings contain sufficient procedural safeguards (see section 5.4.2.3).

It can be concluded that the primary responsibility for the assessment of the risk lies with the State parties. The Committee makes it clear that the individual complaint procedure is not an appellate procedure and that its role is subsidiary to that of the State. Having said this, it is also clear that the Committee allows itself to play an active role in gathering facts and conduct a full review of both fact and law. The cases in which the Committee did play an active role were cases in which the Committee was clearly disappointed in the assessment made by the State. However, getting a decision of the State overruled before the Committee requires a strong case.

5.3.2.5 Protection from the country of origin (national protection)

When the country of origin is able and willing to provide protection against torture there are no substantial grounds for believing that the individual would be in danger

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324 Ibid., para. 8.7, 'The Committee therefore considers that, by expelling the complainant to Tunesia under the conditions in which it did and for the reasons adduced, thereby presenting the Committee with a fait accompli, the State party not only failed to demonstrate the good faith required of any party to a treaty, but also failed to meet its obligations under Articles 3 and 22 of the Convention'.

325 ComAT, *C.T. and K.M. v Sweden*, 22 January 2007, no. 279/2005, para. 7.5.

326 ComAT, *V.L. v Switzerland*, 22 January 2007, no. 262/2005, para. 8.8.

327 ComAT, *Dadar v Canada*, 5 December 2005, 258/2004, para. 8.8.

of being subjected to torture. In other words, there would be no foreseeable risk of torture. The issue of national protection is an interesting one under the Convention against Torture. Under the Refugee Convention, the ECHR and the ICCPR it is possible for non-State actors to commit acts of torture without the direct or indirect involvement of the State authorities. As discussed in section 5.3.1.4 under the Convention against Torture this is not possible. Torture within the meaning of the Convention must be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Consequently, a person can be protected from refoulement only when there is a risk that he will be subjected to an act of torture which by definition involves the authorities of his country of origin. Thus, if his country of origin is able and willing to provide protection it is unlikely that torture within the meaning of this Convention will even be an issue.

However, this does not rule out the possibility for the country of origin to provide protection within the meaning of the Convention against Torture. It is possible that the State has no control over the conduct of its agents in a certain part of its territory, or, again by reference to section 5.3.1.4, that the State no longer has control over a part of its territory and population and that non-State actors who act as State officials have taken over control. Finally, it is possible that the country of origin has no functioning State apparatus but is controlled by various non-State entities which can be regarded as quasi-governmental authorities. In both the latter situations there may be a risk of torture within the meaning of Article 3 and the country of origin may be able and willing to provide protection. In such situations there may be either an area within the country of origin which is controlled by the State or an area which is controlled by a so-called quasi non-governmental entity which is able and willing to provide protection. Moreover, protection may be provided by military forces of a foreign State. In section 5.2.2 I have already discussed the responsibility of US and UK military forces in Afghanistan and Iraq to guarantee the provisions of the Convention.[328] Thus, foreign military forces may be actors of protection. In other words, an internal protection alternative may be available. National protection may also be provided through the issuing of diplomatic assurances guaranteeing the individual's safety. Below I will first discuss the issue of an internal protection alternative (section 5.3.2.5a). Secondly, I will discuss the issue of diplomatic assurances (5.3.2.5b). Finally, I will close this section with the question to what extent it is relevant, in the context of national protection, that the country of origin is a State party to one or more human rights treaties (5.3.2.5c).

5.3.2.5a Internal protection alternative

An internal protection alternative may exist when the public authorities no longer control the whole territory of their State, or when the country is without a functioning State apparatus. The existence of an internal protection alternative presupposes an

328 ComAT, Concluding Observations on the United States of America, 25 July 2006, CAT/C/USA/CO/2, para. 20. Also ComAT, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, 10 December 2004, UN doc. CAT/C.CR/33/3, para. 4 (ii) (b).

area within the country of origin where the State or quasi-governmental entity is able and willing to provide protection to the individual concerned. In *Alan v Switzerland* (1996) the risk of torture for Turkish nationals of Kurdish ethnicity emanated from State agents of Turkey and was in particular present in areas with a Kurdish majority, especially in North Eastern Turkey. In this area an internal armed conflict between Kurdish opposition groups and the Turkish authorities was being fought. In this case Switzerland argued that the individual, a Turkish national of Kurdish origin, could therefore find a safe haven in another part of Turkey; outside North Eastern Turkey. The Committee however considered that the individual had already tried to find a safe area and that it had received indications that the Turkish police were looking for him in that area. The Committee concluded that it was not likely that a safe area existed for the complainant in Turkey.[329] In another case involving a Turkish Kurd, *Haydin v Sweden* (1998), the Committee relied on information from the UNHCR stating that no place of refuge was available within the country for people who risked being suspected of active involvement in or sympathizing with the PKK (an armed Kurdish opposition group).[330] In these two cases the Committee was not convinced that the risk of torture by Turkish police was limited to a specific area within Turkey. A different consideration was arrived at by the Committee in *B.S.S. v Canada* (2004). This case involved India, and the complainant had argued that the risk of torture emanated from the Punjabi police. The Committee considered that the complainant merely referred to a risk of torture in Punjab and that he had failed to substantiate that he would be unable to lead a life free of torture in another part of India. In a similar case, *S.S.S. v Canada* (2005), the Committee considered that it:

> 'has noted that some of the available evidence suggests that high-profile persons may be at risk in other parts of India, but the complainant has not shown that he fits into this particular category'.[331]

Apparently, the Committee considered that there was an internal protection alternative available for both complainants outside Punjab, unless they were able to prove that they had a high profile. Unfortunately, the Committee did not address the fact that the Punjabi police were part of the Indian State apparatus with possible contacts in the rest of the country.[332]

The availability of an internal protection alternative can be a real option if the risk of torture emanates from non-State actors, provided they can be qualified as quasi-governmental actors and as public officials within the meaning of Article 1 of the Convention. In such situations protection can be found in other parts of the country

329 ComAT, *Alan v Switzerland*, 8 May 1996, no. 21/1995, para. 11.4.

330 ComAT, *Haydin v Sweden,* 16 December 1998, no. 101/1997, para. 6.4.

331 ComAT, *S.S.S. v Canada,* 5 December 2005, no. 245/2004, para. 8.5.

332 ComAT, *B.S.S. v Canada*, 17 May 2004, no. 183/2001, para. 11.5. See in this regard the considerations of the ECtHR regarding the possibility of national protection in India for an individual from Punjab: ECtHR, *Chahal v United Kingdom,* 15 November 1996, App. No. 22414/93, paras. 103-105. Discussed in section 3.3.2.6a.

where it is provided either by the State authorities or by (local or regional) quasi-governmental authorities in the absence of a State apparatus. In *H.M.H.I. v Australia* (2002) the individual was to be returned to Somalia and claimed that he would be subjected to torture upon return, in particular in Mogadishu. The State party argued that other parts of Somalia were safe. A Transitional National Government was controlling large parts of Somalia. The State party proposed to return the individual not to Mogadishu but to Kenya where the individual could avail himself of the UNHCR's voluntary repatriation programme and return to a safe area within Somalia. The Committee against Torture agreed and considered:

> 'that the State party does not intend to return the complainant to Mogadishu, and that the complainant will be at liberty to avail himself of the UNHCR voluntary repatriation programme and choose the area of Somalia to which he wishes to return'.[333]

The Committee is rather brief and sparing in its reasoning. Many issues remained unclear. For example, it remained unclear whether or not the individual could actually be returned to Kenya; whether or not he indeed would be at liberty to avail himself of the UNHCR's voluntary repatriation programme; whether or not he then would have the freedom to choose the area of Somalia to which he would like to return; and what the specific requirements of the UNHCR's voluntarily repatriation programme entailed. Furthermore, it remained unclear whether or not repatriation to Somalia was in fact possible. Apparently, there was a lack of funds for the repatriation programme and the security situation in Somalia in 2002 remained fragile. This latter argument was put forward by the individual but not addressed by the Committee.[334] Finally, it should be noted that the UNHCR's repatriation programme is voluntary and the individual would now be forced to join it.

The Committee's views give little or no indications of the substantive requirements for an internal protection alternative. The alternative needs to be a safe area, i.e. safe from the risk of being subjected to torture. The question remains whether or not the alternative area should guarantee other human rights, including protection from other forms of inhuman and degrading treatment. In *B.S.S. v Canada* (2004) the Committee acknowledged that the alternative area would involve considerable hardship, including the applicant's inability to return to his family and his home village. However, this was not decisive. According to the Committee such hardship would not amount to torture within the meaning of the Convention.[335] Apparently, the Committee uses the Convention against Torture and the prohibition on subjecting people to torture

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333 ComAT, *H.M.H.I. v Australia*, 1 May 2002, no. 177/2001, para. 6.6.

334 In 2002 UNHCR had scheduled the repatriation of refugees to Somalia from Ethiopia, Kenya and Djibouti. In February 2002, 220 refugees had been repatriated successfully from Kenya to Northwest Somalia (Somaliland). By the end of June 2002 a total of 11,370 refugees had been repatriated to Northwest Somalia. Repatriation to Northeast Somalia (Puntland) and Central Somalia was, however, hampered for reasons of security. Furthermore, lack of funding halted further repatriation in the second part of 2002 to Somaliland, source: UNHCR Mid-Year Progress Report 2002 – Somalia.

335 ComAT, *B.S.S. v Canada,* 17 May 2004, no. 183/2001, para. 11.5.

as its basis for determining whether or not an alternative area can provide safe and effective protection. It remains unclear whether or not the internal protection alternative has to be accessible for the individual both in law and in practice. In *H.M.H.I. v Australia* (2002) the Committee let the availability of the internal protection alternative rely on the UNHCR's voluntary repatriation programme. It however remained unclear whether or not the individual would actually be accepted into the programme, whether or not repatriation would actually be possible and, if possible, what the legal status of the individual would be.

5.3.2.5b Diplomatic assurances to guarantee safety

The issue of diplomatic assurances to guarantee an individual's safety has become prominent in the Committee's views over the years. For example, in its Concluding Observations on country reports the Committee actively seeks information concerning the extent to which diplomatic assurances have been used to remove individuals who would otherwise be at risk of torture.[336] Also, the Committee has explicitly addressed the issue of diplomatic assurances in three individual cases.[337] In *Pelit v Azerbaijan* (2007), involving extradition, the State party had sought and received diplomatic assurances from the complainant's country of origin, Turkey. The Committee was unable independently to examine the assurances as neither had they been supplied to the Committee nor did the State party detail with sufficient specificity the monitoring undertaken and the steps taken to ensure that the assurances were objective, impartial and trustworthy.[338] Interestingly, the Committee did state that requesting diplomatic assurances regarding possible mistreatment is 'an acknowledgment that, without more, expulsion of the complainant would raise issues of her mistreatment'.[339] The issue of diplomatic assurances was more comprehensively and explicitly examined by the Committee in *Attia v Sweden* (2003) and *Agiza v Sweden* (2005).[340] Attia and Agiza, a married couple, had both arrived in Sweden in 2000 seeking asylum. Their asylum claim was based on Agiza's activities in Egypt. Their

336 See various recommendations made by the Committee in accordance with the Committee's monitoring responsibility under Article 19 of the Convention, including ComAT, Concluding Observations on the Russian Federation, 6 February 2007, UN doc. CAT/C/RUS/CO/4, para. 16. ComAT, Concluding Observations on the United States of America, 25 July 2006, UN doc. CAT/C/USA/CO/2, para. 21. ComAT, Concluding Observations on Canada, 7 July 2005, UN doc. CAT/C/CR/34/CAN, para. 5 (e). ComAT, Concluding Observations on Switzerland, 21 June 2005, UN doc. CAT/C/CR/34/CHE, para. 5 (j). ComAT, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, 10 December 2004, UN doc. CAT/C/CR/33/3, para. 5 (i). ComAT, Concluding Observations on Germany, 11 June 2004, UN doc. CAT/C/CR/32/7, para. 5 (e). See also Jones 2006, p. 12 (note 15).

337 ComAT, *Attia v Sweden,* 24 November 2003, no. 199/2002. ComAT, *Agiza v Sweden,* 24 May 2005, no. 233/2003. ComAT, *Pelit v Azerbaijan*, 29 May 2007, no. 281/2005, para. 11.

338 Ibid., para. 11.

339 Ibid.

340 ComAT, *Attia v Sweden,* 24 November 2003, no. 199/2002, published with comment by Bruin in NAV 2004/36 and Vermeulen in *Rechtspraak Vreemdelingenrecht* 2003/4. ComAT, *Agiza v Sweden,* 24 May 2005, no. 233/2003, published with comment by Bruin in NAV 2005/135 and Wouters in JV 2005/302.

claim was rejected and both were threatened with expulsion to Egypt. On 18 December 2001, Agiza was expelled to Egypt after Sweden had received diplomatic assurances from the Egyptian authorities guaranteeing his safety. Attia in the meantime could not be expelled as she went into hiding in Sweden. Both lodged a complaint with the Committee against Torture. Attia's claim was considered first and rejected by the Committee in an opinion dated 17 November 2003. Agiza's claim was not considered until May 2005. In his case the Committee considered that his expulsion by Sweden was in breach of Article 3 of the Convention against Torture. Attia's case was based on the situation of her husband, who was detained in Egypt for alleged terrorist activities and was awaiting trial. In her case the Committee was not convinced that as a result of her family ties with Agiza she would be in danger of subjection to torture. The Committee considered it was satisfied with the safety guarantees provided by the Egyptian authorities, directed in particular at the complainant's husband, but which also extended to Attia's safety. The Committee also took into account the regular monitoring by Sweden of the situation and condition of the individual's husband, which had not uncovered any maltreatment – at the time of the Committee's considerations in 2003. Finally, the Committee considered it to be relevant that Egypt was a State party to the Convention against Torture and was therefore directly bound to treat prisoners properly.[341] A year and a half after its considerations in the *Attia* case the Committee concluded that with regard to her husband, Agiza, there was a real risk of torture upon return.[342] In the *Agiza* case the Committee considered that the 'natural conclusion' was that the complainant had a real risk of being tortured in Egypt at the time of his removal.[343] The Committee referred to a combination of general information as well as personal facts and circumstances, including:

1. that at the outset it was known, or ought to have been known, to Sweden that at the time of Agiza's removal Egypt had resorted to consistent and widespread use of torture against detainees and that the risk of such treatment was particularly high in cases of detainees being held for political and security reasons,
2. that Sweden was aware that its own security intelligence services regarded Agiza as implicated in terrorist activities and a threat to its national security,
3. that Sweden was aware of the interest in Agiza shown by the intelligence services of two other States, and
4. that in Egypt Agiza had been sentenced in absentia and was wanted for alleged involvement in terrorist activities.

Furthermore, the Committee concluded that 'the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk'.[344] Unlike in the *Attia* decision, in *Agiza* the

341 ComAT, *Attia v Sweden,* 24 November 2003, no. 199/2002, para. 12.3.
342 It should be noted that Mrs. Attia was never expelled. She and her children received a residence permit in Sweden.
343 ComAT, *Agiza v Sweden,* 24 May 2005, no. 233/2003, para. 13.4.
344 Ibid., para. 13.4.

Committee attached no value to the assurances provided by Egypt. In fact, where in the *Attia* case the Committee attached significant weight to the monitoring conducted by Sweden of Agiza's situation and condition in detention, the Committee concluded in the *Agiza* case that no sufficient monitoring mechanism existed. In the *Agiza* case the Committee addressed the distinction between its two decisions. The Committee pointed to several significant events which came to light after its decision in the *Attia* case, including, that in the *Attia* case:

> 'it did not have before it the actual report of mistreatment provided by the current complainant to the Ambassador at his first visit and not provided to the Committee by the State party …; the mistreatment of the complainant by foreign intelligence agents on the territory of the State party and acquiesced in by the State party's police; the involvement of a foreign intelligence service in offering and procuring the means of expulsion; the progressively wider discovery of information as to the scope of measures undertaken by numerous States to expose individuals suspected of involvement in terrorism to risks of torture abroad; the breach of Egypt of the element of the assurances relating to guarantee of a fair trial, which goes to the weight that can be attached to the assurances as a whole; and the unwillingness of the Egyptian authorities to conduct an independent investigation despite appeals from the State party's authorities at the highest levels'.[345]

In both the *Attia* and *Agiza* cases the Committee's findings on the issue of diplomatic assurances are minimal. Many details of the assurances were – for reasons of national security – omitted from the text of the decisions, making it difficult to analyse the issue. Fortunately, several issues do become clear, in particular from the *Agiza* case. Regarding the assurances themselves it is known that they were provided in writing by a senior Egyptian government official during a meeting with a secretary of State of the Swedish Ministry of Foreign Affairs. It was guaranteed that Agiza would receive a fair trial, that he would not be subjected to torture or other forms of prohibited inhuman treatment, that he would not be sentenced to death or be executed, that the Swedish embassy in Cairo would be allowed to monitor the trial and visit him while in detention, even after a conviction, and that his family would not be subjected to any kind of harassment. In addition, Sweden had argued that Egypt was a party to the Convention against Torture and that it had a constitutional prohibition on torture.[346] The Committee was not convinced by the assurances given. The Committee considered that the 'procurement of diplomatic assurances … did not suffice to protect against this manifest risk'.[347] In spite of being guaranteed a fair trial, Agiza was, according to the Committee, not given one.[348] And in spite of the guarantee that Agiza would not be subjected to torture or inhuman treatment and notwithstanding international legal and constitutional prohibitions thereof, it was reported that Agiza

345 Ibid., para. 13.5.

346 Egypt has not recognised the competence of the Committee to receive and consider communications from individuals in accordance with Article 22 of the Convention.

347 ComAT, *Agiza v Sweden,* 24 May 2005, no. 233/2003, para. 13.4.

348 Ibid., para. 13.5.

was mistreated while in detention. Moreover, Egypt's consistent and widespread use of torture was taken into account.[349] Apparently more is needed for assurances to guarantee a person's safety and to minimise the risk both with regard to the content of the assurances, in relation to the facts and circumstances that determine the risk, and with regard to the monitoring of compliance with the assurances.[350]

The Committee is reluctant to accept diplomatic assurances. The diplomatic nature of assurances, the various legal safeguards for prohibiting, preventing and prosecuting acts of torture, the effectiveness of monitoring mechanisms and the occasional good faith of senior government officials do not guarantee the absence of practices of torture or a risk of being subjected thereto. In the *Agiza* case the Committee considered that 'the breach by Egypt of the element of the assurances relating to guarantee of a fair trial, … goes to the weight that can be attached to the assurances as a whole'.[351] The Committee does not completely rule out the use of diplomatic assurances but has, for example in some of its Concluding Observations formulated strict requirements for the use of such assurances.[352] These requirements include:

1. Relying only on diplomatic assurances with regard to States which do not systematically violate the Convention's provisions;
2. Using diplomatic assurances only after a thorough examination of the merits of each individual case;
3. Establishing and implementing clear procedures for obtaining and relying on such assurances, including measures of effective post-return monitoring and adequate judicial review mechanisms.[353]

These requirements make it difficult to rely on diplomatic assurances in cases involving a risk of torture. No doubt most of such cases will involve a country where torture is prevalent.

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349 Ibid., paras. 13.4 and 13.5.

350 Bruin, in his comments on the *Agiza* case (NAV 2005, no. 135, p. 324), has suggested that in spite of assurances extradition should not be possible when the receiving State is not a State party to the Optional Protocol to the Convention against Torture whereby States are obliged to allow visits by the Sub-Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. A/RES/57/199, adopted Dec. 18, 2002 [reprinted in] 42 I.L.M. 26 (2003)]), or to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, allowing visits of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, E.T.S. 126, entered into force 1 Feb. 1989). Both treaties allow independent monitoring.

351 ComAT, *Agiza v Sweden*, 20 May 2005, no. 233/2003, para. 13.5.

352 ComAT, Concluding Observations on the Russian Federation, 6 February 2007, UN doc. CAT/C/RUS/CO/4, para. 16. ComAT, Concluding Observations on the United States of America, 25 July 2006, UN doc. CAT/C/USA/CO/2, para. 21. ComAT, Concluding Observations on Canada, 7 July 2005, UN doc. CAT/C/CR/34/CAN, para. 5 (e). ComAT, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, 10 December 2004, UN doc. CAT/C/CR/33/3, para. 4 (d).

353 Also Nowak & McArthur 2008, p. 150 (para. 80).

5.3.2.5c The country of origin is a State party to one or more human rights treaties
In several cases it has been an issue whether or not the country of origin is a State party to the Convention against Torture and whether or not it has recognised the competence of the Committee to receive and consider individual complaints under Article 22 of the Convention. Of all the countries of origin that were involved in individual cases in which the Committee reached a decision – 38 countries in all – 29 countries are party to the Convention, of which 10 States have accepted the individual complaint procedure.[354] The importance of being a State party to the Convention and having accepted the individual complaint procedure is relative. The main object and purpose of the Convention against Torture, and in particular of Article 3, is to prevent torture. To risk having a person tortured and complain afterwards would not be in accordance with this object and purpose.[355]

In *Mutombo v Switzerland* (1994) the Committee considered the fact that Zaire was not a State party to the Convention in addition to its conclusion that there was a risk of being subjected to torture.[356] In *Alan v Switzerland* (1996) the Committee noted the fact that Turkey is a party to the Convention against Torture and has recognised the Committee's competence under Article 22 to receive and examine individual communications; however, it further considered that the practice of torture is still systematic in Turkey and concluded that expulsion of the complainant in this case would constitute a violation of Article 3 of the Convention.[357] A State not being a party to the Convention against Torture is a circumstance that can strengthen the conclusion that a risk exists. A State being a party to the Convention against Torture is no guarantee of the absence of torture.[358]

In two cases the Committee explicitly took into consideration that the country of origin was a State party to the Convention and that it had accepted the individual complaint procedure. In both cases it concluded that no risk of being subjected to torture existed.[359] In *S.C. v Denmark* (2000), with Ecuador being the country of origin, the Committee acknowledged that the complainant had encountered difficulties with the authorities because of her political activities, but considered:

> 'that the author has carried out her political activities as a member of a lawful political party of a country which has ratified not only the Convention against Torture, but has also made the optional declaration under Article 22 of the Convention'.[360]

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354 These States parties are: Costa Rica, Ecuador, Peru, Russian Federation, South Africa, Spain, Togo, Tunisia, Turkey and Venezuela.

355 Fernhout in his commentary on ComAT, *Alan v Switzerland*, 8 May 1996, no. 21/1995, NJCM-Bulletin Vol. 22 (1997) No. 8, p. 1105, para. 8.

356 ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, para. 9.6 (DR Congo, former Zaire). See also ComAT, *Khan v Canada,* 18 November 1994, no. 15/1994, para. 12.5 (Pakistan).

357 ComAT, *Alan v Switzerland*, 8 May 1996, no. 21/1995, para. 11.5.

358 Bruin 1997, p. 34.

359 ComAT, *S.C. v Denmark,* 3 September 2000, no. 143/1999 (Ecuador, State party since 29 April 1988). ComAT, *E.J.V.M. v Sweden*, 28 November 2003, no. 213/2002 (Costa Rica, State party since 11 December 1993).

360 ComAT, *S.C. v Denmark*, 3 September 2000, no. 143/1999, para. 6.5.

In my opinion, this is rather unsatisfactory reasoning. Why can an active member of a lawful political party in a country which has ratified the Convention and allows individual complaints not become the victim of torture? The complainant had presented a detailed account of her experiences, which included three instances of detention during which she was allegedly ill-treated and raped. She had presented medical records to support her claim. She had stated that her fiancé had disappeared and a warrant for her arrest had been issued. These facts were not seriously disputed by Denmark. At the very least the Committee could have addressed the facts and circumstances put forward more thoroughly. In *E.J.V.M. v Sweden* (2003), with Costa Rica as the country of origin, the Committee started its reasoning by referring to the positive general human rights situation in Costa Rica and the fact that Costa Rica had accepted the individual complaint procedure.[361] Unlike in the above outlined case of *S.C. v Denmark* (2000) the Committee then assessed the facts as presented by the complainant. The Committee considered that inconsistencies in the complainant's claim had not been explained. Furthermore, insufficient evidence had been provided, a period of two years had elapsed between the most serious incident the complainant referred to and his departure, and the complainant's claims were of a general nature. Based on a more thorough examination of what had been put forward the Committee concluded that there was no risk of his being subjected to torture.[362] In this case the Committee put much less weight on the fact that Costa Rica was a State party to the Convention and had accepted the individual complaint procedure than it did in *S.C. v Denmark* (2000); it puts everything more in perspective. In other cases, the fact that the country of origin was a State party to the Convention against Torture and had recognised the competence of the Committee to receive and examine individual complaints was not a consideration even though it was concluded that return would be in breach of Article 3 of the Convention.[363] Furthermore, in one case concerning indirect refoulement (see section 5.4.1.4) it was an additional consideration of the Committee that:

> 'although Jordan is a party to the Convention, it has not made the declaration under Article 22. As a result, the author would not have the possibility of submitting a new communication to the Committee if he was threatened with deportation from Jordan to Iraq'.[364]

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361 ComAT, *E.J.V.M. v Sweden*, 28 November 2003, no. 213/2002, para. 8.4.

362 Ibid., para. 8.5-8.7.

363 ComAT, *Paez v Sweden*, 28 April 1997, no. 39/1996 (Peru, State party since 6 August 1988). ComAT, *Ayas v Sweden,* 12 November 1998, no. 97/1997 (Turkey, State party since 1 September 1988). ComAT, *A v Netherlands*, 13 November 1998, no. 91/1997 (Tunisia, State party since 23 October1988). ComAT, *Haydin v Sweden*, 16 December 1998, no. 101/1997 (Turkey). ComAT, *Chipana v Venezuela*, 16 December 1998, no. 110/1998 (Peru). ComAT, *Arana v France,* 5 June 2000, no. 63/1997 (Spain, State party since 20 November 1987). ComAT, *Karoui v Sweden,* 25 May 2002, no. 185/2001 (Tunisia).

364 ComAT, *Korban v Sweden,* 16 November 1998, no. 88/1997, para. 7.

It remains unclear to what extent States parties may trust the equal and full compliance with the Convention by other States. Arguably, the threshold of trust has to be high as the object and purpose of the Convention against torture, and the prohibition on refoulement under Article 3 in particular, are to prevent torture. Furthermore, to trust the Convention's individual complaint procedure would be to trust a rather weak protection mechanism as the outcome of the procedure is not legally binding.[365]

5.3.3 The absolute character of the prohibition on refoulement

Article 3 of the Convention against Torture is formulated in absolute terms. The Committee 'considers that the test of Article 3 of the Convention is absolute' and that no exceptions are permitted.[366] The absolute character of Article 3 implies that no-one is to be excluded from protection from refoulement. It implies that no-one can be removed by a State party because he poses a threat to the national security of that State or its people or because he has committed serious criminal offences within a State party to the Convention and is therefore ineligible for asylum under domestic law.[367] Furthermore, whatever the nature of the activities in which the person concerned was, or still is, engaged, they cannot be a material consideration under Article 3. These include activities which would, for example, lead to the exclusion of refugee status under Article 1F of the 1951 Convention relating to the Status of Refugees.[368]

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365 Bruin 1997, p. 34.

366 ComAT, *Paez v Sweden*, 28 April 1997, no. 39/1997, para. 14.5. See also ComAT, *Aemei v Switzerland*, 29 May 1997, no. 34/1995, para. 9.8. ComAT, *M.B.B. v Sweden,* 21 June 1999, no. 104/1998, para. 6.4. ComAT, *V.X.N. and H.N. v Sweden*, 2 September 2000, no. 130 and 131/1999, para. 13.4. See also ComAT, Concluding Observations on Slovakia, 11 May 2001, UN doc. A/56/44, paras.99-105, para. 104 (b). ComAT, Concluding Observations on Slovenia, 16 May 2000, UN doc. A/55/44, paras.189-212, para. 206.

367 For example, ComAT, *Khan v Canada,* 18 November 1994, no. 15/1994, in which the author was convicted of assault causing bodily harm and ComAT, *V.X.N. and H.N. v Sweden*, 2 September 2000, nos. 130 and 131/1999, para. 14.3, in which the authors were to be expelled for reasons of national security because they had committed criminal offences (rape and several incidents of violence) for which they had served five years in prison. See also Rosati 1998, p. 540. See also ComAT, Concluding Observations on Canada, 22 November 2000, UN doc. A/56/44, paras. 54-59, para. 58 (e). In *Dadar v Canada* (2005) the Canadian authorities tried to argue that the risk that the complainant represented to Canadian society outweighed any risk that he might face upon his return to Iran. In response the Committee reiterated the absolute character of Article 3: ComAT, *Dadar v Canada*, 5 December 2005, No. 258/2004, paras. 4.4 and 8.8.

368 ComAT, *Paez v Sweden*, 28 April 1997, no. 39/1997, para. 14.5. The author was a member of the Sendero Luminoso, according to Sweden a terrorist organization in Peru. He handed out handmade bombs during a demonstration and he was excluded by Sweden from refugee status under Article 1F of the 1951 Convention relating to the Status of Refugees for participating in serious non-political criminality. In ComAT, *M.B.B. v Sweden*, 21 June 1999, no. 104/1998, para. 6.4, the author was excluded by Sweden from refugee status under Article 1F of the 1951 Convention relating to the Status of Refugees for spying on anti-revolutionary forces in Iran (he was a member of the Iranian Revolutionary Guards or Pasdaran), mistreating people, taking part in arbitrary executions and

The absolute character of Article 3 of the Convention is strengthened by Article 2(2), according to which 'no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture'; and Article 2(3) states that 'an order from a superior officer or a public authority may not be invoked as a justification of torture'.[369] The exceptional circumstances referred to in Article 2(2) are not exhaustive. Torture is never justified, even in exceptional circumstances, however understandable they may be.[370] For example, in 1997 Israel claimed that the use of 'moderate physical and psychological pressure' had thwarted 90 planned terrorist attacks and saved countless lives.[371] Although acknowledging Israel's terrible dilemma in dealing with terrorist threats to its national security, the Committee against Torture considered these techniques to be in violation of Article 1 of the Convention against Torture irrespective of what exceptional circumstances existed, as these techniques amounted to torture within the meaning of Article 1.[372] Article 2 (2) applied in conjunction with Article 3 implies that no-one may be removed to a country where that person would be subjected to torture, even though, according to that country, such subjection might be understandable or justified because of a state or threat of war, political instability, public emergency, for reasons of national security or any other reason. The absolute character of the prohibition of torture in general is acknowledged by the Committee in General Comment Number 2 regarding the implementation of Article 2 of the Convention by States parties.[373]

It should be noted that the absolute character of Article 3 of the Convention could, theoretically, be undermined by the exception for lawful sanctions laid down in

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obtaining information about opponents of the Iranian government. See also ComAT, Concluding Observations on Canada, 7 July 2005, CAT/C/CR/34/CAN, para. 5.

369 See also Burgers & Danelius 1988, p. 124. ComAT, Concluding Observations on Bulgaria, 11 June 2004, UN doc. CAT/C/CR/32/6, para. 6 (f).

370 Boulesbaa 1999, p. 79. See also ComAT, Concluding Observations on Columbia, 4 February 2004, UN doc. CAT/C/CR/31/1, para. 6 regarding internal armed conflicts. ComAT, Concluding Observations on Cameroon, 6 December 2000, UN doc. A/56/44, paras.60-66, para. 64, regarding difficulties of an economic nature, in particular a considerable reduction in financial resources. ComAT, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, 17 November 1998, UN doc. A/54/44, paras.72-77, para. 75 regarding the state of emergency in Northern Ireland. ComAT, Concluding Observations on Yugoslavia, 16 November 1998, UN doc. A/54/44, paras.35-52, para. 42 regarding unrest and ethnic friction in Kosovo. ComAT, Concluding Observations on Armenia, 9 July 1996, UN doc. A/51/44, paras.84-101, para. 89-90 regarding the transition from one system of governance to another. ComAT, Concluding Observations on Afghanistan, 26 June 1993, UN doc. A/48/44, paras.50-62, para. 52.

