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AS ‘ACTORS OF PROTECTION’
IN INTERNATIONAL REFUGEE LAW

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NON-STATE ACTORS IN CONTROL OF TERRITORY
AS «ACTORS OF PROTECTION» IN INTERNATIONAL REFUGEE LAW

Markos Karavias¹

1. Changing Perspectives on International Refugee Law

International refugee law, as enshrined in the 1951 Convention relating to the Status of Refugees (hereafter 1951RC) and the 1967 Protocol thereto, has long been conceived as regulating a complex triangular relationship among the refugee, his country of nationality, and the receiving country.² The former, owing to a well-founded fear of persecution, finds himself outside the country of nationality whilst being unwilling or unable to obtain the protection of that country.³ The status of the refugee therefore presupposes a movement in space, the crossing on behalf of the person at risk of the boundaries of his country into a third one. In this sense, Aleinikoff is correct to underline that the «legal concept of the refugee ... is closely related to understandings of the state, state sovereignty and state membership».⁴

¹ Post-doctoral Researcher, Amsterdam Center for International Law, University of Amsterdam. The idea behind the present paper first emerged during the time the author served as a Member of the Asylum Appeals Committees of the Hellenic Republic. Thanks are therefore due to all Committee colleagues for fruitful discussions on the topic. Thanks are also due to the participants of the SFDI-DGIR Workshop for Junior Scholars of International Law and the Amsterdam Center for International Law Luncheon Meeting Series for their feedback. All errors remain mine.

² Cf C. TOMUSCHAT, «State Responsibility and the Country of Origin», in V. GOWLLAND-DEBBAS (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues*, The Hague, Kluwer Law, 1996, p. 59.

³ See Art. 1 (A)(2)1951RC.

⁴ T.A. ALEINIKOFF, «State-Centered Refugee Law: From Resettlement to Containment», *Michigan Journal of International Law*, vol. 14, 1992-3, pp. 121- 122.

From the entry into force of the 1951RC onwards and throughout the period of the Cold War, the focus came to rest on the role of States, a role painted with a bright political brush. The archetypical image conjured by the term «refugee» in the West was that of an individual facing persecution by the apparatus of a totalitarian State on account of his ideological convictions. States in Europe and North America were especially keen to capitalize on this value-loaded image. As the UNHCR once noted, «[d]uring the Cold War, the superpowers and their allies [...] had a strategic interest in refugees – an interest which offset the costs incurred by granting them asylum».⁵ What is more, in the West, the choice to offer permanent resettlement to a rather small number of persons fleeing communist countries resonated with domestic constituencies.⁶

As the Cold War drew to a close, the operation of international refugee law came under increasing pressure due to changes in the factual patterns of persecution, refugee movement and protection. First and foremost, the number of persons seeking asylum in the refugee-receiving countries of the West started to increase exponentially, with persons travelling in a commercially organized manner from developing countries, thus prompting talk of «jet-age refugees».⁷ Second, these persons were no longer nationals of communist states, but hailed from all over the globe, in particular South Asia and Africa.

Finally, and more significantly, asylum seekers were no longer exclusively fleeing persecution by the apparatus of a totalitarian State. A growing number of asylum seekers were forced to flee regionalized violence associated with civil conflict. The perpetuation of civil conflict well into the period following the end of the Cold War brought to the fore a multitude of non-state actors (hereafter NSAs) participating in hostilities, such as paramilitary troops, armed militia and clans who

⁵ UNHCR, *The State of the World's Refugees: In Search of Solutions*, Oxford, Oxford University Press, 1995, p. 37.

⁶ C. KEELY, «The International Refugee Regime(s): The End of the Cold War Matters», *International Migration Review*, vol. 35, 2001, p. 308.

⁷ M. D. HOND, ««Jet-Age Refugees»: In Search of Balance and Cooperation», in D. MARTIN (ed.), *The New Asylum Seekers: Refugee Law in the 1980s*, Dordrecht, Kluwer, 1988, p. 49.

posed a challenge to the sovereignty of the State in which they operated and a threat to the safety and integrity of individuals caught within the area of their operations.

Domestic courts⁸ faced with asylum claims responded to new realities on the ground from rather early on by admitting that the conduct of NSAs could result in serious violations of human rights and thus NSAs could act as «agents of persecution». UNHCR itself has acknowledged that recognition of refugee status is justified where «persecution is perpetrated by non-governmental entities, for example irregular forces or the local populace, towards an individual ... under circumstances indicating that the State was unwilling or unable to offer effective protection against threatened persecution».⁹ Within this context, the State retains a key role, albeit it is its inaction that triggers the application of 1951RC.

Recently, however, domestic courts have taken a controversial leap forward in admitting that these same non-state entities may also serve as «actors of protection» in international refugee law, ie they may offer protection against persecution, comparable to that normally offered by the State. This proposition breaks with the State-centric conception of international refugee law delineated above, and has thus generated considerable criticism. The crux of the matter, as will be explained below, is the following: the non-state «actor of protection» proposition has been employed by domestic courts as a justification for withholding refugee status from asylum seekers fleeing persecution in civil war-torn areas.

The purpose of this paper is to lay bare the content and operation of the non-state «actor of protection» proposition and highlight the pitfalls it holds for asylum applicants. In order to do so, the paper begins, first, by analyzing the idea of «protection» in international refugee law. It, then, turns to the emergence of the

⁸ Any comparative review of the application of 1951RC in domestic law is bound to stumble across definitional hardships flowing from the fact that each State Party will regulate refugee status determination (RSD) procedures in accordance with the basic precepts of its legal system. In a number of States, it is judicial bodies, which conduct RSD, whereas in others administrative ones, whilst courts retain the power to overturn or quash such administrative decisions. The reference to «domestic courts» and «judges» throughout the paper should be taken to reflect both systems.

