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The Emerging Constitutional Law of the European Union – German and Polish Perspectives

Herausgegeben von A. Bodnar · M. Kowalski · K. Raible · F. Schorkopf

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Trying to Meet the Challenge: the Refugee Definition and the Emerging EU Asylum System

Michał Kowalski

I. Introduction

The aim of this article is to present some remarks on the EU asylum system which is currently under construction. This will be done by studying the personal scope of the emerging system – in other words by referring to the EU approach to the refugee definition.

The basis for the international refugee law is the 1951 Geneva Convention relating to the Status of Refugees (hereinafter the Geneva Convention)[1] and the 1967 New York Protocol relating to the Status of Refugees (hereinafter the New York Protocol).[2] Article 1 A of the Geneva Convention provides the basic definition of refugee. According to this classic definition, a refugee is a person who, firstly, is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country or to return to it; secondly, this is owing to well-founded fear of being persecuted; thirdly, the fear of being persecuted results from at least one of the following reasons: race, religion, nationality, membership of a particular social group or political opinion.[3] Originally, the application of this definition was restricted to

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[1] 189 UNTS 150.

[2] 606 UNTS 267.

[3] Cf. G. Goodwin-Gill, *The Refugee in International Law* (1996) 19; J.C. Hathaway, *The Law of Refugee Status* (1991) 7; Vanheule, 'A Comparison of the Judicial Interpretations of the Notion of Refugee', in J.-Y. Carlier/D. Vanheule (eds.), *Europe and Refugees: A Challenge?* (1997) 93.

events that occurred before 1 January 1951 and the state-parties were allowed to limit the scope of the adopted definition geographically by restricting it exclusively to events that occurred in Europe. These restrictions were deleted by the New York Protocol.

The approach to the scope of the granting of protection was indeed evolving throughout the years. The fundamental question of this evolution was whether the convention definition was a sufficient means of ensuring protection to all persons in need of international protection. Some doubts about this matter arose even at the time of the adoption of the Geneva Convention. Recommendation E of the Final Act of the conference that adopted the Geneva Convention expressed hope that the state-parties would also grant protection provided by the convention's provisions to persons outside the scope of the convention definition. The evolution of the approach to the scope of the granting of protection was further realised through shaping the scope of the UNHCR's competencies, elaborating the Convention on territorial asylum, ultimately not adopted, the development of regional regulations complementing the universal refugee protection, and the states' practice.[4]

In this way, a second category of refugees evolved, which is broad and the scope of which is differentiated: non-conventional refugees or *de facto* refugees who, being outside the scope of the convention definition, are in real need of international protection. Essential to the creation of this category was the development of the *non-refoulement* principle, as well as other means of the protection of human rights, guaranteeing protection against torture and other inhuman and degrading treatment.

In the regional systems of refugee protection in Africa and Latin America definitions were created which are subsidiary to the provisions of the Geneva Convention.[5] This is not the case in Europe where the practice of granting subsidiary protection remains substantially differentiated. Also the convention definition is not interpreted uniformly by the European state-parties.

Thus, the first attempt in Europe of international development of a common and uniform interpretation of the convention definition

[4] Hathaway, *supra* note 3, at 11.

[5] Generally see, e.g. Arboleda, 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism', 3 *International Journal of Refugee Law* (1991) 185.

should be regarded as the adoption by the EU states - within the harmonisation of their asylum policy – of the Joint Position of 4 March 1996 on the harmonised application of the definition of the term "refugee" in Article 1 of the Geneva Convention (hereinafter: the Joint Position).[6] This document was adopted within the third pillar of the EU and constituted the first application of the form of joint position provided for in Article K.3 Treaty on European Union (hereinafter: the EU). Hence, it was only politically binding. Doubts regarding the binding application of the adopted Joint Position are illustrated by its formulation that: "[t]his joint position is adopted within the limits of the constitutional powers of the Governments; it shall not bind the legislative authorities or affect decisions of the judicial authorities of the Member States." It was also provided that the guiding principles included in the Joint Position were to be imparted to the relevant administrative authorities responsible for examining requests for granting the refugee status, which: "... are hereby requested to take them as a basis without prejudice to Member States' case-law on asylum matters and their relevant constitutional positions." The legally non-binding character of the adopted document from the very beginning cast doubts on the possibility of achieving the aim of developing a harmonised application of the convention definition.