371 ComAT, State Party Report, Second Periodic Report, Israel, 18 February 1997, UN doc. CAT/C/33/Add.2/Rev.1, para. 24.

372 ComAT, Concluding Observations on Israel, 9 May 1997, UN doc. A/52/44, paras.253-260, paras. 257 and 258. A similar consideration was already made by the Committee in its Concluding Observations in Israel, 12 June 1994, UN doc. A/49/44, paras.159-171, para. 168 and repeated in ComAT, Concluding Observations on Israel, 18 May 1998, UN doc. A/53/44, paras.232-242, para. 239 and ComAT, Concluding Observations on Israel, 23 November 2001, UN doc. CAT/C/XXVII/Concl.5, para. 6. Also mentioned in Joseph, Schultz & Castan 2000, p. 151.

373 ComAT, General Comment No. 2 (2008).

Article 1, for example, by making certain sanctions lawful by way of legalising them under national law. As already mentioned in section 5.3.1.6 such practice would be contrary to the absolute character of the prohibition on torture. In individual cases regarding Article 3 of the Convention the Committee has made it clear that any conduct which amounts to torture falls within the scope of Article 3, irrespective of national legislation. In its General Comment Number 2 the Committee explicitly considered that it 'rejects absolutely any efforts by States to justify torture and ill-treatment as a means of to protect public safety or avert emergencies in these and all other situations'.[374]

The absolute character of Article 3 of the Convention is becoming even more important in the fight against 'terrorism', as already indicated by the above example of Israel. In *Paez v Sweden* (1997) Sweden hinted that no protection should be afforded to people involved in an organisation with a terrorist character.[375] The Committee against Torture did not address the issue of terrorism explicitly in that case. In *Arana v France* (2000), involving a member of the Basque separatist movement ETA and concerning extradition to Spain, the Committee explicitly addressed the international fight against crime by stating that it:

> 'recognises the need for close co-operation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully respect the rights and fundamental freedoms of the individuals concerned'.[376]

In various views the Committee has acknowledged the difficulties States face in fighting crime and terrorism, but it has consistently reiterated that no justifications for torture can be invoked.[377] Notwithstanding the absolute character of Article 3 of the Convention States parties do have an obligation to take legal action against people suspected of having committed acts of torture.[378]

374 Ibid., para. 5.

375 ComAT, *Paez v Sweden,* 28 April 1997, no. 39/1997, para. 6.3.

376 ComAT, *Arana v France*, 5 June 2000, no. 63/1997, para. 11.5.

377 ComAT, Concluding Observations on the Russian Federation, 6 June 2002, UN doc. CAT/C/CR/28/4, para. 4. ComAT, Concluding Observations on Spain, 23 December 2002, UN doc. CAT/C/CR/29/3, para. 7. ComAT, Concluding Observations in Egypt, 23 December 2002, UN doc. CAT/C/CR/29/4, para. 4. ComAT, Concluding Observations on Yemen, 5 February 2004, UN doc. CAT/C/CR/31/4, para. 5. ComAT, Concluding Observations on New Zealand, 11 June 2004, UN doc. CAT/C/CR/32/4, para. 6 (b).

378 Article 5(2) and 7 Convention against Torture. Also Nowak & McArthur 2008, p. 149 (paras. 76 and 77).

5.4 The character and contents of State obligations deriving from the prohibition on refoulement under Article 3 of the Convention against Torture

Article 3 of the Convention against Torture prohibits the expulsion, return or extradition of a person to another State where there is a risk of his being subjected to torture.[379] States are responsible for people who are within their territory as well as for those who are within their extra-territorial responsibility (see section 5.2). In general, a State is obliged to avoid the situation where, as a consequence of its conduct, a person for whom it is responsible is forced to go to a State where he will be in danger of being subjected to torture. Such conduct includes expulsion, return and extradition, as well as any other conduct as a result of which the individual is forced to return or to go to a State where he will be at risk. Depending on the specific situation in which the individual finds himself the State can have negative or positive obligations to protect the individual from refoulement. Negative obligations are those obligations on a State to refrain from acting. Such negative obligations include the prohibitions on expulsion, deportation, transfer, extradition, or, in general, the forced return or removal of a person. The various negative obligations which can be derived from Article 3 of the Convention against Torture will be discussed in section 5.4.1. Positive obligations are obligations on the State to take action in order to prevent a person from returning or going to a State where he is at risk of being tortured. Various positive obligations will be discussed in section 5.4.2.

5.4.1 Negative obligations

5.4.1.1 Prohibition on removal

It is irrelevant in what legal setting the removal takes place. Article 3 of the Convention covers all forms of forced removal, including the extradition of a criminal and the expulsion or deportation of an alien, and applies to all situations of forced removal to another country irrespective of whether or not the individual has already been there.[380] It is unclear to what extent Article 3 also covers measures whereby a person is not physically transferred to another State but indirectly forced to go to another State. To my knowledge the Committee against Torture has not dealt with such measures.

The prohibition on refoulement prohibits return to 'another State'. The scope of protection from refoulement is not limited to the country of origin of the person, but

379 In many cases in which the Committee decides that removal of the individual would be in breach of Article 3 of the Convention the Committee formulates the State party's obligation as follows: 'the State party has an obligation, in accordance with Article 3 of the Convention, to refrain from forcibly returning the author': see, for example, ComAT, *A.S. v Sweden,* 15 February 2001, no. 149/2001, para. 9.

380 Burgers & Danelius 1988, p. 126, argue that Article 3 of the Convention is intended to cover all measures by which a person is physically transferred to another State. Anker 1999, p. 521.

to any State where he would be at risk, including States which are not party to the Convention.[381] The use of the word 'State' implies that the legal status of the territory to where the individual is removed is relevant, and that only those territories or areas which are under the sovereign control of a State come within the scope of Article 3.[382] What belongs to the territory of a State is discussed in section 1.2.3.2. Arguably, in reality the use of the word 'State' instead of the more neutral term 'territory' will not create many problems. It is difficult to imagine that a State party to the Convention against Torture will remove an individual to a territory that is not part of a State. As briefly outlined in section 1.2.3.2 not all territory belongs to States. Arguably, removing a person to a territory which is not governed by a sovereign State comes within scope of Article 3. That would be in accordance with the object and purpose of Article 3 and would be in line with the idea that even in the absence of a State authority torture can exist.[383]

5.4.1.2 Prohibition on extradition

Extradition is explicitly prohibited by Article 3 of the Convention against Torture if there are substantial grounds for believing that the extradited person would be in danger of being subjected to torture after extradition. This may give rise to a conflict of treaty obligations, as extradition is frequently covered by bilateral or multilateral extradition treaties. During the drafting of the Convention against Torture considerable attention was given to the problem of conflicting treaty obligations.[384] In the last report (1984) of the Working Group set up by the Commission on Human Rights to draft the Convention against Torture, it was explicitly mentioned that States parties to the Convention might wish, at the time of signature or ratification of the Convention or accession thereto, to declare that they did not consider themselves to be bound by Article 3 of the Convention in so far as the Article might not be compatible with obligations under extradition treaties. Burgers and Danelius therefore assume that reservations or declarations in accordance with this statement would be legally permissible.[385] However, no such reservations or declarations have been made. The Committee against Torture seems to acknowledge the importance and prevalence of protection under Article 3 when there is a conflict with an extradition obligation. The Committee has on many occasions sought clarification of the measures taken by the States parties to the Convention to ensure that people were not extradited to a State where the risk of being subjected to torture existed.[386] Notably, in none of the cases

381 Burgers & Danelius 1988, p. 127.

382 See section 2.4.1.1, Article 33(1) Refugee Convention refers to 'territories' as opposed to States.

383 Section 5.1.2.1 (object and purpose of the Convention against Torture) and section 5.3.1.4a (torture in the absence of a State authority).

384 Burgers & Danelius 1988, p. 126.

385 UN doc. E/CN.4/1984/72, para. 12 as read in Burgers & Danelius 1988, p. 127.

386 ComAT, Concluding Observations on Sweden, 26 June 1993, UN doc. A/48/44, paras.365-386, para. 372. ComAT, Concluding Observations on Panama, 26 June 1993, UN doc. A/48/44, paras.311-341, paras. 320 and 330. ComAT, Concluding Observations on Libya, 26 June 1993, UN doc.

in which the complainant was threatened with extradition was there a conflict of treaty obligations.[387] Moreover, as I outlined in section 1.2.3.6 a prohibition on refoulement which aims to prevent subjection to torture must prevail over any legal obligation to extradite a person to a State in which he is likely to be subjected to torture.[388]

5.4.1.3 Prohibition on rejection at the frontier and beyond

What happens if an individual finds himself at the border of a State party, is seeking protection, and is not allowed to enter the territory of the State party? People who are at the de facto frontier of a State are under the actual control of the State. As discussed in section 5.2.2 the State is then responsible for protecting them from refoulement. In most cases however, people will not be at the de facto border but at the State's legal border. They have arrived via air, sea or land and find themselves at the State's international airport, in the State's sea port or at a land border checkpoint. In all cases they will be likely to be already within the territory of the State but have not (yet) been allowed formally to enter the State. In all these situations the individual will be within the territory of the State. Where he is not within a State's territory, Suntinger has argued that Article 3 of the Convention against Torture is applicable in border situations, where non-admission would mean forcing the individual to go to a country where there was a risk of being subjected to torture.[389] So far, this issue has not been considered by the Committee in individual cases. Only in its Concluding Observations has the Committee touched upon this issue. For example, in its Concluding Observation on Norway (1993) members of the Committee, with reference to Article 3, requested:

> 'information on how the 1988 Immigration Act actually worked and asked, in particular, whether foreigners, especially refugees, could be denied entry to Norway by the border police and turned back and what recourse procedure was available to them'.[390]

A/48/44. paras.181-207, para. 185. ComAT, Concluding Observations on Tunisia, 19 November 1998, UN doc. A/54/44, paras.88-105, para. 101. And in a case where a State party, Libya, did extradite a person, the Committee did not agree that the State party was legally obliged to do so: ComAT, Concluding Observations on Libya, 11 May 1999, UN doc. A/54/44, paras.176-189, para. 183.

387 ComAT, *Chipana v Venezuela*, 16 December 1998, no. 110/1998 (extradition to Peru) and ComAT, *G.K. v Switzerland*, 12 May 2003, no. 219/2002 (extradition to Spain). ComAT, *Pelit v Azerbaijan*, 29 May 2007, no. 281/2005 (extradition to Turkey).

388 Dugard and Van de Wyngaert state: 'Consequently, no requested state should have difficulty in justifying a refusal to extradite a person to a state in which he is likely to be subjected to torture – a course approved by the 1984 Convention against Torture and the UN Model Treaty on Extradition': Dugard & Van den Wyngaert 1998, p. 198.

389 Suntinger 1995, p. 210.

390 ComAT, Concluding Observations on Norway, 26 June 1993, UN doc. A/48/44, paras. 63-87, para. 68.

And in its Concluding Observations on France (1998) the Committee recommended that 'the possibility should exist of lodging a suspensive appeal against a refusal to allow entry into France and subsequent refoulement'.[391]

What happens if the person concerned does not find himself at the State's actual border but further away from the State's territory? This question has hitherto not been addressed by the Committee against Torture. I would argue that a person who is further away from a State's territory but is within the State's effective actual control (section 5.2.2) may have a right to be protected from refoulement by that State. The type and content of the State's obligations in that regard depend on the situation in which the person finds himself.

5.4.1.4 Prohibition on indirect refoulement and the concept of safe third countries

Article 3 of the Convention against Torture includes a prohibition on indirect refoulement. Under Article 3 no-one shall be expelled, returned or extradited to 'another State'. According to the Committee against Torture the words 'another State' refer to:

> 'the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited'.[392]

The prohibition on indirect refoulement was confirmed by the Committee in several individual cases.[393] In two cases the issue of indirect refoulement was explicitly discussed, because a possible third safe country was involved. In *Korban v Sweden* (1998) the complainant was threatened with expulsion to Jordan from which he feared he would subsequently be expelled to Iraq, where he claimed he would run the risk of being tortured.[394] The Committee first determined whether or not there was an arguable claim under Article 3 of the Convention for reasons of admissibility. The Committee then, regarding the merits of the case, considered whether or not there were substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Iraq. The Committee concluded that such substantial grounds existed and then continued with an assessment of the risk of subsequent

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391 ComAT, Concluding Observations on France, 27 May 1998, UN doc. A/53/44, paras.137-148, para. 147.

392 ComAT, General Comment No. 1 (1997), para. 2.

393 ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1994, para. 10. ComAT, *Tala v Sweden,* 15 November 1996, no. 43/1996, para. 11. ComAT, *Aemei v Switzerland*, 29 May 1997, no. 34/1995, para. 10. ComAT, *Ayas v Sweden,* 12 November 1998, no. 97/1997, para. 7. ComAT, *A.S. v Sweden*, 15 February 2001, no. 149/1999, para. 9. ComAT, Concluding Observations on Finland, 9 July 1996, UN doc. A/51/44, paras. 120-137, para. 131, in which the Committee expressed its concern 'about the absence of sufficient legal protection of the rights of persons who are denied asylum through the use of a list of safe countries in which those persons could be sent back, in the Immigration Act of Finland'.

394 ComAT, *Korban v Sweden*, 16 November 1998, no. 88/1997.

expulsion from Jordan to Iraq. The Committee noted that the State party, Sweden, had not made such an assessment and considered that it appeared from the parties' submissions that the complainant was 'not entirely protected from being deported [by Jordan]' to Iraq.[395] In this regard information from the UNHCR was considered to be relevant, indicating that in the previous year two cases of forced expulsion of refugees had taken place and that Jordan should not be considered a safe country as Iraqis were not protected from expulsion to Iraq. The Committee then concluded that Sweden had an obligation not to return the author to Jordan and ended with noting that, although Jordan was a party to the Convention against Torture, it had not made a declaration under Article 22 of the Convention as a result of which the author would not have the possibility of submitting a new communication to the Committee if he was threatened with expulsion from Jordan to Iraq.[396] It should be noted in this regard that as early as in its Concluding Observations on Jordan in 1995 the Committee had expressed its concerns regarding the expulsion of individuals from Jordan to countries where there were substantial grounds for believing that they would be in danger of being subjected to torture in contravention of Article 3.[397] In *Z.T. v Australia* (2003) the individual complained that he would be subjected to torture upon his return to Algeria.[398] From Algeria he had travelled to Saudi Arabia, where he had stayed for seven months; he then went to South Africa from where he travelled to Australia and requested asylum. The claim was denied and the individual was removed to South Africa were he was detained. He feared he would be returned by South Africa to Algeria and he was concerned about that the South African authorities would notify Algeria of his presence in South Africa. As in the *Korban* case the Committee first assessed whether or not there was an arguable claim for reasons of admissibility and then continued with the assessment of whether or not there were substantial grounds for believing that the individual would be subjected to torture upon return to Algeria. Unlike in the *Korban* case however, the Committee considered that no such substantial grounds existed; hence the Committee concluded that the expulsion of the individual from Australia to South Africa was not in breach of Article 3. The Committee did not address the risk of subsequent removal by South Africa to Algeria.[399] Several conclusions can be drawn from these two views. First, it needs to be determined whether or not there are substantial grounds for believing that the individual would be in danger of being subjected to torture in the country of origin.[400] In other words,

395 Ibid., para. 6.5.

396 Ibid., para. 6.1-7.

397 ComAT, Concluding Observations on Jordan, 26 July 1995, A/50/44, paras. 159-182, para. 170.

398 ComAT, *Z.T. v Australia*, 19 November 2003, no. 153/2000.

399 Ibid., paras. 6.4 and 6.5. A similar view was considered by the Committee in *H.M.H.I. v Australia* (2002) where the individual was threatened with removal to Kenya and from there to an internal protection alternative his country of origin Somalia: ComAT, *H.M.H.I. v Australia*, 1 May 2002, no. 177/2001.

400 In its Concluding Observations on Monaco (2004) the Committee reminded Monaco that 'it must satisfy itself that no one will be returned to a third country where there might be a risk of torture': ComAT, Concluding Observations on Monaco, 28 May 2004, UN doc. CAT/C/CR/32/1, para. 5 (c).

a full test is required regarding the existence of a real risk in the country of origin before the prohibition on indirect refoulement can be invoked. If it is determined that no such substantial grounds exist no further assessment of the risk of subsequent removal by a third country and the indirect refoulement by the State party will be necessary. Secondly, if, however, it is determined that such substantial grounds exist a full assessment needs to be made of the risk of subsequent removal by a third State. If such a risk existed, (indirect) refoulement to the third country by the State party would then be in violation of Article 3 of the Convention. What remains unclear is the level of risk involved in this assessment of the subsequent removal by the third country to the country of origin. Given the phrase, used by the Committee in the *Korban* case, that the complainant is not entirely protected from subsequent deportation, it is implied that the State party should have a high level of certainty that no subsequent removal by the third country to the country of origin will take place. Furthermore, the *Korban* case also implies that this risk does not necessarily have to be personal, as the assessment in this case was based on general information, mainly from the UNHCR. In addition, based on the *Korban* case, it seems to be relevant whether or not the third country is a State party to the Convention and whether or not it has accepted the individual complaint procedure. The extent to which this is relevant remains unclear. In my view such a consideration should be relative and applied with great caution.

5.4.2 Positive obligations

5.4.2.1 Right to asylum, right to enter and right to remain

The Convention against Torture does not contain a right to enjoy asylum. In *X v Spain* (1995) the Committee considered:

> 'that its authority does not extend to a determination of whether or not the claimant is entitled to asylum under national laws of a country, or can invoke the protection of the Geneva Convention relating to the Status of Refugees'.[401]

And in *Aemei v Switzerland* (1997) the Committee considered that its:

> 'finding of a violation of Article 3 of the Convention in no way affects the decision(s) of the competent national authorities concerning the granting or refusal of asylum … Consequently, the State party is not required to modify its decision(s) concerning the granting of asylum'.[402]

401 ComAT, *X v Spain,* 15 November 1995, no. 23/1995, para. 7.3.
402 ComAT, *Aemei v Switzerland*, 29 May 1997, no. 34/1995, para. 11.

Notwithstanding the absence of a right to asylum effective protection from refoulement may imply that the State is obliged to allow the entry and tolerate the presence of an alien on its territory. There is however no obligation under the Convention against Torture to regularise the alien's presence.[403] According to the Committee 'the legal status of the individual concerned in the country where he/she is allowed to stay is not relevant'.[404] Nevertheless, the Committee against Torture has acknowledged the responsibility of a State party to find a solution – either legal or political – for people whose removal would be in breach of Article 3 of the Convention. In *Aemei v Switzerland* (1997) the Committee continued to consider that:

> 'on the other hand, it [State party] does have a responsibility to find solutions that will enable it to take all necessary measures to comply with the provisions of Article 3 of the Convention. These solutions may be of a legal nature (e.g. decision to admit the applicant temporarily), but also of a political nature (e.g. action to find a third State willing to admit the applicant to its territory and undertaking not to return or expel him in its turn)'.[405]

It remains indeterminate, however, to what extent a legal solution should be provided if a political solution is not found.[406] Some further clarification on this matter can perhaps be derived from *E.H. v Hungary* (1999). In this case the Committee declared a complaint concerning Article 3 of the Convention inadmissible because the complainant was issued with a certificate allowing him to stay in Hungary temporarily. Although the Committee did not address the issue of the entitlements included in the certificate – such as the right to work and social benefits – it did consider that the complainant was in no immediate danger of expulsion. It seems that the Committee chose a minimal solution, considering written proof of temporary lawful presence to be sufficient, without addressing possible long term stay and the possible lack of various possible entitlements regarding work and social benefits.[407] The question whether or not in due time, when the risk of subjection to torture continues to exist and the individual continues to remain in the territory of the State party, the State may have an obligation to find a more permanent (legal) solution, for example, by issuing a residence permit, has not been addressed by the Committee.The fact that an individual cannot be removed from the territory of the State party does mean that the State party is obliged to ensure the provisions of the Convention against Torture

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403 This is different for Member States of the European Union. According to Article 18 EU Qualification Directive EU Member States are obliged to grant a residence permit to person eligible for subsidiary protection; a protection status that in part reflects the prohibition on refoulement contained in Article 3 CAT.

404 ComAT, *M.B.B. v Sweden,* 21 June 1999, no. 104/1998, para. 6.4.

405 ComAT, *Aemei v Switzerland*, 29 May 1997, no. 34/1995, para. 11.

406 Within the context of the European Union a legal solution is provided in the EU Qualification Directive, Article 18 in conjunction with Article 15 (b).

407 ComAT, *E.H. v Hungary,* 11 June 1999, no. 62/1996, para. 6.2. A similar approach was taken by the Committee in an earlier case, ComAT, *Mohamed v Greece*, 28 April 1997, no. 40/1996, in which, on humanitarian grounds, the order for the expulsion of the author had been laid down for a period of a month in within which the author was leave Greece for a country of his choice.

in relation to the individual, including undertaking to prevent the individual from being subjected to other acts of cruel, inhuman or degrading treatment or punishment in accordance with Article 16 of the Convention.

5.4.2.2 Obligations after removal

Obviously, there are no obligations on the State party if the removal is not in violation with Article 3 of the Convention. If, however, the removal is in breach of Article 3 the State party remains responsible under Article 3 for having removed the individual. Not having any responsibility in such a situation would de facto nullify the wording of Article 3. A State party could then easily evade its responsibility by removing all individuals seeking protection under Article 3. It seems, however, that the responsibility for breaching the obligation not to remove does not contain an obligation to take any further action, but is limited to an acknowledgment of the breach. In six individual cases, *Chipana v Venezuela* (1998), *Arana v France* (2000), *Agiza v Sweden* (2005), *Brada v France* (2005), *Tebourski v France* (2007) and *Pelit v Azerbaijan* (2007), the Committee concluded that there was a violation of Article 3 after the individual had already been removed by the State party and acknowledged the breach.[408] In the *Arana* and *Pelit* cases the Committee also asked to receive information on any measure taken by the State party in accordance with its decision.[409] In the *Agiza* case the Committee made a similar request, adding that the State party is also under an obligation to prevent similar violations in the future.[410] In the *Brada* and *Tebourski* cases the Committee went even further and asked to be informed not only of the steps the State party had taken in response to its decision, but also of the measures of compensation for the breach of Article 3 and the determination, in consultation with the country to which the complainant was returned, of his current whereabouts and state of well-being.[411] Moreover, in the *Tebourski* case the Committee also stated that the State party had failed to seek an alternative solution with the agreement of the complainant and the assistance of the UNHCR and a third country willing to receive the complainant who feared for his safety. The complainant had requested

408 ComAT, *Chipana v Venezuela,* 16 December 1998, no. 110/1998, para. 7. ComAT, *Arana v France*, 5 June 2000, no. 63/1997, para. 12. ComAT, *Agiza v Sweden*, 20 May 2005, no. 233/203, para. 14. ComAT, *Brada v France,* 24 May 2005, no. 195/2002, para. 14. ComAT, *Tebourski v France*, 11 May 2007, no. 300/2006, para. 9. ComAT, *Pelit v Azerbaijan*, 29 May 2007, no. 281/2005, para. 12.

409 In both cases the Committee requests information on the steps taken in response to the Committee's decision is based on Rule 112, paragraph 5, of the Committee's Rules of Procedure (Rules of Procedure of the Committee against Torture, 9 August 2002, UN doc. CAT/C/3/Rev.4). ComAT, *Arana v France*, 5 June 2000, no. 63/1997, para. 13. ComAT, *Pelit v Azerbaijan*, 29 May 2007, no. 281/2005, para. 13.

410 ComAT, *Agiza v Sweden,* 20 May 2005, no. 233/203, para. 15.

411 ComAT, *Brada v France,* 24 May 2005, no. 195/2002, para. 15. ComAT, *Tebourski v France,* 11 May 2007, no. 300/2006, para. 10.

not to be returned to his country of origin.[412] In accordance with its Rules of Procedure the Committee may also designate a Special Rapporteur to follow up on the Committee's decision and for the purpose of ascertaining the measures taken by States parties to give effect to the Committee's findings.[413]

The request to be informed of compensation measures is most likely to be based on Article 14 of the Convention. According to Article 14 victims of an act of torture have a right to redress and to fair and adequate compensation, including the means for as full a rehabilitation as possible. The text of Article 14 does not stipulate who should be responsible for the act of torture, thereby leaving open the possibility that it includes victims of acts of torture by another State after their removal.[414] Reading the Convention as a whole and applying it in a comprehensive manner, victims of the prohibition on refoulement under Article 3 have a right to redress and fair and adequate compensation and as full a rehabilitation as possible from the State party which has removed them in breach of Article 3 if they are subjected to torture after removal. Obligations of compensation and rehabilitation in the context of refoulement involve significant legal, political and practical problems as the individual is no longer in the jurisdiction of the State party. Nevertheless, in my opinion it may be expected of the State party to make use of all means possible to compensate the victim and to prevent him or her from being further subjected to torture. In *Nadeem Ahmad Dar v Norway* (2007) the complainant was expelled contrary to a request for interim measures by the Committee. By failing to respect this request the Committee concluded that the expulsion of the complainant was in breach of Article 22 of the Convention. The Committee considered that the breach of Article 22 had been remedied by Norway because it had facilitated the safe return of the complainant and had granted him a residence permit for three years.[415] No findings were made regarding Article 3 of the Convention. It should be noted that the Committee can call upon States parties to find redress and compensation only in accordance with Article 14 of the Convention against Torture and its domestic legislation. The Committee has no authority to determine and impose compensation itself.

5.4.2.3 Obligation to install procedural safeguards

5.4.2.3a The initial determination procedure

If a claim for protection under Article 3 of the Convention is made, the State party has an obligation to determine the claim, i.e. to assess whether or not substantial

412 Ibid., para 8.5. The Committee even speaks of a universally accepted practice in this regard. I doubt whether this is the case. See Ricci Ascoli's comment on the *Tebourski c*ase in NAV 2007, no. 37, p. 37.

413 Rule 114 of the Rules of Procedure of the Committee against Torture, 9 August 2002, UN doc. CAT/C/3/Rev.4.

414 Ingelse 2001, p. 362, who also argues that this is indicated by the reservation made by the USA on Article 14 of the Convention declaring that it considers Article 14 only to be applicable for acts of torture committed in territory under the jurisdiction of the State party.

415 ComAT, *Nadeem Ahmad Dar v Norway*, 16 May 2007, no. 249/2004, paras. 16.3 and 16.4.

grounds exist for believing that the claimant would be in danger of being subjected to torture after removal.[416] To ensure effective protection under Article 3 each claim should be assessed individually and cannot automatically be denied.[417] Even if there are doubts about the facts presented by the complainant, for example because of inconsistencies, it must still be ensured that the individual's security is not endangered.[418] Even in situations of mass influx each individual has a right to have his or her claim under Article 3 assessed.[419] The Convention against Torture itself, however, does not provide for any specific procedural safeguards regarding the initial determination process. Nevertheless, having an obligation to assess a claim and ensure a person's safety clearly implies that some procedural safeguards should be installed and afforded.[420] In a number of Concluding Observations the Committee against Torture made it clear that the assessment under Article 3 of the Convention requires States parties to enact effective procedural safeguards in their national legislation.[421] In some Concluding Observations this was further specified. It was considered, for example, that if a claim under Article 3 is made, the individual should be able to attend a formal hearing and be granted due process rights.[422] He should be able to gather evidence.[423] The assessment should be made in full transparency[424] and the pro-

416 See para. 3.2.3 of this part; see also ComAT, General Comment No. 1 (1997), paras. 6 and 7 and, for example, ComAT, *Mutombo v Switzerland,* 27 April 1994, no. 13/1993, para. 9.2.

417 Joseph, Schultz & Castan 2000, p. 169.

418 ComAT, *Mutombo v Switzerland,* 27 April 1994, no. 13/1993, paras. 6.1 and 9.2. See also ComAT, *Khan v Canada,* 18 November 1994, no. 15/1994, para. 12.3.

419 ComAT, Concluding Observations on the Former Yugoslav Republic of Macedonia, 5 May 1999, UN doc. A/54/44, paras.106-117, para. 116.

420 Bruin argues that this already stems implicitly from the Committee's General Comment No. 1 (1997), para. 6, in which the Committee stated that the State party and the Committee are obliged to assess a claim under Article 3 of the Convention: Bruin 2003, p. 573.

421 See, for example, without further specification ComAT, Concluding Observations on Jordan, 26 July 1995, UN doc. A/50/44, paras. 159-182, para. 178. ComAT, Concluding Observations on Armenia, 9 July 1996, UN doc. A/51/44, paras. 84-101, para. 98. ComAT, Concluding Observations on Malta, 9 July 1996, UN doc. A/51/44, paras. 163-173, para. 170. ComAT, Concluding Observations on Finland, 9 July 1996, UN doc. A/51/44, paras. 120-137, paras. 131 and 13. ComAT, Concluding Observations on Paraguay, 5 May 1997, UN doc. A/52/44, paras. 189-213, para. 204. ComAT, Concluding Observations on Namibia, 6 May 1997, UN doc. A/52/44, paras. 227-252, para. 249. ComAT, Concluding Observations on Mauritius, 5 May 1999, UN doc. A/54/44, paras. 118-123, para. 123 (c). ComAT, Concluding Observations on Bulgaria, 7 May 1999, UN doc. A/54/44, paras. 151-162, para. 158.

422 ComAT, Concluding Observations on Venezuela, 5 May 1999, UN doc. A54/44, paras. 124-150, para. 147.

423 ComAT, *X v Netherlands*, 12 May 1999, no. 124/1998, para. 6.3, in which the Committee stated that 'in view of the fact that the author has been in detention ever since he arrived in the Netherlands, it has been very difficult for him to gather evidence in support of his claim, and it is therefore unreasonable to question his credibility by asserting, for instance, that he had not produced any medical certificates attesting to alleged acts of torture or ill-treatment or their subsequent effects'. The complaint was declared admissible. This view of the Committee is unpublished (available with the author).

424 ComAT, Concluding Observations on Canada, 22 November 2000, UN doc. A/56/44. paras. 54-59, para. 58 (f), in which the Committee explicitly referred to cases involving national security.

ceedings should be impartial and adversarial.[425] In its Concluding Observations on France (2006) the Committee recommended that the State party 'should consider introducing a procedure that distinguishes between asylum applications based on article 3 of the Convention and other applications'.[426] Also, the Committee recommended States parties to adopt a more thorough assessment in cases involving Article 3, 'including by systematically holding individual interviews to better assess the personal risk to the applicant, and by providing free interpretation services'.[427] In its Concluding Observations on Canada (2000) the Committee expressed its concerns regarding the assessment of the need for protection under Article 3 and the assessment of a national security risk being conducted by the same governmental body. The Committee noted the alleged lack of independence of the decision-makers in this regard.[428] In its Concluding Observations on the Netherlands (2007) the Committee expressed its concern about the difficulties faced by asylum-seekers in substantiating their claims under the accelerated procedure, in particular regarding the 48-hour timeframe, the maximum of five hours for legal assistance after a report of the first interview is issued and a decision on the claim is made, and the fact that the asylum-seeker may not be assisted by the same lawyer throughout the proceedings.[429] The Committee against Torture has given special consideration to women who are seeking protection in accordance with Article 3. According to the Committee female asylum-seekers must be interviewed by female officers at all stages.[430] Finally, it is essential that State officials carrying out the assessment process are adequately trained in the obligations entailed in Article 3.[431]

5.4.2.3b Appeal procedures: effective legal remedies offered by Article 3

Article 3 of the Convention against Torture entails a right to an effective remedy. In *Agiza v Sweden* (2005) the Committee observed:

> 'that the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory. … In the Committee's view, in order to reinforce the protection of the norm in question and understanding the Convention consistently, the prohibition on refoulement contained in Article 3 should be interpreted the same way to encompass a remedy

425 ComAT, Concluding Observations on Bolivia, 10 May 2001, UN doc. A/56/44, paras. 89-98, para. 97 (i).
426 ComAT, Concluding Observations on France, 3 April 2006, UN doc. CAT/C/FRA/CO/3, para. 6.
427 Ibid., para. 6.
428 ComAT, Concluding Observations on Canada, 22 November 2000, UN doc. A/56/44, paras. 54-59, para. 58 (f).
429 ComAT, Concluding Observations on the Netherlands, 3 August 2007. UN doc. CAT/C/NET/CO/4, para. 7 (a), and (b).
430 ComAT, Concluding Observations on Austria, 15 December 2005, UN doc. CAT/C/AUT/CO/3, para. 9.
431 ComAT, Concluding Observations on Ecuador, 8 February 2006, UN doc. CAT/C/ECU/CO/3, para. 20. Nowak & McArthur 2008, p. 153 (paras. 87 and 88).

for its breach, even though it may not contain on its face such a right to remedy for a breach thereof'.[432]

According to the Committee the right to an effective remedy requires 'an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that Article 3 issues arise'.[433] The Committee does not specify a particular form of remedy or when a national authority is competent to provide an effective remedy. The Committee does, however, consider that the authority need not necessarily be judicial, but may be administrative as long as the authority is independent and impartial.[434] Furthermore, the remedy should allow for a review of the merits, rather than merely of the reasonableness, of decisions to expel an individual and should permit the individual to present facts and documentation which could not be made available, with reasonable diligence, at the time of the first submission.[435] In addition, the individual should be duly informed about all the domestic remedies available to him and about being granted legal aid.[436]

The Committee against Torture has raised concerns about the application of the concept of safe countries of origin, internal asylum and safe third countries.[437] According to the Committee the application of such concepts must be examined 'with due consideration for the applicant's personal situation and in full conformity with

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432 ComAT, *Agiza v Sweden,* 20 May 2003, no. 233/2003, para. 13.6. A right to an effective remedy under Article 3 of the Convention was already implied by the Committee in *Arana v France*, 5 June 2000, no. 63/1997, paras. 11.5 and 12. See also the Committee's Concluding Observation to the USA's second country report in which the Committee stated that 'The State party should always ensure that suspects have the possibility to challenge decisions of refoulement': ComAT, Concluding Observation on the United States of America, 25 July 2006, CAT/C/USA/CO/2, para. 20.