⁹ UNHCR, *Agents of Persecution – UNHCR Position*, 14 March 1995, para. 4, available at <http://www.refworld.org/docid/3ae6b31da3.html>.

non-state «actor of protection» proposition in domestic law and its incorporation into European asylum law before reviewing the legal argumentation surrounding the issue. Ultimately, the paper concludes that in those jurisdictions, which choose to apply the proposition, domestic courts should apply a composite criterion fusing legal and factual considerations.

1. «Protection» in international refugee law

Art. 1 (A)(2) 1951RC constitutes the cornerstone of international refugee law in defining the «refugee» as a 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 [...]». The provision builds on three key concepts, namely *fear of persecution*, *grounds for persecution* and *protection of the country of nationality*. Domestic judges normally begin by assessing whether the claimant's fear of being persecuted in his country of origin is well-founded. «In addition to identifying the serious harm potentially at risk in the country of origin, a decision on whether or not an individual faces a risk of «being persecuted» must also comprehend scrutiny of the state's ability and willingness effectively to respond to that risk [...] a risk of being persecuted implies an element of persistence, relentlessness, or inescapability which is only present if the state is unwilling or unable to protect against the risk of harm.»¹⁰

In sum, the concepts of persecution and protection by the country of nationality cannot be disaggregated. The failure of the country of nationality to protect its nationals constitutes an integral element of a finding on persecution. Lord Hoffmann of the UK House of Lords summarized this state of affairs in the

¹⁰ J. HATHAWAY and M. FOSTER, *The Law of Refugee Status*, Cambridge, Cambridge University Press, 2014, p. 293.

following formula: «Persecution = Serious Harm + The Failure of State Protection».¹¹ It becomes obvious then that the term «protection of the country of nationality» in Art. 1(A)(2) 1951RC refers to the protection from persecution available to nationals within their State of origin. International refugee law does not act as bulwark against any form of harm, but provides «a remedy to a fundamental breakdown in the relationship between an individual and her state».¹² «The mere lack and inability of access to protection from other forms of human rights violations *not* amounting to persecution is not relevant for the purposes of [the provision]».¹³

The concept of «protection» also appears in the third preambular paragraph of the 1951RC, which states that the Contracting Parties considered it «desirable to revise and consolidate previous agreements relating to the status of refugees and to extend the scope and protection accorded by such instruments by means of a new agreement.»¹⁴ Reference to «protection» in this context carries a different meaning from that of Art. 1(A)(2) 1951RC and is closely linked with the purpose of the 1951RC as such, namely the recognition by virtue of international law of the juridical status of the «refugee» and the guarantee of a number of rights to those recognized as refugees, which they can exercise in the state of refuge.¹⁵ Indeed, Arts. 2-34 1951RC set forth a list of rights that States Parties to the Convention are obliged to accord to those recognized as «refugees».¹⁶

¹¹ UK House of Lords, *R. v. Immigration Appeal Tribunal and Another, Ex parte Shah*, [1999] 2 AC 635. The interplay between persecution and protection has been affirmed in numerous other jurisdictions. In New Zealand: Court of Appeal, *Butler v. Attorney General and Refugee Status Appeals Authority*, [1999] NZAR 216-217. In Canada: Federal Court, *Zalzali v. Minister of Employment and Immigration*, [1999] 3 FC 609-610.

¹² J. HATHAWAY and M. FOSTER, *op. cit.*, p. 288.

¹³ A. ZIMMERMANN and C. MAHLER, «Article 1A, para. 2», in A. ZIMMERMANN (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford, Oxford University Press, 2011, p. 445.

¹⁴ Preamble para. 3 1951RC.

¹⁵ See also N. NATHWANI, *Rethinking Refugee Law*, The Hague, Martinus Nijhoff, 2003, p. 18.

¹⁶ For an exhaustive treatment, see J. HATHAWAY, *The Rights of Refugees under International Law*, Cambridge, Cambridge University Press, 2005.

Thus, «protection» does not carry a singular meaning throughout the Convention. On the contrary, Janus-faced, it looks in two different directions. On the one hand, in the direction of the State of origin, whose failure to provide protection from persecution to one of her nationals results in the latter's flight. On the other hand, in the direction of the State of refuge, which is called upon to protect those rights of the refugee accorded under international law. These two conceptions of protection are closely linked. As the House of Lords noted in *Horvath*, «[t]he general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a convention reason in his own country to turn for protection to the international community».¹⁷ Protection offered to individuals recognized as refugees under the 1951RC -in sum the international protection- is considered *subsidiary* or *surrogate* in character and is triggered when the protection of the country of nationality is lacking.¹⁸

2. Non-State Actors as «Actors of Protection»

The protection of the fundamental rights of individuals, whether in the light of international human rights law or international refugee law, is a task normally falling on the shoulders of States, the primordial addressees of the relevant international law provisions. Nonetheless, shifts in the configurations of authority on the international plane have resulted in exposing the negative consequences emanating from the conduct of NSAs as well. NSAs are thought of as potential violators of human rights, prompting inquiries into the need for international law obligations to be placed upon them as a means of deterring misconduct.¹⁹

The non-state «actor of protection» proposition turns this logic inside out. Apart from posing a risk to individuals' safety, NSAs are also conceived as able of actually offering protection from persecution. In other words, the protection offered

¹⁷ *Horvath v. Secretary of State for the Home Department*, [2000] 3 All ER 577.

¹⁸ It has been noted that such a reading of the 1951RC actually reflects the drafters' intention. See A. ZIMMERMANN and C. MAHLER, *op. cit.*, 448.

¹⁹ In this respect, see A. CLAPHAM, *Human Rights Obligations of Non-State Actors*, Oxford, Oxford University Press, 2006.

by an NSA and that offered by a State to her nationals can be equivalent. This line of reasoning has a significant implication: if protection is available to the applicant within his country of nationality, albeit by a NSA, then the «well-foundedness» of his fear of persecution is vitiated.²⁰ By implication, the said applicant is not in need of international protection under the 1951RC. The surrogate nature of international refugee law in this case serves as a reason to deny refugee status to the asylum applicant.²¹ Indeed, this has been the position adopted by a certain number of jurisdictions. What is more the non-state «actor of protection» proposition has been included in European asylum law. These two developments are analysed below.