The adopted document refers only to the interpretation of the convention definition and the application of its criteria and does not influence – as it is clearly stated in paragraph 1 of the Joint Position – the conditions under which a Member State may, according to its domestic law, permit persons, who are not covered by the scope of this definition and whose return to the countries of their nationality might expose them to a violation of their safety or physical integrity, to remain in its territory.

The Joint Position emphasised the importance of guaranteeing protection to refugees according to the provisions of the Geneva Convention and referred to the UNHCR Handbook on procedures and criteria for determining refugee status as a valuable aid for the Member States in determining refugee status. This *expressis verbis* reference to the Handbook is remarkable especially in the context of further formulations of the Joint Position which are to some extent contradictory with the in-

[6] OJ 1996 L 63/2.

terpretation of the convention definition included in the Handbook and which thus contribute to the narrowing of its scope.[7]

Before analysing particular provisions it may be said that this first attempt to develop a harmonised interpretation of the convention definition in Europe turned out to be very ineffective. The Member States were unable to eliminate such essential differences as those concerning possibility of finding protection in a part of the territory of the country of one's nationality (internal flight alternative), granting the status of *sur place* refugee, taking into account persecution by agents other than state authorities, as well as the interpretation of terms such as political opinion or membership of a particular social group as reasons of persecution. Thus the scope of the differences remains relatively wide. It is worth emphasising that discrepancies referring to the interpretation of the convention definition are also a feature of European states other than the EU members.

In the context of further harmonisation of the asylum policy within the EU after the entry into force of the Treaty of Amsterdam (hereinafter: the TA) it is indispensable to elaborate a uniform interpretation of the convention definition. Article 63 (1) (c) of the Treaty establishing the European Community (hereinafter: the EC) obliges the Council to adopt, within a period of five years after the entry into force of the TA (1 May 1999), minimum standards with respect to the qualification of nationals of third countries as refugees, or – in other words – minimum standards of the harmonised interpretation of the convention definition. On 12 September 2001 the Commission presented a Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (hereinafter: the proposed Directive).[8] It was thus decided to propose to regulate with one community legal measure both the standards regarding the conditions of being granted the refugee status, and subsidiary protection, as well as the scope of rights guaranteed by granting these forms of protection.

The proposed Directive is also worth analysing because adopting a harmonised interpretation of the convention definition will be essential

[7] Guild, 'The impetus to harmonise: asylum policy in the European Union', in F. Nicholson/P. Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 331.

[8] COM(2001) 510 final, 12.9.2001.

for elaborating – as it was announced in Tampere by the European Council – a common European asylum system.

Moreover, essential for the scope of the term "refugee" are the exclusion clauses. The Geneva Convention formulated them in Articles 1 D-F. The clauses constitute an established standard being applied in the practice of the European states, which was also reflected in the proposed Directive where the formulations of Articles 1 D-F of the Geneva Convention are literally repeated.[9]

II. Being outside the Country of one's Nationality and Inability or Unwillingness to Avail oneself of the Protection of that Country or to Return to it

A. Internal Flight Alternative

The means of protection known as internal flight alternative remains to be one of the essential matters. Such a situation occurs when some parts of the country are free from the circumstances which led to leaving that country and seeking international protection.

A question remains whether in such a situation the possibility of finding protection in a part of the country's territory becomes a prerequisite to exclude granting refugee status. No direct answer to this question can be found in the formulations of the convention definition, nor in the *travaux préparatoires* of the Geneva Convention.