433 ComAT, *Agiza v Sweden,* 20 May 2003, no. 233/2003, para. 13.7. Also ComAT, Concluding Observations on Bosnia and Herzegovina, 15 December 2005, UN doc. CAT/C/BIH/CO/1, para. 12.

434 ComAT, *Agiza v Sweden,* 20 May 2003, no. 233/2003, para. 13.8. In *Arana v France,* 5 June 2002, no. 63/1997, para. 11.5, the Committee considered that 'the deportation was effected under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police, … without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer'. See also ComAT, Concluding Observations on the Russian Federation, 6 February 2007, UN doc. CAT/C/RUS/CO/4, para. 15, 'The State party should ensure compliance with the requirements of Article 3 of the Convention for an independent, impartial and effective administrative or judicial review of the decision to expel'.

435 ComAT, Concluding Observations on Canada, 7 July 2005, UN doc. CAT/C/CR/34/CAN, para. 5 (c). Interestingly, the Committee in its Concluding Observations on Canada talks of judicial review and not of judicial or administrative review: ComAT, Concluding Observations on the Netherlands, 3 August 2007, UN doc. CAT/C/NET/CO/4, para. 7 (d).

436 ComAT, *S.H. v Norway*, 19 April 2000, no. 121/1998, para. 7.4, in which the Committee also explicitly recommended States parties to inform individual asylum seekers about the possibility of judicial review before the courts.

437 ComAT, Concluding Observations on France, 3 April 2006, UN doc. CAT/C/FRA/CO/3, para. 9. ComAT, Concluding Observations on Austria, 15 December 2005, UN doc. CAT/C/AUT/CO/3, para. 7. Also, Nowak & McArthur 2008, pp. 155 and 156 (para. 95).

article 3'.[438] National security concerns may justify some adjustments to a particular process of review; the mechanism chosen must always satisfy the requirements of Article 3 by being an effective, independent and impartial review.[439] In *Agiza* the Swedish government took the first and at the same time final decision to expel the complainant. The Swedish Migration Board and Aliens Appeals Board relinquished the case to the government for reasons of national security. That mechanism, according to the Committee, did not meet the requirements of an effective remedy and was therefore in breach of Article 3.

An effective remedy is guaranteed only when there is a plausible allegation that an issue under Article 3 arises.[440] The Committee has not explained when an allegation or claim is plausible. It becomes clear from the Committee's case law that the effective application of Article 3 requires a flexible approach towards claims for protection under Article 3. In *Mutombo v Switzerland* (1994) the Committee acknowledged that Article 3 could be abused by asylum-seekers, but the Committee considered 'that, even if there are doubts about the facts adduced by the author, it must ensure that his security is not endangered'.[441] The threshold should not be set too high. Perhaps the threshold for plausibility should at least be the same as that applied for declaring claims inadmissible in accordance with Article 22 (2) of the Convention against Torture and Rule 107 of the Committee's Rules of Procedure, i.e. when the claim is anonymous, when it is an abuse of the right to submit a claim or manifestly unfounded or when it is incompatible with the provisions of the Convention.[442]

Because of the fundamental character of the prohibition on refoulement and the irreparable nature of the harm which might occur if the risk of torture materialised an appeal under Article 3 must have suspensive effect and the individual must have

438 ComAT, Concluding Observations on France, 3 April 2006, UN doc. CAT/C/FRA/CO/3, para. 9.

439 ComAT, *Agiza v Sweden*, 20 May 2003, no. 233/2003, para. 13.8. See also: ComAT, Concluding Observations on Australia, 21 November 2000, UN doc. A/56/44, paras.47-53, para. 53 (b). ComAT, Concluding Observations on Canada, 22 November 2000, UN doc. A/56/44. paras.54-59, para. 58 (f), in which the Committee explicitly referred to cases involving national security. ComAT, Concluding Observations on Bolivia, 10 May 2001, UN doc. A/56/44, paras.89-98, para. 97 (i). ComAT, Concluding Observations on Sweden, 6 June 2002, UN doc. CAT/C/CR/28/6, para. 6 (b), in which the Committee raised its concern that 'the Special Control of Foreigners Act, known as the anti-terrorism law, allows foreigners suspected of terrorism to be expelled under a procedure which might not be in keeping with the Convention, because there is no provision for appeal'.

440 ComAT, *Agiza v Sweden,* 20 May 2003, no. 233/2003, para. 13.7.

441 ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, para. 9.2.

442 This is in line with the 'arguability test' applicable under Article 3 of the ECHR: see section 3.4.2.3.

sufficient time to lodge an appeal.[443] Otherwise the appeal cannot be considered effective.[444]

5.5 Article 16 of the Convention against Torture

The Convention against Torture does not provide for an explicit prohibition on refoulement regarding a risk of being subjected to other acts of cruel, inhuman or degrading treatment or punishment. Article 16 of the Convention contains an obligation on States parties:

> 'to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity …'.

During the drafting of the Convention it was discussed whether or not the prohibition on refoulement in Article 3 of the Convention should also apply to such treatment. It was decided that it should not.[445] Article 16 paragraph 2 states that wider protection in international instruments, or national law, in particular regarding expulsion and extradition, shall not be affected by the limited protection the Convention gives against cruel, inhuman or degrading treatment or punishment.[446] Arguably this refers to the protection from refoulement under, for example, Article 7 of the ICCPR and Article 3 of the ECHR, both of which include protection against subjection to inhuman or degrading treatment or punishment. The decision of the drafters not to include a prohibition on refoulement regarding cruel, inhuman or degrading treatment or punish-

443 ComAT, Concluding Observation on Belgium, 27 May 2003, UN doc. CAT/C/CR/30/6, para. 6 (d), in which the Committee recommended 'giv[ing] suspensive effect not only to emergency remedies applied for but also to appeals filed by any foreigner against whom an expulsion order is issued and who claims that he or she faces the risk of being subjected to torture in the country to which he or she is to be returned': ComAT, Concluding Observations on Cameroon, 5 February 2004, UN doc. CAT/C/CR/31/6, para. 5 (i), in which the Committee expressed its concern that 'appeals to the competent administrative court against deportation orders are not suspensive, and this may lead to a violation of article 3 of the Convention'. Also ComAT, Concluding Observations on Monaco, 28 May 2004, UN doc. CAT/C/CR/32/1, para. 4 (c). ComAT, Concluding Observations on France, 3 April 2006, UN doc. CAT/C/FRA/CO/3, para. 7.

444 ComAT, *Arana v France,* 5 June 2000, no. 63/1997, para. 6.1; according to the Committee 'an appeal against the ministerial deportation order issued in respect of the complainant on 13 January 1997 would not have been effective or even possible, since it would not have had a suspensive effect and the deportation measure was enforced immediately following notification thereof, leaving the person concerned no time to seek a remedy. The Committee therefore found that article 22, paragraph 5 (b), did not preclude it from declaring the communication admissible'. See also ComAT, *Nadeem Ahmad Dar v Norway,* 16 May 2007, no. 149/2004, para. 6.4. ComAT, Annual Report, 1 November 2006, UN doc. A/61/44, para. 61.

445 Burgers & Danelius 1988, p. 150.

446 Ibid.

ment and the explicit wording of Article 16 (2) of the Convention imply that Article 16 does not contain a prohibition on refoulement. The Committee against Torture has confirmed this in its case law. In *T.M. v Sweden* (2003) the Committee considered 'that the scope of the non-refoulement obligation described in Article 3 does not extend to situations of ill-treatment envisaged by Article 16'.[447]

Although Article 16 of the Convention does not protect from refoulement when there is no risk of torture but 'only' inhuman or degrading treatment or punishment, it can be applicable in situations of refoulement, when the removal itself would be inhuman or degrading in terms of Article 16. In *G.R.B. v Sweden* (1998), for example, the Committee considered the possibility that the aggravation of the author's state of health caused by deportation itself could amount to cruel, inhuman or degrading treatment envisaged in Article 16.[448] Furthermore, in *S.V. et al. v Canada* (2001) the Committee considered that the expulsion 'in itself' was not in violation of Article 16.[449]

Confusion has arisen among scholars regarding whether or not Article 16 of the Convention contains a prohibition on refoulement.[450] The Committee's second General Comment of January 2008 is the cause of this confusion. In General Comment Number 2 the Committee apparently combines Article 16 with Article 3 of the Convention. The Committee considered in paragraph 3:

> 'The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter "ill-treatment") under article 16, paragraph 1, are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture. … therefore the measures required to prevent torture must be applied to prevent ill-treatment'.[451]

And in paragraph 6 it stated that:

> 'The Committee reminds all States parties to the Convention of the non-derogable nature of the obligations undertaken by them in ratifying the Convention. In the aftermath of the attacks of September 11, 2001, the Committee specified that the obligations in article 2 (whereby "no exceptional circumstances whatsoever…may be invoked as a justification

447 ComAT, *T.M. v Sweden,* 2 December 2003, no. 228/2003, para. 6.2. See also, although less clearly formulated, ComAT, *B.S. v Canada,* 14 November 2001, no. 166/2000, para. 7.4, 'that Article 3 of the Convention does not encompass situations of ill-treatment envisaged by Article 16, and further finds that the petitioner has not substantiated a claim that he would face such treatment upon return to Iran as would constitute cruel, inhuman or degrading treatment or punishment within the meaning of Article 1 of the Convention'. Also ComAT, *S.V. et al. v Canada*, 15 May 2001, no. 49/1996, para. 9.9.

448 ComAT, *G.R.B. v Sweden,* 15 May 1998, no. 83/1997, para. 6.7. Also ComAT, *S.V. et al. v Canada*, 15 May 2001, no. 49/1996, para. 9.9 and ComAT, *S.S.S. v Sweden*, 5 December 2005, no. 245/2004, para. 7.3.

449 ComAT, *S.V. et al. v Canada*, 15 May 2001, no. 49/1996, para. 9.9.

450 For example, raised by Bruin, in: R. Bruin, "Individuele Toelatingsgronden", NAV, Vol. 24 (2008), p. 157, arguing that Article 16 CAT does not contain a prohibition on refoulement.

451 ComAT, General Comment No. 2 (2008), para. 3.

> of torture"), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) are three such provisions that "must be observed in all circumstances". The Committee considers that articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment'.[452]

Although the confusion is understandable, I believe that the Committee against Torture did not change its view and did not intend to incorporate a prohibition on refoulement in Article 16 in its second General Comment. To interpret Article 16 as including a prohibition on refoulement would imply a complete and unfounded break with the Committee's previous views and would arguably go beyond the Committee's monitoring responsibilities. Furthermore, the General Comment refers to the implementation of Article 2 of the Convention, i.e. to the general obligation on States to prevent acts of torture in every circumstance. Paragraph 3 of the General Comment refers to this general obligation and is meant to acknowledge that there is a close relationship between preventing acts of torture and other acts of cruel, inhuman or degrading treatment or punishment. These acts largely overlap and will often induce each other. Finally, paragraph 6 of the General Comment refers to the absolute and non-derogable nature of the obligations set out in the Convention. The Committee makes it clear that no exceptional circumstances whatsoever may be invoked to justify acts of torture or other cruel, inhuman or degrading treatment or punishment. Thus, Articles 3 to 15 are equally obligatory and must be observed in all circumstances, whether they apply to acts of torture or to acts of other forms of ill-treatment.

5.6 Conclusion

Under Article 3 of the Convention against Torture no State party shall remove a person to another State where there are substantial grounds for believing that he will be in danger of being subjected to torture. This explicit prohibition on refoulement is partly based on Article 33 (1) of the Refugee Convention and inspired by the development of a prohibition on refoulement under Article 3 of the ECHR. The prohibition on refoulement in Article 3 of the Convention against Torture is one of a set of measures aimed at strengthening the struggle against practices of torture and preventing people from becoming victims of torture.

The views of the Committee against Torture are essential in order to find the international meaning of Article 3 of the Convention against Torture. These views are not legally binding but provide an authoritative opinion on the interpretation and application of the Convention.

The prohibition on refoulement applies to all people who are within the territory of a State party or, when outside the State party's territory, are under its actual control

452 Ibid., para. 6.

or authority. A person is not protected by Article 3 of the Convention when he remains in his country of origin.

A critical limitation on the prohibition on refoulement contained in Article 3 of the Convention follows from the fact that Article 3 protects people only from being subjected to torture as defined in Article 1 of the Convention. Other forms of cruel, inhuman or degrading treatment or punishment are exempted from the prohibition on refoulement. This limitation has several consequences. First, for conduct to amount to torture it is necessary for it to cause severe physical or mental pain or suffering. Secondly, such pain or suffering must be inflicted intentionally, i.e. the torturer must know that his conduct will cause severe pain or suffering, although that does not necessarily have to be his aim. Thirdly, the pain or suffering must be inflicted for a certain purpose which relates, even remotely, to the interests or policies of the State. Fourthly, torture can only be inflicted by, at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In other words, the State authorities must somehow be responsible for the act of torture to occur, because the State either acted or refrained from acting, as is indicated by the term 'acquiescence'. Consequently, an act committed by non-State actors can amount to torture if the State knew, could have known or ought to have known that it was about to be committed or had been committed and the State failed to respond to the best of its de facto capabilities and in accordance with its legal obligations. Even in the absence of a State authority acts causing severe pain or suffering can amount to torture if the non-State torturers can be regarded as quasi- or de facto State or government officials. Fifthly and finally, torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. The exact meaning or implication of this exclusion clause remains unclear and can best be ignored. Allowing torture by legalising certain conduct would undermine the working and object and purpose of the Convention against Torture, and in particular the absolute character of the prohibition on torture. Also, the Committee against Torture has made it clear that certain conduct by definition amounts to torture and cannot be excluded from the Convention through the adoption of lawful sanctions.

A person is protected under Article 3 of the Convention when there are substantial grounds for believing that he would be in danger of being subjected to torture. It is essential for a risk of subjection to torture to exist. Such a risk is determined by the level of probability of being subjected to torture, which in turn is determined by the existence of substantial grounds. The risk is an objective requirement, indicating a real, personal and foreseeable risk which goes beyond mere theory or suspicion but does not have to be highly probable.

In order to establish the existence of substantial grounds for believing that there is such a risk sufficient facts and circumstances relating to the individual concerned must be put forward. This can be a collection of facts and circumstances, or a single fact, for example, belonging to a particular group which is targeted with violence on such a scale that every member of that group has a foreseeable risk of being subjected to torture. So far, no cases have been brought before the Committee relying on a single fact. Therefore, the question remains what the Committee's view would be when a

group was targeted on such a scale that every member had a foreseeable risk. In practice cases are determined by a set of facts and circumstances. These include personal facts as well as general facts and circumstances relating to the human rights situation in the country of origin. Of particular importance are past experiences of torture and other forms of ill-treatment, the engagement of the person concerned in political activities or other activities making him more vulnerable to subjection to torture; for example, detention, desertion and internal exile. It is relevant when these past experiences took place, how often they took place and how intense or severe they were. In addition, other factors may be of equal importance, such as, amongst other factors, a person's ethnicity, his family ties, his sexual orientation, his profile and the amount of publicity his case may have received. Also, recognition as a refugee is an important element in the Committee's case law. So are activities conducted by the person concerned after he has left his country of origin.

The personal facts and circumstances presented must be assessed in light of the general situation in the country of origin. This involves in particular the security and human rights situation, but also the political situation. In the end it is impossible to state in general what facts and circumstances will be decisive in determining the existence of substantial grounds for believing that a person has a foreseeable risk of subjection to torture. It is important whether or not the claim is credible and the facts plausible. Any claim for protection under Article 3 of the Convention must be sufficiently detailed, comprehensive, consistent and plausible. This is again assessed on a case-by-case basis and also depends on supporting evidence. In general, missing details, inconsistencies and implausible elements in the person's story can undermine the credibility of the claim unless they are immaterial to claim itself or sufficiently explained. It certainly is not necessary to present all facts and evidence at the moment a claim is first lodged; although that is preferable. Furthermore, complete accuracy is seldom to be expected by victims of torture. Although a claim must be supported by as much evidence as possible, full proof is neither possible nor required. In general, it is relevant to provide as much evidence as possible in support of the individual and his claim. Submitting evidence of the general human rights situation in the country of origin will also be beneficial to a successful claim. Of particular importance is medical evidence regarding past experiences of torture or other forms of ill-treatment.

The initial burden of presenting the relevant facts and providing supporting evidence lies with the individual. It is then for the State to respond and actively collect further facts and evidence. It is the combined and co-operative responsibility of the individual and the State to determine the existence of substantial grounds for believing that the individual would be in danger of being subjected to torture.

The determination focuses on the foreseeable consequences of removal. The moment of removal is therefore decisive in assessing the risk. Thus, all relevant facts and circumstances which are known or ought to be known at that time of removal will have to be taken into account. The determination requires an assessment ex nunc. If removal has already taken place, the moment of the removal remains decisive. Subsequent events are relevant to the assessment of what the State knew or ought to have known at the time of removal.

The State is the principal entity responsible for determining the risk. The Committee attaches great weight to the findings of fact and law made by the State. The Committee is a monitoring body and in general assumes a subsidiary role. However, in some cases the Committee has allowed itself to conduct a full review of both facts and law. It has done so in cases in which the Committee was disappointed in how the State had assessed the case, for example, when the State had failed to take into account important facts or evidence or when the State had applied Article 3 of the Convention wrongly.

When the individual's country of origin is able and willing to provide protection no substantial grounds will exist for believing that he would be in danger of being subjected to torture. National protection may be available when the risk of torture emanates from non-State actors who can be regarded as quasi-State officials in control over part of the State's territory and the State, or another State or quasi-governmental entity, is able and willing to provide protection in a different part of the country. Any internal protection alternative must be safe, i.e. it must be safe from the risk of being subjected to torture. So far the Committee against Torture has not indicated that other human rights must be guaranteed, or even that the area must be reachable and accessible.

In addition to the issue of an internal protection alternative, national protection can also be available by way of diplomatic assurances guaranteeing the individual's safety upon return. The Committee does not categorically rule out the use of diplomatic assurances, but is very reluctant to accept them. It will not accept them in relation to States which systematically violate the Convention's provisions, but only after a thorough examination of the merits of the individual case and only when clear procedures for obtaining and relying on diplomatic assurances have been established and implemented, including measures of effective monitoring and adequate judicial review mechanisms.

Article 3 of the Convention against Torture is an absolute provision. No exceptions are allowed, for example for reasons of national security or because the person concerned has committed a crime. Furthermore, no derogation is permitted in times of war or public emergency. Torture, or the removal to a country where there is a risk of subjection to torture, is not permitted under any circumstances. This includes terrorist threats.

The obligations deriving from the prohibition on refoulement are primarily negative. They imply that a State is obliged to refrain from acting, i.e. prohibited from expelling, returning, extraditing or in any other way forcibly removing a person. Arguably, this includes the prohibition on rejection at the frontier. The fact that according to Article 3 it is prohibited to return a person to 'another State', and not, more neutrally, to another country or territory has no apparent consequences.

Besides negative obligations the prohibition on refoulement may also contain positive obligations, which oblige a State to act. This may include allowing a person to enter a State party's territory. Neither the Convention against Torture nor Article 3 in particular provides for an obligation to grant asylum. However, States may have an obligation to find a solution for people who cannot be removed and thus have to

remain on the territory of the State party. A final positive obligation on States is the obligation to enact procedural safeguards, and to organise an initial determination procedure and an appeal procedure. The Committee has given little guidance on the substantive and organisational criteria for such procedural safeguards. Fortunately, the Committee has stated that Article 3 of the Convention does entail a right to an effective remedy which includes an opportunity for an effective, independent and impartial review of a decision to remove a person when there is a plausible allegation that issues under Article 3 arise. Such review may be considered by an administrative authority and must include the possibility of a full review.

Article 3 is limited to protection from subjection to torture and does not include a prohibition on refoulement in the context of other cruel, inhuman or degrading treatment or punishment. Article 16 of the Convention contains a general obligation on States to prevent such conduct in any territory under their jurisdiction. In my view, this Article does not contain a prohibition on refoulement.

Finally, the Committee against Torture plays an important role in understanding the Convention. Unfortunately, in its various views the Committee is often brief and sparing in its reasoning, providing little guidance on the interpretation and application of the Convention and of Article 3 in particular. For example, it remains unclear how the exclusion of lawful sanctions clause in Article 1 should be applied, how Article 3 should be applied in cases where removal takes place to States which have no clear government. There is also still ambiguity regarding the element of risk, the burden of proof and the applicability of emerging concepts such as the internal protection alternative and diplomatic assurances. Finally, it would be good if the Committee could provide clarity on the relationship between Article 16 of the Convention and the prohibition on refoulement. Perhaps the Committee should issue a General Comment on the interpretation of the various elements of the torture definition listed in Article 1, the substantive requirements for the application of Article 3 and the relationship between Article 16 and the prohibition on refoulement.[453]

453 Notably, already during the Committee's second session in April 1989 the Special Rapporteur on Torture to the United Nations Commission on Human Rights, Professor Kooijmans, made this suggestion: see Zoller 1989, p. 253.

6 Prohibitions of refoulement in international law compared

6.1 Introduction

6.1.1 Prohibitions on refoulement as part of international human rights law

In Chapters 2 to 5 I investigated the prohibitions on refoulement contained in and developed under four different human rights treaties: the Refugee Convention, the ECHR, the ICCPR and CAT. I have identified, analysed and compared the common features contained in these prohibitions of refoulement. While there is an obvious relationship between the four prohibitions, they are not synonymous. There is no uniform prohibition of refoulement. There are clear differences in scope and content, as well as in object and purpose. At first sight there are some obvious differences between the prohibition entailed in Article 33 Refugee Convention and those in Article 3 ECHR, Article 3 CAT and Article 7 ICCPR. First, the personal scope of Article 33 Refugee Convention is limited to refugees and does not apply to people in general. Secondly, Article 33 Refugee Convention does not provide absolute protection but allows for exceptions. A closer look at the four prohibitions on refoulement reveals other potential differences. First, there is the issue of the extra-territoriality of the prohibition and the subsequent responsibility on a State to provide protection to people outside their territory. Thirdly, there is the issue of the harm from which a person is protected. Article 33 Refugee Convention protects a refugee from being persecuted for a specific reason; Article 3 ECHR protects a person from being subjected to torture or inhuman or degrading treatment or punishment; Article 7 ICCPR equally protects against torture and inhuman or degrading treatment or punishment; whereas Article 3 CAT protects only against torture. Fourthly, there is the element of risk. This concerns both the substantive or material definition of the risk and issues of credibility and proof. Furthermore, it concerns issues of protection alternatives. A fifth element involves the question of obligations deriving from the prohibitions of refoulement, in terms of both negative positive obligations. All these obvious and less obvious differences, as well as similarities, will be discussed in this chapter.

Two of the four treaties investigated include provisions explicitly prohibiting refoulement. Two treaties have developed prohibitions on refoulement under general human rights provisions, in particular under a general prohibition on torture and inhuman or degrading treatment or punishment. The traditionally dominant prohibition on refoulement is formulated in Article 33(1) of the Refugee Convention. This Convention was adopted in 1951. It was not until 1984 that another prohibition on refoulement was explicitly formulated in CAT. And it was not until the end of the 1980s and the

beginning of the 1990s that prohibitions on refoulement began to develop in some detail under the ECHR and ICCPR.[1]

The development of the prohibitions on refoulement contained in the Refugee Convention, ECHR, ICCPR and CAT is closely linked.[2] The first Swedish draft of the Convention against Torture included such a prohibition inspired by emerging case law regarding a similar prohibition under Article 3 ECHR.[3] In addition, the final text of Article 3 CAT was also inspired by the Refugee Convention, inter alia, by including the term 'refouler'. At the same time, the prohibition on refoulement developed under Article 3 ECHR was inspired by Article 3 CAT. In the first case in which the European Court of Human Rights accepted a prohibition on refoulement, *Soering v United Kingdom* (1989), explicit reference was made to the prohibition contained in Article 3 of the Convention against Torture and the prohibition was formulated by the Court in a way that resembles the wording of Article 3 CAT.[4] Equally, in the first case in which the Human Rights Committee discussed in detail a prohibition on refoulement under the ICCPR, *Kindler v Canada* (1993), reference was made to the *Soering* judgment of the European Court of Human Rights.[5] The four treaties investigated in this book and the prohibitions on refoulement they contain cannot be seen separately. They are complementary and mutually influence each other.[6] The importance of other human rights and regional refugee protection instruments has explicitly been acknowledged by the Executive Committee[7] and by the States parties to the Refugee Convention and/or Protocol in their Declaration adopted in 2001 commemorating the

1 The first refoulement case in which the ECtHR adopted a judgment on the merits was considered in 1989. This was ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88. The former European Commission of Human Rights first considered cases of expulsion and extradition under Article 3 ECHR in the 1960s.

2 Lauterpacht and Bethlehem talk of 'cross-fertilization of treaties': Lauterpacht & Bethlehem 2003, p. 106 (para. 46).

3 Burgers & Danelius 1988, pp. 35 and 125. Suntinger 1995, p. 209.

4 ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, para. 88. Suntinger 1995, p. 207.

5 HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, para. 15.3.

6 As Hathaway puts it, 'even when refugee law is the source of a stronger or more contextualised form of protection on a given issue, it is usually the case that the [human rights; author] Covenants contribute in some way to the clarification of the relevant responsibilities of States': Hathaway 2005, p. 10.

7 EXCOM Conclusion No. 81 (XLVIII), 1997, para. (e); EXCOM Conclusion No. 84 (XLVIII), 1997, para. (a); EXCOM Conclusion No. 87 (L), 1999, paras. (a) and (h); EXCOM Conclusion No. 95 (LIV), 2003, para. (l), in which the Executive Committee 'notes the complementary nature of international refugee and human rights law as well as the possible role of the United Nations human rights mechanisms in this area'; and EXCOM Conclusion No. 103 (LVI) 2005, preamble and paras. (c) and (m), in which the Executive Committee underlined the value of regional instruments, including the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa, the 1984 Cartagena Declaration on Refugees, and the asylum legislation adopted by the European Union. See also the EXCOM Agenda for Protection, 26 June 2002, UN doc. A/AC.96/965/Add.1, Goal 1.

fiftieth anniversary of the Refugee Convention.[8] Specific reference to other prohibitions on refoulement was made by the Executive Committee, in particular to Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[9]

A final introductory remark: all four treaties investigated are human rights treaties. The main objective of the prohibitions on refoulement they contain is to protect people from future serious and proscribed harm, be it persecution, torture or other forms of proscribed inhuman treatment. None of the treaties contains an explicit right to asylum; nevertheless they are all part of the concept of asylum.[10] In other words, they all provide an opportunity for individuals to obtain protection from serious harm in a country other than their own. This is most clearly the case with regard to the prohibition on refoulement contained in Article 33 of the Refugee Convention. Under this Convention people who can no longer avail themselves of the protection of their own country, have a right to and are deserving of international refugee protection. Consequently, a person who is a refugee may, under certain conditions, claim a set of rights listed in the Refugee Convention. The prohibition on refoulement contained in the Refugee Convention is part of a set of rights specifically formulated and codified to ensure protection to those who can no longer receive protection from their own country. With the adoption of the Refugee Convention a form of communal State responsibility has been put in place to fill a gap where national protection is failing. Albeit less clear, the prohibitions on refoulement deriving from general human rights norms are equally part of the concept of asylum. Although these prohibitions are not part of a set of rights explicitly formulated and adopted to create a protected status and a protection regime for people in need of international protection, they do form a distinctive right for people to be protected from refoulement when they can no longer avail themselves of the protection of their own country and are in need of the protection of the country in which they seek asylum. And in addition to their right to be protected from refoulement they may claim various rights and freedoms in their country of asylum to which they are entitled under general human rights law.

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8 Declaration of States Parties to the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, preamble, para. 3, in which the OAU Convention Governing Specific Aspects of Refugee Problems in Africa and the Cartagena Declaration on Refugees and the development of a common European Union asylum system are explicitly mentioned, adopted at the Ministerial Meeting of States Parties, Geneva, Switzerland, 12-13 December 2001, UN doc. HCR/MMSP/2001/09, 16 January 2002 and published in Feller, Türk & Nicholson 2003, p. 81.

9 EXCOM Conclusion No. 79 (XLVII), 1996, para. (j); EXCOM Conclusion No. 81 (XLVIII), 1997, para. (i); EXCOM Conclusion No. 82 (XLVII), 1997, para. (i); EXCOM Conclusion No. 103 (LVI), 2005, para. (m).

10 With the development of a common European Union asylum system, and in particular the adoption of the EU Qualification Directive a right to seek and enjoy asylum has now been formulated in EU legislation.

6.1.2 Supervising the implementation and enforcement of the prohibition on refoulement

In order to find the international meaning of each of the treaties investigated and the prohibitions on refoulement they contain I have focussed on the international supervisory mechanisms which are available for each of these treaties. These mechanisms are important for the development, understanding, implementation and enforcement of the treaties. In their own right these mechanisms provide an international authoritative interpretation of the prohibition on refoulement. Nevertheless, important differences exist, in particular between the mechanisms available under the general human rights treaties, the ECHR, CAT and the ICCPR, and the – lack of – mechanisms under the Refugee Convention. The three general human rights treaties all provide for the possibility of a supervisory body assessing and commenting on specific individual cases. Thus, these treaties have developed an interesting and, certainly in the case of the ECHR and CAT, substantial case law providing a partly cristalised international meaning of their respective prohibitions on refoulement. The Refugee Convention does not contain such a supervisory mechanism, although the UNHCR has intervened in some domestic individual refugee cases. Consequently, the international meaning of the prohibition on refoulement contained in the Refugee Convention is far more difficult to determine. The analysis of the Refugee Convention in chapter 2 is more focussed on doctrine. Therefore, with regard to many of the topics investigated the general human rights treaties will provide a stricter and more authoritative interpretation, whereas the Refugee Convention allows for a more general and less authoritative interpretation.

Interestingly, both the Refugee Convention and the Convention against Torture give the ICJ the authority bindingly to interpret the Convention when there is a dispute between two or more States parties regarding the interpretation or application of the Convention.[11] It is unfortunate that hitherto no dispute has arisen or been brought before the ICJ. No doubt on such issues as the definition of torture, the meaning of the term persecution, the application of the reasons for being persecuted, the concept of actors of protection, the absolute character of the prohibition on refoulement and issues of a conflict between the prohibition of refoulement and obligations to extradite the ICJ could provide important guidelines.