(a) Domestic case-law

(i) International administrations

The first string of cases upholding the capacity of actors other than the State to provide protection in the context of international refugee law dealt with asylum applications by Kosovar Albanians fleeing ethnic persecution associated with the eruption of civil war in former Yugoslavia. A turning point in this respect was the decision on behalf of the United Nations Security Council to deploy in Kosovo «under United Nations auspices ... international civil and security presences».²² The result was the creation of the United Nations Interim Administration Mission in Kosovo (UNMIK), as well as the deployment of the Kosovo Force (KFOR), a NATO-led international peacekeeping force.

Following these developments, the UNHCR in a background note of February 2000 noted: «Since the withdrawal of Yugoslav forces and the entry of the

²⁰ If protection is available in a region other than the one in which the applicant resided prior to his or her flight, the internal flight alternative (IFA) may apply. Still, a detailed analysis of the IFA falls outside the context of the present paper.

²¹ For an analysis on the uses and abuses of the concept of surrogacy, see G. GOODWIN-GILL and J. MCADAM, *The Refugee in International Law*, Oxford, Oxford University Press, 2007, pp. 9-11.

²² UN SC Resolution 1244, UN Doc. S/RES/1244 (1999), para. 5.

international military presence (KFOR) and the UN Interim Administration Mission (UNMIK) into Kosovo in mid-June 1999, the situation for ethnic Albanians inside Kosovo has dramatically improved. The systematic persecution described in earlier UNHCR and OSCE documents no longer prevails.»²³

This finding by UNHCR prompted domestic courts to dismiss asylum applications on the basis of the fact that «protection» was available in the country of nationality, a suggestion contested by asylum applicants. In the seminal *Dyli* judgment, the UK Immigration Appeal Tribunal held that «for the purposes of the Convention, protection provided by or through UNMIK and KFOR is capable of amounting to the protection of [the applicant's] own country for a resident of Kosovo».²⁴ In order to reach that conclusion the Tribunal made two key findings. First, it refused to impose a constitutional colour on the phrase «protection of the country of origin». According to the Tribunal, «there is little reason for taking the word in other than a geographical sense».²⁵ What mattered in fact was the availability of protection within that geographical space. Second, the Tribunal opined: «How [protection] is achieved, whether directly by the authorities of the country, or by others, is irrelevant.»²⁶

Simon Brown LJ in a later case decided by the Court of Appeal of England and Wales suggested that according to *Dyli* «any entity which in fact provides such protection with or without a duty under international law to do so and with or without the consent of the country of nationality»²⁷ may serve as an «actor of protection» under international refugee law. Especially, as regards UNMIK and KFOR, they were thought to be providing protection «with the consent of the

²³ UNCHR, *Background Note on Ethnic Albanians from Kosovo Who are in Continued Need of International Protection*, March 2000, available at <http://www.unhcr.org/3c3c0bd14.html>

²⁴ UK IAT, *Dyli v. the Secretary of State for the Home Department*, [2000] Imm AR 652, para. 14.

²⁵ *Ibid.*, para. 12.

²⁶ *Ibid.*, para. 13.

²⁷ UK Court of Appeal, *Canaj v. the Secretary of State for the Home Department and Vallaj v. A Special Adjudicator*, [2001] EWCA Civ 782, at para. 9.

«country of nationality»». ²⁸ Counsel disputed the adequacy of protection by UNMIK and KFOR for one of the applicants due to his personal circumstances, namely the fact that his was persecuted in the past. The argument was dismissed by the Court which stressed that were this argument sound, «one would have the very remarkable position of UNHCR ... advising that most Kosovar Albanians could safely be returned ... notwithstanding that the level of protection available to them was insufficient for Convention purposes.» ²⁹

The issue of consent by the country of nationality was fleshed out from a different angle by the Federal Court of Canada. Thus, in case where a country is being supported or assisted in providing protection by another entity, the Court assessed whether there was a «difference in interests» between the two. As regards Kosovo, the Court found that «there is no difference between the UN forces and the government of the Federal Republic of Yugoslavia ... The presence of UN forces is not evidence of a breakdown of the State apparatus in Yugoslavia or Kosovo. The UN forces and security police in Kosovo work in conjunction with the local Kosovo police service to maintain order.» ³⁰

The UNMIK and KFOR cases consolidated the idea that NSAs can serve as actors of protection in the sense of 1951RC. More significantly, the courts abstained from an assessment of the nature and extent of the protection provided by the UNMIK and KFOR. Their presence in Kosovo following State consent, coupled with the aforementioned UNHCR background note, led to the establishment of a *presumption* of protection for all Kosovars within Kosovo. The underlying assumption was that the presence of an international force in a given region would necessarily create there an atmosphere of safety and stability, which would allay the fear of persecutory acts.

(ii) Peace enforcement operations

²⁸ *Ibid.*

²⁹ *Ibid.*, para. 11.

³⁰ *Isufi v. Canada (Minister of Citizenship & Immigration)* [2003] FC 880, para. 20.