The issue of refusing refugee status and returning persons to the countries of origin, in a part of which the persons seeking protection may find refuge is a very current matter in the context of persons seeking protection in Europe, as in the case of the Kurds in Turkey, the Tamils in Sri Lanka or the Sikhs in India. This problem also refers to the practice of returning persons seeking refugee status to what is known as safe havens or safety zones, i.e. internationally protected areas established in the country of origin where the conflict prevails.[10]

[9] Further see, e.g. P.J. van Krieken (ed.), *Refugee Law in Context: The Exclusion Clause* (1999).

[10] Such practice occurred for example during the war in the former Yugoslavia. The absolute condition of such procedure must be securing lasting security in such internationally protected areas. As the experience form Bosnia shows,

According to the UNHCR's interpretation included in paragraph 1 of the Handbook, there is no requirement in the formulation of the convention definition that the fear of being persecuted extends to the whole territory of the country of origin. Such interpretation prevails in the doctrine.[11]

In the UNHCR's interpretation, however, there is a possibility to condition granting refugee status on examining whether the person seeking protection might not find refuge from persecution in a part of the country of origin's territory and whether it was not reasonable in the light of all circumstances. The practice of numerous states developed in this direction, which means that granting refugee status has come to be dependent on determining whether the internal flight alternative is not applicable. Nevertheless, the practice of particular states, including the European ones, is significantly differentiated as regards this issue.[12] The differences consider matters such as, for example, the essential question of the time in which the alternative of finding refuge in one's country of origin could exist: should the moment of leaving the country of origin be decisive or the situation in that country at the time the asylum request is being examined or should both be taken into account? Another example of divergent practice is the matter of assessing the reasonableness of the possibility of finding refuge, both in the context of the existence of safe areas or in the context of their accessibility.[13]

this may be difficult to guarantee and thus seriously question this form of protection, see V. Vevstad, *Refugee Protection: A European Challenge* (1998) 55 and 143; see also Landgren, 'Safety Zones and International Protection: A Dark Grey Area', 7 *International Journal of Refugee Law* (1995) 436.

[11] See, e.g. Goodwin-Gill, *supra* note 3, at 74: "There is also no reason in principle why the fear of persecution should relate to the whole of the asylum seeker's country of origin"; however, cf. Storey, 'The Internal Flight Alternative Test: The Jurisprudence Re-examined', 10 *International Journal of Refugee Law* (1998) 501-503.

[12] ELENA, *Research Paper on the Application of the Concept of Internal Flight Alternative* (1998) 5; see also country reports in J.-Y. Carlier *et al.* (eds.), *Who is a Refugee?: A Comparative Case Law Study* (1997), as well as Storey, *supra* note 11, at 505.

[13] Generally on the notion of "reasonable" in international law see, e.g. O. Corten, 'The Notion «Reasonable» in International Law: Legal Discourse, Reason and Contradictions', 48 *The International and Comparative Law Quarterly* (1999) 613.

Paragraph 8 of the Joint Position referring to the issue of the internal flight alternative provides that in the situation when the persecution is definitely confined to a specific part of a country's territory, it may be necessary to make sure that the person seeking refugee status: "... cannot find effective protection in another part of his own country, to which he may reasonably be expected to move." Thus, the persons who, according to relevant authorities of the Member States, might find effective protection in a part of their country of origin's territory where they might be returned, would find themselves outside the convention definition if interpreted in this way. It is inconceivable that such a formulation could be sufficient to reach a harmonised approach to the issue by the Member States. Although it seems that the use of the present tense in the above quoted sentence of paragraph 8 indicates the moment of examining the asylum request as decisive, further issues are not developed there. Moreover, the quoted paragraph of the Joint Position states that the possibility of finding protection in another part of a country of origin should be considered: "in order to check that the condition laid down in Art. 1 A of the Geneva Convention has been fulfilled, namely that the person concerned is unable or, owing to such fear (of persecution), is unwilling to avail himself of the protection of that country ... ." As *Jean-Yves Carlier* rightly pointed out, such formulation clearly emphasises the discrepancy between the possibility of the internal flight alternative provided for in the Joint Position and the formulation of the convention definition which refers literally to a situation in which a person seeking refugee status *does not want to* avail himself of the protection of his country or to return to it.[14] Thus paragraph 8 of the Joint Position allows here a considerably narrowing interpretation of the convention definition applied by some Member States, which is contradictory to UNHCR's interpretation and creates doubts as for the formulation of the definition itself.