Clearly the strongest mechanism can be found under the ECHR. This convention contains a highly developed judicial system of individual complaints which has resulted in an extensive body of well-argued and legally binding case law. More importantly the ECHR is not relevant just for the development and interpretation of law, but also for direct individual human rights protection. The European Court of Human Rights does not merely assess individual complaints but can provide a binding judgment in individual cases and is de facto functioning as an appellate judicial body. As analysed in section 3.3.2.5 the ECtHR in cases involving the prohibition on refoulement developed under Article 3 ECHR allows itself actively to gather and verify relevant facts

11 Article 38 Refugee Convention; Article 30(1) Convention against Torture.

and to conduct a full and rigorous assessment of both facts and law. The Court is not bound by the information presented by the parties or by the assessment made by the State. It must be said, though, that only in a very few cases has a full review been conducted by the Court. The Court has done so when it felt that there were reasons of fact or law for doing so: for example, because the State party had wrongly applied the national security considerations;[12] when credible information came to light during the proceedings before the Court;[13] when the State had failed to recognise the significance of the applicant's refugee status;[14] when the claim called for an assessment of the general credibility of the statements made by the applicant;[15] and when the applicant had provided reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government.[16] In most cases, however, the Court confirms the State party's assessment after having done some research of its own.[17]

The weakest mechanism is no doubt to be found in the Refugee Convention. There is no individual complaint mechanism, a completely unused mechanism for States parties to complain to the International Court of Justice and a weakly developed international enforcement mechanism under the aegis of the UNHCR. In principle, real authoritative interpretation of the Refugee Convention can be found only at the national level; in the domestic legislation and the case law of the judiciary of each State party. At the international level there is no available source with the authority to provide a legally binding interpretation of the Refugee Convention. Nevertheless, the UNHCR and EXCOM provide views which have global reach and are accepted by States as being important guidelines on the interpretation and application of the Refugee Convention. In addition, the European Union has adopted several legal documents, most importantly the Qualification Directive, providing minimum legal standards for the interpretation and application of the Refugee Convention on a regional – European (Union) – level.[18]

The CAT and the ICCPR are somewhere in between. Both treaties contain monitoring mechanisms, including the ability of States to opt for an individual complaint procedure. However, both systems are younger than their European equivalent, have created a less developed body of case law than the European system and, unlike the judgments of the European Court, give non-binding views. Different from the European Convention though, CAT and the ICCPR provide for a State reporting mechanism and the possibility of their respective supervisory bodies, the Committee against Torture and the Human Rights Committee, to adopt general legal views on issues

12 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93.
13 ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99.
14 ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94; ECtHR, *Jabari v Turkey,* 11 July 2000, Appl. No. 40035/98.
15 ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02.
16 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 136.
17 See section 3.3.2.5.
18 The EU Qualification Directive also provides standards for the interpretation and application of subsidiary protection, i.e. protection other than refugee protection.

of Convention interpretation and application. However, the bodies' comments on State reports and their general views are non-binding. The Committee against Torture and the Human Rights Committee do neither regard themselves as appellate bodies in assessing individual claims for protection nor do they function as such. Their role is clearly secondary to that of the State organs. In most individual claims brought before the Human Rights Committee the Committee relied fully on the facts gathered and the assessment made by the State party. Only when the prohibition on refoulement has clearly been applied wrongly,[19] or, in general, when there is bad faith, abuse of power or other arbitrariness involved on the part of the State will the Committee conduct a full review.[20] The Committee against Torture also gives considerable weight to the findings of fact and law made by the State, but appears to give itself more room for a full review of its own.[21] In general, it allows itself a limited role in gathering additional facts and only marginally to review the assessment made by the State. However, the Committee is not bound by the State's assessment or by the facts presented by it. The Committee has declared that it is ultimately the Committee which must decide whether there is a risk of torture.[22] Only in a very few cases, when the Committee was clearly disappointed by the State's assessment, has it conducted a full review of both fact and law. This included cases in which, according to the Committee, the State had either clearly failed to take into account important facts and evidence presented by the individual, or because Article 3 had clearly been applied wrongly.[23]

It is fair to conclude that the European Convention provides the best opportunity to come up with the most comprehensive and least speculative analysis of the prohibitions on refoulement analysed in this book. The Court is open to gathering facts on its own and to conducting a full review of the claim.[24] The Court's judgments are detailed and well-reasoned. On the other hand, many cases which have been brought before the Court concerning claims for protection from refoulement have been declared inadmissible. In only 29 cases has the Court delivered a judgment involving the prohibition on refoulement.

6.2 Personal and (extra-)territorial scope of the prohibition on refoulement

6.2.1 Personal scope

One of the most obvious differences between the protection from refoulement contained in the Refugee Convention and that contained in other human rights treaties

19 HRC, *Alzery v Sweden*, 10 November 2006, no. 1416/2005.
20 Section 4.3.2.4.
21 Section 5.3.2.4.
22 ComAt, *Tebourski v France,* 11 May 2007, no. 300/2006, para. 8.4.
23 ComAT, *C.T. and K.M. v Sweden,* 22 January 2007, no. 279/2005; ComAT, *V.L. v Switzerland*, 22 January 2007, no. 262/2005; ComAT, *Dadar v Canada*, 5 December 2005, no. 258/2004.
24 Lambert 1999, p. 544.

is that the prohibition on refoulement under the Refugee Convention is limited to refugees, or refugee claimants ('asylum seekers') awaiting a decision on their claim, as defined by Article 1 of the Refugee Convention. This implies at least five significant restrictions, three of which stem from the substantive definition of a refugee set out in Article 1A(2) of the Refugee Convention and two of which stem from the cessation and exclusion clauses of Article 1. First, in accordance with the definition of a refugee in Article 1A(2) of the Refugee Convention refoulement protection under Article 33(1) is limited to people who are outside their country of nationality or habitual residence – in general their country of origin. Thus, the personal scope contains a geographical limitation.[25] Secondly, refoulement protection under Article 33(1) is limited to people who are afraid of being harmed for reasons of race, religion, nationality, membership of a particular social group or political opinion; an element that is part both of the definition of a refugee and of the text of Article 33(1).[26] Thirdly, a refugee must be unable or unwilling to avail himself of the protection of his country or countries of nationality. Consequently, a person with dual nationality fleeing persecution from his 'first' country of nationality, will first need to try and obtain protection from his 'second' country of nationality before being considered a refugee and being entitled to protection from refoulement. In addition, restrictions on the personal scope are provided by the cessation clauses of Article 1C of the Refugee Convention and the exclusion clauses of Articles 1D, 1E and 1F. No such restrictions are explicitly contained in the other treaties. The prohibitions on refoulement contained in the ECHR, CAT and ICCPR apply to everyone, irrespective of their nationality or legal status, whether they are inside or outside their country of origin and whether or not they fear being harmed for reasons of discrimination. Although not explicitly mentioned in or developed under the prohibitions on refoulement in the ECHR, CAT and ICCPR, it is fair to suggest that in cases of dual or multiple nationality the prohibition on refoulement does not apply in situations in which the person concerned can obtain protection from another country of which he is a national. In line with the concept of national protection (i.e. protection from the country of origin) a person applying for protection from refoulement must first seek protection from his own State rather than from a foreign one.

6.2.2 Territorial and extra-territorial scope of the prohibition on refoulement

All four treaties investigated apply within the territory of their States parties. What areas belong to the territory of a State is discussed in section 1.2.3.2. A State may limit its territory neither through formal treaty reservations or declarations nor because it encounters difficulties in controlling an area. The territorial scope may also not be limited by creating international or transit zones or by declaring certain parts of the State's territory outside the realm of the law for immigration, including asylum,

25 Section 6.2.2.
26 Section 6.3.1.

purposes. The territorial scope of the treaties, including the prohibitions on refoulement they contain, means that individuals who are physically present within a State's territory, including those who are stranded in the transit zone of the State's international aiport and stowaways who arrive at the State's seaport, come within the scope of the prohibitions on refoulement contained in these treaties.[27] Thus, their presence in a State's territory determines that State's responsibility for guaranteeing protection from refoulement.

The issue of protection from refoulement outside the territory of the host State is more complex. The ECHR and the ICCPR provide explicit rules on their (extra-)territorial scope. According to the European Convention States parties have the responsibility to ensure the rights and freedoms of the Convention to everyone within their jurisdiction, and the ICCPR refers to all individuals within its territory and subject to its jurisdiction.[28] Neither the Refugee Convention nor the CAT contains an explicit standard regarding its (extra-)territorial scope for protection from refoulement. However, the wording of Article 33(1) Refugee Convention as well as its object and purpose indicate an extra-territorial scope of the prohibition on refoulement which is determined by the State party's conduct wherever it occurs. What is relevant is that, as a consequence of the conduct of the State the refugee is forced to the frontiers of territories where there is a threat to his life or freedom. The extent to which the State party has actual control or authority over the refugee and his right to be protected from refoulement is thus essential to establish a State's responsibility to provide protection. This is similar to the notion of jurisdiction which governs the extra-territorial scope of the prohibitions on refoulement developed under the ECHR and ICCPR. That notion determines the responsibility of a State to ensure protection from refoulement as regards an individual who is outside the State's territory. In essence, it is about the de facto relationship between the individual and the State. The responsibility of the State is then engaged by its extra-territorial conduct through which the individual comes under its actual – de facto – control and by which his or her rights and freedoms are affected. In general, two situations are to be distinguished. First, a situation of effective overall control, where a State has full control over a foreign territory and which thus affects the entire range of substantive human rights to which the State is bound by its international legal obligations. This situation generally occurs as a consequence of military occupation or through the consent, invitation or acquiescence of the government of the foreign territory, whereby a demarcated foreign territory is under the actual and consistent control of the foreign State to the extent that it can be regarded as de facto belonging to that State. The controlled territory can be a part of the territory of another State or the whole of the territory of that State. Secondly, responsibility is established in situations where agents of the State exercise

27 As explained in section 2.2.2 with regard to the Refugee Convention, in the early days of the Refugee Convention various scholars have argued that Article 33 has a narrow, territorial limitation and applies only to people who are already present within the territory of the host State. Such an interpretation is no longer commonly accepted.

28 Article 1 ECHR and Article 2(1) ICCPR.

de facto control over a person in a more incidental way and outside the State's territory to the extent that it affects certain individual rights and freedoms. In general, such a situation of extra-territorial control occurs as a result of conduct – an act or omission – which can be attributed to the State and was performed outside the State's territory or has produced effects outside the State's territory. The conduct must have an effect on the person's human rights – for the purpose of this study, on his right to be protected from refoulement. This latter element is essential in establishing responsibilty via extra-territorial State conduct. Only in situations where, by reason of the State's conduct the individual concerned is directly exposed to a risk of being subjected to serious harm as protected by the relevant prohibition on refoulement and where the State has a real and effective power to protect the individual from that harm is the State responsible. In other words, there must be a consequential relationship or causal link between the extra-territorial conduct of the State and the person's risk of being subjected to serious harm.

A person who remains within the territory of his country of origin will not have a right to be protected from refoulement under Article 33 Refugee Convention. As already indicated in section 6.2.1, Article 33 contains an important geographical limitation. The protection from refoulement is limited to refugees, i.e. to people who are outside their country of nationality or habitual residence. Thus a person claiming protection at an embassy or foreign mission in his own country will not fall within the scope of the Refugee Convention. No such limitation exists with regard to protection from refoulement under Article 3 ECHR, Article 7 ICCPR and Article 3 CAT.

Consequently, all prohibitions on refoulement analysed in this study apply to people:

1. who are present within the territory of a host State,
2. who are at the border of a host State,
3. who are present in a foreign country, not being the territory of the host State or the country of origin, which is under the effective control of a host State,
4. who are outside their country of origin and under the effective control of the host State through conduct which can be attributed to the State and has a direct effect on the person's right to be protected from refoulement.

In addition, in my opinion based on this study the prohibitions on refoulement contained in Article 3 ECHR, Article 7 ICCPR and Article 3 CAT are applicable to people who are present within their country of nationality or habitual residence. This is not the case with regard to Article 33(1) Refugee Convention.

6.3 The content of the prohibitions on refoulement

6.3.1 The harm from which a person is protected

In general, the prohibition on refoulement protects a person from being subjected to serious human rights violations or serious harm. Most restrictive and at the same time

clearest in this regard is Article 3 CAT which protects individuals only from being subjected to torture as defined in Article 1 CAT. Article 3 ECHR and Article 7 ICCPR have a wider reach as these Articles protect individuals from being subjected to torture as well as other forms of inhuman or degrading treatment or punishment. Both treaties however lack a clear definition of what amounts to torture or to inhuman or degrading treatment or punishment. Moreover, the Human Rights Committee has decided not to make a sharp distinction between the various forms of treatment prohibited by Article 7 ICCPR.[29] In addition, the ICCPR also protects people from being subjected to arbitrary deprivation of life. Article 33 Refugee Convention is least clear when it comes to the harm from which a person is protected, as it protects refugees from being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion. The Convention lacks a definition of what constitutes persecution for one of the five reasons mentioned.

Overall there are three interesting comparisons to be made. First, how do the definitions of torture, being a specific form of inhuman treatment, as referred to in Article 3 CAT, Article 3 ECHR and Article 7 ICCPR, compare to one another? Secondly, how does the act of torture relate to other forms of prohibited ill-treatment mentioned in Article 3 ECHR and Article 7 ICCPR. And, thirdly, how does the protection against subjection to forms of proscribed ill-treatment compare to the protection from persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. In addition to these three comparisons there is a fourth interesting issue, i.e. is it relevant who or what inflicts the harm from which a person has a right to be protected.These four issues will be further analysed below. In section 6.3.1.1 the act of torture as contained in CAT, the ECHR and the ICCPR will be discussed, in particular in the context of refoulement. In section 6.3.1.2 this will be followed by an analysis of torture in relation to other forms of proscribed ill-treatment in the context of refoulement. In section 6.3.1.3 protection against subjection to prohibited ill-treatment will be compared with protection against being persecuted for reasons of race, religion, membership of a particular social group or political opinion. And in section 6.3.1.4 I will discuss the issue of the actors of the harm or the source of the risk.

6.3.1.1 Torture

Although the prohibitions on refoulement contained in Article 3 ECHR, Article 7 ICCPR and Article 3 CAT all protect people from being subjected to torture, only CAT provides a definition of the term. Common to all three provisions, torture must attain a certain level of severity in terms of the suffering it causes to its victim. This level of severity is higher than that of other forms of proscribed ill-treatment. Furthermore, an act of torture must be intentionally inflicted and must have a certain purpose. Both elements are most clearly defined under CAT but arguably apply to all the

29 HRC, General Comment No. 20 (1992), para. 4. According to McGoldrick the meaning and boundaries of the various 'levels' are complex, fluid and may change over time: McGoldrick 1991, p. 371.

treaties investigated. The element of intent implies a general intent on the part of the torturer. He must know that the conduct performed will cause severe pain or suffering. The purpose element must be interpreted broadly and ranges from obtaining information to discriminatory purposes. Under CAT the purpose element must also have some, even a remote, connection with the interests or policies of the State. Such a connection does not necessarily exist under the other conventions, although in most individual cases such a connection existed. In particular the extensive case law of the European Court of Human Rights has provided numerous examples of conduct which amounts to torture. Interestingly, the element of intent was not explicitly discussed in all cases. Perhaps it was assumed to be present because in all the cases brought before the European Court torture took place while the victim was in detention or in the custody of State agents. In fact, under CAT conduct will amount to torture only when there is some form of official State involvement. No such requirement is formulated by the European Court of Human Rights, although to date the Court has not had the opportunity to consider a case potentially involving torture outside the ambit of State officials. Similarly, the Human Rights Committee has made it clear that torture can also be conducted by private individuals, but no examples exist in its case law.

Another difference between torture as defined in CAT and torture as developed in the context of European Convention on Human Rights or ICCPR is that under CAT torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Regrettably the Convention does not clarify what should or can be meant by lawful sanctions. It cannot be the purpose of CAT to allow certain acts of torture by labelling them lawful sanctions. On several occasions the Committee against Torture has made it clear that certain conduct by definition amounts to torture. Since no meaningful application can be found for the exclusion clause it can best be ignored. No such exception has been developed under the European Convention or ICCPR.

The close relationship between Article 3 ECHR and Article 3 CAT became clear in *Ireland v United Kingdom* (1978) in which the European Court explicitly referred to Article 1 of the 1975 United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[30] This Declaration was the primary inspiration for CAT which was adopted in 1984.[31] Later, in *Selmouni v France* (1999), the Court explicitly referred to Articles 1 and 16 CAT to show that there is a distinction between torture and inhuman or degrading treatment or punishment, and again to Article 1 CAT to establish whether or not the pain or suffering inflicted upon the applicant was severe enough to amount to torture.[32] And in *Mahmut Kaya v Turkey* (2000), *Salman v Turkey* (2000), *Ilhan v Turkey* (2000), *Dikme v Turkey* (2000) and *Akkoc v Turkey* (2000) the Court again explicitly referred to Article 1 CAT with respect to the element of

30 ECtHR, *Ireland v United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 167.
31 Burgers & Hans Danelius 1988, p. 1.
32 ECtHR, *Selmouni v France*, 28 July 1999, Appl. No. 25803/94, paras. 97 and 100.

intent.[33] In spite of a close relationship between CAT and the ECHR the Committee against Torture and the European Court do not always agree on what acts amount to torture. In *Ireland v United Kingdom* (1978) the European Court considered the methods of handcuffing, hooding, shaking and sleep deprivation, either alone or in combination, to amount to inhuman treatment and not torture.[34] This is different from the view of the Committee Against Torture regarding the same techniques used by Israel. The Committee Against Torture considered these techniques to be in violation of Article 1 CAT.[35] The Human Rights Committee considered these techniques to be in breach of Article 7 ICCPR without further specification.[36]

The relationship between the concepts of torture under CAT and the ICCPR is uncertain. The Convention against Torture is based upon the recognition that torture is already proscribed under international law, in particular Article 7 ICCPR. CAT does not contain a general prohibition on torture. The definition of torture contained in Article 1 CAT cannot be used to interpret the concept of torture laid down in Article 7 ICCPR. In its General Comment 20 on Article 7 ICCPR the Human Rights Committee does not refer to Article 1 of the Convention against Torture to define the term. In fact, according to the Committee the acts referred to in Article 7 ICCPR can be inflicted by everyone, public as well as private persons.

Not limiting the perpetrators of torture to public officials is in line with the character of the prohibition as well as its object and purpose. The prohibition on torture is an absolute and fundamental human right which, because of its severity and the desire to make the struggle against it more effective, should not be limited to acts committed by public officials.

6.3.1.2 Other cruel, inhuman or degrading treatment or punishment

Article 3 ECHR and Article 7 ICCPR prohibit not only torture, but also other forms of inhuman and degrading treatment or punishment; all are prohibited in equal terms. In addition, Article 7 ICCPR also refers to cruel treatment or punishment. In spite of a difference in terminology, there is in principle no difference in the meaning of the terms used for the concept of ill-treatment proscribed in Article 3 ECHR and Article 7 ICCPR.

As with acts of torture, it is essential for other forms of inhuman and degrading treatment to attain a minimum level of severity. This level is primarily an issue of

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33 ECtHR, *Mahmut Kaya v Turkey*, 28 March 2000, Appl. No. 22535/93, para. 117; ECtHR, *Salman v Turkey*, 27 June 2000, Appl. No. 21986/93, para. 114; ECtHR, *Ilhan v Turkey*, 27 June 2000, Appl. No. 22277/93, para. 85; ECtHR, *Dikme v Turkey*, 11 July 2000, Appl. No. 20869/92, para. 94; ECtHR, *Akkoc v Turkey*, 10 October 2000, Appl. Nos. 22947/93 and 22948/93, para. 115.

34 ECtHR, *Ireland v United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 167.

35 ComAT, Concluding Observations on Israel, 9 May 1997, UN doc. A/52/44, paras. 253-260, para. 257 and 258, repeated in ComAT, Concluding Observations on Israel, 18 May 1998, UN doc. A/53/44, paras. 232-242, para. 239 and ComAT, Concluding Observations on Israel, 23 November 2001, UN doc. CAT/C/XXVII/Concl.5, para. 6. Joseph, Schultz & Castan 2000, p. 151.

36 HRC, Concluding Comment on Israel, 18 August 1998, CCPR/C/79/Add.93, para. 19.

relativity rather than proportionality. This means that the level of severity depends on the particular facts and circumstances of a situation, more so in that it involves a balancing test between the interest of the State and the harm inflicted upon the individual. This does not mean that an element of proportionality is absent. For example, the amputation of a limb may cause severe pain but may be necessary to save a person's life. Thus, the amputation will not amount to proscribed ill-treatment. Furthermore, in situations of arrest or detention certain harsh treatment may be necessary, for example, to control someone resisting arrest or trying to escape. In such situations the circumstances determine whether or not harsh treatment amounts to proscribed ill-treatment. These include, inter alia, the conduct of the person concerned during his arrest or detention, his age, health and condition, the lawfulness of his arrest or detention and the amount and type of force used.

Cruel, inhuman or degrading treatment prohibited by Article 3 ECHR and 7 ICCPR need not necessarily be inflicted with a particular intent or motive or have a purpose and can be inflicted by both public officials and private persons.

Ill-treatment arising from poor socio-economic conditions is not covered by Article 3 ECHR or 7 ICCPR. Nevertheless, only in one very exceptional case has the European Court considered the prohibition on refoulement developed under Article 3 ECHR to be applicable in a situation of ill-treatment which was not directly or indirectly the result of deliberate human activity or inactivity.[37]

As already mentioned, torture as well as other forms of cruel, inhuman and degrading treatment or punishment are prohibited in equal terms. And while there is a clear distinction between torture and the other forms of proscribed ill-treatment, in terms of severity, intent and motive, such a distinction is less prevalent regarding cruel and inhuman treatment or punishment on the one hand and degrading treatment or punishment on the other hand. There the distinction seems to be one of gradation in the suffering inflicted. The suffering is then defined as arousing feelings of fear, anguish or inferiority in the victim that will humiliate or debase him. Here, the victim's personal circumstances and feelings are important elements. In most cases though neither the European Court nor the Human Rights Committee distinguishes between inhuman and degrading treatment or punishment. Nevertheless, it must be said that some cases in which the Court explicitly concluded that a situation amounted to degrading treatment are remarkable, causing one to question whether or not the concept of degrading treatment has been stretched too far.[38] Furthermore, it poses the question whether or not different standards should apply for treatment to amount to proscribed ill-treatment when it comes to situations of refoulement compared to those outside the context of refoulement. Both Article 3 ECHR and Article 7 ICCPR prohibit torture and other forms of inhuman or degrading treatment or punishment in equal terms.

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37 ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96, paras. 52 and 53.

38 This involved a case where the applicant while in detention had his head shaved bald: ECtHR, *Yankov v Bulgaria*, 11 December 2003, Appl. No. 39084/97, and a case where the applicant while in detention received only light meals on trial days: ECtHR, *Moisejevs v Latvia*, 15 June 2006, Appl. No. 64846/01.

Both provisions are absolute, allowing for no limitations or derogations. Neither the views of the Human Rights Committee nor the judgments of the European Court have indicated that different standards should apply regarding treatment directly inflicted by a State party and treatment which might be inflicted by the authorities of another State after removal of a person. This was explicitly stated by the European Court in *Saadi v Italy* (2008).[39]

6.3.1.3 Protection from being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion compared to other prohibitions on refoulement

Although the concept of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion has no definition in international law, it is best defined as serious discriminatory harm contravening human rights standards. There are three important differences between the harm from which a person is protected by Article 33 Refugee Convention and that from which a person is protected by the prohibitions on refoulement contained in the other three treaties investigated. First, persecution is not limited to acts of torture or other forms of inhuman or degrading treatment or punishment, but may include violations of other human rights. Secondly, although both persecution and forms of proscribed ill-treatment require a minimum level of severity, that level is not necessarily the same. Thirdly, unlike Article 3 CAT, Article 3 ECHR and Article 7 ICCPR, Article 33 (1) contains an element of discrimination as is implied by the phrase 'for reasons of race, religion, nationality, membership of a particular group or political opinion'. One need not just have a risk of being subjected to persecution, but of being subjected to persecution on discriminatory grounds.

On the issue of the harm from which a person is protected the term 'persecution' is certainly broader than the acts of ill-treatment prohibited under the ICCPR, ECHR and CAT. It would be wrong to define persecution by referring to general prohibitions on torture and inhuman and degrading treatment or punishment. Nevertheless, persecution has a human rights basis and includes torture and other forms of proscribed ill-treatment as well as other human rights. In that regard the Refugee Convention has a broader scope and human rights treaties such as ICCPR and ECHR as a whole are relevant for a better understanding of the term persecution rather than just a single provision. In essence, the harm from which a person is protected by a prohibition on refoulement is determined by the level of severity of suffering caused by the harm that may be expected. In general, the level of severity is guided by human rights standards and should not be delineated by specific human rights or violations thereof. This is most clearly relevant under the Refugee Convention. Under the Refugee Convention violations of socio-economic rights may amount to persecution provided they meet a level of severity that leaves the person with no means of earning his

39 ECtHR, *Saadi v Italy,* 28 February 2008, Appl. No. 37201/06, para. 138.

livelihood or breaches core elements of these rights for clear discriminatory reasons (see section 1.3.1.1). To a lesser extent, the Human Rights Committee has also formulated a general prohibition on refoulement under the ICCPR which focuses more on the level of severity than on specific human rights. Although it must be said that so far this prohibition has been largely developed under Articles 6 and 7 ICCPR. Under the European Convention on Human Rights the prohibition on refoulement is largely limited to the prohibition on torture and inhuman or degrading treatment or punishment. But even the European Court has accepted that this is not a strict limitation and that in essence it is about the severity of the harm to which a person may be subjected. The European Court has accepted a prohibition on refoulement in cases where a person's right to life is in danger and has not ruled out the possibility that violations of other human rights, including the right to a fair trial, may also warrant protection from refoulement, albeit that the level of severity must either be similar to that of violations of the prohibition on torture or inhuman or degrading treatment or punishment, whereby the Court refers to a flagrant denial, or in fact amount to torture or inhuman or degrading treatment or punishment. Article 3 CAT is inherently most restrictive in this regard because it protects people only from being subjected to torture as defined in Article 1 CAT. But even in that respect the level of severity is an important element.

Persecution is not limited to specific human rights violations, and the level of severity is determined by the situation as a whole and not necessarily by a single act or omission.[40] In that respect the prohibition on refoulement contained in Article 33 Refugee Convention provides more room than that contained in the other treaties investigated. For example, violations of such rights as the freedom of thought, conscience and religion (Articles 18 ICCPR and 9 ECHR) may independently amount to persecution without having to come within the meaning of inhuman or degrading treatment or punishment.[41] More precisely, the evasion of or desertion from military service may amount to persecution for reasons of, for example, race, having only minimal regard to the severity of the treatment that the person may be subjected to. The minimum level of severity does not depend on the possible treatment but on the situation as a whole, i.e. the fact that a person is obliged to perform military service which is contrary to his genuine and valid reasons of conscience, where there is no possibility of performing an alternative social service and he is faced with prosecution, makes the situation severe enough to amount to persecution. In addition, persecution may be the result of accumulating discriminatory measures or discrimination leading to consequences of a substantially prejudicial nature, making life in one's country of origin very difficult. For example, the arbitrary deprivation of one's nationality

40 UNHCR Handbook, para. 55.

41 In section 2.3.1.1 on the Refugee Convention I use the example of *Korablina v INS* (USA), 158 F.3d 1038 (9th Cir. CA) involving a person suffering from religious discrimination whereby she was limited in her educational and employment opportunities, had been fired from work, had been the butt of discriminatory remarks, had received threats to her life and had on one occasion been physically harassed leading to concussion.

for reasons of race, making the person concerned stateless, will amount to persecution but not to proscribed ill-treatment. This is to say that the existing case law of the European Court, Human Rights Committee and Committee Against Torture gives no indication that they would consider the above examples to amount to proscribed ill-treatment. However, in theory Articles 3 ECHR and 7 ICCPR prohibit removal if there is a risk of subjection to degrading treatment. Accumulating discriminatory measures or measures leading to consequences of a substantially prejudicial nature making life very difficult or intolerable may be declared degrading as prohibited by Articles 3 ECHR and 7 ICCPR. Note in this regard also the UNHCR Handbook paragraph 55 which emphasises the situation for the person concerned as a whole rather than the seriousness of individual measures. The ECtHR has, in some cases, relied on cumulative aspects or a mix of measures.[42]

Where the other prohibitions on refoulement investigated protect a person from being returned to a territory where he faces some form of serious harm, the prohibition on refoulement entailed in Article 33(1) Refugee Convention provides protection only when there is a risk of being subjected to serious discriminatory harm or, in terms of the Refugee Convention, of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. For example, in *Soering v United Kingdom* (1989) before the European Court, the individual was at risk of being subjected to the death row phenomenon if extradited to the United States of America. The European Court considered that the phenomenon in the US amounted to inhuman treatment and concluded that Soering could not be extradited. Because there was no link with Soering's race, religion, nationality, membership of any social group, or political opinion his extradition would not be in breach of Article 33(1) Refugee Convention.

6.3.1.4 The actors of the harm or the source of the risk

This section discusses whether or not it is relevant who inflicts the harm from which an individual has a right to be protected. In other words, is it relevant, in order to have a right to be protected from refoulement, to know the source of the risk?

Article 3 CAT is the most restrictive in this regard. The harm from which a person is protected, i.e. torture, requires the involvement of a public official or a person acting in an official capacity. In other words, some form of involvement of the State or a quasi-State entity is required. The lowest level of State involvement is indicated by the term 'acquiescence', which implies indirect involvement to the extent that the State should have acted in response to acts of torture or the imminent threat thereof, but refrained from acting. If the State knows, could have known or ought to have known that an act of torture was about to be committed or has been committed by a non-State actor it has a legal responsibility to act to the fullest extent of its de facto capabilities in accordance with its legal obligations. The required involvement of State

42 ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99. ECtHR, *NA. v United Kingdom*, 17 July 2008, Appl. No. 25904/07, para. 134. See section 3.3.2.1d.

authorities in the country of origin is essential for the victim to be afforded protection from refoulement under Article 3 CAT. If a risk of torture emanates from non-State actors it will fall within the scope of Article 3 CAT only if the government is acquiescing in torture committed by non-State actors, i.e. if the government knows, ought to know or could have known about these acts of torture, it has the ability to act but is unwilling to take appropriate steps in accordance with its legal obligations against these practices of torture and provide adequate protection in terms of prevention, punishment and redress.[43] The requirement of State involvement is problematic when no State authorities are present, because of a complete breakdown of the State apparatus or because the State territory is controlled by non-State entities. The Committee against Torture has accepted that the CAT applies in situations where non-State entities occupy part of the State's territory and exercise quasi-governmental authority over that territory, to which the individual is to be returned.

The other prohibitions on refoulement do not restrict the source of the risk to State or quasi-State officials. However, they do restrict it to verifiable human activity or inactivity. It is required that the risk of persecution under the Refugee Convention and the risk of proscribed ill-treatment under the ICCPR stem from factors which directly or indirectly engage the responsibility of the public authorities in the country of origin. Though the Refugee Convention is silent as to the conceivable actors of persecution it is clear that such actors are either the State or others when the State is unable or unwilling to provide protection. Even in the situation of a so-called 'failed State' there can be a risk of proscribed ill-treatment from which a person may need protection. Similarly, under the ECHR the European Court has made it clear that the risk of proscribed ill-treatment must emanate from intentionally inflicted acts of public authorities or from non-State bodies when the authorities are unable to afford protection.[44] Only in one very exceptional case where the risk of proscribed ill-treatment did not emanate from intentional conduct has the Court concluded that the prohibition on refoulement under Article 3 ECHR was applicable.[45] The case involved a terminally ill person who was in dire need of medical and social care; which did not exist in his country of origin.[46]

The question of the source of the risk or the possible actor of the harm is closely linked to the issue of national protection, i.e. the availability of effective protection in the country of origin. The issue of national protection will be discussed in section 6.3.2.4.

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43 Rosati 1998, p. 538. See also Joseph, Jenny & Melissa Castan 2000, p. 143 and Copelon 1994, p. 141 in which it is stated that 'the concept of acquiescence encompasses private violations against women to which the State has not responded adequately in a preventive or punitive way'.