Courts espoused a similar line of reasoning when dealing with the capacity of UN-led missions to offer protection within the areas of their operation. In *Siaw* the Federal Court of Australia addressed the significance of the presence of the United Nations Mission in Sierra Leone (UNAMSIL)³¹ in the country in the context of an application for review of a decision by the Refugee Review Tribunal to refuse refugee status to a Sierra Leone national. The Tribunal held that the claimant would enjoy protection from persecution by rebel forces if returned to Freetown, the capital of Sierra Leone. That protection was provided by the «combination of UN and government security forces».³²

The applicant submitted before the Federal Court that the Tribunal had erred in holding that he could be refused refugee status and relocated to Sierra Leone where the protection available «was provided by an armed international force and not by the applicant's own State.»³³ The Federal Court held that the Tribunal, despite variations in the formulation of its holding, had found that «it was a combination of UN and government forces that would provide adequate protection ... that Freetown and its environs were secure, that the applicant would be able to live there safely».³⁴ The Court stressed that '[A]t no stage did the Tribunal attribute the applicant's safety solely to the UN forces.'³⁵ The Court then proceeded to note *obiter* that «[t]he political composition of those who are keeping the peace and making an area secure is not relevant to the assessment of whether an applicant has

³¹ UNAMSIL was established by virtue of UN Security Council Resolution 1270/1999. The mandate of UNAMSIL in principle was to 'cooperate with the Government of Sierra Leone with a view to implementing the Peace Agreement reached between the parties to the Sierra Leone civil war in Lome on 7 July 1999. Importantly, the Security Council, acting under Chapter VII, decided that in discharge of its mandate UNAMSIL was empowered to 'take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence'. (Art 14)

³² Federal Court of Australia, *Siaw v. Minister for Immigration and Multicultural Affairs* [2001] FCA 953, para. 6.

³³ *Ibid.*, para. 7.

³⁴ *Ibid.*

³⁵ *Ibid.*

a well-founded fear».³⁶ Accordingly, there is «no difference between cases where adequate protection is provided entirely by government forces ... by mercenaries (alone or paid to assist government forces), by United Nations forces invited to assist government forces.»³⁷

(iii) *De facto* regimes

One of the more interesting –and peculiar for that matter– cases, where courts have held that a NSA is in the position to offer protection, has been that of the *de facto* regime of Somaliland. Once a British protectorate, Somaliland attained independence on 26 June 1960, but was later united with the Trust territory of Somalia, which had gained independence from Italy, with a view to forming a ‘Greater Somalia’. Following the fall of the Somali government in 1991, Somaliland participated briefly in the ensuing intra-clan hostilities before retreating to the former colonial borders and declaring independence. Ever since the Declaration of Independence, «Somaliland has morphed into a *de facto* state exhibiting all the quintessential features of a state» but for recognition by third States.³⁸

In a case turning on the dismissal of an asylum claim by a Somali on account of available «protection» in Somaliland, the UK Immigration Appeal Tribunal held that «[t]he administration in Somaliland operates the main functions of a government and spends a large proportion of its annual budget on security and law and order. Whilst it is not recognized as an independent state ..., nevertheless there has been appreciation from the United Nations for what they have achieved.»³⁹ On the basis of these considerations, the Tribunal held that under the circumstances of

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ J.N. MAOGOTO, «Somaliland: Scrambled by International Law?», in D. FRENCH (ed.), *Statehood, Self-Determination and Minorities*, Cambridge, Cambridge University Press, 2013, p. 209.

³⁹ UK IAT, *HF (Persecution-Discrimination-Yibir-Occupation-Caste) Somalia CG* [2002] UKIAT 05520, p. 6.

the case, there was sufficient protection within Somaliland and dismissed the appeal.

The Swiss *Asylrekurskommission* has followed a similar logic. Whilst recognizing the chaotic situations in the South of Somalia, it has noted the «constant progress, especially in terms of stability of institutions and security, in the north of the country, which is made up of Somaliland and Puntland». ⁴⁰ It therefore has concluded that Somali claimants hailing from Somaliland clans can be reasonably returned to Somaliland and Puntland, unless they belong to vulnerable groups, such as unaccompanied minors, or they do not have a family network to turn to for support in Somaliland. ⁴¹

(iii) Clans

A final category of NSAs found to be able to offer protection equal to that of the country of nationality is clans. The leading case in this respect is *DM*, in which the UK Asylum and Immigration Tribunal held that majority clans in Somalia can serve as actors of protection. The Tribunal upheld the finding in *Dyli* dissociating statehood from protection, and noted that «[a]ll that is essential for Refugee Convention ... purposes, therefore, is that as a matter of fact an entity within a country or state affords effective protection. Plainly, an entity which relies for its law an order functions on drug barons or armed militias may be less able to provide effective protection than one which can rely on those functions being performed by properly trained, properly resourced and accountable police or army personnel whose standards of human conduct are exemplary.» ⁴² The Tribunal then went to analyze the operation of clans in Somalia and held that it is beyond dispute that three major clans in Somalia each control a substantial part of its territory. It then held: «we see no logical difficulty with clan militiamen and other majority clan

⁴⁰ Commission suisse de recours en matière d'asile, 2006/2, §7.1-7.2 [translation by the author].

⁴¹ Ibid. 7§2

⁴² UK AIT, *DM (Majority Clan Entities Can Protect) Somalia* [2005] UKAIT 00150, para. 22.

personnel performing quasi-governmental functions being considered as state actors (as opposed to non-state actors) ... there will be a continuum of circumstances spanning the state agency/non-state actor divide.»⁴³

A similar line of reasoning was adopted by the Federal Court of Canada in *Elmi*, which concerned the refusal of refugee status to a Somali applicant. The Federal Court allowed the application for judicial review and set aside the initial judgment finding that it erred in law. Yet, it refused to find an error in law as regards the reliance on behalf of the Immigration and Refugee Board on specialized knowledge. The Board had based its finding on the experience gathered by the Board in dealing with cases on Somalia. Specifically, the Board held that « it is one's clan that is the *de facto* government and therefore the *de facto* agent of protection in the various regions controlled by one's clan; it is the clan that is the social welfare agency in that region».⁴⁴

(b) European Asylum Law

The Member States of the European Union adopted on 29 April 2004 the «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»⁴⁵ (hereafter Qualification Directive). The Qualification Directive was described as «unquestionably the most important instrument in the new legal order in European asylum because it goes to the heart of the 1951 Convention Relating to the Status of Refugees.»⁴⁶ The purpose of the Qualification Directive was to shed light on key elements of the 1951RC, whilst at the same time harmonizing the application of the 1951RC in the European

⁴³ *Ibid.*, para. 31.