The issue of the internal flight alternative was similarly approached in the proposed Directive. According to the proposed Article 10 (1), the Member States may examine whether the fear of being persecuted is not confined only to a part of the country of origin's territory and whether the person seeking international protection (this term is understood in the proposed Directive both as refugee status and as subsidiary protection): "... could reasonably be returned to another part of the country where there would be no well-founded fear of being persecuted or of otherwise suffering serious and unjustified harm." Taking into account

[14] Carlier, 'General Report', in Carlier *et al.*, *supra* note 12, at 722.

the postulates of independent experts, the proposed Directive provides that the situation, in which the agent responsible for persecution is the state's authority or other agent related to it, should constitute "a strong presumption" against allowing the possibility of finding protection by a applicant in the country of origin. It should be emphasised, however, that such possibility was not eliminated.

According to Article 10 (2) of the proposed Directive, in examining whether an applicant can be reasonably returned to the country of origin within the internal flight alternative, Member States should have regard both to the general situation in the part of the country of origin the person is to be returned to, and the applicant's personal circumstances, including age, sex, health, family situation and ethnic, cultural and social links.

While analysing the internal flight alternative principle, it should be indicated that it may be very difficult to assess the circumstances in particular parts of the country and hence the effectiveness of the protection granted to a person coming from one part of the country who is to be returned to another part, especially because the situation may deteriorate. Thus returning a person to his country of origin as a result of refusing refugee status due to the internal flight alternative may cause serious danger of violation of the *non-refoulement* principle. Obligations of the state-parties of the 1950 European Convention of Human Rights (hereinafter: the ECHR) which result from Article 3 ECHR forbidding tortures and inhuman or degrading treatment should also be taken into account in this context.

Strasbourg organs, while examining cases on violation of Article 3 ECHR towards persons who are to be expelled to countries such as Sri Lanka, Turkey or India, refer clearly to differentiated danger of being exposed to the forbidden treatment in different parts of those countries, thus considering this aspect to be important for deciding whether the expulsion of particular person amounts to a violation of Article 3.[15] In the case of Chahal versus the United Kingdom of 1996, the applicant was a Sikh residing legally in the UK whose request for granting refugee status was refused. The decision about his deportation to India was taken because of his activities on the territory of the UK for the sake of the independence of Punjab, which were assessed by the authorities as

[15] See, e.g. *Cruz-Veras v. Sweden,* ECHR (1991) Series A, No. 201; *Vilvarajah v. the United Kingdom,* ECHR (1991) Series A, No. 125; *Vijayanathan and Pusparajah v. France,* ECHR (1992) Series 241-B; *Chahal v. the United Kingdom,* ECHR (1996) RJD.

bearing signs of terrorist activities and as such endangered the security of the UK. Recognising the fact that the situation in Punjab was more dangerous than in other parts of India, the British authorities were ready to transport the applicant to any airport in India. Examining the danger of exposing the applicant to the forbidden treatment should he be deported, the Court, as well as the Commission in its report, decided that, among others, it is necessary to assess the risk of exposing the applicant to such treatment not only in Punjab, where he came from, but also in the whole territory of India.[16] It was only the conclusion that, although the danger of exposing the applicant to the forbidden treatment was the greatest in Punjab, such risk existed in the whole territory of India, which lead the Court to deciding that in case of deportation Article 3 ECHR would be violated.[17]

In the above quoted case the Court recognised that, in deciding whether the deportation would violate Article 3 ECHR, the moment of possible expulsion was decisive and only to a limited extent considered the past situation when the applicant, residing temporarily in Punjab in 1984, was subjected to tortures. It is also remarkable that the British authorities, while examining his application for refugee status lodged in 1990, did not take those circumstances mentioned by the applicant into account, as they regarded the moment of examining the application as decisive. Such approach is consistent with the previous case-law referring to Article 3 ECHR.