44 ECtHR, *N. v United Kingdom*, 27 May 2008, Appl. No. 26565/05, para. 31. The interpretation of the actors of persecution or proscribed ill-treatment corresponds with that of Article 6 of the EU Qualification Directive.

45 ECtHR, *N. v United Kingdom*, 27 May 2008, Appl. No. 26565/05.

46 ECtHR, *D. v United Kingdom*, 2 May 1997, Appl. No. 30240/96.

6.3.2 The element of risk

6.3.2.1 Defining the risk

The essence of the prohibition on refoulement is the element of risk, i.e. the probability that subjection to proscribed ill-treatment or persecution will occur. The European Court has formulated this criterion as a real, personal and foreseeable risk, going beyond the mere possibility that subjection to proscribed ill-treatment will occur. The risk does not have to be certain or highly probable. Similar wording is used by the Committee against Torture. According to the Committee the danger of being subjected to torture must be real, personal and foreseeable; it must go beyond mere theory or suspicion, but does not have to meet the test of being highly probable. A different formulation is used by the Human Rights Committee. According to this Committee the risk must be real, i.e. it must necessary and foreseeable that as a consequence of removal the individual will be subjected to proscribed ill-treatment. In the context of the Refugee Convention the risk is formulated as a well-founded fear. There is no clear and independent international legal interpretation of the risk criterion contained in the Refugee Convention. Academic research suggests that States tend to define the risk as a reasonable chance or serious possibility that the person concerned will be subjected to persecution. Similar words are used by the UNHCR, which tends to talk about reasonable degree or good reasons. In essence, having a well-founded fear in accordance with the Refugee Convention implies having a real, personal and foreseeable risk in accordance with the ECHR and CAT. When it comes to the material risk criterion there does not seem to be a difference between the Refugee Convention, the ECHR and CAT.[47] Under the ICCPR the use of the word 'necessary' implies a different and higher risk.

Whatever the general definition of the risk criterion may be, whether or not there is a sufficient risk in a specific case and in accordance with a specific treaty depends on several key elements. These elements include: prospectivity, objectivity, individualisation, membership of a vulnerable group, credibility, and plausibility. In addition, it is important to take into account factors which can minimise or negate the risk, such as the existence of an internal protection alternative, the presentation of diplomatic assurances or the formally binding character of international human rights instruments for the country of origin. Before comparing these various elements it is important to acknowledge that the risk criterion is impossible to couch in objective and measurable terms, for example, in the form of a probability calculus. In essence, the level of individualisation of the risk and the credibility of the claim and of the facts and circumstances presented are decisive. In particular credibility and evidence

47 ECtHR, *Ahmed v Austria*, 17 December 1996, Appl. No. 25964/94, para. 44, in which the Court considered that the circumstances in the country of origin (Somalia) had not changed for the applicant. He therefore remained a refugee; had a well-founded fear of being persecuted and, therefore, had a real risk of being subjected to proscribed ill-treatment. See also ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, para. 41.

are issues the law should be concentrating on; thereby providing clear guidelines for both individual and State in which the specific circumstances in which an individual seeking international asylum protection finds himself must have a prominent role.

6.3.2.1a Prospectivity

The prohibition on refoulement implies that the possibility of being subjected to serious harm must lie in the present or near future. In other words, the focus is on something that has yet to occur. In general, past experiences of serious harm are a serious indication of a present or future risk, but do not by themselves establish a right to be protected from refoulement.[48] As a result of the decisive focus on the future people suffering from post-traumatic stress as a result of past experiences will not automatically be protected from refoulement. It will in particular be difficult to establish a real risk of the traumatisation being the result of inherently non-recurring past experiences, for example, women who have been subjected to female genital mutilation. They are no longer at risk of such treatment, but may be severely traumatised by it. Can these women be protected from refoulement? The answer is no, unless past experiences may result in further victimisation. In the case of women having been subjected to female genital mutilation, that may be the case when these women are subjected to renewed mutilation, for example, to undo surgery that they underwent in the country of refuge to reverse as far as possible the initial mutilation. The fact that past experiences and the subsequent traumatisation cause significant psychological harm when the person concerned is returned to his country of origin will not be sufficient to warrant protection from refoulement. In order to be afforded protection from refoulement the harm feared may not merely be caused by past experiences but must in part also be based on direct or indirect conduct of the authorities of the country of origin. In *Cruz Varas and Others v Sweden* (1991) the European Court of Human Rights rejected a refoulement claim by one of the applicants in spite of the fact that he was suffering from a post-traumatic stress disorder. The Court was focussed very much on the possibility of certain conduct to which the applicant might be subjected upon return to his country of origin rather than on an ongoing form of ill-treatment as a result of his being traumatised.[49] Notably, the exception is the Convention against Torture. In general, the Committee attaches significant weight to past experiences of torture and the after-effects, such as post-traumatic stress, in particular when resulting from rape or other forms of sexual abuse. In *El Rgeig v Switzerland* (2007) the Committee placed significant weight on the fact that the complainant suffered from post-traumatic stress and was incapable of coping with a forced return which would entail a definite risk to his health.[50]

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48 According to Article 4(4) of the EU Qualification Directive past experience of persecution or serious harm or direct threats thereof is a serious indication of a risk of subjection to future persecution or serious harm, unless there are good reasons for considering that such harm will not be repeated.

49 ECtHR, *Cruz Varas and Others v Sweden,* 20 March 1991, Appl. No. 15576/89. para. 84.

50 ComAT, *El Rgeig v Switzerland*, 22 January 2007, no. 280/2005, para. 7.4.

6.3.2.1b Objectivity

The risk criterion is an objective requirement and does not depend on a subjective emotion on the part of the person concerned. Consequently, the risk must be established by looking at objectively determinable facts and circumstances. Somewhat unfortunate in this regard is the word 'fear' mentioned in the definition of a refugee in Article 1A(2) of the Refugee Convention as that word could imply that the emotional state of mind of the person concerned was relevant. Clearly, that is not the case. What is relevant with regard to all the prohibitions on refoulement investigated are the objective circumstances of each case, which may relate to the individual concerned, including his background, age, gender, beliefs, state of health, and activities, or to the general (human rights) situation in the country of origin (see below when discussing the required facts and circumstances).

6.3.2.1c Individualisation, singled out and indiscriminate violence

The risk of being subjected to serious harm must be personal. This individualisation requirement poses four important questions: first, whether or not a person claiming protection must be singled-out. In other words, does the risk criterion require a comparison, i.e. must the person concerned, if belonging to a group which is the victim of violence or human rights violations, be treated differently or substantially worse than other members of the group in order to be afforded protection? Secondly, can protection from refoulement be afforded to people fleeing a situation of indiscriminate violence? Thirdly, does the individualisation requirement exclude the possibility of a group as a whole being afforded protection? Fourthly, what facts and circumstances relating to the individual concerned are required or decisive for him to be afforded protection? I will address these questions separately below. I will first address questions one and two in this section. In section 6.3.2.1d I will then address question three, and finally I will address question four in section 6.3.2.1e.

The individualisation requirement has been the topic of considerable debate in the context of the European Convention, starting with *Vilvarajah and Others v United Kingdom* (1991). In its judgment in this case the ECtHR introduced the phrase 'special distinguishing features' while assessing the risk for the applicants of being subjected to proscribed ill-treatment upon their return to Sri Lanka. In theory, the phrase 'special distinguishing features' can be interpreted so as to imply an element of comparison, where the person concerned must have a higher risk than other members of the group to which he belongs. As analysed in section 3.3.2.1b the use of this phrase cannot be interpreted so as to argue the need for a comparison between members of a specific group. One need not be *singled out* in order to have a right to be protected from refoulement. The phrase is used by the Court to define what facts may determine the existence of a foreseeable risk of being subjected to proscribed ill-treatment if the sole fact of belonging to a vulnerable group is not enough for the existence of a real, personal and foreseeable risk for every member of that group to be accepted. The ECtHR does not rule out the possibility of a group being targeted on such a scale

that every individual member is at risk of being subjected to proscribed ill-treatment.[51] Moreover, it also does not rule out that a general situation of violence will be so extreme that no one should be placed in such a situation.[52] Although it is unclear when such a situation will exist, the conclusion that Article 3 ECHR will be applicable in situations of extreme violence reduces the importance of the individualisation requirement in favour of determining what the actual risk is of being subjected to proscribed ill-treatment in a given situation. In fact, to determine the existence of a real risk the Court has adopted a three-pronged approach. First, it may be relevant to assess whether the situation of violence in the country of origin is so extreme that no one may be returned. Secondly, it may be that the individual belongs to a group which is targeted on such a scale that every member of that group is at risk. Thirdly, there may be a set of facts indicating that the individual is at risk of being subjected to proscribed ill-treatment. The other treaties provide less clarity regarding the interpretation and application of the individualisation requirement.

Under the Refugee Convention it is not necessary for people to be singled out. It is commonly accepted that entire groups may fear persecution as a result of which each member of such groups has a well-founded fear of being persecuted. The Refugee Convention rules out that a situation of extreme violence will result in a well-founded fear of being persecuted by that mere fact alone. In such a situation there is a lack of the persecution reasons enumerated in Article 1A(2) Refugee Convention. This is different in situations where the violence is rooted in ethnic, religious, social or political differences. For example, the UNHCR has concluded that Iraqis coming from Central or Southern Iraq should be considered refugees because the violence there is rooted in ethnic, religious and political differences.[53]

Under the Convention against Torture the general human rights situation in the country of origin is certainly a significant element to be taken into consideration. However, a consistent pattern of gross, flagrant or mass violations of human rights or extreme violence will not be enough for protection under Article 3 CAT to be claimed.[54] It is not possible to conclude the existence of a real risk of being subjected to torture in accordance with Article 3 CAT based on a situation of extreme and indiscriminate violence because the definition of torture in Article 1 CAT does not allow that. The definition requires an element of intent and purpose. It is possible under the Convention against Torture to be protected from refoulement based on the fact of belonging to a group which is targeted as a whole. The threshold however appears to be high. In *Elmi v Australia* (1999) the alleged risk was based on the situation of violence in Mogadishu and the fact that the complainant was a member of a minority clan living in Mogadishu. And although the Committee did take this

51 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, paras. 146 and 148; ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, para. 132; ECtHR, *Sultani v France*, 20 September 2007, Appl. No. 45223/05, para. 67.

52 ECtHR, *NA. v United Kingdom*, 17 July 2008, Appl. No. 25904/07, para. 115.

53 UNHCR 2007, p. 15.

54 ComAT, *Falcon Rios v Canada*, 17 December 2004, no. 133/1999, para. 8.3.

into account it considered two further factors supporting the conclusion that the complainant was particularly vulnerable to a risk of torture. First, the family had been particularly targeted in the past, resulting in the displacement, rape and death of family members. Secondly, the case had received considerable publicity, increasing the complainant's profile. This case is largely similar to *Salah Sheekh v Netherlands* (2007) brought before the European Court of Human Rights and concerning Article 3 ECHR. Unlike the Committee against Torture the Court placed decisive significance on the situation of minority clans in Somalia and the applicant's membership of such a clan.[55]

Little can be said about the application of the individualisation requirement under the ICCPR because there are no clear views on this available from the Human Rights Committee. All individual refoulement cases which have been brought before the Committee involved situations with a clear individualised risk. In general, the prohibition on refoulement developed under the Covenant obliges States not to return people when there is a risk of irreparable harm such as is contemplated by Articles 6 and 7 ICCPR. On a grand scheme Article 6 includes obligations to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. As such, in theory at least, States may be prohibited from returning people to situations of war, genocide or mass violence.

6.3.2.1d Membership of a particular group or group persecution

Under the Refugee Convention the concept of group persecution is somewhat complex. According to the UNHCR Handbook mere membership of a racial, religious or social group will normally not be sufficient to ground a fear of persecution, whereas the same Handbook states that mere membership of a national, ethnic or linguistic group can be enough.[56]The distinction between racial, religious and social groups on the one hand and national, ethnic and linguistic groups on the other remains unexplained. It becomes even more unclear because in reality the UNHCR has, on certain occasions, stated that mere membership of a group, ethnic, religious or political, can indeed be enough to warrant protection from refoulement.[57] The UNHCR's use of group persecution seems to be reserved for situations of a mass influx of refugees, where it is considered that an entire group has been displaced under circumstances in which each member of that group could be considered individually as a, so-called prima facie, refugee. Notably, States originally had the same approach to situations of mass influx. In more recent years though, as discussed in section 2.4.2.2, States have become more reluctant to accept prima facie refugee protection and use the tool of temporary protection without an immediate determination of refugee status in anticipation of how the situation in the country of origin will develop.

55 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, paras. 146 and 148.

56 See UNHCR Handbook, paras. 70, 73 and 79 regarding racial, religious and social groups, and para. 74 regarding national, ethnic and linguistic groups.

57 For example, in August 2007 regarding the situation in Iraq: UNHCR 2007, p. 134.

The question remains when mere membership of a particular group is sufficient to establish a real, personal and foreseeable risk of persecution or proscribed ill-treatment. Under the ECHR the scale necessary to warrant protection is difficult to determine. Two situations have been distinguished. First, a specific group, such as army deserters, will have the foreseeable risk of being subjected to clear forms of proscribed ill-treatment.[58] Secondly, an ethnic group is systematically targeted for practices of proscribed ill-treatment at an endemic level. Accepting such situations requires a high standard of proof.[59]

6.3.2.1e Required facts and circumstances to meet the necessary level of risk

This leaves the question of what facts and circumstances are required to meet the necessary level of risk. In general this is impossible to determine. It all depends on the specific case at hand. As discussed above, in some cases a single fact, for example, membership of a group which is systematically the target of human rights violations may be sufficient. In most cases however a combination of facts and circumstances is required. In addition, the risk is influenced by such elements as the availability of an internal protection alternative or diplomatic assurances, which will be discussed in section 6.3.2.4.

In general a whole variety of facts and circumstances can be put forward. These are either facts relating to the person concerned or general facts and circumstances concerning the situation in the country of origin. As already mentioned, of particular importance are past experiences of torture, ill-treatment, persecution or other human rights violations. The type, frequency and severity of and the time which has elapsed between the past experiences and the alleged risk are important elements. In addition, experiences such as an arrest, detention, criminal charges, army desertion, illegal departure, communication possibilities with one's lawyer or, in general, experiences that make a person known and/or vulnerable are relevant. Furthermore, experiences of family members or close friends or associates can be relevant. Also relevant is engagement in political or other activities. Here the level, type and scale of engagement or responsibility are important. Other important personal facts include someone's ethnicity, family ties, sexual orientation and the publicity surrounding him or his case. Finally, recognition as a refugee by a State or the UNHCR is a serious indication of a real risk of serious harm in accordance with the prohibitions of refoulement contained in the ECHR, ICCPR and CAT. It is fair to assume that those who have a well-founded fear of being persecuted may have a fair chance of also being at risk of treatment which comes within the scope of the prohibition on torture and other forms of inhuman or degrading treatment or punishment.[60] It will be more difficult to assume that those who have a well-founded fear of persecution have a risk of being subjected to torture within the meaning of Article 3 CAT because of the strict definition of torture in Article 1.

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58 ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02.

59 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04.

60 Vermeulen 2006, p. 438.

In addition to personal facts it is relevant to take into account the situation in the country of origin. This includes the human rights situation, in particular systematic practices of torture and inhuman treatment, the conditions in detention, the level of violence in the country and the authorities' control thereof. Furthermore, important elements are changes in government or policies, the existence of a peace process or an agreed ceasefire and the repatriation of refugees under the supervision of the UNHCR.

6.3.2.1f Risk 'sur place'

The concept of refugee or risk *sur place* has been developed mainly in the context of the Refugee Convention. In brief, the concept implies that the risk of being subjected to persecution arose after the person concerned had left his country of origin. The risk is then either the result of circumstances arising in his country of origin since he left or of his own conduct since he left. The latter situation has led to some debate as the risk is then not necessarily the result of a continuation of actions or convictions held by the person concerned in his country of origin. In fact, he may even have deliberately created a risk after he left his country by taken certain action for the sole purpose of being granted protection from refoulement. Under the ECHR, ICCPR and CAT the concept of a risk *sur place* has had little or no attention paid to it. The Committee against Torture has made it clear that activities conducted both in the country of origin and in that of refugee are relevant. The Committee did not discuss a continuation requirement. In the few cases in which the European Court of Human Rights had to deal with activities in the country of refuge these involved facts that were a continuation of activities conducted by the person concerned in his country of origin.[61] The Human Rights Committee has so far been silent on the issue of a risk *sur place* or on the possible requirement of the continuation of actions or convictions. In the EU Qualification Directive such a continuation requirement is not necessary, although preference is given to a risk which is based on activities that constitute the expression and continuation of convictions held in the country of origin.[62] Furthermore, EU Member States may determine that a person who files a subsequent application for protection shall not be granted refugee status if the risk is based on circumstances which the applicant has created by his own decision since leaving his country of origin. In my opinion, while deliberately creating a risk may be morally wrong for the purposes of having a right to be protected from refoulement the relevant question is whether there is a genuine risk of being subjected to harm. In principle, it is irrelevant when, where or how that risk is established. It remains to be seen whether or not this opinion will be followed by the ECtHR, the HRC and the ComAT.

61 ECtHR, *A.B. v Sweden,* 31 August 2004, Appl. No. 24697/04 (admissibility decision); ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02.

62 Article 5(2) of the EU Qualification Directive.

6.3.2.2 Standard and burden of proof

According to the UNHCR, it must be established to a reasonable degree that the person concerned has a well-founded fear of persecution.[63] According to Article 3 CAT substantial grounds must exists for believing that he would be in danger of being subjected to torture. Also, according to the Human Rights Committee, under the ICCPR substantial grounds must exist. Finally, the European Court of Human Rights also refers to substantial grounds which must be shown for believing that the person concerned faces a real risk of being subjected to proscribed ill-treatment. Where the Refugee Convention refers to reasonable degree, the other treaties refer to substantial grounds. Arguably, there is no difference in application. It is not necessary to prove beyond reasonable doubt that a risk exists. The essence of the prohibition on refoulement lies in the fact that it aims to protect a person from future harm. The assessment of the risk that such harm will occur is, therefore, essential. The obvious problem is that it can never be determined with certainty that a person will be subjected to proscribed harm as one can never be certain about future events. The risk can never be 'proven' in the same way as, for example, past violations of human rights can be documented or criminal offences can be proven in court. The aim is not to seek conclusive evidence whether or not a claimed risk exists or as to the validity of the facts and circumstances presented. The aim is to believe or not to believe that subjection to serious harm is likely to occur. What is relevant is that a claim for protection is put forward which is credible and plausible in the light of the situation in the country of origin.

6.3.2.2a Issues of credibility

In general, credibility depends on (1) the internal credibility of the claim, (2) the plausibility of the claim in the light of the situation in the country of origin, and (3) evidence presented in support of the claim. All three elements are interrelated. Internal credibility is determined by such elements as the number of details, the comprehensiveness, and coherence of the claim. The plausibility of the claim is determined by its internal credibility, by the extent to which the claim contains what is generally known about the country of origin, and evidentiary support. Evidentiary support in turn refers to all forms of documentation, evidence and information which can be put forward in support of the claim. In addition, credibility is determined by a prompt and consistent presentation of facts and evidence as well as plausible explanations for the absence of any of the above. In this regard it must be acknowledged that it cannot always be expected of people seeking protection from refoulement that they submit and explain everything immediately. Such a person may feel apprehensive towards any authority and may be afraid to speak freely. Even an untruthful claimant may still be in need of protection. In particular the Committee against Torture appears to be lenient with people whose claim lacks detail, is incoherent or contradictory, in particular when they have been victims of torture and are suffering from post-traumatic

63 UNHCR Handbook, para. 42.

stress disorder. And under the Refugee Convention special consideration should be given to children, in particular when unaccompanied, people suffering from a mental disorder and women.[64]

6.3.2.2b Issues of evidence

Evidence can be an important tool in support of the claim. It may improve the credibility of the claimant and the claim or increase their plausibility. Although evidence is not a necessary requirement and full proof of the facts and circumstances is certainly not required, the absence of any evidence will seriously undermine the claim. The reality of many individual cases is that lack of documentary evidence will easily lead to the conclusion that the claim is lacking in sincerity and credibility. In general, it is expected that a claim will be supported to some extent by evidence even though there may be good reasons for the absence of evidence, and even though it is acknowledged that it may not always be possible for the claimant to provide evidence, given the circumstances in which he had to leave his country of origin. Therefore, it is important for any claimant to provide as much evidence as promptly as possible and to provide a plausible explanation for the absence of evidence. Moreover evidence should not be too general but relate to the claim at hand and directly address the grounds for the alleged risk of harm. This latter element was explicitly considered by the European Court of Human Rights in relation to evidence in general reports.[65]

The persuasiveness of the evidence depends on type, comprehensiveness, consistency and source. Evidence can come from many sources. And it is largely the reliability of the source that determines the persuasiveness of the evidence. Of particular interest in this regard is the jurisprudence of the ECtHR which contains clear guidelines on what makes a source reliable. Reliability depends on the independence and objectiveness of the source and the authority and reputation of the author.[66] While reports written by States parties as well as Non-Governmental Organisations remain important, the ECtHR has acknowledged the specific capabilities of agencies of the United Nations to gather information and provide materials, particularly given their direct access to the authorities of the country of origin as well as their ability to carry out on-site inspections and assessments in a way not open to States and Non-Governmental Organisations.[67] No such detailed guidelines are available for the other treaties, except that both the Committee against Torture and the Human Rights Committee continue to put decisive weight on the findings of national authorities, including reports written by States parties, albeit that, according to the HRC, a State cannot merely refer to the outcome of the assessment made by its own authorities but must comment on the individual's statement.[68]

64 UNHCR Handbook, paras. 206-219.

65 ECtHR, *NA v United Kingdom*, 17 July 2008, Appl. No. 25904/07, para. 121.

66 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 100; ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, para. 143; ECtHR, *NA v United Kingdom*, 17 July 2008, Appl. No. 25904/07, para. 120.

67 ECtHR, *NA v United Kingdom*, 17 July 2008, Appl. No. 25904/07, para. 121.

68 HRC, *Byahuranga v Denmark,* 9 December 2004, no. 1222/2003, para. 11.3.

Interestingly, as the Committee attaches significant weight to past experiences of torture and its after-effects, such as post-traumatic stress, the Committee against Torture has an important interest in medical reports, in particular when written by experts and when identifying a causal link between the individual's injury and his alleged experiences of ill-treatment.[69]

6.3.2.2c Burden of proof

A common element of all the prohibitions on refoulement investigated is that the initial burden of presenting a credible claim rests on the shoulders of the individual claimant. In the end, however, establishing to a reasonable degree, or showing substantial grounds to believe, the existence of a real risk is a responsibility shared between the claimant and the host State. It is a cooperative effort of the individual and the State to determine whether or not the person has a right to be protected from refoulement. Consequently, there must be open communication between the individual and the State and a process governed by the principle of equality of arms.

In general, the shared burden of proof means that the individual must to the greatest extent practically possible provide relevant credible information and materials. The State must provide the individual with the opportunity to do this freely. Thereafter, it is the State which must assess the information and materials and gather information of its own accord and share this with the individual. In fact, the European Court has stated that under the ECHR rigorous scrutiny must necessarily be conducted of an individual's claim.[70] The State must obtain a complete and accurate idea about the situation in the country of origin and cannot rely on a single source, certainly when information from that source has been contested.[71] The basic assumption at the start of procedure should be that the individual concerned is in need of protection. In particular the declaratory character of the refugee definition implies such an assumption, as a refugee is a refugee as soon as he meets the criteria laid down in the definition; he does not become a refugee because he is determined to be one.

Access is essential for a proper and fair determination process for both the individual and the State to provide sufficient objective and accurate information to facilitate a well-informed decision. In particular the State may have a tendency (1) to limit its information to its own sources, in particular the country of origin reports of its own Ministry of Foreign Affairs, and (2) to use sources which are unavailable to the

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69 ComAT, *El Rgeig v Switzerland*, 22 January 2007, no. 280/2005, para. 7.4. See also ComAT, *Tala v Sweden*, 15 November 1996, no. 43/1996, para. 10.3: 'the Committee has noted from the medical evidence that the scars on the author's thighs could only have been caused by a burn and that this burn could only have been inflicted intentionally by a person other than the author himself'. ComAT, *I.A.O. v Sweden,* 6 May 1998, no. 65/1997, para. 14.3; ComAT, *A.F. v Sweden*, 8 May 1998, no. 89/1997, para. 6.5; ComAT, *Haydin v Sweden*, 16 December 1998, no. 101/1997, para. 6.6. See for a comprehensive discussion on the use of medical reports by the Committee against Torture and other supervising bodies Bruin & Reneman 2006, pp. 86-109.

70 ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98, para. 39.

71 ECtHR, *Said v Netherlands*, 5 July 2005, Appl. No. 2345/02, para. 54; ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 136.

individual. The ECtHR and the EU Procedures and Qualification Directives have made it clear that a State cannot rely just on domestic materials. A State must include other reliable and objective sources, in particular the United Nations High Commissioner for Refugees.[72] This is interesting because it shows the close link between the work of the UNHCR in supervising the Refugee Convention and protection from refoulement to be afforded in accordance with the ECHR. If the State does rely solely on its own materials the European Court of Human Rights sees it as its supervisory task to take into account other reliable and objective sources.[73] Consequently, a similar task may be expected of the State and its administrative and judicial institutions. The second tendency is more problematic. States have a tendency to make crucial sources unavailable to the individual for reasons of confidentiality, personal safety of the informant or national security. This will prejudice the individual as he is then unable to contest the information, in particular when it is used to decide against his protection claim. The problem is of course that the State may have valid reasons for not sharing this information or its sources. It is clear that in such cases a balance is needed and that at least Courts should be informed. Nevertheless, great caution should be applied and only under clear and exceptional conditions should States be allowed not to share information.

6.3.2.3 Time of assessing the risk

The premise of the right to be protected from refoulement is an evaluation or assessment of a risk. The responsibility of States to protect individuals from refoulement is established by way of State conduct exposing the individual to such a risk. Thus, every time a State is about to release an individual from its responsibility and expose him to a risk of being subjected to proscribed harm – in most situations and hereafter referred to as the moment of removal – that risk must be assessed as at that point in time.

This has been most clearly developed under the ECHR. All the facts and circumstances that are known or ought to be known at the moment of removal must be taken into account. So long as the individual has not been removed the prohibitions on refoulement prescribe an assessment ex nunc every time a person is threatened with removal. This is a responsibility on the State in general as well as on each State institution conducting such an assessment. Consequently, information which comes to light after the initial assessment by an administrative institution, i.e. an immigration service, must be taken into account during the appeals procedure before a judicial institution. Equally, if the case is assessed at the international level by the European Court all information that is known or should be known at the time of the assessment must be taken into account. This is no different in cases where the person concerned has already been removed. Even then the decisive moment for assessing the risk is

72 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 136. Article 8(2)(b) of the EU Procedures Directive. Preamble, paragraph 15, EU Qualifications Directive.

73 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 136.

the moment of removal and it is what was known or ought to have been known at that moment that is important. Two important questions remain in such a situation: (1) what to do with information that comes to light after the removal, and (2) what role do subsequent events, i.e. events which occur after the removal, play? With regard to the first question it is relevant to determine whether or not that information ought to have been known to the State at the time of the removal. For example, if information was withheld by the individual or can only come from the individual it cannot be concluded that the State ought to have known of it. If on the other hand the State was not aware of the information because of its own poor information gathering, the State cannot hide behind the excuse that it did not know. The State ought to have known the information at the time of removal. With regard to the second question subsequent events in principle cannot play a part in the determination process. How can it be expected of a State to know what will occur in the future? Nevertheless, the ECtHR does seem to take subsequent events into account, in the sense that the Court seems to allow the use of subsequent events if they 'confirm' the Court's assessment made before the removal that there was no real, personal and foreseeable risk,[74] and not if they refute this assessment.[75] The Committee against Torture takes a similar approach.

Notwithstanding the absence of clear guidelines under the Refugee Convention and ICCPR, I have argued that under these treaties the moment of removal is decisive.

6.3.2.4 Protection from the country of origin (national protection)

The risk of being subjected to proscribed harm can be minimised or negated by the availability of national protection, i.e. protection from the individual's own country. There are different forms of national protection. It may be provided by the authorities of the individual's country of origin or perhaps by others who have the ability to provide effective protection; there may be an area available inside the country of origin where the individual is safe; or the country of origin may have provided diplomatic assurances that will guarantee the individual's safety. It makes sense for national protection to take priority over international protection because it is first and foremost a person's own country which must ensure his human rights. It is only in the absence of national protection that international protection comes into play.

The Refugee Convention is clearest: when a person is able and willing to avail himself of the protection of his country of origin, i.e. nationality or, in the absence of a nationality, habitual residence, he has no right to be protected from refoulement,

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74 ECtHR, *Al-Moayad v Germany*, 20 February 2007, Appl. No. 35865/03, paras. 67 and 106 with regard to Article 6 ((in)admissibility decision). See also ECtHR, *Nsona v Netherlands*, 28 November 1996, Appl. No. 23366/94, para. 102; ECtHR, *Salkic and Others v Sweden*, 29 June 2006, Appl. No. 7702/04 ((in)admissibility decision).

75 ECtHR, *Vilvarajah and Others v United Kingdom,* 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 112; ECtHR, *Shamayev and 12 Others v Georgia and Russia*, 12 April 2005, Appl. No. 36378/02, paras. 362 to 367; ECtHR, *Mamatkulov and Askarov v Turkey,* 6 February 2003, Appl. Nos. 46827/99 and 46951/99, para. 72.

provided the protection removes the risk and he is effectively safe.[76] In the context of the Refugee Convention this is generally referred to as the 'protection clause'. Ability to provide protection refers to circumstances in which it is possible to receive protection and not to situations in which the person has already been denied protection or where the circumstances in the country of origin are such that protection will not be possible, for example, because of an armed conflict. Willingness refers to the objective will of the person concerned to seek protection in the country of origin. What is relevant is the question whether there is an objective ground for not expecting the individual to be willing to avail himself of national protection. This unwillingness is linked to the risk of being persecuted. Thus, when the risk stems from the State it is unreasonable to expect the individual to be willing to try to obtain protection from that same State unless it can objectively be determined that the State can provide protection, for example because effective legal remedies are available to counter the risk.

No clear protection clause is formulated under the other prohibitions on refoulement investigated. Nevertheless, a similar concept of protection from the country of origin has emerged under the prohibition on refoulement contained in Article 3 ECHR. The European Court of Human Rights has in the context of Article 3 considered that it must be shown that the authorities of the receiving State are not able and willing to obviate the risk by providing appropriate protection.[77] The focus of the Court has been mainly on the question whether the receiving State and its organs can and are willing to provide protection, but this was more a matter of being presented with such cases than legally limiting internal protection to the State and its organs. In particular in *Salah Sheekh v Netherlands* (2007), involving Somalia as the country of origin where no clear State authority existed, the Court considered the possibility of protection by the receiving country, the protection then having to come from local authorities acting as quasi-governmental entities.[78] In essence the protection clause developed by the Court is similar to the one formulated in the Refugee Convention, in the sense that the focus is primarily on the State, its organs and formal substitutes to provide protection, not excluding non-State entities or actors who can be regarded as de facto State entities. Less clear is the element of willingness. The Refugee Convention refers to willingness on part of the individual, i.e. whether he is willing to avail himself of protection from his country of origin. The European Court on the other hand connects willingness to the State. This difference in interpretation may not have been deliberate, simply because the ECtHR has so far never had to deal with this difference, but, as it stands, it may lead to a different outcome. For example, a person who is traumatised may have objectively good reasons not to be willing to avail himself of the protection

76 Article 1A(2) Refugee Convention.

77 ECtHR, *Chahal v United Kingdom,* 15 November 1996, Appl No. 22414/93, paras. 91, 99, 104 and 105; ECtHR, *H.L.R. v France*, 29 April 1997, Appl. No. 24573/93, paras. 40 and 43; ECtHR, *Njie v Sweden*, 19 October 1999, Appl. No. 47956/99 ((in)admissibility decision); ECtHR, *N. v Finland*, 26 July 2005, Appl. No. 38885/02, para. 164; ECtHR, *Hukic v Sweden*, 27 September 2005, Appl. No. 17416/05 ((in)admissibility decision).