⁴⁴ Federal Court of Canada, *Elmi v. the Minister of Citizenship and Immigration*, IMM-580-98, para. 8.

⁴⁵ Council Directive 2004/83/EC of 29 April 2004 [2004] *Official Journal* L304/12.

⁴⁶ H. LAMBERT, «The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law», *International and Comparative Law Quarterly*, vol. 55, 2006, p.161.

legal order. In order to do so, it drew on and codified pre-existing practices of Member States. Perhaps for this reason, the Qualification Directive was criticized at the time for «equalizing down» at the refugee's expense.⁴⁷

One of the most controversial aspects of the Directive was the incorporation into European asylum law of the non-state «actor of protection» proposition. It was suggested that «EU Member States wished to use it to reject claims from asylum seekers from Kosovo, overseen for several years by a UN administration ... and peacekeeping force».⁴⁸

According to Art. 7 (1) Qualification Directive, «Protection can be provided by: (a) the State; or (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.» The modalities of protection were codified in the second paragraph of the above provision, which states that «Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.»

Art. 7 (1) Qualification Directive leaves the door ajar for the recognition of NSAs as «agents of protection» in stipulating that States, parties or organisations can qualify. It is interesting to note that the term «organisations» does not equal international organisations, as it «includes» international organizations in its logically wider ambit. The key condition that the Directive sets is that the entity in question is «controlling the State or a substantial part of the territory of the State». Read in combination with Preamble Recital 19 of the Qualification Directive, the term «substantial part» should be read as «a region of a larger area within the territory of the state».

⁴⁷ G. GILBERT, «Is Europe Living up to Its Obligations to Refugees?», *European Journal of International Law*, vol. 15, 2004, p. 969.

⁴⁸ See M. GARLICK, «UNHCR and the Implementation of Council Directive 2004/83/EC on Minimum Standards», in K. ZWAAN (ed.), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Nijmegen, Wolf Legal Publishers, 2007, p. 65.

As to when such protection is actually offered, the Directive relies on the concept of «reasonable steps» to be taken by the respective actor. The concept appears problematic as it is unclear whether it refers solely to the willingness, or also to the ability to offer protection. Indeed, it seems to imply «that there is «protection» if the actor of protection is willing, though not (fully) able to afford it».⁴⁹ Of course, such a conception, which resembles a due-diligence standard, does not square with international refugee law, since protection from persecution must either exist or not.⁵⁰

The question of adequacy of protection was one of the issues that called for more clarity and, therefore, was recast in the 2011 Qualification Directive (recast).⁵¹ As to the entities that can offer protection «against persecution or serious harm», the approach of the original Qualification Directive was adhered to, albeit with a significant addition at the end of the provision. Thus, while Art. 7 (1) Qualification Directive (recast) includes references to the State, parties and organisations as agents of protection, it posits that they only qualify as such «provided they are *willing and able* to offer protection in accordance with paragraph 2».⁵² Paragraph 2 was further amended in light of the criticism voiced against the original Directive. It now reads: «Protection against persecution or serious harm must be *effective* and of *a non-temporary nature*. Such protection is generally provided when the actors ... take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and

⁴⁹ See H. BATTJES, *European Asylum Law and International Law*, Leiden, Brill, 2006, p. 248.

⁵⁰ See K. HAILBRONNER and S. ALT, «Interpretation-Art. 7», in K. HAILBRONNER (ed.), *EU Immigration and Asylum Law – Commentary*, Munich, CH Beck, 2010, 1050-1051.

⁵¹ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] *Official Journal* L 337/9.

⁵² [emphasis added].

punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.»⁵³

(c) Deciphering the Applicable Criteria

A perusal of the relevant domestic case-law suggests that there are two key criteria at play when applying the non-state «actor of protection» proposition. On the one hand, certain cases exhibit reliance on *consent*. When the NSA operates in and controls the territory of a State with the latter's consent, then domestic judges are quick to infer the availability of protection.

On the other hand, when consent is lacking, domestic judges will look to the actual structure and more importantly *function* of the NSA, within the territory it controls. The formulation of the judgments, and the description for example of clans as a «de facto government» or Somaliland as performing «the functions of government», is evident of the fact that judges use the State as a yardstick against which to measure the function of the actor in question.

European law seems to lean towards a functional criterion. The text of the Qualification Directive (recast) makes no reference to consent whatsoever, when it comes to NSAs. It rather chooses to focus on whether the entities in question control a substantial parcel of territory and are «willing and able» to offer effective and durable protection, which is guaranteed for example through the operation of an effective and accessible legal system. It becomes obvious anew that in order for a NSA to qualify as an «actor of protection» under the Directive, it will have to exhibit certain characteristics akin to those of States.

3. The Critique Against Non-State «Actors of Protection»

The proposition that NSAs can accord protection for the purposes of 1951RC, as reflected in domestic case law and European asylum law has generated criticism

⁵³ [emphasis added].

both from the UNHCR and academic quarters. A wide array of arguments derived from international law have been put forth with a view to corroborating that this proposition is contrary to 1951RC and that it jeopardizes the fundamental rights, and ultimately, the life and limb of refugees.

The first port of call of critics is the actual text of the Convention. The repeated references throughout Art. 1 1951RC to the «country» of nationality «make clear that only national protection is relevant for the assessment of refugee status». ⁵⁴ More specifically, Art. 1 (A)(2) 1951RC expressly incorporates in the refugee definition the inability or unwillingness of the claimant to «avail himself of the protection of that country». «The words indicate that it is not the absence of protection that is at issue but it is the absence of protection from the state.» ⁵⁵

The second line of argumentation highlights the differences in legal status between States and NSAs under international law. Thus, the UNHCR noted in relation to the Qualification Directive, that «[u]nder international law, international organizations do not have the abilities of a State. In practice, this generally has meant that their ability to enforce the rule of law is limited.» ⁵⁶ The assumption behind the position of the UNHCR is that «while international organizations continue to provide the best level of support and protection that they can, limited resources and legal authority may systematically handicap their efforts. This

⁵⁴ J. HATHAWAY and M. FOSTER, *op. cit.*, p. 291.