B. Refugees sur place

The next issue to be analysed is the situation of the *sur place* refugees. The term refers to persons who left their countries of origin for reasons other than the fear of being persecuted, but during their stay abroad circumstances arose that resulted in the fear of being persecuted in case they should return to the county of origin. In other words, bearing in mind the declarative character of granting refugee status, such persons were not refugees at the time of leaving their countries and became refugees during their stay abroad. It is generally agreed that, in the light of the convention definition, such persons may seek refugee status.

[16] *Chahal v. the United Kingdom, supra* note 15, 98.

[17] *Ibid,* 104-107.

There are two types of situation that may cause persons being outside the country of their origin to become *sur place* refugees. First, objective reasons, when the circumstances in that country change. Second, subjective reasons, as a result of a particular person's activities during his stay abroad. Subjective reasons are undoubtedly more difficult to assess. In some circumstances, the states' dislike towards political activities of dissenters from other countries may play an important role here.[18] In paragraph 96 of the UNHCR Handbook it is stated that activities of that kind must be carefully examined in the light of all relevant circumstances in order to establish whether it is sufficient to justify a well-founded fear of persecution. It must also be taken into account whether the authorities of the country of origin know about the person's activities and how they may perceive it.

Guiding principles regarding this issue provided for in paragraph 9 of the Joint Position are in compliance with the above formulations. Paragraph 9 (1), referring to the situation of changes occurring in the country of origin, states that the changes may justify the fear of being persecuted only if the asylum seeker is able to demonstrate that as a result of the changes he would personally have grounds to fear persecution. In the situation of the person acting outside the country of his origin, to which paragraph 9 (2) refers, there are no grounds to grant refugee status to an asylum seeker who expressed his convictions mainly for the purpose of being granted the status. This does not, however, prejudice his right to remain in the receiving state if the return to the country of origin could endanger his physical integrity or freedom.

Paragraph 9 (2) conditions granting the refugee status also on whether the activities performed outside the country of origin constitute the expression and continuation of convictions which the person concerned had held in his country of origin or: "... can objectively be regarded as the consequence of the asylum-related characteristics of the individual." The condition of continuity is not taken into account if the asylum-seeker was not yet able to establish convictions because of age. Such

[18] Vevstad, *supra* note 10, at 53; Such situation is illustrated, for example, by the above mentioned *Chahal* case. The applicant came to the UK at the beginning of the seventies for economic reasons and legalised his stay. During his stay he got involved in activities of Sikh separatists acting for the sake of independence of Punjab being part of the territory of India. Because of his activities he was, during his stay in Punjab in 1984 detained and tortured by security forces; he managed however to return to the UK. Threatened by deportation to India in 1990 he lodged an application for refugee status which was refused.

conditions may cause doubts as regards their consistency with the convention definition. For as *Vigdis Vevstad* rightly pointed out, according to the provisions of the Geneva Convention, it is inadmissible to condition the granting of refugee status on the place and time of expressing convictions that are grounds for the fear of persecution.[19]

The above reservations are even more relevant in the context of the regulations laid down in the proposed Directive. According to the proposed Article 8, prerequisites for granting refugee status can come into being *sur place*, but as regards the activities performed outside the country of origin, it must be established whether or not they were performed for the sole purpose of creating the necessary conditions for making an application for international protection. The proposed Directive states only that such situation does not exist if "the activities relied upon constitute the expression and continuation of convictions held in the country of origin, and they are related to the grounds for recognition of the need for international protection".

III. Well-founded Fear of Persecution

According to convention definition, a refugee is a person who has a well-founded fear of persecution. It is thus necessary to analyse here two terms that constitute this key element of the analysed definition: fear, which must be well-founded, and persecution. Both elements were considered while formulating the harmonising practice of the Member States of the EU included in the Joint Position and the proposed Directive.