78 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 147.

of his country of origin. Consequently, the protection clause in the Refugee Convention, Article 1A(2), will not bar him from being a refugee and from being protected from refoulement. This may be different under the ECHR, as there his willingness to avail himself of the protection of his country of origin is not relevant; what is relevant is the willingness of the State to provide him with protection.

The decisive question when it comes to protection from the country of origin is: who can provide protection? Under the Refugee Convention it is the country of origin which can provide protection. What this means in reality is not completely clear. It does mean that primarily protection must come from the de jure State and its organs or any formal substitute as referred to in the Draft Articles on Responsibilities of States for Internationally Wrongful Acts.[79] It may however not be ruled out that non-State entities or actors can provide protection. It is essential that any actor of protection, be it the State or non-State actor, is able to provide effective protection. (1) The actor of protection must be legally responsible for providing protection, (2) it must be possible to hold him accountable if protection is not guaranteed, and (3) in reality he must be capable of providing effective protection.[80] This comes very close to a de jure State or any of its recognised formal substitutes. As described above the ECtHR has not excluded non-State actors from being able to provide protection, but has focussed primarily on the State and formal substitutes who can be regarded as de facto State entities. The Committee against Torture has accepted the possibility of military forces of a foreign State, such as the forces of the UK and the USA in Afghanistan and Iraq, to be able to provide protection.[81] Equally, the Human Rights Committee has accepted the possibility of military forces of foreign States, including UN peacekeeping forces, to be responsible for guaranteeing the rights of the ICCPR for people within their effective control.[82] Where the UNHCR is reluctant to accept the possibility of an international organisation providing national protection under the Refugee Convention, the Human Rights Committee has even held the UN Interim Administration Mission in Kosovo to be responsible for the human rights situation in that part of Serbia.[83]

Interestingly, the essential issue of what amounts to effective protection has had little or no attention. Some guidelines have been provided within the specific concept of an internal protection alternative, which is discussed below.

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79 Draft Articles on Responsibilities of States for Internationally Wrongful Acts, International Law Commission, 53rd session (2001), UN Doc. A/56/10, (<via www.un.org/law/ilc>).

80 Article 7(1)(b) and (2) of the EU Qualification Directive. See section 2.3.2.4.

81 ComAT, Concluding Observations on the United States of America, 25 July 2006, CAT/C/USA/CO/2, para. 20. Also ComAT, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, 10 December 2004, UN doc. CAT/C.CR/33/3, para. 4 (ii) (b).

82 See section 4.2.2.2.

83 HRC, Concluding Observations on Kosovo (Serbia), 14 August 2006, UN doc. CCPR/C/UNK/CO/1. The responsibility of the United Nations Interim Administration in Kosovo for the protection and promotion of human rights in Kosovo is based on the UN Security Council resolution 1244, 10 June 1999, UN doc. S/RES/1244 (1999), para. 11 (j).

6.3.2.4a Internal protection alternative

Beyond the more general notion of national protection is the specific concept of an internal protection alternative. This is a particular geographical variant on the national protection clause. The concept has been developed under the Refugee Convention and has so far had only minimal attention under the other prohibitions. The internal protection alternative refers to an area inside the country of origin, not being his original place of residence, where the person concerned has no risk of being subjected to serious harm. The applicability of an internal protection alternative presupposes that the (original) risk is limited to a certain geographical area within the country of origin. In general, the Refugee Convention prescribes that the alternative area must be practically, legally and safely accessible to the individual. He must be safe there from persecution as well as other forms of serious harm. In addition, he must be able to lead a relatively normal life as can be expected in that area, without undue hardship.

An internal protection alternative is most likely to be available when the risk of harm stems from non-State entities which control a part of the territory of the country of origin, i.e. in situations of an internal armed conflict.[84] The State may then be able and willing to provide protection in the part of the territory under its control.[85] If, however, the risk of harm stems from a non-State actor whose actions are not limited to a specific geographical area, or when the risk stems from a State agent, an internal protection alternative will normally not be available. With regard to a risk stemming from State agents an internal protection alternative may be available only when the risk stems from an authority of the State the power of which is clearly limited to a specific geographical area,[86] or when a non-State entity is acting as a de facto State authority in a certain part of the country of origin.

The concept of an internal protection alternative has been an issue in some of the cases brought before the European Court of Human Rights and has been dealt with in a very casuistic manner. In general, it can be concluded that the ECtHR does not easily accept the availability of an internal protection alternative when the risk of proscribed ill-treatment stems from State agents[87] or when the risk emanates from a criminal organisation the actions of which are not restricted to a certain geographical area within the country of origin.[88] On the other hand, in situations of internal armed conflict, for example in Sri Lanka,[89] or in situations where no clear State authority exists and non-State entities are acting as local de facto governmental entities, for

84 Section 2.3.2.4.

85 UNHCR 2003, pp. 4 (para. 13), 5 (paras. 16 and 17) and 6 (para. 27).

86 According to the UNHCR, 'where the risk of being persecuted emanates from local or regional bodies, organs or administrations within a State, it will rarely be necessary to consider potential relocation, as it can generally be presumed that such local or regional bodies derive their authority from the State': UNHCR 2003, p. 4 (para. 14).

87 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, paras. 103-105; ECtHR, *Hilal v United Kingdom*, 6 March 2001, Appl. No. 45276/99, paras. 67-68.

88 ECtHR, *H.L.R. v France,* 29 April 1997, Appl. No. 24573/93, paras. 40-43.

89 ECtHR, *Thampibillai v Netherlands*, 17 February 2004, Appl. No. 61350/00, para. 67.

example in Somalia,[90] the Court has acknowledged the possibility of an internal protection alternative provided by either State or non-State actors. The Court goes even further and seems to have accepted the possibility of international organisations, for example the United Nations Interim Administration Mission in Kosovo (UNMIK) providing the internal protection alternative by creating a safe haven for ethnic minorities.[91] This is an important difference from the interpretation of an internal protection alternative under the Refugee Convention. There it seems that accepting non-State actors, including United Nations entities, as possible protectors is highly unlikely because of their legal and factual inability to afford effective protection in accordance with international legal standards. Under the Refugee Convention only States or entities becoming the new Government of the State, i.e. formal State substitutes, can provide protection. As already mentioned, the Committee against Torture has accepted the possibility of the military forces of a foreign State being able to provide protection. Equally, under the ICCPR it is possible that military forces of foreign States, UN peacekeeping missions or even UN governed Administrations may be able to guarantee human rights protection.[92]

Under the Convention against Torture the risk of torture must inherently emanate from the State, or from non-State entities in the absence of a central government which can be regarded as quasi-governmental entitities. In the former context the Committee has been reluctant to accept an internal protection alternative. In two cases involving Turkish nationals of Kurdish ethnicity the risk emanated from Turkish State agents and may have been largely limited to North Eastern Turkey. The Committee was not convinced that a risk of torture did not exist in orther parts of Turkey.[93] Only in one case, involving a low-profile person claiming to be at risk of the Punjabi police in the State of Punjab in India, did the Committee consider an internal protection alternative to be available. It was particularly relevant for the Committee that the complainant was a low-profile person.[94] The European Court of Human Rights considered otherwise regarding a high-profile person coming from the State of Punjab in India.[95]

With regard to the substance of an internal protection alternative, the ECtHR concurs with many of the elements that have been developed as part of the concept under the Refugee Convention. The Court made it clear that it must be ensured that the alternative area is practically, legally and safely accessible to the person con-

90 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04.

91 ECtHR, *Sadena Muratovic v Denmark,* 19 February 2004, Appl. No. 14513/03 ((in)admissible) and ECtHR, *Aslan and Atifa Muratovic v Denmark*, 19 February 2004, Appl. No. 14923/03 ((in)admissibility decision).

92 Section 4.3.2.5.

93 ComAT, *Alan v Switzerland*, 8 May 1996, no. 21/1995, para. 11.4; ComAT, *Haydin v Sweden*, 16 December 1998, no. 101/1997, para. 6.4.

94 ComAT, *S.S.S. v Canada*, 5 December 2005, no. 245/2004, para. 8.5.

95 ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, paras. 103-105.

cerned.[96] Furthermore, there must be a guarantee that the person is able to stay and settle himself in the alternative area.[97] With regard to issue of safety and applicable human rights standards in the alternative protection area the Court restricts itself to the standards set out in Article 3 ECHR and is more focussed on the physical safety of the person concerned than on the humanitarian conditions prevailing in the alternative area.[98] Under the Refugee Convention the approach is much broader. The humanitarian and social-economic conditions in the internal protection alternative are as important as the refugee's physical safety. The refugee must be able to lead a relatively normal life without undue hardship. As already mentioned in chapter 3, the ECtHR notes in the case of Salah Sheekh that where the UNHCR's concerns are focussed on humanitarian elements, on the possible destabilising effects of an influx of involuntary returnees on the already overstreched absorption capacity of the internal flight alternatives in Somalia and on the dire situation in which returnees find themselves, the Court is of the opinion that:

> 'such considerations do not necessarily have a bearing, and certainly not a decisive one, on the question whether the person concerned would face a real risk of ill-treatment within the meaning of Article 3 of the Convention in those areas'.[99]

While it may make sense for the Court to focus on Article 3 ECHR, as that is the Court's basis, the issue of humanitarian considerations and safeguarding other human rights is not without relevance. When applying an internal protection alternative one deals with internally displaced persons.[100] They have a right to be assured of more human rights than just Article 3 of the European Convention on Human Rights. In fact, the United Nations has adopted the Guiding Principles on Internally Displaced Persons stipulating what rights and freedoms should be guaranteed.[101] And although these Principles are not legally binding they do provide important standards for the treatment of internally displaced persons which goes beyond the prohibition on torture and inhuman or degrading treatment or punishment. It is interesting in this regard that the Human Rights Committee has explicitly stated that when applying an internal protection alternative such alternative must provide full protection for the human rights of the individual.[102]

Under the Convention against Torture little guidance is given on the substantive requirements for applying an internal protection alternative, most likely because the

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96 The accessibility of the suggested internal protection alternative was discussed in: ECtHR, *Thampibillai v Netherlands*, 17 February 2004, Appl. No. 61350/00, para. 67 and ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, paras 141 and 143.

97 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, paras. 141 and 143.

98 Ibid., para. 140. See also ECtHR, *Jeltsujeva v Netherlands*, 1 June 2006, Appl. No. 39858/04 ((in)admissibility decision).

99 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 141.

100 See also ECtHR, *Jeltsujeva v Netherlands*, 1 June 2006, Appl. No. 39858/04 ((in)admissibility decision).

101 Guiding Principles on Internal Displacement, UN doc. E/CN.4/1998/53/Add.2, 11 February 1998.

102 HRC, Concluding Observations on Norway, 25 April 2006, UN doc. CCPR/C/NOR/CO/5, para. 11.

Committee against Torture has only been confronted with the issue of an internal protection alternative in a limited number of cases. The alternative must provide safety from torture. Like the ECtHR the Committee against Torture restricts itself to the standards entailed in the prohibition on refoulement. Accessibility has not been a particular issue for the Committee. It seems that the Committee does not require the alternative area to be clearly accessible. In one case the Committee relied on the UNHCR's voluntary repatriation programme. It was unclear whether or not the individual would actually be accepted into the programme, whether or not repatriation would actually be possible and, if possible, what the legal status of the individual would be.[103]

6.3.2.4b Diplomatic assurances to guarantee safety

More often States which want to remove aliens from their territory are requesting diplomatic assurances from the country to which the alien is to be removed in order to have his safety guaranteed. The practice of diplomatic assurances has long been common in extradition cases and is now used more and more in asylum cases.

In the context of the prohibition on refoulement the aim of diplomatic assurances is to reduce the risk of subjection to harm to a negligible level. The legitimacy of such assurances depends on their ability to reduce the risk to such a level and effectively guarantee the person's safety. In order for the assurances to do so, they must be unequivocal, leaving absolutely no doubt that no torture or other forms of proscribed ill-treatment or harm will occur, and an effective monitoring system should be implemented after a person is returned. Furthermore, Battjes has argued that diplomatic assurances are meaningful only when they provide more guarantees than already implied by existing international legal obligations of the receiving State.[104]

The use of diplomatic assurances is not explicitly ruled out under one of the four treaties investigated, though arguably it is difficult to use diplomatic assurances in the context of the Refugee Convention. They are difficult to reconcile with the refugee's fear of being persecuted and his subsequent unwillingness to avail himself of the protection of his country of origin. Furthermore, instead of negating the risk, requesting assurances by identifying the individual concerned to his country of origin may increase it. It certainly raises issues of privacy and confidentiality. The UNHCR has stated that diplomatic assurances should not be used in situations involving refugees whose right to be protected from refoulement in accordance with Article 33(1) Refugee Convention has – formally – been recognised.[105] Equally, in my view, diplomatic assurances should not be used in cases of refugees who have not been formally recognised as there is no difference between formally recognised and non-formally recognised refugees. The declaratory character of the refugee definition requires States to protect unrecognised refugees and refugee claimants from refoule-

103 ComAT, *H.M.H.I. v Australia*, 1 May 2002, no. 177/2001, para. 6.6.

104 See Battjes' comment on CAT, *Agiza v Sweden,* 24 May 2005, no. 233/2003, in *Rechtspraak Vreemdelingenrecht* 2005, No. 5, p. 66 (para. 5).

105 UNHCR 2006, p. 13 (para. 30).

ment as if they were refugees. Only when the exceptions to such protection under Article 33(2) Refugee Convention are invoked can assurances to guarantee the refugee's safety be applied. In fact, the UNHCR states that in such situations States are obliged to use diplomatic assurances in order to remove any risk of being subjected to torture or other forms of proscribed ill-treatment in accordance with Article 3 CAT, Article 7 ICCPR and Article 3 ECHR. The interpretation and application of the concept of diplomatic assurances being developed under international human rights law will be decisive for the removal of refugees and the application of Article 33(2) when they still have a risk of being subjected to torture, inhuman or degrading treatment or punishment upon return.

It is generally accepted that diplomatic assurances can be an effective tool for preventing subjection to serious harm in extradition cases. In particular in cases involving the death penalty diplomatic assurances are easily accepted when they reduce the risk of imposition of the death penalty to a negligible level. This would largely depend on who would provide the assurances and whether or not that person had the authority to prevent the death penalty being sought, imposed or executed.

A different approach is seen in asylum cases. The Human Rights Committee and the Committee against Torture are reluctant to accept diplomatic assurances in asylum cases. Both Committees are clear that a State should not rely on assurances coming from States which systematically violate the Conventions' provisions; that assurances should be used only after a thorough examination of the merits of each individual case and that clear procedures for obtaining and relying on assurances must be established and implemented, including measures of effective post-return monitoring and adequate judicial review mechanisms. The ECtHR has formulated less clear criteria for allowing the use of diplomatic assurances. The Court is reluctant to accept them when the assurances are given by a State in which endemic practices of torture occur and the Government lacks effective control, or when the assurances are too general, referring only to a State's international legal obligations stemming from human rights treaties.[106] Worrying is that the ECtHR has so far said nothing about post-return monitoring and judicial review mechanisms.

Clearly, it is with great caution that States should rely on diplomatic assurances in cases involving a risk of being subjected to harm as prohibited by the various prohibitions on refoulement. The harm from which a person is protected will often be irreparable. The State must be almost certain that no harm will occur; the risk must be reduced to a negligible level. The irony of diplomatic assurances, as stated by the Commissioner for Human Rights of the Council of Europe, 'lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment'.[107] Assurances given in the context of extradition, in particular

106 ECtHR, *Chahal v United Kingdom,* 15 November 1996, Appl. No. 22414/93; ECtHR (Grand Chamber), *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06.

107 Report by Mr. Alvaro Gil-Robes, Commissoner for Human Rights, on his visit to Sweden (21-23 April 2004), Comm DH (2004) 13. para. 19, quoted from the report of the UN Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment

where the death penalty is concerned, have legally binding status. They can be provided by a competent authority which has the actual power not to impose the death penalty. The risk of proscribed ill-treatment can therefore effectively be reduced to a negligible level. Even though with regard to, for example, the United States that may be questionable, given the US practice of rendition. Assurances given outside the context of extradition, in the context of a person seeking asylum protection, are much more difficult, if not impossible, to value. Such assurances do not have a clear legal status and there is often no clear authority which has the actual power to prevent proscribed ill-treatment.[108] Such assurances are based on good faith rather than on law. Relying on good faith in this context is worrying. A State may not be capable of controlling its agents and therefore guaranteeing that a risk of proscribed ill-treatment is reduced to a negligible level. Furthermore, the countries which have to provide such assurances are often countries with a poor human rights record or where systematic practices of torture or other grave human rights violations occur. To rely then on diplomatic assurances based on formal legal obligations is to have too much faith and, as the Commissioner for Human Rights of the Council of Europe has said, is ironic. To rely on diplomatic assurances requires an affirmative asnwer to the following six questions:

1. Can the State which provides the assurances be trusted?
2. Is the State which provides the assurances capable of effectively guaranteeing the person's safety?
3. Are the given assurances aimed at guaranteeing the person's safety?
4. Are the assurances sufficient to guarantee safety?
5. Is it possible effectively to conduct post-return monitoring of the implementation of the assurances?
6. Is redress possible in the event of non-compliance with the assurances?

The United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment is of the opinion that requesting and obtaining assurances as a precondition for the transfer of people should be ruled out altogether.[109] Although the Special Rapporteur had previously appealed to all States to ensure that the receiving State had provided an unequivocal guarantee to the

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or punishment to the United Nations General Assembly, 23 August 2004, UN doc. A/59/324, para. 31, and repeated by Nowak in his report as Special Rapporteur on the question of torture in 2005, 23 December 2005, E/CN.4/2006/6, para. 31 (b).

108 According to Nowak, the United Nations Special Rapporteur on the question of torture stated that 'Diplomatic assurances are not legally binding. It is therefore unclear why States that violate binding obligations under treaty and customary law should comply with non-binding assurances': Report of the Special Rapporteur on the question of torture, 23 December 2005, E/CN.4/2006/6, para. 31 (d).

109 Report of the UN Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment to the United Nations General Assembly, 23 August 2004, UN doc. A/59/324, para. 30 (van Boven), and 30 August 2005, UN doc. A/60/316, para. 46 (Nowak), and para. 32 of the Report of the United Nations Special Rapporteur on the question of torture, Manfred Nowak, E/CN.4/2006/6, 'diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and refoulement'.

extraditing authorities that the people concerned would not be subjected to torture or any other form of ill-treatment, and that a system to monitor the treatment of such persons had been put in place to ensure that they were treated with full respect for their human dignity, the Special Rapporteur has come across a number of instances where there were strong indications that diplomatic assurances were not respected.[110]

In my view, the problem with diplomatic assurances is that, even if a State were able to obtain unequivocal guarantees regarding a person's treatment, that State would have difficulty in closely monitoring the fate of the returned person and take action if the person is ill-treated. When a State relies on safety guarantees for its assessment of a risk, it has an obligation to monitor compliance with the guarantees. Protection from refoulement would otherwise be meaningless as States could then easily evade their responsibility by removing the individual after they had received guarantees on paper regarding the person's safety. Monitoring will be even more difficult in asylum cases, in particular when the country of return has a record of torture and inhuman treatment.[111] Unlike in extradition cases, in asylum cases safety guarantees will not be given in a formal legal context.[112] In my opinion, in cases involving asylum seekers claiming protection from refoulement, requesting diplomatic assurances would be a violation of the prohibition on refoulement as it would identify the asylum seeker with the authorities of the country of return, it would draw the attention of these authorities to the asylum seeker's claim and it might increase the risk of the asylum seeker to be ill-treated upon return.[113] In the context of asylum the use of diplomatic assurances would by-pass the individual. The individual has no role to play in requesting, assessing and accepting or refusing assurances. Consequently, the enhanced standing of individuals in public international law and human rights law in particular comes under threat.[114] Diplomatic assurances to guarantee a person's safety may be allowed only in cases involving two States with opposing but equally legitimate legal systems and where a clear guarantee can be asked for and provided, for example in extradition cases concerning the death penalty.

110 Report of the UN Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment to the United Nations General Assembly, 23 August 2004, UN doc. A/59/324, paras. 30 and 31; Report of the UN Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment to the United Nations General Assembly, 3 July 2003, UN doc. A/58/120, para. 15.

111 Kapferer 2003, p. 494 (para. 135).

112 In extradition cases requesting and obtaining safety guarantees will often be required: see, for example, Council of Europe, Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies, December 2002, para. XIII (2); Kapferer 2003, p. 44 (para. 121).

113 See also Bruin & Wouters 2003, p. 26.

114 Schimmel 2007, p. 28.

6.3.3 Absolute protection or exceptions

The prohibitions on refoulement contained in Article 3 ECHR, Article 3 CAT and Article 7 ICCPR provide absolute protection. This means, (1) there are no exceptions allowed for such reasons as the past criminal conduct of the person concerned, or the public order, health, morals or national security of the State concerned, and (2) there is no derogation possible in times of war or other public emergencies threatening the life of the nation. Consequently, not only may an individual never, for whatever reason, be subjected to proscribed ill-treatment, he may also not be removed to a country where he faces such a risk, even if he poses a threat to the security or community of the country which provides him with protection. The ECtHR has made it very clear that no disctinction can be made between treatment inflicted directly by a State party and treatment that may be inflicted by or in another State upon the expulsion of an alien; and that in the latter (refoulement) context protection against proscribed ill-treatment should not be weighed against the interest of the State or its community.[115] Also, the Human Rights Committee and the Committee against Torture have made clear that considerations of national security cannot be weighed against the individual right to be protected from refoulement.[116]

Article 33 Refugee Convention is not absolute. In its second paragraph protection from refoulement is limited on two grounds: first, because the refugee poses a threat to the security of the asylum country, and, secondly, because the refugee has been convicted by final judgment of a particularly serious crime and constitutes a danger to the community of that country. In addition, refugee status and, consequently, protection from refoulement is not provided when (1) the person concerned receives assistance from UNWRA (Article 1D Refugee Convention), (2) the person concerned is a so-called 'con-national', i.e. he has rights and obligations which are attached to the possession of the nationality of the country in which he has taken residence, although not formally possessing nationality or citizenship (Article 1E Refugee Convention), and (3) there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to provide for such crimes, (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee, or (c) he has been guilty of acts contrary to the purposes and principles of the United Nations. In particular this last exception, formulated in Article 1F Refugee Convention, shows the normative character of the Refugee Convention: i.e. if one does not deserve refugee protection one should not obtain it. Such a consideration is not part of the other prohibitions on refoulement.

The absolute character of Articles 3 ECHR, 3 CAT and 7 ICCPR may have important consequences for refugees. A refugee who may be removed in accordance with Article 33(2) Refugee Convention remains a refugee. Thus, he may have a real

115 ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, para. 138.

116 HRC, *Ahani v Canada*, 15 June 2004, no. 1051/2002, para. 10.10. ComAT, *Dadar v Canada*, 5 December 2005, no. 258/2004, para. 4.4 and 8.8.

risk of being subjected to torture or other forms of proscribed ill-treatment. While he may be removed in accordance with Article 33(2), he may not be removed in accordance with other prohibitions on refoulement.[117] As a consequence the refugee remains entitled to the benefits of the Refugee Convention at large, in particular those provisions which do not require lawful presence or residence. Moreover, the applicability of Article 33(2) Refugee Convention becomes questionable. If a refugee cannot be removed on the basis of other – absolute – prohibitions on refoulement applying Article 33(2) Refugee Convention will no longer be proportionate to its aim of alleviating or negating the danger to the country of refuge.[118]

There is a growing awareness among the supervisory bodies of the ECHR, CAT and ICCPR that the absolute character of the prohibitions on refoulement contained in these treaties raises serious issues regarding criminals trying to evade justice and issues of drug trafficking and terrorism. And although the various prohibitions on refoulement do not allow criminals, drug traffickers or 'terrorists' to be deported if faced with a certain risk, the respective supervisory bodies have ackowledged the need to find ways to hold them criminally accountable for their actions. Where States on the one hand have an obligation to uphold the absolute character of refoulement protection, they may on the other hand have a responsibility to take all necessary steps, both legal and practical, to hold suspected criminals, or 'terrorists', accountable for their actions.[119]

6.4 The character and content of States' obligations deriving from the prohibitions on refoulement

When it is determined that a State is responsible for guaranteeing an individual's right to be protected from refoulement the next question is: what obligations does a State then have? In general, prohibitions on refoulement refer to any conduct whereby the individual concerned is exposed to a risk of being subjected to a certain proscribed harm. The basic premise of the prohibition on refoulement is that the alien finds himself in the safety of a State as a result of which the State is responsible for guaranteeing protection from refoulement. The specific obligations which derive from this responsibility depend on the concrete circumstances, and it is essential that the obligations are functional to the individual right to be protected from refoulement. In other words, the obligations must result in effective protection and may involve single or multiple duties. A State may have to act or refrain from acting when, as a result of that action or omission, the individual is directly exposed to a risk of the harm from which a person is protected. Thus, a State may have both negative and positive obligations to ensure effective protection. Negative obligations include such obligations

117 ComAT, *Paez v Sweden,* 28 April 1997, no. 39/1996, paras. 14.4 and 14.5; ComAT, *M.B.B. v Sweden,* 21 June 1999, no. 104/1998, para. 6.4. See also UNHCR 2007-2, para. 11.

118 See section 2.3.3.1.

119 Bruin & Wouters 2003, p. 29.

as not to expel, deport, return, extradite or in any other way, either directly or indirectly through a third country, forcibly remove a person to a country where he is at risk of being subjected to serious harm. Positive obligations include such obligations as allowing the individual to enter and remain in the State's territory, allowing access to a procedure determining the right to and need for protection, legalising the individual's presence, and granting substantive rights. This basic premise applies to all four treaties investigated.

6.4.1 Negative obligations

6.4.1.1 Prohibition on removal

The primary responsibility for protecting a person from refoulement implies an obligation not to expel, deport, return, extradite or in any other way forcibly remove a person to a country or territory where he will be unsafe, i.e. where he will face a risk of being subjected to serious harm. The legal setting in which removal takes place is irrelevant. Also, practices of rendition or extraordinary rendition may be in violation of the prohibition on refoulement.[120] Finally, it may even include a prohibition on such measures as withholding food, water and other essentials, whereby people are indirectly forced to leave. However, no international jurisprudence exists in this regard.

An important element of the prohibition on removal is the issue of where the person is prohibited to go. Article 33(1) Refugee Convention refers to the frontiers of territories. Article 3 CAT refers to another State. The European Court of Human Rights has been silent on the issue of the legal status of the territory to which removal is prohibited and has only dealt with the removal to States. Finally, the Human Rights Committee has used a variety of terms, including State, country, place, location and jurisdiction. With the exception of under Article 3 CAT the legal status of the area to which the person is removed does not appear to be relevant. Only under CAT is it required that removal take place to an area which is under the sovereign control of a State.

6.4.1.2 Prohibition on extradition

Extradition is explicitly prohibited under Article 3 CAT. The term is not mentioned in Article 33(1) Refugee Convention but is covered by that Article. Also, extradition may be prohibited under Article 3 ECHR and Article 7 ICCPR when there are sub-

120 Nowak & McArthur 2008, p. 196. Council of Europe, European Commission for Democracy Through Law (Venice Commission), Extraordinary renditions: a European Perspective, 11 October 2006, Opinion 363/2005, CDL(2006)077. Ordinary rendition is usually used for the forcible abduction and removal of a suspect, by military or intelligence agents, from the territory of another State for the purpose of bringing him to justice. Extraordinary rendition may be defined as the transfer of an individual suspected of involvement in terrorism, captured and in the custody of American officials, who is sent to another country often for interrogation and sometimes to face torture.

stantial grounds for believing that there is a risk of being subjected to proscribed ill-treatment or other harm. The prohibition on extradition under prohibitions on refoulement may result in a conflict of treaty obligations if extradition is mandatory under extradition treaties. Such a conflict will not exist when there is a risk of subjection to torture because of the *jus cogens* character of the prohibition on torture.[121] Where there is a risk of other forms of proscribed ill-treatment or persecution it is, from an international legal point of view, not automatical that the prohibition on refoulement prevails. There is no hierarchy of treaties. As said in section 1.3.2.6 it goes beyond the scope of this study to investigate the issue of conflict of treaty obligations. From the perspective of the prohibition on refoulement and the international legal interpretation provided by the various supervisory bodies used in this study the prohibition prevails.

The issue can however be relevant, in particular in the current struggle against terrorism. To resolve a potential conflict States may rely on specific conflict clauses that allow either the prohibition on refoulement or the extradition obligation to prevail. Furthermore, States may rely on diplomatic assurances as a legitimate tool provided under extradition treaties to guarantee that an extradited criminal will not be subjected to proscribed ill-treatment.

6.4.1.3 Prohibition on indirect refoulement

The prohibitions on refoulement investigated also prohibit removal to a third country, where no risk exists, but where there is a chance of the individual being removed from that third country to his country of origin, where he does face a risk of subjection to harm. This is generally referred to as the prohibition on indirect refoulement.

A situation of indirect refoulement involves two distinctive elements of risk: first, the risk of being subjected to proscribed harm in the country of origin, and, secondly, the risk of being removed by the third country to the country of origin. The Convention against Torture requires a full assessment of both risks. First, it must be assessed whether there are substantial grounds for believing that a real risk of subjection to torture exists in the country of origin. If so, according to the Committee against Torture, the individual may not be removed if he is not entirely protected from deportation by the third country to his country of origin. In other words, the Committee requires a high level of certainty that the individual is not subsequently removed to his country of origin. This is different under the ECHR. The real risk of subjection to proscribed ill-treatment in the country of origin is only marginally assessed, in terms of arguability of the claim. The focus is on the risk of being removed by the third country to the country of origin, but a high level of certainty that subsequent removal will not take place is not required. Under the ECHR a minimal form of protection provided for in law and which the individual can claim will suffice, certainly with regard to States which are party to the European Convention. In situations of indirect

121 See section 1.3.2.5 regarding extradition and a conflict of treaty obligations.

refoulement involving States parties to the ECHR the Court appears to attach significant weight to the fact that the third country is a State party to the ECHR. In three recent cases (2008) the Court rejected requests for interim measures involving removal to Greece as the individuals' first country of asylum, stating that no imminent risk of irreparable damage existed.[122]

6.4.1.3a Safe third countries

The prohibition on refoulement does not preclude removal to a third country which is safe. Safety is however not an automatic presumption. At a minimum, safety implies an effective form of protection, even temporary, which is provided for in law, and to which the individual can make a claim. As mentioned above with regard to the ECHR this may include a claim for protection under Article 3 ECHR before the European Court of Human Rights.

The Refugee Convention seems to go further. Not only should removal to the country of origin be ruled out, but the third country must also guarantee at least the same level of Convention rights as would have been guaranteed by the original host State. A similar argument cannot be made for the other treaties investigated.

6.4.1.4 Prohibition of rejection at the frontier and beyond

The prohibition on refoulement proscribes a State from acting when as a result of that acting the individual is directly exposed to a risk of the harm from which he has a right to be protected. A State is proscribed from doing so as regards individuals who are within its territory and individuals who are outside its territory but under the State's actual control, as outlined in section 6.2.2. This includes a responsibility to individuals who are at the State's border, de facto or de jure, although when the individual is at a State's de jure border, for example, in the international zone at the State's airport, he will already be within the State's territory. All the treaties investigated prohibit rejection at the frontier if as a consequence the individual is forced to return to an area of risk. As a result of the prohibition of rejection the State will have to refrain from closing its border and taking measures which prevent the individual from entering the State. In addition, the State may have positive obligations, such as to allow the individual to enter and to provide access to a procedure. Positive obligations will be further discussed in section 6.4.2.