⁵⁵ N. KELLEY, «Internal Flight/Relocation/Protection Alternative: Is it Reasonable?», *International Journal of Refugee Law*, vol. 14, 2002, p. 20. A similar argument has been made by O' Sullivan who argued that «the criteria for refugee status set out in article 1A(2) of the Refugee Convention are clearly based on a framework of the state and nationality». M. O'SULLIVAN, «Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law», *International Journal of International Law*, vol. 24, 2012, p. 89.

⁵⁶ UNCHR, *Annotated Comments on the EC 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*, January 2005, p. 18 (available at: <http://www.unhcr.org/43661eee2.pdf>)

renders unrealistic the suggestion that international organizations can ‘control’ territory and ‘protect’ people in the same way that a State can.»⁵⁷

Finally, it is argued that NSAs are unaccountable under international law. In the words of Hathaway and Foster: «[t]he very structure of the 1951 Convention arguably requires that protection will be provided not by some legally unaccountable entity with *de facto* control, but rather by a government responsible for its actions as a matter of international law.»⁵⁸ The purpose of the 1951RC is not to guarantee for persons at risk some measure of relative safety, but restore «refugees to membership in a national community, that is, in a political community that has clear protective duties under international law.»⁵⁹

All these arguments undoubtedly carry legal weight, yet they do not appear conclusive towards barring NSAs from the status of ‘actors of protection’. It goes without saying that the text of the 1951RC constitutes the starting point of any attempt to interpret it. As the International Court of Justice held, «in accordance with customary international law, reflected in Article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.»⁶⁰ Still, as per Lord Hope, one needs to take an «evolutionary approach» to the text of the 1951RC, because this «enables account to be taken of changes in society ... which may not have been obvious to the delegates when the Convention was drafted.»⁶¹ Domestic case-law in respect of NSAs may signal a need to interpret the 1951RC in the light of changing realities. «A simple textual analysis, particularly where the text of the Convention is ambiguous as to meaning, is not

⁵⁷ M. GARLICK, *op. cit.*, 65.

⁵⁸ P. MATTHEW, J. HATHAWAY and M. FOSTER, «The Role of State Protection in Refugee Analysis», *International Journal of Refugee Law*, vol. 15, 2003, p. 453.

⁵⁹ J. HATHAWAY and M. FOSTER, *op. cit.*, p. 292.

⁶⁰ ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports 1994, p. 21-22, para. 41.

⁶¹ UK House of Lords, *Islam v. Secretary of State for the Home Department, R. v. Immigration Appeal Tribunal and another, ex parte Shah* [1999] 2 AC 629 (UK), p. 657 (Lord Hope).

sufficient to deal with the complex legal and political issues posed by the question of non-state actors of protection». ⁶²

The question of NSAs' legal status and capacity under international law is somewhat more perplexed. It goes without saying that NSAs, including international organizations, may enjoy legal personality under international law, yet the measure of such personality is necessarily limited compared to that enjoyed by sovereign States. That much can be gleaned from the International Court of Justice's *Reparation for Injuries Advisory Opinion*, where it was held that the State is the entity that «possesses the totality of international rights and duties recognized by international law» ⁶³ and by logical inference the rights and duties of any other entity, not constituting a State, will depend upon that entity's purpose and function. Thus, to suggest that NSAs are limited subjects of international law and that in fact they do not and cannot operate like a State ⁶⁴ is nothing more than stating the obvious.

What matters regarding the capacity of NSAs to offer protection, is not their legal personality under international law in the abstract, but the actual measure of each entity's personality, which is a corollary of the entity's rights and obligations under international law. It is herein that the crux of the matter lies: the status of NSAs as addressees of international human rights law, and therefore their obligation to uphold the fundamental rights of individuals present in the territory they control. If NSAs are not bound in the first place, then they cannot be held legally responsible for human rights transgressions, and they therefore may be described as «unaccountable». ⁶⁵ The implicit assumption is that the existence of international human rights law obligations binding on the «actor of protection» may produce

⁶² M. O'SULLIVAN, *op. cit.*, p. 101.

⁶³ ICJ, *Reparation for Injuries in the Service of the United Nations, Advisory Opinion*, ICJ Reports 1949, p. 180.

⁶⁴ See A. KLUG, «Harmonization of Asylum in the European Union-Emergence of an EU Refugee System?» *German Yearbook of International Law*, vol. 47, 2004, p. 607.

⁶⁵ On the discontents of the term «accountability» from the perspective of international law, see A. TZANAKOPOULOS, *Disobeying the Security Council*, Oxford, Oxford University Press, 2011, p.2-7. For the purposes of the present paper accountability is considered as a synonym of responsibility under international law.

sanctions or allow for redress in case of breach and thus act as a deterrent, in the sense of a presumption that the «actor of protection» will live up to its role.

Nonetheless, a suggestion that NSAs *in toto* are not bound by international human rights obligations, and thus unaccountable, potentially misrepresents the state of contemporary human rights. At first, there is now a solid body of academic commentary suggesting that human rights operate beyond the strict confines of the state in binding a number of non-state actors.⁶⁶ More specifically, it is nowadays accepted that ‘addressing human rights issues has become an integral part of UN-led or UN-mandated peace operations.’⁶⁷ Of course, the extent to which a peace operation calls the application of international human rights into question will depend on the specific circumstances of that operation, and thus the issue will in principle be expressly addressed in the operation’s mandate. Even when such an express provision in the mandate is lacking it does not mean that the peacekeepers operate in a legal vacuum. On the one hand, they are to respect that law of the receiving state, including its international human rights commitments. On the other hand, «it is part of binding *lex lata* that the human rights obligations of the sending states apply extraterritorially for acts committed within their jurisdiction».⁶⁸

A similar argument can be made with respect to cases of territorial administration. The most prominent example in this regard would be UNMIK, the main «responsibilities» of which according to Section 11 of UN Security Council Resolution 1244 expressly include «protecting and promoting human rights». The actual scope of these «responsibilities» shouldered by UNMIK in respect of human rights are set forth in a series of Regulations promulgated by the Mission. UNMIK Regulations 1999/1 and 1999/24 both stress that «[i]n exercising their functions, all

⁶⁶ See for example the contributions in P. ALSTON (ed.), *Non-State Actors and Human Rights*, Oxford, Oxford University Press, 2005.