A. Well-founded Fear

The fear of persecution is of subjective and/or objective character. The subjectivity of the fear means that a person is convinced that he is in danger of being persecuted, while the objectivity of the fear refers to an exterior element which is at least to some extent verifiable and which confirms the danger of persecution. Both factors must be considered, but it is the objective character which is decisive in establishing whether

[19] Vevstad, *supra* note 10, at 53.

the fear of persecution is justifiable, which is indispensable for being granted the convention protection. Thus the recognition of a well-founded fear of persecution depends on answering two essential questions: first, whether the fear of persecution is well-founded, which boils down to the question about the extent of the risk that a person is endangered by persecution; and second, what is the evidence standard, i.e. what constitutes the sufficient evidence that the fear of persecution is well-founded.[20]

Analysing this issue in the context of guiding principles laid down in the Joint Position, the answer to the above questions is as follows. As regards the extent of the risk of persecution, it is necessary to establish its credibility and thus exclude irrational reactions and fear. As regards evidence, the asylum-seeker is responsible for proving the risk in the context of his personal situation, but the authorities must confront his claims with the general circumstances in the country of origin, which is not sufficient in itself. The presented evidence does not need to confirm the presented facts in detail, but they must justify the danger of persecution. Such interpretation of the formulation "well-founded fear" laid down in the Joint Position is consistent with the interpretation presented in the UNHCR Handbook,[21] as well as with the postulates of independent experts.[22] Such interpretation was also reflected in the regulations of the proposed Directive (the proposed Article 7).

B. Persecution

The term "persecution" is not defined in the Geneva Convention, nor in the internal case-law of the state-parties of the Geneva Convention where the dominating approach is characterised by analysing the semantic range of this term in the context of each particular case.[23] The Joint Position does not formulate such a definition either, which is expressed *expressis verbis* in paragraph 4. But the term "persecution" is carefully interpreted in the Joint Position, while formulating guiding principles harmonising the application of convention definition.

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[20] Vanheule, *supra* note 3, at 95.

[21] Para. 37 - 50.

[22] Vanheule, *supra* note 3, at 93; Carlier, *supra* note 14, at 695.

[23] Carlier *et al.*, *supra* note 12, *passim.*

In spite of there being no definition of the term, it is generally agreed that persecution may be of different character (e.g. physical, psychological, in some circumstances economic) and that for a particular treatment to be regarded as persecution must reach a particular level of painfulness. It is also necessary to refer persecution to the guaranteed human rights in the context of their violation.[24] The Joint Position shares this approach stating in paragraph 4, among others, that persecution within the meaning of Article 1 A of the Geneva Convention constitute acts that must be "... sufficiently serious, by their nature or their repetition: they must either constitute a basic attack on human rights, for example, life, freedom or physical integrity, or, in the light of all facts of the case, manifestly preclude the person who has suffered them from continuing to live in his country of origin."

Further in paragraph 4 of the Joint Position it is stated that acts which constitute persecution within the meaning of the Geneva Convention must be also based on one of the reasons mentioned in the further part of the convention definition (thus race, religion, nationality, membership of a particular social group, political opinion). An individual may fear persecution for one or more of these reasons. Such an approach is common. The Joint Position adds here two reservations that are very important for the range of the term "persecution". First, it is immaterial whether the reasons of persecution are in a particular case authentic, or whether they are attributed by the persecutor. Second, persecution may also be constituted by particular acts considered jointly, which would not amount to persecution if considered apart.