It remains unclear to what extent States have obligations outside the actual border context. For example, when the individual is further removed from the border but is under the State's actual control, or when the State initiates measures that are in general aimed at preventing individuals from coming to its borders and entering its territory. This latter example has been discussed in the context of the Refugee Convention. In a strict legal sense States therefore have the right to impose measures, such as visa requirements or carrier sanctions in the case of transporting illegal migrants,

122 In a fourth case, also involving removal to Greece, the Court granted a request for an interim measure, see section 3.4.1.3.

which may seriously restrict a person's ability to leave his own country even though he may have a risk of being subjected to proscribed harm. However, the potential discriminatory enforcement, and the arguable incompatibility with the object and purpose of the Refugee Convention whereby people who may clearly be in need of protection are prevented from seeking protection, make the implementation of such measures highly questionable. In this respect the UNHCR has called upon States to balance such measures by adequate means of identifying genuine cases of refugees. It is important to note that the Refugee Convention does not apply if a person is still within his country of origin. To resolve this problem other prohibitions on refoulement play an important role because States do have an obligation to protect people under these prohibitions even when they are still in their country of origin. Thus, under Article 3 ECHR, Article 3 CAT and Article 7 ICCPR States may not impose measures which would effectively undermine people's ability to leave their own country and seek international protection. It has also been suggested that the right to leave any country including one's own, as provided for in Article 12(2) ICCPR, may provide a solution for people who are prevented from leaving and seeking protection elsewhere. While that right may certainly be invoked it does not resolve the problem of potential host States preventing people from seeking asylum; it merely regulates the duty of the country of origin to allow people to leave. Wanting to seek protection from persecution or other serious harm may certainly be a good enough reason to leave which may not be impeded by the country of origin. The Human Rights Committee has referred to Article 12 ICCPR in response to countries of origin adopting exit visa requirements for their nationals as a general rule.[123]

States are responsible for ensuring protection from refoulement for individuals who are under the State's actual control. These includes individuals who are seeking protection at a State's embassy or with its military forces. The State will be prohibited from handing the individual over to the authorities of the country where he will not be safe. A notable exception is the Refugee Convention with regard to people seeking such protection within their country of origin.[124] Furthermore, States are responsible for ensuring protection from refoulement for individuals who are at sea and have come under the actual control of a potential host State, for example, because a State's vessel has boarded the individual's boat or controls its course. In such situations a State may not renounce its responsibility to provide protection from refoulement. Such responsibility will then most likely include positive obligations, for example to allow the individuals to disembark and to assess their claim for protection. The issue of obligations for refugees at sea has had particular attention in the context of the Refugee Convention; see section 2.4.2.1a.

123 HRC, Concluding Observations on Uzbekistan, 26 April 2005, UN doc. CCPR/CO/83/UZB, para. 19; HRC, Concluding Observations on Syrian Arab Republic, 24 April 2001, UN doc. CCPR/CO/71/SYR, para. 21, in which the Committee does state that States may adopt an exit visa requirement in individual cases that are justified under the Covenant.

124 Section 6.2.2.

6.4.2 Positive obligations

6.4.2.1 Obligation to admit (a right to asylum, enter and remain)

In general, States have a sovereign right to control the entry, residence and expulsion of aliens. Be that as it may, all the prohibitions on refoulement investigated in this book limit this sovereign right. And while none of the prohibitions investigated create an obligation on a State to provide aliens with a residence permit of some type or form, they all create a protected status for the individual. Such status may not necessarily be legal, but it is at least a de facto status allowing the person concerned to remain in the protective care of the host State or admitted to the territory of the host State, and thus creating certain positive obligations for that State. The Committee against Torture has acknowledged that a State has a responsibility to find a solution, either legal or political, for persons whose removal would be in breach of Article 3 CAT.

Arguably, as soon as it is functional to effective protection from refoulement States have an obligation to allow the person concerned to enter and remain in their territory. No such positive obligation exists when protection can be found elsewhere, for example because of the existence of a safe third country, or because effective protection can be provided outside the host State's territory. Caution should be observed here, certainly under the Refugee Convention. The prohibition on refoulement contained in Article 33 is not a stand-alone provision, but must be read together with the other provisions of the treaty. As such, both third country and extra-territorial protection may only secure a minimum set of rights provided to refugees. They will certainly be deprived of rights guaranteed to refugees who have a presence in the territory of the host State. While in a strict legal sense this is not a problem, one may question the fairness of distinguishing between refugees who are present within the host country and those who are not while both are under the protective care of the same authority. Furthermore, one may question whether or not such an approach is in accordance with the systematics and the object and purpose of the Refugee Convention. The Convention provides refugees with declaratory refugee status and the possibility of obtaining a range of substantive rights, provided the declaratory refugee status is transposed into a legal status. And while this transposition remains the sovereign right of States, the Refugee Convention does create a long term responsibility for them towards refugees who are their responsibility and who will remain so as long as the refugees continue to have a well-founded fear of being persecuted. In the long run, States have a responsibility to provide them with a lasting solution. When voluntary repatriation or resettlement in a third country is not possible the country of asylum will eventually be obliged to promote local integration. In fact, Article 34 Refugee Convention obliges States parties to facilitate, as far as possible, the assimilation and naturalisation of refugees. Refugees may not indefinitely be kept illegal. In that sense the Refugee Convention entails an implicit obligation at some point to legalise the declaratory status of refugees. The existence of this implicit obligation is acknowledged within the European Union with the adoption of the Qualification Directive obliging

EU Member States to provide refugees with a residence permit. Similarly, the Human Rights Committee has stated that in the long run States may be obliged to promote the integration of aliens, in particular refugees.

Under Article 3 ECHR there is no obligation on States to regulate the alien's presence in terms of providing him with a residence permit. The systematics and object and purpose of the ECHR do not generate a long term responsibility on States to provide aliens who are in their protective care with a lasting solution. There are three important remarks to be made in this regard. First, the absence of any form of regularisation of the alien may, over time, lead to unbearable or degrading situations. Secondly, under Article 1 ECHR a State is obliged to ensure the rights and freedoms of the Convention to those who are within its jurisdiction, including aliens, unless the application of rights is lawfully restricted for aliens. A similar obligation exists under Article 2(1) ICCPR. Thirdly, the ECtHR has not ruled out the possibility that there may be an obligation to regularise under Article 8 ECHR, emphasising though that Article 8 cannot be construed as guaranteeing, as such, the right to a particular type of residence permit.[125]

6.4.2.2 Obligations after removal

If a person is removed in breach of a prohibition on refoulement the State which removed him may continue to have obligations. Not having any responsibility would de facto nullify effective protection from refoulement, because States could then easily evade their responsibility simply by removing all individuals seeking protection from refoulement. As a minimum the responsibility includes the acknowledgement that they have breached the prohibition on refoulement. Whether more obligations exist is different for each of the treaties, albeit that no rules have been formulated under the Refugee Convention. Under the ECHR it is unclear what further obligations exist. A State may have the obligation to monitor the safety of the removed person where it has sent him to an internal protection alternative. Furthermore, according to Article 41 it is the Court, and not the State, which shall, if necessary, afford just satisfaction to the injured party if it finds that there has been a violation of the Convention and if the internal law of the State allows only partial reparation. Thus, in general, the ECHR provides for a possibility of obtaining reparation, either from the State or from the Court. So far, Article 41 has not been applied in refoulement cases, nor has the issue of reparation been discussed in a refoulement case. It is worth mentioning that in *Vilvarajah and Others v United Kingdom* (1991) the British Adjudicator considered that the applicants were, at the time of their removal, at risk of being subjected to proscribed ill-treatment. He concluded that following their removal they should be returned to the United Kingdom with the minimum of delay.[126] The Committee

125 ECtHR, *Sisojeva and Others v Latvia*, 15 January 2007, Appl. No. 60654/00 (Grand Chamber), para. 91.

126 ECtHR, *Vilvarajah and Others v United Kingdom*, 8 May 1990, Appl. Nos. 13163/87, 13164/87, 13165/87, 1244/87 and 13448/87, para. 71.

against Torture goes a step further. In cases in which the removal was in breach of Article 3 CAT the Committee has requested information from the State on measures taken in response to the breach.[127] In two cases the Committee even requested information regarding compensation as well as the whereabouts of the person and his state of well-being.[128] It is the Human Rights Committee, though, which has gone furthest. In accordance with Article 2(1) ICCPR a State is required to provide an effective remedy, including compensation. In one case the Committee requested the State to make such representations as might still be possible to avoid subjection to harm. It must be noted that was in an extradition case concerning the imposition of the death penalty.[129] In another case the Human Rights Committee stated that the State was under an obligation to make reparation and to take such steps as might be appropriate to ensure that the person was not, in the future, subjected to torture as a result of the events surrounding his presence in, and removal from, the State party.[130]

6.4.2.3 Obligations to install procedural safeguards

Ensuring effective protection from refoulement includes the obligation on States to assess the right to be protected from refoulement and to enact sufficient procedural safeguards which allow for an adequate initial 'protection' determination procedure as well as an effective appeal procedure.

6.4.2.3a The initial determination procedure

Although none of the treaties investigated contain explicit provisions regarding the initial determination procedure a number of important guidelines can be deduced from the views of the various supervisory bodies. In the initial procedure it must be determined whether or not the person concerned has a right to be protected from refoulement, or, in terms of the Refugee Convention, is in need of refugee protection. Such a determination involves the combined effort of both individual and State and must be organised in such a way that a thorough assessment is possible. Thus, it is important to allow flexibility and sufficient time to gather, present and evaluate relevant information. For example, it is important for States to take into account the vulnerable position in which individuals in need of protection often find themselves. Also, if a State is confronted with a large influx of aliens it is fair to allow the State some time to assess all claims. Although in general there is no fixed time by which a decision on a claim must have been made, the EU Procedures Directive provides a guideline of six months

127 In both cases the Committee's request for information on the steps taken in response to the Committee's decision is based on Rule 112, para. 5, of the Committee's Rules of Procedure (Rules of Procedure of the Committee against Torture, 9 August 2002, UN doc. CAT/C/3/Rev.4). ComAT, *Arana v France*, 5 June 2000, no. 63/1997, para. 13; ComAT, *Pelit v Azerbaijan*, 29 May 2007, no. 281/2005, para. 13.

128 ComAT, *Brada v France*, 24 May 2005, no. 195/2002, para. 15; ComAT, *Tebourski v France*, 11 May 2007, no. 300/2006, para. 10.

129 HRC, *Chitat Ng v Canada,* 7 January 1994, no. 469/1991, para. 18.

130 HRC, *Ahani v Canada,* 15 June 2004, no. 1051/2002, para. 12.

for making the initial decision.[131] The Human Rights Committee has expressed concerns about procedures taking more than two years, before even formal initiation.[132] The fundamental and humanitarian character of the prohibition on refoulement and the often irreparable consequences of a failure to protect a person from refoulement require States to conduct an individual and rigorous scrutiny of a claim for protection. The procedure should be transparent, impartial and not adversarial.

In principle, all those claiming to have a right to be protected from refoulement must have access to such a procedure, irrespective of how they have arrived or why the State is responsible for them. Lack of proper documentation, such as a visa, passport or identity card, or the fact that a person comes from a country regarded as safe cannot lead to a denial of access to a procedure. Since none of the treaties investigated contain specific provisions in this regard States have a certain freedom as to how to organise such procedure. Nevertheless, the initial assessments of claims for protection must be conducted by clearly identified, well-informed and qualified persons and is best done through a special procedure, outside the framework of general procedures for the admission of aliens. The determination procedure should be clearly anchored in national legislation. A specific place may be designated for the conduct of such procedure. The individual should be given the necessary information and facilities, including the services of a competent interpreter, be allowed a personal interview, and have access to legal aid and representation. His right to the confidentiality of his claim should be guaranteed. The individual should be given sufficient time to gather evidence and prepare his claim, as should the State have sufficient time to assess the claim. Furthermore, the individual must be allowed to await the outcome of his claim for protection. Under the European Convention the European Court has formulated some criteria with regard to the time frame for submitting a claim and has made it clear that no automatic and mechanical short time-limit of five days may be applied.[133]

Special procedures may be enacted for claims involving specific issues, such as claims where the individual has already found effective protection elsewhere, i.e. claims involving a first country of asylum, or those involving a safe third country. Such claims may be assessed in accelerated procedures. Such procedures still require an individual and thorough assessment, including representation, the services of an interpreter and an interview. The issue of safe third countries or first countries of asylum may not lead to the automatic denial of the claim. Also, accelerated procedures may be used for claims which are likely to be fraudulent or without any foundation. Even in such cases a proper assessment should be made, which gives the individual the opportunity to present his claim. The Committee against Torture has expressed concerns about the difficulties faced by asylum-seekers in substantiating their claims under the accelerated procedure, in particular regarding a 48-hour timeframe, the time

131 Article 23(2) of the EU Procedures Directive.

132 HRC, Concluding Observations on Russian Federation, 6 November 2003, UN doc. CCPR/CO/79/RUS, para. 25.

133 ECtHR, *Jabari v Turkey,* 11 July 2000, Appl. No. 40035/98, para. 40.

of only five hours provided for legal assistance between the issue of the report of the first interview and the decision on the claim, and the fact that the asylum-seeker may not be assisted by the same lawyer throughout the proceedings.[134] Similar concerns have been raised by the Human Rights Committee.[135]

Special consideration should be given to female asylum seekers and children. Female asylum seekers should be given the opportunity to make a claim independently of their husbands; they should be allowed an interview by a female official and care should be taken regarding their past experiences of, in particular, sexual abuse. Children should be designated a guardian and the best interest of the child should be ensured.

All investigated treaties have similar requirements for an adequate initial procedure to guarantee effective protection from refoulement. In fact, for reasons of efficiency, cost- and labour management, and most importantly for reasons of guaranteeing effective protection from refoulement it is essential that States adopt a single procedure for determining the need for refugee protection and other forms of protection from refoulement.

6.4.2.3b Appeal procedures

When after the initial determination procedure it is concluded that the individual has no right to be protected from refoulement under one of the prohibitions on refoulement he must have a right to appeal the decision. The right to an effective remedy is contained in Article 13 ECHR and in Article 2(3) ICCPR. In addition, the right to have a negative decision reviewed may be governed, to some extent, by various provisions on the expulsion of lawful aliens, such as Article 32 Refugee Convention, Article 13 ICCPR, and Article 1 of Protocol 7 to the ECHR. Furthermore, due process rights contained in Article 16 Refugee Convention, Article 14 ICCPR or Article 6(1) ECHR may also be relevant. Finally, the various prohibitions on refoulement themselves provide procedural safeguards regarding the review of a negative decision.

A right to an effective remedy is most clearly formulated in the ECHR and ICCPR. In particular under the ECHR the Court has developed extensive case law on this matter. The prohibitions on refoulement contained in the ECHR and ICCPR, together with the general obligation on States to provide an effective remedy, provide for a right to have a review or appeal of a negative decision which is available in law and practice, is accessible for the individual, allows a competent national authority to deal with the substance of the claim, and has the authority to grant appropriate relief. According to the Human Rights Committee a decision on appeal must be binding.[136] And according to the European Court remedies which have virtually no prospect of

134 ComAT, Concluding Observations on the Netherlands, 3 August 2007. UN doc. CAT/C/NET/CO/4, para. 7 (a), and (b).

135 HRC, Concluding Observations on Latvia, 6 November 2003, UN doc. CCPR/CO/79/LVA, para. 9.

136 Boeles 1997, p. 109.

success in a particular case are deemed ineffective.[137] The right to an effective remedy exists when the individual has an arguable claim. The arguability of the claim has been extensively discussed by the European Court. In essence a claim is arguable if it is supported by demonstrable facts and not manifestly lacking grounds in law.[138] An effective remedy must provide the opportunity of obtaining the independent and rigorous scrutiny of a claim in a second tier. It must allow the appeal authority to conduct a second full review of both facts and law based on up-to-date information. This has been most clearly developed under the ECHR.[139] Thus, on appeal it must be allowed to present new information. Primacy is given to a remedy by a competent and independent judicial authority, but it is not ruled out that administrative authorities may be equally competent.[140] Also, it is not necessary for the remedy to be provided by a single authority, but may come from an aggregate of bodies. The appeal procedure must include sufficient procedural safeguards, including sufficient time to lodge the appeal.[141] The individual should have access to legal aid and representation. The Human Rights Committee and the Committee against Torture are clear that the individual should be allowed to await the outcome of the decision on appeal.[142] It is unclear whether this means that the appeal procedure must have automatic suspensive effect. Under the ECHR the appeal system as whole must allow for suspensive effect.[143] According to the European Court, if the ordinary appeal pro-

137 ECtHR, *Salah Sheekh v Netherlands*, 11 January 2007, Appl. No. 1948/04, para. 123 (see, for the Court's findings as to why an appeal would have stood virtually no prospect of success, paras. 123 and 124).

138 Boeles 1997, p. 271.

139 Section 3.4.2.3b. See also under the CAT: ComAT, Concluding Observations on Canada, 7 July 2005, CAT/C/CR/34/CAN, para. 5 (c). Interestingly, the Committee in its Concluding Observations on Canada talks of judicial review and not of judicial or administrative review: ComAT, Concluding Observations on the Netherlands, 3 August 2007, UN doc. CAT/C/NET/CO/4, para. 7 (d).

140 Article 2(3)(b) ICCPR. HRC, *Judge v Canada,* 20 October 2003, no. 829/1998, para. 10.9; ECtHR, *Golder v United Kingdom*, 21 February 1975, Appl. No. 4451/70, para. 33; ECtHR, *Klass and Others v Germany*, 6 September 1978, Appl. No. 5029/71, para. 67; ECtHR, *Leander v Sweden,* 26 March 1987, Appl. No. 9248/81, paras. 77 and 83. See also Boeles 1997, pp. 272, 273 and 277. ComAT, *Agiza v Sweden,* 20 May 2003, no. 233/2003, para. 13.8. In *Arana v France*, 5 June 2002, no. 63/1997, para. 11.5, the Committee considered that 'the deportation was effected under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police, … without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer'. See also ComAT, Concluding Observations on the Russian Federation, 6 February 2007, CAT/C/RUS/CO/4, para. 15: '[t]he State party should ensure compliance with the requirements of Article 3 of the Convention for an independent, impartial and effective administrative or judicial review of the decision to expel'.

141 HRC, Concluding Observations on France, 31 July 2008, UN doc. CCPR/C/FRA/CO/4, para. 20, in which concerns were raised by the Human Rights Committee regarding a 48-hour time limit for lodging an appeal. In *Alzery v Sweden* (2006) the complainant had no real time to appeal the decision to deport him; he was expelled only hours after the decision to expel him was taken, HRC: *Alzery v Sweden*, 10 November 2006, no. 1416/2005, para. 3.10.

142 Sections 4.4.2.3b and 5.4.2.3b.

143 Section 3.4.2.3b and a combination of ECtHR, *Gebremedhin [Gaberamadhien] v France*, 26 April 2007, Appl. No. 25389/05, para. 66 and ECtHR, *Conka v Belgium*, 5 February 2002, Appl. No. 51564/99, para. 79.

cedure does not have automatic suspensive effect it must be possible for the individual to use an urgent procedure to prevent the execution of a deportation order and await the outcome of the ordinary appeal.[144] A decision reached in an accelerated procedure or involving specific issues such as a safe third country or a first country of asylum or issues of exclusion in accordance with Article 1F Refugee Convention may have no restrictive procedural effects.

With regard to the Refugee Convention, both the Executive Committee and the UNHCR have acknowledged the right of an individual to appeal a first (negative) decision. According to the UNHCR it is essential that the appeal must be considered by an authority other than and independent of the authority which made the initial decision and that a full review is allowed.

6.4.2.3c Right of due process

As already mentioned, due process rights are contained in Article 16 Refugee Convention, Article 14 ICCPR and Article 6(1) ECHR and may be relevant for appeal procedures in the context of protection from refoulement. Article 6(1) ECHR is clearly not relevant. The European Court has made clear that Article 6(1) does not apply in cases involving decisions regarding the entry, stay and deportation of aliens,[145] thus including decisions regarding the prohibition on refoulement. Also, the Human Rights Committee has made it clear that Article 14(1) ICCPR does not apply directly. However, the Committee does allow for important notions of due process entailed in Article 14(1) to apply in refoulement cases by incorporating these notions in Article 13 ICCPR. These include such notions as the principle of impartiality, fairness and equality of arms; the right to have legal assistance; and the prohibition on imposing fees which would de facto prevent access to justice.[146] Note that Article 13 ICCPR applies only to lawfully present aliens.

Finally, Article 16 Refugee Convention is a general non-discrimination clause regarding access to courts. The Article applies to all refugees, allowing them free access to the courts of the country of asylum. It is unclear whether this means that a refugee should be allowed access to a court in cases involving a decision on his refugee status and his right to be protected from refoulement. It appears that neither EXCOM nor the UNHCR has concluded that Article 16 applies in cases involving refoulement. The right to appeal a decision regarding refoulement protection does not necessarily include a right to have access to a court. If, however, national courts have jurisdiction to deal with issues of refoulement protection, then Article 16 requires all refugees to have free access to the court, which includes legal assistance.

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144 ECtHR, *Conka v Belgium*, 5 February 2002, Appl. No. 51564/99, para. 79.

145 ECtHR, *Maaouia v France*, 5 October 2000, Appl. No. 39652/98, para. 40. Spijkerboer, in his comment on the case in '*Rechtspraak Vreemdelingenrecht 1974-2003*', no. 51, p. 341, argues that this does not necessarily imply that Article 6 of the Convention is not applicable in cases involving aliens but not relating to refoulement. See also Boeles' comment in JV 2000, no. 264, p. 1008.

146 Section 4.4.2.3d.

6.4.2.3d Procedural safeguards limited to lawfully present aliens

Article 32 Refugee Convention, Article 13 ICCPR, and Article 1 Protocol 7 ECHR provide additional procedural safeguards against the expulsion of lawful aliens. The application of these provisions is limited. It is necessary either that the alien is lawfully within the territory of a State (Article 13 ICCPR and Article 32 Refugee Convention), or that he is lawfully residing in the State (Article 1 of Protocol No. 7 to ECHR). 'Lawfully present' is interpreted by the Human Rights Committee as requiring some form of legal entitlement to be in the territory of the State, based on either national or international law. This encompasses aliens who are within the territory of a State, who have applied for protection from refoulement and whose application is still pending. A similar interpretation can be given of Article 32 Refugee Convention. Article 1 Protocol 7 ECHR is more restrictive as it requires aliens to reside lawfully in the State. First, the term 'lawfully' is interpreted restrictively by the ECtHR. According to the Council of Europe's Explanatory Report on Protocol 7 ECHR the term 'lawfully' is interpreted according to the domestic law of the State concerned and not international law.[147] Moreover, it requires aliens to reside lawfully in the territory of the State, or to have a legitimate expectation of being permitted to stay, and not merely to be lawfully present.[148] Thus, aliens who are awaiting a decision on a request for a residence permit, even if they have entered the State legally, fall outside the scope of this provision. Only aliens who have been allowed, not necessarily indefinitely, to enter and remain in the territory of the State for residential purposes are protected by Article 1 of Protocol 7 ECHR.

The procedural safeguards provided by Article 1 of Protocol 7 ECHR and Article 13 ICCPR are similar. Aliens who come within the scope of these Articles may be expelled or otherwise removed only in pursuance of a decision reached in accordance with the law. Once such a decision is made the alien must be allowed to submit reasons against his expulsion; he must be allowed to have his case reviewed; and he must have access to representation. The review authority can be administrative or judicial. Where compelling reasons of national security exist there is a difference between the ECHR and ICCPR in applying the procedural safeguards. Where compelling reasons of national security exist a person is excluded from these safeguards under Article 13 ICCPR. Under Article 1 Protocol 7 ECHR, however, he is not excluded from these safeguards but may nevertheless be expelled for reasons of national security or public interest. While it may then be difficult for the alien to invoke the procedural safeguards he still has a right to use them.

Article 32 Refugee Convention has a different approach. Where Article 13 ICCPR and Article 1 Protocol 7 ECHR allow the expulsion of lawfully present or residing aliens, Article 32 does not allow the expulsion of lawfully present refugees, except for reasons of national security or public order. If such grounds exist the decision to expel the refugee must be reached in accordance with due process of law. The

147 Explanatory Report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 117, para. 9.

148 ECtHR, *Bolat v Russia*, 5 October 2006, Appl. No. 14139/03, para. 77.

refugee shall be allowed to submit evidence to clear his name, has a right to appeal and to be represented. Arguably, in spite of a difference in wording (evidence v reasons and appeal v review) these procedural safeguards are similar to those contained in Article 13 ICCPR and Article 1 Protocol 7 ECHR. Where compelling reasons of national security exist Article 32 takes the same approach as Article 13 ICCPR, in that it then does not allow the refugee to invoke these procedural safeguards. An important difference between Article 32 and Articles 13 ICCPR and 1 Protocol 7 ECHR is that under Article 32 the refugee shall be allowed to have a reasonable time within which to seek legal admission to another country.

6.5 Overall concluding remarks

In the early nineties two Peruvian brothers arrived separately in Sweden claiming asylum. Their request was denied. After having exhausted the legal remedies in Sweden one brother lodged an application under the European Convention on Human Rights; the other filed a complaint under the Convention against Torture. The facts in the two cases were identical and undisputed. Both brothers were members of the armed opposition group Sendero Luminoso and came from a political active family of which one cousin had disappeared and one was killed. Both had participated in a demonstration, had handed out leaflets and had their house searched. Their mother and sister were both granted de facto refugee status in Sweden. In spite of identical facts the outcome of their complaints before the respective international monitoring bodies, the former European Commission of Human Rights and the Committee against Torture, was different. The first bother's claim was rejected by the former European Commission of Human Rights. The Commission concluded that expulsion of J.A. Paez would not violate Article 3 of the ECHR.[149] The opposite conclusion was reached by the Committee against Torture in the case of G.E.T. Paez.[150] The discrepancy between the former European Commission of Human Rights and the Committee against Torture illustrates the reasons for my research into the meaning of the prohibition of refoulement. The prohibition of refoulement is not an unequivocal concept. It is a concept that has been and still is being developed under various treaties. The prohibitions of refoulement as contained in and developed under the treaties investigated in this study have common features but differ in content and scope. Providing a comprehensive analysis and comparison of these features will contribute to a better understanding of the right to be protected from refoulement.

I end this study with perhaps the most pressing question: which of the four instruments analysed in this study offers the greatest individual protection from refoulement. Unfortunately, this question cannot be answered in a general abstract manner. An

149 EComHR, *Paez v Sweden*, 6 December 1996, Appl. No. 29482/95. The European Court has delivered no judgment in this case as the case was struck out of the list. The applicant had received permanent residence in Sweden, ECtHR, *Paez v Sweden*, 30 October 1997, Appl. No. 29482/95.

150 ComAT, *Paez v Sweden*, 28 April 1997, no. 39/1996.

essential characteristic of the prohibitions on refoulement which I have analysed is that their content and application are very case-specific. Certainly, as I have pointed out, there are the obvious differences. The ECHR is applicable only in Member States of the Council of Europe and will be useless when seeking protection in, for example, Canada. The CAT protects people only from being subjected to torture and the Refugee Convention will not be of much use to people who are suspected of having committed very serious crimes or who remain in their country of origin. In some cases the European Court has explicitly considered the ECHR to afford wider protection than the Refugee Convention.[151] This is, however, not a general conclusion of this study. Notwithstanding the particularities of each of the instruments and their respective refoulement prohibitions, there is mutual influence between the four treaties, closely linking their respective prohibitions. People who are in need of international protection may well have a well-founded fear of persecution as they may have a real risk of being subjected to torture or other forms of proscribed ill-treatment or serious harm. Persecution may be equated with proscribed ill-treatment or it may be that having a well-founded fear of persecution may imply the existence of a real risk of treatment in the sense of, for example, Article 3 ECHR. A person will then have a right to be protected under various prohibitions on refoulement. It is not possible to state the reverse. Having a real risk of being subjected to proscribed ill-treatment by no means implies that the person has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and will have a right to be protected from refoulement in accordance with Article 33(1) Refugee Convention. The person may not fear discriminatory harm; he may be excluded from refugee protection, or he may be exempted from protection from refoulement in accordance with Article 33(2) Refugee Convention.

In many ways the Refugee Convention and its prohibition entailed in Article 33 is distinct from the other three treaties. First, Article 33 is in many respects the essence of the Refugee Convention, as the Convention is particularly aimed at protecting aliens seeking protection from threats in their own country. Secondly, protection from refoulement under the Refugee Convention is limited to aliens recognised as refugees. Thirdly, protection under the Refugee Convention is not absolute. Fourthly, the Refugee Convention contains only a very weak international supervisory protection mechanism.

One thinks that the ECHR offers the greatest protection perhaps because it has the best developed international supervisory protection mechanism allowing individuals to complain before an international Court which has the authority to adopt binding rulings. Nevertheless, the Court has set a high threshold for showing that substantial grounds for believing that a real risk exists in the country of origin. It is not easy (1) to show sufficient personally related facts and circumstances to believe that proscribed ill-treatment is foreseeable, and (2) to substantiate that foreseeable or real risk.

151 For example, ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93, para. 80.

Samenvatting (Summary in Dutch)

Internationale juridische standaarden voor de bescherming tegen refoulement

Inleiding

Het verbod van refoulement is de hoeksteen van het internationaal asiel- en vluchtelingenrecht. Mensen die het risico lopen te worden vervolgd, gefolterd, onmenselijk of vernederend te worden behandeld danwel het risico lopen slachtoffer te worden van ernstige schendingen van mensenrechten in hun eigen land zoeken mogelijk elders bescherming. Andere landen kunnen dan de verantwoordelijkheid hebben om hen deze bescherming te verlenen. In algemene zin verbiedt het verbod van refoulement de gedwongen verwijdering van een persoon naar een land, doorgaans aangeduid als het land van herkomst, waar hij het risico loopt te worden blootgesteld aan ernstige schendingen van mensenrechten. Het verbod van refoulement heeft zich onder diverse verdragen ontwikkeld. Het verbod wordt expliciet vermeld in artikel 33 van het Vluchtelingenverdrag en in artikel 3 van het Verdrag tegen Foltering en Andere Wrede, Onmenselijke en Vernederende Behandeling of Bestraffing (kortweg het Anti-Folterverdrag). Daarnaast is het verbod van refoulement ook ontwikkeld in diverse – algemene - mensenrechtenverdragen en in het bijzonder onder het algemeen verbod van foltering en onmenselijke en vernederende behandeling of bestraffing zoals o.a. is neergelegd in artikel 3 van het Europees Verdrag voor de Rechten van de Mens (EVRM) en artikel 7 van het Internationaal Verdrag inzake Burger- en Politieke Rechten (IVBPR). Deze vier verdragen en de daarin neergelegde refoulementverboden vormen het onderwerp van deze studie. Het doel daarbij is het identificeren, analyseren en vergelijken van gemeenschappelijke kenmerken van het verbod van refoulement.

Centraal in het onderzoek staan (1) de reikwijdte en inhoud van het verbod van refoulement neergelegd en ontwikkeld in het Vluchtelingenverdrag, het EVRM, het IVBPR en het Anti-Folterverdrag, en (2) de verplichtingen en verantwoordelijkheden die uit deze verboden voortvloeien voor staten. Hierbij is gekozen om te kijken naar het internationaal juridisch perspectief en vooral gebruik te maken van internationale bronnen. Van groot belang daarbij zijn de zienswijzen van internationale toezichthoudende organen bij elk van deze verdragen, te weten het Bureau van de Hoge Commissaris van de Verenigde Naties voor de Vluchtelingen (de UNHCR) ten aanzien van het Vluchtelingenverdrag, het Europese Hof voor de Rechten van de Mens ten aanzien van het EVRM, het Mensenrechten Comité ten aanzien van het IVBPR en het Comité tegen Foltering ten aanzien van het Anti-Folterverdrag. Een belangrijke, bewust

aangebrachte, beperking van de gehanteerde onderzoeksmethodiek is dat geen rekening is gehouden met nationaal recht en slechts incidenteel, ter illustratie, wordt verwezen naar nationale regelgeving en jurisprudentie. Bij de analyse van het refoulementverbod neergelegd in het Vluchtelingenverdrag wordt wel gebruik gemaakt van relevante EU-regelgeving, in het bijzonder de Kwalificatie- en Procedure richtlijn. Deze richtlijnen bevatten belangrijke regionaal aanvaarde minimumnormen die van invloed kunnen zijn op de uitleg en toepassing van vooral het Vluchtelingenverdrag. De vier onderzochte verdragen worden ieder in een apart hoofdstuk behandeld en bevatten een identieke inhoudsopgave welke de gemeenschappelijke kenmerken aangeven. In het concluderende zesde hoofdstuk wordt een vergelijking gemaakt tussen de onderzochte verdragen en hun refoulementverboden.