⁶⁷ B. KLAPPE, «The Law of International Peace Operations», in D. FLECK (ed.), *The Handbook of International Humanitarian Law*, Oxford, Oxford University Press, 2013, p. 620.

⁶⁸ D. FLECK, «The Law Applicable to Peace Operations», in A. CLAPHAM & P. GAETA (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford, Oxford University Press, 2014, p. 234.

persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards».⁶⁹

The question whether other NSAs are addressees of human rights obligations under international law is vexed. Non-state parties to armed conflicts are nowadays considered bound by relevant international humanitarian law rules,⁷⁰ yet the situation as regards their international human rights obligations remains unclear. A number of commentators refute the existence of such obligations on the basis of a traditional state-centric reading of the law,⁷¹ whilst others suggest that recent practice hints towards a changing of assumptions.⁷² Equal caution is applied to arguments put forth regarding the human rights obligations of *de facto* regimes. Schoiswohl in his relevant monograph concludes that «there are hardly any (primary) norms directly imposing customary human rights obligations on *de facto* regimes, which despite their *quasi*-governmental state of affairs do not enjoy any *explicit* international legal personality in this respect.»⁷³

⁶⁹ UNMIK Regulation 1999/1, 25 July 1999, Section 2; UNMIK Regulation 1999/24, 12 December 1999, Section 1.3.

⁷⁰ The International Court of Justice affirmed the application of customary international humanitarian law rules to non-international armed conflicts in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, ICJ Rep 1986, p. 114. *Cf.* Appeals Chamber of the Sierra Leone Special Court, *Prosecutor v Sam Hinga Norman* (Case No SCSL-2004-14-AR72(E)) Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Decision of 31 May 2004, §22, wherein it was held that «it is well-settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties. See also S. SIVAKUMARAN, *The Law of Non-International Armed Conflict*, Oxford, Oxford University Press, 2012, pp. 236-250; A. CLAPHAM, *op. cit.*, pp. 771-786.

⁷¹ L. MOIR, *The Law of Internal Armed Conflict*, Cambridge, Cambridge University Press, 2002, p. 194 ; L. ZEGVELD, *Accountability of Armed Opposition Groups in International Law*, Cambridge, Cambridge University Press, 2002, p. 53.

⁷² See the extensive practice cited in A. CLAPHAM, *op. cit.*, pp. 786-805.

⁷³ M. SCHOISWOHL, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of Somaliland*, The Hague, Martinus Nijhoff, 2004, p. 265. A similar view held by Y. RONEN, «Human Rights Obligations of Territorial Non-State Actors», *Cornell Journal of International Law*, vol. 46, 2013, p.47.

4. Are non-state «actors of protection» really non-state?

The analysis of the arguments relied upon by the critics of non-state «actors of protection» conjures an image of normative fuzziness. There are three reasons for this. The first reason is intimately linked with the concept of NSAs as such. Any effort to come up with a definition that works across the board, has proven somewhat elusive, perhaps due to the fact that the term, imported into law from political science, «does not contain a positive attribute».⁷⁴ According to Alston, the use of the term to describe an infinite variety of organized collectivities may not stem from «language inadequacies» but may seek to «reinforce the assumption that the State is not only the central actor, but also the indispensable and pivotal one around which all the other entities revolve.»⁷⁵ From an international law point of view, this suggests that «key actors are divided into two categories: states and the rest».⁷⁶ Nonetheless, what Alston classifies as «the rest» refers to an infinite variety of collectivities. This gives rise to the following risk: by relying on the concept of NSAs in the abstract one may result in treating dissimilar entities from a legal and factual view as similar.

Second, the juxtaposition of states to non-state actors suggests that the latter lack the characteristics of the former. In other words, an entity is either State or non-State. *Tertium non datur*. Still, recent research indicates otherwise. Thus, it has been suggested in relation to «failed» or «failing» States that in the absence of State authorities we do not find chaos, or anarchy. «Rather, we do find governance – both rule-making and the provision of collective goods- in areas of limited statehood

⁷⁴ A. PETERS, L. KOEHLIN & G.F. ZINKERNAGEL, «Non-State Actors as Standard-Setters: framing the issue in an interdisciplinary fashion», in A. PETERS, L. KOEHLIN, T. FÖRSTER & G.F. ZINKERNAGEL (eds.), *Non-State Actors as Standard Setters*, Cambridge, Cambridge University Press, 2009, p.14.

⁷⁵ P. ALSTON, «The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?» in P. ALSTON, *op. cit.*, p. 3.

⁷⁶ *Ibid.*, p.19.

which is both legitimate and effective under certain conditions.»⁷⁷ State and Non-State should not be seen as two mutually exclusive notions, but as the opposite ends of the spectrum. An entity not constituting a State may still be an entity towards becoming State.

