PROTECTION AGAINST *REFOULEMENT* FROM EUROPE: HUMAN RIGHTS LAW COMES TO THE RESCUE

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I. INTRODUCTION

A growing opinion has appeared in refugee and human rights discourse that the 1950 European Convention on Human Rights and Fundamental Freedoms (the European Convention) provides more extensive protection against *refoulement* than the 1951 UN Convention relating to the Status of Refugees (the Refugee Convention). However, uncertainties remain as to whether the protection offered by the 1984 UN Convention against Torture (the Torture Convention) and the 1966 UN International Covenant on Civil and Political Rights (the Political Covenant) may substitute, or, rather, reinforce, that of the European Convention. Which of these four instruments offers the greatest protection against a decision of *refoulement* from a European country? The answer to this question is far from being academic. The rule that an international organ may only be competent to consider an individual petition or communication provided "the same matter is not being examined under another procedure of individual investigation or settlement" is embodied in all three instruments providing a procedure for individual complaints. It is therefore crucial for an asylum-seeker to give his or her best shot first, even if, as rightly pointed out by Liz Heffernan, the Strasbourg organs and the Geneva organs are not in competition.[1] This article will review the scope of protection afforded under the three of these treaties which provide an international enforcement mechanism to persons who have sought refugee status in the domestic jurisdiction.

Refoulement describes the act of returning a person to a country where he or she fears for his or her life or freedom on grounds of race, religion, nationality, membership of a particular social group or political opinion. The principle of *non-refoulement* is part of the right (not) to return recognised to everyone by international law. In situations where an individual is unwilling to return, States' authorities must verify that no obstacles exist to the return of the individual to his or her country of origin

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1. See L. Heffernan, "A Comparative View of Individual Petition Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights" (1997) 19 H.R.Q. 78–112, at p.112.

before exercising their power to depart or expel. Protection against *refoulement* is thus closely related to protection against torture and inhuman or degrading treatment.

While there is no European instrument explicitly prohibiting *refoulement*, Article 3 of the European Convention has been construed as also covering such a prohibition. As early as 1965, the Parliamentary Assembly of the Council of Europe recognised that "Article 3 of the Convention for the Protection of Human Rights and Freedoms ..., by prohibiting inhuman treatment, binds contracting parties not to return refugees to a country where their life or freedom would be threatened".[2] Of more direct legal consequence is the ruling by the European Court of Human Rights, in the case of *Chahal* v. *United Kingdom*, that the "protection afforded by Article 3 is ... wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees".[3]

The system of protection offered by the Refugee Convention is distinct from that offered under the other three instruments which have an international enforcement mechanism for at least four reasons. First, it relies on the power of the judiciary in each member State to interpret the provisions of the Convention. Second, it is limited to persons recognised as refugees under the Convention (and the definition is restrictive) and to asylum-seekers who are awaiting a decision on their refugee status.[4] Third, it provides derogations to the principle of *non-refoulement* in time of war but also where the applicant has committed some serious crime. Fourth, it provides no mechanism of enforcement. In contrast, the European Convention offers considerable advantages over the Refugee Convention to persons not formally recognised as refugees against return to a country where they would fear for their security. Article 3 of the European Convention is absolute and unconditional. Moreover, it applies to everyone, even illegal entrants, whatever their activities or personal conduct.[5] The individual does not need to be a citizen of a contracting party, or need to be inside the territory of a contracting State.[6] Finally, the European Convention provides a mechanism of enforcement.

Thus, the European Convention appears to be more extensive in scope than the Refugee Convention, but is it the best one to offer protection against *refoulement* for asylum-seekers in particular? Indeed, if the recent

2. Recommendation 434 "Concerning the granting of the right of asylum to European refugees".

3. 15 Nov. 1996, Reports of Judg. and Dec. (1996–V) No.22, para.80.

4. See M.-O. Wiederkehr, "L'oeuvre du Conseil de l'Europe dans le domaine du droit de l'asile et des réfugiés", paper presented at the Colloque de la Société Française pour le Droit International (1996), pp.12–13 (unpublished).

5. *Chahal* v. *United Kingdom*, *supra* n.3. *D.* v. *United Kingdom*, 2 May 1997, Reports of Judg. and Dec. (1997–III) No.37.

6. *Soering* v. *United Kingdom*, 7 July 1989 Ser. A, No.161.

case law of the European Court of Human Rights shows some interesting developments, in the sense that its jurisdiction is quite liberal, its overall jurisprudence remains restrictive with regard to asylum-seekers. As this article discusses, the standard of evidential requirements is set incredibly high and, as a result, can rarely be met in cases involving asylum-seekers. Moreover, the backlog of applications may convince some asylum-seekers to look for alternatives. It is, therefore, essential to examine the existence of any other options and to assess the suitability of such alternative instruments for asylum-seekers. Two such option s exist, both of which are provided by global instruments. First, asylum-seekers can lodge a petition to the Convention against Torture Committee (Torture Committee) set up under the Torture Convention. Or, and this is the second option, individuals can bring a complaint to the Human Rights Committee established under the Political Covenant. Both Committees are based in Geneva. As more and more European States have now ratified these instruments, such options are becoming increasingly attractive.[7]

On the basis of a comparative study of the key elements of the individual complaints procedures under the European Convention, the Torture Convention, and the Political Covenant, this article examines the practical advantages and disadvantages that each mechanism may offer to an asylum-seeker in Europe.[8]This article focuses on international proceedings.[9] It concludes that the most generous protection against *refoulement* from Europe lies in the development of the case law of the

7. On 1 Jan. 1998, the European Convention was binding on 39 European States, all of which had recognised the right of individual petition under Art.25 and the jurisdiction of the Court under Art.46. The Refugee Convention was binding on 131 States, including all the signatories to the European Convention with the exception of Andorra and San Marino. The Torture Convention was binding on 103 States, including all the signatories to the European Convention except four, i.e. Andorra, Belgium, Ireland and San Marino. Of these 35 States, Albania, Estonia, Germany, Latvia, Lithuania, Macedonia, Moldova, Romania, the UK and Ukraine had not recognised the competence of the Torture Committee to receive individuals' complaints. The Political Covenant was binding on 140 States, including all the signatories to the European Convention, except three, i.e. Andorra, Liechtenstein and Turkey. Of these 36 States, Albania, Switzerland and the UK are not a party to the Optional Protocol.