Karakter van het refoulementverbod

Er is geen eenduidig verbod van refoulement in het internationale recht. De refoulementverboden neergelegd en ontwikkeld in de vier onderzochte verdragen zijn weliswaar complementair en wederzijds beïnvloedbaar maar laten duidelijke verschillen zien in inhoud en reikwijdte. Zo beschermt het Vluchtelingenverdrag alleen vluchtelingen zoals bedoeld in artikel 1 van het verdrag. De overige onderzochte verdragen kennen deze beperking niet. Dit heeft een aantal belangrijke consequenties. Ten eerste worden onder het Vluchtelingenverdrag alleen die personen beschermd die zich buiten hun land van herkomst bevinden. Onder de andere verdragen worden ook personen beschermd die zich in hun land van herkomst bevinden. Ten tweede worden alleen die personen beschermd die het risico lopen vervolgd te worden op grond van hun ras, godsdienst, nationaliteit, het behoren tot een bepaalde sociale groep of hun politieke overtuiging. Het vereiste om het risico te lopen vervolgd te worden wegens bepaalde gronden kennen de andere verdragen niet. Ten derde wordt een persoon alleen beschermd als hij niet in staat of bereid is bescherming te krijgen van zijn eigen land. Het vereiste van nationale bescherming is minder duidelijk aanwezig bij de andere verdragen. Voorts biedt het refoulementverbod neergelegd in artikel 33 Vluchtelingenverdrag geen absolute bescherming maar staat het bijvoorbeeld toe mensen bescherming te onthouden wanneer deze een gevaar vormen voor de nationale veiligheid van het land van toevlucht. De andere onderzochte refoulementverboden zijn absoluut van karakter. Daarnaast zijn er ook andere, minder evidente verschillen. Bijvoorbeeld wanneer het gaat om de extra-territoriale reikwijdte van de verschillende verboden, de schade waartegen de refoulementverboden beogen te beschermen, en het risicocriterium dat daarbij van toepassing is.

Toepassingsbereik

Alle onderzochte verdragen zijn van toepassing op personen die zich feitelijk binnen het grondgebied van een verdragsstaat bevinden. Het creëren van internationale of

transit zones op luchthavens doet daar niets aan af. De vraag of personen die zich buiten het grondgebied van een verdragsstaat bevinden ook binnen de reikwijdte van de onderzochte verdragen vallen is moeilijker te beantwoorden. In het algemeen geldt voor elk van de onderzochte verdragen dat die personen worden beschermd die zich binnen de rechtsmacht van een verdragsstaat bevinden. Het berip rechtsmacht wordt dan bepaald door de vraag in hoeverre de betreffende staat daadwerkelijke controle heeft over de persoon in kwestie en over zijn rechten, onder andere het recht beschermd te worden tegen refoulement. Het kan zijn dat een persoon zich weliswaar buiten het grondgebied van een staat bevindt maar dat hij of het door hem ingeroepen recht zich evengoed wel onder de daadwerkelijke controle, en dus de rechtsmacht, van die staat bevindt. De extra-territoriale verantwoordelijkheid van de staat om een persoon te beschermen tegen refoulement is dan het gevolg van het feit dat de staat effectieve controle uitoefent over een heel (buitenlands) gebied. Dit kan zijn wanneer de staat een (buitenlands) gebied militair bezet houdt. Extra-territoriale verantwoordelijkheid van de staat kan ook het gevolg zijn van een situatie waarbij door een handelen dat is toe te rekenen aan de staat en dat plaatsvindt, of effect heeft, buiten het grondgebied van de staat de persoon onder de feitelijke controle van die staat komt en waardoor zijn recht om beschermd te worden tegen refoulement wordt aangetast.

Schade waarvoor bescherming wordt geboden

In het algemeen beschermen de refoulementverboden personen tegen een risico te worden blootgesteld aan een bepaalde schade die het gevolg is van mensenrechtenschendingen. Om welke schade het gaat of hoe ernstig die moet zijn verschilt per refoulementverbod. Het meest duidelijk en ook het meest restrictief is in dit verband het refoulementverbod neergelegd in artikel 3 van het Anti-Folterverdrag. Dat verbod beschermt slechts tegen een risico van foltering zoals gedefinieerd in artikel 1 van het verdrag. Artikel 3 EVRM en artikel 7 IVBPR zijn ruimer en beschermen niet alleen tegen foltering, maar ook tegen onmenselijke en vernederende behandeling of bestraffing zonder daarbij een duidelijke definitie van deze handelingen te geven. Het verschil tussen foltering enerzijds en onmenselijke en vernederende behandeling of bestraffing anderzijds is vooral een onderscheid in intensiteit of ernst van het toegebrachte leed. Foltering is het meest intens of ernstig en vernederende behandeling of bestraffing het minst. Wel moet er altijd sprake zijn van een minimum niveau van ernst of intensiteit alsvorens het als een verboden behandeling te kunnen aanmerken. Dit om verboden onmenselijke behandeling te onderscheiden van niet verboden wrede behandelingen. Ook moet de behandeling worden beoordeeld in de context waarin deze plaatsvindt. Bijvoorbeeld, het amputeren van een been kan onder medische omstandigheden toegestaan en zelfs noodzakelijk zijn, maar onder andere omstandigheden als onmenselijk en verboden worden gekwalificeerd. Ook is het zo dat tijdens een arrestatie of gevangenschap sprake kan zijn van een behandeling die een zeker leed toebrengt aan de arrestant of gedetineerde, bijvoorbeeld omdat hij zich tegen zijn arrestatie verzet. Zo een behandeling is dan niet zonder meer te kwalificeren als een verboden

onmenselijke behandeling. In zeer uitzonderlijke omstandigheden kan, onder de huidige uitleg van artikel 3 EVRM, een onmenselijke behandeling ook voortvloeien uit een situatie en niet uit een direct of indirect menselijk handelen. Bijvoorbeeld wanneer de persoon in kwestie lijdt aan een terminale ziekte en er geen noodzakelijke medische en sociale opvang aanwezig is. Naast de ernst of intensiteit van het toegebrachte leed is een belangrijk onderscheid tussen foltering en onmenselijke en vernederende behandeling of bestraffing ook dat foltering met opzet en met een bepaald doel moet worden toegepast. Het doel is ruim en kan variëren van bijvoorbeeld het verkrijgen van informatie tot een discriminerende behandeling. Onder het Anti-folterverdrag is het doel dat de definitie van foltering bepaalt wat nauwer en moet het in verband staan met de belangen of het beleid van de staat.

Een belangrijk verschil tussen foltering onder het Anti-Folterverdrag en dat onder het EVRM en IVBPR is dat onder het Anti-Folterverdrag foltering geen pijn of leed omvat slechts voortvloeiend uit, inherent aan of samenhangend met wettige straffen. Wat deze uitzonderingsgrond betekent is onduidelijk. Ondanks dat staten zich er in het verleden wel op hebben beroepen is het Comité tegen Foltering en ook de literatuur van mening dat deze uitzonderingsgrond moeilijk toepassing kan vinden. Toepassing zou het doel en de betekenis van het Anti-Folterverdrag, namelijk het voorkomen van ernstig leed onder elke omstandigheid, ondermijnen.

Artikel 33 Vluchtelingenverdrag is het minst eenduidig en beschermt tegen vervolging op grond van ras, religie, nationaliteit, het behoren tot een bepaalde sociale groep, of hebben van een politieke overtuiging. Het concept van vervolging wegens een van de aangegeven gronden is het beste te definiëren als ernstige discriminatoire schade als gevolg van mensenrechtenschendingen. Van belang is de vraag hoe het begrip vervolging en de daaraan gekoppelde vervolgingsgronden zich verhoudt tot foltering en onmenselijke en vernederende behandeling of bestraffing. Vervolging omvat meer dan foltering en onmenselijke en vernederende behandelingen en kan ook het resultaat zijn van andere mensenrechtenschendingen. Daarbij is vooral van belang de ernst van het leed en het feit dat deze op specifieke discriminatoire gronden wordt toegepast of veroorzaakt. Minder van belang is welke mensenrechtenschendingen aan het leed ten grondslag liggen. Overigens is het niet uit te sluiten dat onder het EVRM en het IVBPR ook andere mensenrechtenschendingen dan die van artikel 3 EVRM en artikel 7 IVPBR een mogelijk verbod van refoulement inhouden. Daarbij gaat het dan vooral om andere absolute en niet-derogeerbare mensenrechten. Het Europese Hof voor de Rechten van de Mens en het Mensenrechten Comité hebben beiden al aangegeven dat het recht op leven en het verbod op de doodstraf eveneens een refoulementverbod inhoudt. Daarnaast heeft het Europese Hof ook al verklaard dat een risico van een flagrante schending van het recht op een eerlijk proces tot een verbod van refoulement aanleiding kan geven.

Wie veroorzaakt de schade?

Artikel 3 Anti-Folterverdrag beschermt tegen een risico te worden blootgesteld aan foltering 'toegebracht door of op aanstichten van dan wel met de instemming of gedogen van een overheidsfunctionaris of andere persoon die in een officiële hoedanigheid handelt'. De staat moet dus betrokken zijn bij de foltering. Als de staat niet direct betrokken is dan moet de verantwoordelijkheid van de staat op andere wijze blijken. Als bepaalde handelingen worden verricht door niet-statelijke entiteiten dan kan er slechts sprake zijn van foltering als de staat met deze handelingen instemt, ze gedoogt, of van deze handelingen wist, of had moeten weten, zonder in te grijpen. De andere onderzochte refoulementverboden kennen deze beperking niet. Het risico te worden onderworpen aan vervolging in de zin van het Vluchtelingenverdrag, dan wel te worden blootgesteld aan foltering of onmenselijke of vernederende behandeling op grond van artikel 3 EVRM of artikel 7 IVBPR kan evenzeer uitgaan van de (autoriteiten van de) staat als niet-statelijke entiteiten of privé personen. Het is dan overigens wel relevant of de staat in staat en bereid is bescherming te verlenen.

Het risicocriterium

De crux van de refoulementverboden is het risicocriterium. Het verbod wordt van toepassing op het moment dat er een risico is dat de persoon in kwestie wordt blootgesteld aan bepaalde ernstige schade. In algemene zin moet het gaan om een reëel, persoonlijk en voorzienbaar risico. Het hoeft niet vast te staan of zeer waarschijnlijk te zijn dat de persoon is kwestie aan een bepaalde ernstige schade wordt blootgesteld, maar het moet wel gaan om meer dan een theoretische kans of mogelijkheid. Deze interpretatie volgt uit de jurisprudentie van het Europese Hof voor de Rechten van de Mens en de zienswijzen van het Comité tegen Foltering. In het Vluchtelingenverdrag is het risicocriterium geformuleerd als een gegronde vrees. Volgens de UNHCR en de literatuur gaat het ook daarbij om een redelijke kans of serieuze mogelijkheid dat de persoon zal worden vervolgd. Dit risicocriterium is wat betreft omschrijving te vergelijken met het criterium dat onder het EVRM en Anti-Folterverdrag is ontwikkeld. Het Mensenrechten Comité formuleert het risicocriterium wat scherper door te stellen dat blootstelling aan ernstige schade het noodzakelijke en voorzienbare gevolg moet zijn van de gedwongen verwijdering van de persoon in kwestie.

Het risicocriterium is een objectief criterium dat ziet op een toekomstige gebeurtenis. Gevoelens van angst of onoverwinnelijkheid spelen geen rol. Ervaringen uit het verleden kunnen van belang zijn om in te schatten wat er in de toekomst zou kunnen gaan gebeuren. Ervaring uit het verleden zijn op zich zelf geen reden iemand tegen refoulement te beschermen. Mensen die lijden aan een post-traumatische stress stoornis zullen derhalve niet automatisch voor bescherming tegen refoulement in aanmerking komen. Er zal opnieuw een risico moeten zijn op ernstige schade dan wel hun ervaringen uit het verleden zullen moeten leiden tot verdere schade of leed.

Voorts moet sprake zijn van een persoonlijk, individualiseerbaar risico. Het kan zijn dat de persoon die bescherming zoekt een belangrijke en bekende oppositieleider is waarvan duidelijk is dat hij een zeker gevaar loopt. Het kan ook zijn dat een bepaalde groep, bijvoorbeeld een etnische groep, als geheel gevaar loopt omdat deze groep op systematische wijze het doelwit van geweld is. Dan loopt ieder lid van die groep een persoonlijk risico. Er is dan sprake van groepsvervolging op grond waarvan ieder lid een individualiseerbaar risico loopt. Het kan zelfs zo zijn, zoals het Europese Hof voor de Rechten van de Mens in theorie heeft aanvaard, dat het geweld in een bepaald land dusdanig extreem en wijdverspreid is dat iedereen die zich daar bevindt een individualiseerbaar risico loopt.

Vaststelling van het risico

Het risicocriterium is gewoonlijk niet meetbaar door middel van kansberekening. Of een risico aanwezig is hangt af van de aangedragen feiten en omstandigheden en wordt vooral bepaald door de aannemelijkheid van het concrete verhaal van de persoon die bescherming zoekt en zijn geloofwaardigheid. Een heel scala aan feiten en omstandigheden kunnen hierbij een rol spelen. Daarbij gaat het om zowel feiten en omstandigheden die direct aan de persoon in kwestie gerelateerd zijn, maar ook algemene feiten en omstandigheden die verband houden met de veiligheid of mensenrechtensituatie in het land van herkomst. Het hoeft vervolgens niet onomstotelijk vast te komen staan dat een bepaald risico aanwezig is. Dat hoeft niet 'bewezen' te worden; het moet aannemelijk gemaakt worden. In het algemeen hangt de aannemelijkheid af van de feiten en omstandigheden die naar voren worden gebracht en de coherentie en volledigheid van het verhaal. Daarnaast is het van belang of het verhaal geloofwaardig is in het licht van wat bekend is over het land van herkomst en of er eventuele bewijsmiddelen zijn gepresenteerd ter ondersteuning of onderbouwing van het verhaal. Hoewel het aandragen van bewijsmiddelen geen noodzakelijk vereiste is zal de afwezigheid van enig ondersteunend bewijs mogelijk afbreuk doen aan de aannemelijkheid van het verhaal. Het is dus van belang het verhaal te onderbouwen met gegevens, al dan niet direct gerelateerd aan de persoon in kwestie, afkomstig uit onafhankelijke bronnen en landeninformatie van bijvoorbeeld de Verenigde Naties of mensenrechtenorganisaties zoals Amnesty International of Human Rights Watch. Het Europese Hof voor de Rechten van de Mens heeft in dit verband een aantal richtlijnen in haar jurisprudentie geformuleerd. Het Hof hecht bijvoorbeeld veel waarde aan bronnen die in staat zijn onafhankelijk onderzoek te doen en gegevens te verzamelen in het land van herkomst. Het Mensenrechten Comité en het Comité tegen Foltering daarentegen hechten veel waarde aan de landenrapporten geschreven door het land van toevlucht. Voorts is voor de aannemelijkheid van belang dat eventuele onvolledigheden, inconsistenties of ongeloofwaardigheden verklaard kunnen worden. Vooral het Comité tegen Foltering geeft in haar zienswijzen blijk van enige coulantie ten aanzien van eventuele onvolledigheden en tegenstrijdigheden in het verhaal van personen die hun land zijn ontvlucht, mogelijk getraumatiseerd zijn en bescherming zoeken. Het beoordelen van

de aannemelijkheid en geloofwaardigheid en de noodzaak en recht om bescherming te krijgen is een gezamenlijke verantwoordelijkheid van de persoon die om bescherming vraagt en de autoriteiten van het land van toevlucht waar hij bescherming vraagt. Het initiatief ligt bij het individu om een aannemelijk en geloofwaardig verhaal te presenteren. Het is vervolgens aan de autoriteiten van het land van toevlucht dit te beoordelen en daarbij zelf ook informatie ter ondersteuning of ontkrachting van het verhaal te verzamelen. Dit moeten de autoriteiten vervolgens in alle openheid en eerlijkheid aan het individu voorleggen.

Moment van vaststelling

Ook is het van belang te bepalen op welk moment het risico moet worden beoordeeld. De risicotoets moet plaatsvinden op het moment van dreigende verwijdering of uitzetting. Omdat het moment van uitzetting bepalend is vereist de risicobeoordeling een toets *ex nunc*. Ieder moment dat er een beoordeling plaatsvindt dienen alle dan bekende feiten en omstandigheden te worden meegenomen. Dit geldt voor zowel de beoordeling in eerste aanleg bij het bestuursorgaan als bij iedere beroepsprocedure. Ook wanneer de persoon in kwestie reeds is uitgezet blijft het moment van uitzetting bepalend. De toets wordt dan wel een toets *ex tunc* waarbij de beoordeling van het risico plaatsvindt op basis van datgene wat ten tijde van de uitzetting bekend was of bekend had moeten zijn. Feiten en omstandigheden die na het moment van uitzetting bekend worden kunnen slechts een rol spelen wanneer ze bekend hadden moeten zijn op het moment van uitzetting. Feiten en omstandigheden die zich pas voordoen na de uitzetting kunnen in principe geen rol spelen bij de risicotoets. Het Europese Hof voor de Rechten van de Mens en het Comité tegen Foltering lijken feiten en omstandigheden die zich voordoen na uitzetting wel mee te wegen wanneer deze de uitkomst van de *ex tunc* toets van het moment van uitzetting, namelijk dat er geen risico was, bevestigen.

Beschermingsalternatieven

Het risico van ernstige schade kan worden geminimaliseerd of worden weggenomen doordat het land van herkomst de persoon in kwestie kan beschermen. Het kan zijn dat de autoriteiten van het land in staat zijn afdoende bescherming te verlenen tegen het risico van ernstige schade. Het kan ook zijn dat anderen daartoe in staat zijn, of dat er in het land van herkomst een gebied aanwezig is waar de persoon geen risico loopt. Dit zogenaamde binnenlands beschermingsalternatief is een bijzondere vorm van nationale bescherming en ziet op de aanwezigheid van een gebied in het land van herkomst waar de persoon oorspronkelijk niet vandaan komt of woonachtig was, maar wat veilig voor hem is. Van essentieel belang is de vraag wie bescherming kan verlenen. Onder het Vluchtelingenverdrag wordt vooral gedoeld op de formele autoriteiten van het land. Het Europese Hof voor de Rechten van de Mens heeft in zijn

jurisprudentie vastgesteld dat niet kan worden uitgesloten dat ook niet-statelijke entiteiten bescherming kunnen verlenen. De bescherming moet dan wel effectief zijn omdat de betreffende niet-statelijke entiteit daarvoor juridisch verantwoordelijk is, deze entiteit daar ook aan gehouden kan worden, en ook in de praktijk in staat is effectieve bescherming te bieden. Het Mensenrechten Comité en het Comité tegen Foltering hebben geaccepteerd dat ook militaire missies bescherming kunnen verlenen, inclusief VN Vredesmissies. Het binnenlands beschermingsalternatief is vooral ontwikkeld onder het Vluchtelingenverdrag. Voor toepassing van het alternatief onder het Vluchtelingenverdrag is het van belang dat het alternatieve gebied praktisch, legaal en veilig bereikbaar is, er geen voorzienbaar risico is op vervolging en andere schade, en de persoon er een relatief normaal leven kan leiden zoals dat voor een ieder in het alternatieve gebied geldt. Het is moeilijk voor te stellen dat een binnenlands beschermingsalternatief aanwezig is wanneer het risico op vervolging afkomstig is van de autoriteiten van het land zelf, tenzij de macht van de autoriteiten geografisch beperkt is en een niet-statelijke of quasi-statelijke entiteit effectieve controle uitoefent over een deel van het grondgebied van het land van herkomst. Het Europese Hof voor de Rechten van de Mens heeft slechts in een zeer beperkt aantal zaken geoordeeld over een mogelijk binnenlands beschermingsalternatief. Ook voor het Hof moet het alternatieve gebied praktisch, legaal en veilig bereikbaar en toegankelijk zijn. In tegenstelling tot wat in het kader het Vluchtelingenverdrag relevant is, acht het Hof vooral van belang dat de persoon er niet wordt blootgesteld aan handelingen die zijn verboden door artikel 3 EVRM.

Diplomatieke garanties

Er is wel beargumenteerd dat het risico ook kan worden weggenomen doordat het land van herkomst diplomatieke garanties afgeeft aan, en op verzoek van, het land van toevlucht ten behoeve van de veiligheid van de persoon. Het gebruik van diplomatieke garanties is echter moeilijk te verenigen met het Vluchtelingenverdrag, in het bijzonder als er sprake is van gegronde vrees van de vluchteling voor vervolging en zijn dientengevolge legitiem te achten gebrek aan bereidheid om de bescherming van de autoriteiten van zijn eigen land in te roepen. Bovendien kan het verzoek om diplomatieke garanties het risico van vervolging verhogen in plaats van verkleinen nu daardoor de identiteit van de vluchteling bekend is gemaakt bij de autoriteiten van het land van toevlucht. Dat roept tevens vragen op omtrent de privacy van de vluchteling. Waar diplomatieke garanties een effectief middel kunnen zijn in uitleveringszaken is dit aanmerkelijk minder het geval in asielzaken. In uitleveringszaken worden diplomatieke garanties afgegeven in een duidelijke juridische context en betreft het bindende afspraken tussen twee landen. In asielzaken is er vaak sprake van landen van herkomst waar op systematische wijze de mensenrechten worden geschonden, is het vaak niet mogelijk om duidelijke garanties te krijgen die het risico op ernstige en vaak onherstelbare schade ondubbelzinnig kunnen uitsluiten, en is er geen effectief mechanisme om naleving van de garanties te monitoren. Bovendien is het niet mogelijk

om bij niet-naleving het land van herkomst aansprakelijk te stellen. Het Mensenrechten Comité en het Comité tegen Foltering zijn zeer terughoudend in het aanvaarden van diplomatieke garanties. Het Europese Hof voor de Rechten van de Mens is wat minder terughoudend hoewel ook het Hof zorgen heeft wanneer garanties worden gegeven door landen waar sprake is van endemisch onmenselijk handelen.

Absolute en niet absolute refoulementverboden

De refoulementverboden uit artikel 3 EVRM, artikel 3 Anti-Folterverdrag en artikel 7 IVBPR zijn absolute verboden. Dit betekent dat er geen uitzondering op mogelijk is vanwege redenen zoals de openbare orde of de nationale veiligheid. Ook betekent dit dat deze verboden niet mogen worden beperkt of opgeschort ten tijde van oorlog of in geval van een noodtoestand. Als gevolg van het absolute karakter van deze verboden mag niemand worden verwijderd naar een land waar hij een risico loopt te worden blootgesteld aan verboden handelingen, ook niet wanneer hij een gevaar oplevert voor de nationale veiligheid bijvoorbeeld omdat hij wordt verdacht van terroristische activiteiten. Artikel 33 Vluchtelingenverdrag bevat geen absoluut verbod van refoulement. Op grond van het tweede lid mag een vluchteling worden verwijderd ondanks zijn gegronde vrees voor vervolging, wanneer hij een gevaar is voor de nationale veiligheid van het land van toevlucht, dan wel wanneer hij is veroordeeld voor een bijzonder ernstig misdrijf en hij een gevaar oplevert voor de samenleving. Als deze uitzonderingen zich voordoen kan het evengoed zijn dat de vluchteling niet mag worden verwijderd op grond van de andere refoulementverboden. Ook kan het op grond van het Vluchtelingenverdrag zo zijn dat een vluchteling moet worden uitgesloten van vluchtelingrechtelijke bescherming, bijvoorbeeld wanneer hij een oorlogsmisdrijf of een misdrijf tegen de menselijkheid heeft gepleegd. Opnieuw kan hij dan wellicht wel bescherming verkrijgen op grond van de andere verboden.

Positieve en negatieve verplichtingen

Wanneer een verbod van refoulement van toepassing is en een staat verantwoordelijk is voor de bescherming tegen refoulement is het de vraag welke concrete verplichtingen de staat ten opzichte van de persoon heeft. In het algemeen verbiedt het verbod van refoulement ieder handelen of nalaten van de staat waardoor de persoon in een situatie komt waarin hij het risico loopt te worden blootgesteld aan ernstige schade. Daarbij kan het gaan om verplichtingen die negatief van aard zijn en waarbij de staat zich moet onthouden van handelen. Zo kan een staat de verplichting hebben de persoon niet te verwijderen, uit te zetten of uit te leveren aan een land waar hij het risico loopt het slachtoffer te worden van vervolging, foltering, onmenselijke of vernederende behandeling of bestraffing. Ook kan het land van toevlucht de verplichting hebben de persoon niet te verwijderen naar een (derde) land waar de persoon weliswaar geen risico op mensenrechtenschendingen loopt maar waarvandaan hij het risico loopt te

worden teruggestuurd naar zijn land van herkomst waar hij wel een risico loopt. Dit wordt aangeduid als het verbod van indirect refoulement. Onder het Anti-Folterverdrag is het vereist dat beide risico's grondig worden onderzocht. Dit is anders onder het EVRM. Het risico in het land van herkomst wordt slechts marginaal onderzocht. Wanneer op basis van deze marginale toets wordt geconcludeerd dat er mogelijk sprake is van een risico op blootstelling aan onmenselijke behandeling in het land van herkomst dan moet worden beoordeeld of het derde land mogelijk de persoon zal verwijderen naar zijn land van herkomst. Volgens de jurisprudentie van het Europese Hof voor de Rechten van de Mens wordt al bij minimale bescherming in het derde land, bijvoorbeeld het gedogen van de persoon, geconcludeerd dat een risico van verwijdering naar het land van herkomst niet aanwezig is. Het derde land kan dan als veilig worden aangemerkt. Onder het Vluchtelingenverdrag kan een derde land pas als veilig worden aangemerkt als verwijdering naar het land van herkomst door het derde land is uitgesloten en de persoon in het derde land de rechten uit het Vluchtelingenverdrag krijgt gegarandeerd op zijn minst op gelijke wijze als hij die zou krijgen in het land van toevlucht.

Het verbod van refoulement kan ook inhouden dat een persoon niet mag worden geweigerd aan de grens. Een staat mag niet zijn grenzen sluiten voor personen die bescherming zoeken. In het verlengde hiervan ligt de vraag of staten zich ook moeten onthouden van het nemen van maatregelen die het mensen onmogelijk maakt bescherming te zoeken, bijvoorbeeld het instellen van visumverplichtingen. Als door het instellen van verregaande visumverplichtingen het mensen onmogelijk wordt gemaakt hun land van herkomst te verlaten en bescherming te zoeken in een ander land dan ontstaat strijdigheid met het verbod van refoulement zoals is neergelegd in artikel 3 EVRM, artikel 7 IVBPR en artikel 3 Anti-Folterverdrag.

Staten kunnen ook verantwoordelijk zijn om mensen te beschermen tegen refoulement wanneer deze mensen zich buiten het grondgebied maar binnen de rechtsmacht van de staat bevinden, met andere woorden, onder de effectieve controle van de staat staan. Zo zal een staat verantwoordelijk zijn voor mensen die bescherming zoeken in een ambassade en mag de staat deze mensen niet zonder meer weer op straat zetten.

Het verbod van refoulement kan ook positieve verplichtingen voor de staat inhouden. Het kan zijn dat de staat juist moet handelen om te voorkomen dat de persoon in een situatie komt waarin hij een risico loopt. Hoewel staten het soevereine recht hebben om de toegang, het verblijf en de verwijdering van vreemdelingen te reguleren kan het refoulementverbod dit recht beperken. Om effectieve bescherming tegen refoulement te garanderen kan het zijn dat een staat verplicht is de persoon tot zijn grondgebied toe te laten en hem een zekere beschermende status toe te kennen.

Duurzame bescherming, recht op verblijf

Geen van de onderzochte refoulementverboden kent een verplichting voor staten om aan personen die het recht hebben beschermd te worden een verblijfstitel af te geven. Wel heeft de verplichting om de persoon toe te laten en het verbod hem te verwijderen

tot gevolg dat de staat de persoon op zijn grondgebied zal moeten gedogen. Het Comité tegen Foltering heeft zelfs geconcludeerd dat de staat verplicht is om een oplossing te vinden van juridische dan wel politieke aard voor personen die niet verwijderd mogen worden. Onder het Vluchtelingenverdrag kan worden geconcludeerd dat het verbod van refoulement niet op zichzelf staat maar deel uitmaakt van een verdrag dat concrete rechten aan vluchtelingen toekent. In dit boek wordt bepleit dat op termijn staten de verplichting hebben een duurzame oplossing te vinden voor vluchtelingen die niet verwijderd mogen worden. En wanneer terugkeer naar het land van herkomst of hervestiging in een derde land niet mogelijk is, dan is integratie en naturalisatie in het land van toevlucht de enige overgebleven mogelijkheid. Overigens is in EU-regelgeving wel aangegeven dat mensen die beschermd moeten worden een verblijfstitel moeten krijgen.

Procedurele waarborgen

Effectieve bescherming tegen refoulement betekent ook dat staten de verplichting hebben mensen die om bescherming verzoeken toe te laten tot een adequate (asiel)procedure, inclusief een beroepsprocedure. Zo een procedure moet flexibel, onpartijdig en transparant zijn. De individu en de staat moeten voldoende tijd hebben om het verzoek tot bescherming voor te bereiden danwel te beoordelen. In EU-regelgeving wordt een termijn van zes maanden aangegeven. Het Mensenrechten Comité heeft zijn zorgen uitgesproken over termijnen van twee jaar en langer. Voorts moet voldoende informatie omtrent de inhoud en verloop van de procedure worden gegeven, moet de persoon de beschikking krijgen over een tolk en heeft hij recht op juridsche bijstand. Ook versnelde procedures moeten zorgvuldig worden toegepast. Indien de staat negatief beslist op een verzoek tot bescherming moet de persoon de mogelijkheid hebben om tegen deze beslissing in beroep te gaan. Hem moet een effectief rechtsmiddel ter beschikking staan, tenzij het verzoek om bescherming evidente onzin is of elke juridische grondslag mist. Het rechtsmiddel moet de mogelijkheid bieden tot een onafhankelijke, volledige en nauwkeurige herbeoordeling van de negatieve beslissing. Vooral in de jurisprudentie van het Europese Hof voor de Rechten van de Mens komt dit duidelijk aan bod. Ook de beroepsprocedure moet onpartijdig, transparant en voldoende flexibel zijn. Bovendien moet de persoon de beslissing op beroep mogen afwachten en mag hij niet tussentijds worden verwijderd.

Tot slot

Het verbod van refoulement is niet een uniform en eenduidig verbod. De verboden zoals ze zijn neergelegd en zich ontwikkeld hebben in de vier onderzochte verdragen bevatten gemeenschappelijke kenmerken, en zijn complementair, maar verschillen op belangrijke punten van inhoud en reikwijdte. Dit onderzoek draagt bij aan de verdere ontwikkeling van de verschillende refoulementverboden en biedt inzicht in de betekenis van de verschillende gemeenschappelijke kenmerken.

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Curriculum Vitae

Kees Wouters was born in 's-Hertogenbosch on 21 May 1970. He attended the Hoogveld College in Rosmalen between 1982 and 1988. He obtained the Dutch equivalent of a master's degree in Law at Leiden University in 1996. In 1996 and 1997 he worked as a legal officer at the refugee department of the Dutch section of Amnesty International and in the legal aid department of the national office of the Dutch Council for Refugees. In addition, he volunteered for three months with the United Nations Nigh Commissioner for Refugees (UNHCR) in The Hague. Between 1998 and 2000 he worked at the legal department of FORUM, the Dutch Institute for Multicultural Development, where he was the coordinating editor of *Jurisprudentie Vreemdelingenrecht*. In 2000 he became a staff member and lecturer at the Office of Human Rights Studies and Social Development of Mahidol University in Thailand and joined the Institute of Immigration Law at Leiden University, where he embarked on his PhD research. In 2005 he joined the Centre on Housing Rights and Evictions (COHRE), a global Non-Governmental Organisation fighting for the right to adequate housing for everyone, everywhere. In 2005 and 2006 he was responsible for setting up and managing the national office of COHRE in Sri Lanka. In 2007 and 2008 he worked as a consultant and legal officer for COHRE's Asia and Pacific Programme and was involved in various projects concerning housing, land and property restitution for refugees and displaced persons. He is married and has two daughters.