Third, by focusing exclusively on the capacity of the NSA to offer protection one might assume that the NSA is acting antagonistically to the State. In this vein, it will be either the state or the NSA that will offer protection within the territory each respectively controls. Yet, the reality is often much more complex. Starting from the domestic law analyzed above, it becomes obvious that missions led by international organizations or international forces operate within the territory of the State, with that State's consent and often in cooperation with that State. In sum, NSAs may act as agents or partners of the State, or –to put it more generally- NSAs may operate in the «shadow of the State». This argument has not gone amiss to those critical of NSAs as «actors of protection». Matthew, Hathaway and Foster have noted with respect to UNMIK that the «importance of legal accountability as a prerequisite to being able to «protect» under the terms of the Convention need not prevent reliance on the efforts of an international agency operating under state authority».⁷⁸ On a similar note, O'Sullivan suggests that «it is arguable that certain international organizations, such as the UN, *may* provide such protection, if they are acting as a *stable, state-like authority*, are supported by an international mandate and are acting in an agency relationship, that is, in place of a «failed state» or with the consent of the government in question».⁷⁹

The use of the generic concept of «NSAs» as an analytical tool to approach the question of protection should then be avoided on two counts. First, it allows the group of all entities other than States –irrespective of how dissimilar they are– under a common heading, and thus suggests that these entities can be treated in a similar fashion. Second, it reinforces the divide between States and «the rest»

⁷⁷ T. RISSE, «Governance Configurations in Areas of Limited Statehood: Actors, Modes Institutions and Resources», SFB-Governance Working Paper Series No. 32, Research Center (SFB) 700, Berlin, 2012, p.5.

⁷⁸ P. MATTHEW, J. HATHAWAY & M. FOSTER, *op. cit.*, p. 457.

⁷⁹ M. O'SULLIVAN, *op. cit.*, p. 107.

propagating an inaccurate capturing of contemporary political reality. NSAs may indeed act as antagonists to the State, as is the case with armed rebel groups in the context of a civil war. Yet, they may also operate hand-in-hand with the territorial State, and under the latter's authority.

5. A Modest Proposal to Move Forward: Combining Consent with Function

After all legal arguments are rehearsed, the key question still looms large: where does this leave domestic judges? Should they proceed to espouse the non-state «actor of protection» proposition and, if so, which criteria are applicable? The truth of the matter is that the proposition has not taken sway in all of EU jurisdictions, following the adoption of the Qualification Directive and the Qualification Directive (recast). A recent study conducted by a consortium of NGOs across eleven of EU jurisdictions, found that «little information emerged ... regarding the details of the assessment by which Member States qualify a non-state actor as an actor of protection».⁸⁰ In light of this finding, and the lack of coherence in the application of the non-state «actor of protection» proposition, the study recommended that «non-state actors should never be considered as actors of protection.»⁸¹ Though the recommendation is sound, it cannot guarantee that domestic courts will heed the advice. Yet, to the extent that courts decide to treat entities other than the state as «actors of protection» they should do using criteria sufficient to guarantee the rights of refugees.

In order to be able to speak to the criteria to be applied by domestic judges when deciding asylum applications, one has to have a clear idea of the nature of the refugee determination procedure. Goodwin-Gill and McAdam offer an insightful description, in noting that «a decision on the well-foundedness or not of a fear of persecution is essentially an essay in hypothesis, an attempt to prophesy what might

⁸⁰ ECRE *et al.*, *Actors of Protection and the Application of the Internal Protection Alternative – European Comparative Report*, 2014, p. 50.

⁸¹ *Ibid.*, p. 53.

happen to the applicant in the future, if returned to his or her country of origin.»⁸² Refugee status determination then is an exercise in risk assessment. Factual determinations are necessarily crucial. At the same time, legal considerations necessarily play a pivotal role. After all the determination procedure embodies in practice the application of the 1951RC.

In the light of the above, it is safe to argue that an exclusively legal analysis centering on the legal personality of a given entity or even the express consent of a State vis-à-vis the operation of that entity on its territory is not sufficient. Speaking before the House of Lords Select Committee on the European Union, Goodwin-Gill has correctly argued that «[t]he procedure is so very much a matter of fact that we cannot ignore that and just simply apply legal rules, like look to the existence in fact or in law or other of a government and assume that that implies legal protection. We know it does not necessarily.»⁸³ What appears to be a sound legal argument on paper may not equal effective protection in practice. Suffice here to note that the overwhelming majority of those dealing with the concept of «actors of protection» have singled out the case of UNMIK as a case which –legally at least- presents less of a conceptual hurdle. Still, as corroborated by facts, the presence of UN-mandated and NATO-led forces did not prevent the outbreak of violent riots in 2004, jeopardizing the life and limb of Kosovar Serbs and Kosovars of Roma descent.

Having said that, to forego any legal considerations in favor of an exclusively factual determination focusing on the *function* of the actor on the ground, and the measure of «protection» that can be gleaned from such function, is problematic. International law after all does not operate in isolation of the facts. On the contrary, it codes the existing power configurations on the international plane. Thus, the express consent by a State to an organization, international or other, to operate within its territory, may evidence the existence of a partnership or collaboration, which has the capacity to guarantee the protection of the rights of individuals within such territory. Conversely, the operation of an actor within the territory of the State

⁸² G. GOODWIN-GILL and J. MCADAM, *op. cit.*, p. 54.

⁸³ House of Lords, Minutes of Evidence taken before the European Union Committee (Sub-Committee E), 10 April 2002, p. 7.

without that State's consent, as is the case in the civil war context, may translate into a situation of tension, or -even worse- of hostilities between the two parties. In this case, it is logical that the rebel entity engaged in hostilities cannot easily qualified as an «actor of protection».

Reliance on consent, is also significant from a legal point of view. The existence of consent links back the operation of any actor to the State-centric context. In doing so, one is closer to the spirit of the 1951RC, which as a rule is addressed to States. If the said actor operates in tandem with the State, and not as a free-standing actor, accountability concerns are allayed.

Concluding, the application of the non-state «actor of protection» proposition gives rise to a host of legal problems, and -what is more- has the potential to hamper the fundamental rights of refugees. Therefore, domestic courts should tread cautiously and with heightened awareness of the pitfalls at play. It is for this reason, that the criterion applied should be one that fuses both legal and factual considerations with a view to offering the maximum of guarantees. A «belt-and-braces» approach is necessary, and such an approach can be expressed in a twin-track criterion. Domestic judges who choose to apply the non-state «actor of protection» proposition, with a view to refusing refugee status, should only do so when the NSA in question operates within the territory of the State following its consent *and* is willing and able to offer permanent and durable protection.