A similar approach to persecution is presented in the proposed Directive. According to the proposed Article 11, while evaluating the well-founded fear of persecution in the procedure for granting refugee status the term persecution should be understood as comprising at least four mentioned situations. First, infliction of serious and unjustified harm or discrimination on the grounds mentioned in the convention definition, which is sufficiently serious by its nature or repetition as to constitute a significant risk to a person's life, freedom or security or to preclude the person from living in his country of origin; second, legal, administrative, police and/or judicial measures when they are designed or implemented in a discriminatory manner on the grounds mentioned in the convention definition and if they constitute a significant risk to the per-

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[24] Further see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1992), para. 51 - 65; Hathaway, *supra* note 3, at 99; Vanheule, *supra* note 3, at 98.

son's life, freedom or security or preclude him form living in the country of origin; third, prosecution or punishment for a criminal offence if, on the grounds mentioned in the convention definition, the person is either denied means of judicial redress or suffers a disproportionate or discriminatory punishment, or the criminal offence for which the person is at risk of being prosecuted or punished, purports to criminalise the exercise of fundamental rights; fourth, in particular circumstances, prosecution or punishment for refusal to meet a general obligation to perform military service on the grounds mentioned in the convention definition.

Very important for the semantic scope of the term "persecution" and, consequently, for the scope of the convention definition is the question of the sources of persecution, i.e. agents of persecution. Three situation may be mentioned in this context:

- first, when persecution results form direct actions of any kind of state authority;
- second, when persecution results from actions taken by agents other than state authorities, but the actions are at least tolerated by the authorities;
- third, when persecution results form actions taken by agents other than state authorities and the authorities are unable to prevent them;

The Geneva Convention does not refer to the problem of the source of persecution. The aim of the Geneva Convention is ensuring protection to persons endangered by persecution and not being protected in this respect by their country of origin. It is decisive here that the endangered person is unable or unwilling to avail himself of the protection of his country of origin. Thus according to the interpretation included in paragraph 65 of the UNHCR Handbook, all three situations mentioned above constitute persecution within the meaning of the convention definition and constitute a prerequisite to granting refugee status.[25] Such interpretation is shared by non-governmental organisations dealing with refugee protection,[26] as well as being reflected in the practice of numerous state-parties of the Geneva Convention. In the practice of some of the state-parties, however, persecution within the meaning of

[25] UNHCR, *Information Note on Article 1 of the 1951 Geneva Convention* (1995); J. van der Klaauw, 'Refugee protection in Western Europe: A UNHCR perspective', in J.-Y. Carlier and D. Vanheule (eds), *supra* note 3, at 239.

[26] See, e.g. ECRE, *Position on the Interpretation of Article 1 of the Refugee Convention* (2000) 27.

the convention definition is understood as comprising only the first two situations and thus persons endangered by persecution by agents other than state authorities when the authorities are unable to ensure protection are refused conventional protection. Direct participation (acting) or indirect participation (encouraging, tolerating) of state authorities is decisive. Such practice developed in Europe in the case-law of countries such as Austria, France, Germany, Switzerland.[27] Thus this matter constitutes an essential discrepancy in interpreting the convention definition by European states, including the EU Member Sates.

The Member States of the EU had to consider this issue while attempting to harmonise the interpretation of the convention definition in the Joint Position. It deals with the forms of persecution by state authorities in paragraph 5 (1), and in sub-paragraph 2 of paragraph 5, which deals with persecution by third parties. It states that persecution by agents other than state authorities enters within the scope of the Geneva Convention if it is based on one of the grounds mentioned in Article 1 A, is of individual character and is encouraged or tolerated by state authorities; and further it states that when the authorities "fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light, in particular, of whether or not the failure to act was deliberate." According to the last sentence of 5 (2), the persons concerned may be eligible in any event for appropriate forms of protection under national law.

Thus, according to the Joint Position, persecution by agents other than state authorities is, in principle, taken into account only when the authorities encourage or tolerate the actions amounting to persecution. The decisive element determining the character of the state authorities' passiveness is the issue whether the inaction was deliberate. This formulation is rightly criticised for being very ambiguous. The wording "in accordance with national judicial practice" allows a far-reaching freedom of interpretation.[28]

This argument was taken into account by the Commission while formulating the provisions of the proposed Directive. The proposed Article 9, which deals with the question of the sources of persecution, in-

[27] Carlier *et al.* (eds), *supra* note 12, at 44, 398, 269 and 149 accordingly.

[28] Carlier, *supra* note 14, at 721; also cf. Noll/Vedsted-Hansen, 'Non-Communitarians: Refugee and Asylum Policies', in P. Alston (ed.), *The EU and Human Rights* (1999) 379.

cludes the situation when the persecution results from actions taken by agents other than state authorities and they are unable or unwilling to prevent such actions. Decisive for evaluating whether the fear of persecution is well-founded is the question whether there is an effective system of protection against persecution ensured by state authorities available in the state of origin. The term protection by state authorities within the meaning of the proposed Directive comprises also the protection guaranteed by intergovernmental organisations, as well as – under certain conditions – by quasi-state authorities.

In this context it is necessary to mention the Strasbourg case-law referring to Article 3 ECHR, which also refers to the problem of being endangered with a forbidden treatment by agents other than state authorities. In 1997 the Court examined a case against France, in which the applicant who was of Colombian nationality and charged with drug trade, claimed that his expulsion to Columbia would violate Article 3 ECHR because of the risk of being endangered by drug cartels. The Court clearly stated that it did not exclude the possibility of applying Article 3 in a situation when the danger of being treated in a forbidden way did not come from state authorities. It is nevertheless necessary to demonstrate that the risk is real and that state authorities are unable to prevent the danger by ensuring a relevant protection.[29]

Also, in another case of the same year the Court confirmed the necessity to examine the problem of protecting against treatment forbidden in Article 3 in the situation when the risk that a particular person would be treated in a forbidden way, had its source in intentional actions of public authorities in the country of origin or came from non-state agents and the authorities were unable to ensure a relevant protection.[30]

Such an approach remains consistent with the theory of negative and positive obligations of states resulting form the duty to respect human rights. States are not only obliged negatively not to violate particular rights of individuals under their jurisdiction, but also have the positive obligation to protect those rights. Thus even an unintentional lack of ensuring by the state authorities protection against violations of those rights by other agents, may constitute a violation of a state's obligations and thus constitute a violation of human rights.[31]

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[29] *HLR v. France,* ECHR (1997) RJD, 40; see also *Ahmed v. Austria,* ECHR (1996) RJD, 44.

[30] *D v. the United Kingdom,* ECHR (1997) RJD, 49.

[31] Noll/Vedsted-Hansen, *supra* note 28, at 380.

IV. Grounds of Persecution

According to the convention definition, the fear of persecution must result form at least one of the five mentioned grounds: race, religion, nationality, political opinion or membership of a particular social group. Persecution may often be connected with more than one of these grounds. Also, it should be immaterial whether the grounds are real or attributed to a person by the persecutor. Such approach is confirmed in the Joint Position.

The Joint Position deals with grounds of persecution in paragraph 7. The interpretation of the first three grounds (race, religion and nationality) does not give rise to any controversies and is consistent with the interpretation of the UNHCR Handbook,[32] as well as the common way of defining these terms in international law. However, the interpretation of the last two grounds (political opinions and membership of a particular social group) may cause reservations. According to paragraph 7 (4) holding political opinions different form those of the state authorities is not in itself a sufficient ground for seeking refugee status. It is necessary to demonstrate that, firstly, the authorities know about an applicant's political opinions or attribute them to him; secondly, that those opinions are not tolerated by the authorities; and thirdly, that in this situation the applicant is likely to be persecuted for holding such opinions.

This interpretation is shared by the UNHCR Handbook, but is widened in paragraph 82 by a reference to a situation when a person seeks refugee status because of his political opinions that have not yet been expressed by the applicant and hence the authorities know nothing about them. When it is justifiable to assume that the opinions will be given expression later and that this would lead to persecution, the applicant should be considered to have fear of persecution on the ground of political opinion.

From the omission of this element in the Joint Position it follows that persons about whose political opinions state authorities are not informed are excluded form the scope of the convention definition, even if those opinions would undoubtedly result in persecution when state authorities learned about them.[33]

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[32] Para. 68-76.

[33] Guild, *supra* note 7, at 332.