8. Provisions relating to the right to life, unlawful detention, family life, education, freedom of association and expression, though relevant to the issue of expulsion of asylum-seekers, remain outside the scope of this article. For reasons of space, this article focuses exclusively on *refoulement* from Europe. The right to family life is explored in H. Lambert, "The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion" (1999) I.J.R.L. (July, Vol. 11, No.3). On unlawful detention see C. Giakoumopoulos, "Detention of Asylum Seekers in the Light of Article 5 of the European Convention on Human Rights", in J. Hughes and F. Liebaut (Eds), *Detention of Asylum Seekers in Europe: Analysis and Perspectives* (1998), pp.161–182.

9. Given space constraints, it does not offer a systematic treatment of the application of the Refugee Convention in European States. For such a treatment, see H. Lambert, *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (1995).

European Court of Human Rights, in particular with regard to proceedings based on Article 3.

Finally, two points may be made about the timeliness of this article. In the last five years, the European Court of Human Rights has dealt with an increasing number of cases of expulsion under Article 3 of the European Convention. The result seems to be a more liberal jurisprudence. Previous conclusions on the subject need, therefore, to be revisited in the light of recent judgments and also of Protocol XI to the European Convention.[10] Similarly, more cases of *refoulement*, expulsion and deportation have come to the attention of the Geneva Committees. Hence, the need to concentrate on the findings of these Committees and to apply them to a specific contest, i.e. *non-refoulement*.[11]

Taking the perspective of an asylum-seeker, this article addresses four questions to determine which instrument provides best protection from *refoulement* from Europe. Who is covered by the provisions relating to *non-refoulement*? What are the admissibility requirements? What kinds of ill-treatment in the country of destination may provide grounds for claiming protection from *refoulement*? And what are the evidentiary requirements? Before answering each of these questions in turn, the substantial provisions prohibiting torture as a means of preventing *refoulement* will be discussed.

II. SUBSTANTIAL PROVISIONS PROHIBITING TORTURE AS MEANS OF PREVENTING *REFOULEMENT* FROM EUROPE

NON-REFOULEMENT is the principle upon which the system of legal protection of refugees rests. It has become a peremptory norm of international human rights law, as demonstrated by its endorsement in two UN instruments, the Refugee Convention (Article 33) and the Torture Convention (Article 3).[12] Furthermore, Article 7 of the Political

10. See, in particular, the excellent study by W. Suntinger, "The Principle of Non-Refoulement: Looking Rather to Geneva than to Strasbourg" (1995) 49 Austrian J. Pub.Int.L. 203–225. Protocol XI entered into force on 1 Nov. 1998.

11. Apart from Suntinger's article (*ibid*), interesting comparative elements may be found in two other articles, Heffernan, *op. cit. supra* n.1, at pp.78–112, and O. Andrysek, "Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures" (1997) 9 I.J.R.L. 392–414. Among the vast literature on individual instruments, see in particular the works by M. Nowak, *UN Covenant on Civil and Political Rights—CCPR Commentary* (1993), D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the ICCPR* (1991), G. Goodwin-Gill, *The Refugee in International Law* (1996), and Steiner and Alston, *International Human Rights in Context* (1996).

12. 189 U.N.T.S. 150 and UNGA Res.39/46 of 10 Dec. 1984, respectively.

Covenant and Article 3 of the European Convention has been interpreted to encompass this prohibition.[13]

In the language of protection, it does not really matter whether protection against *refoulement* is provided under the Refugee Convention or under principles of human rights law, so long as it is effective. Refugee law is often recognised to be part of human rights law. However, considerations on *refoulement* or torture, by the Geneva Committees or Strasbourg organs do not constitute a decision on refugee status. Thus, the distinction between the two systems of legal norms becomes important regarding the determination of refugee status because the Refugee Convention alone creates a status which is recognised in domestic law.[14]

Refoulement refers to the expulsion, deportation, removal, extradition, sending back, return or rejection of a person from a country to the frontiers of a territory where there exists a danger of ill-treatment, i.e. persecution, torture or inhuman treatment. Of the four instruments, the Refugee Convention is the only one which does not provide an absolute and unconditional guarantee against *refoulement*.[15] Protection from *refoulement* under the Refugee Convention is limited on two grounds: danger to the security of the country in which the refugee is, or, having been convicted by a final judgment of a particularly serious crime, a refugee constitutes a danger to the community of that country (Article 33(2)). In addition, Article 1F excludes from the benefit of the whole Convention any person whom there are serious reasons for considering has committed a crime against peace, a war crime, or a crime against humanity, a serious non-political crime outside the country of refuge prior to admission to that country of refuge, or has been found guilty of

13. UNGA Res.2200 A (XXI) and E.T.S. No.5, respectively. Outside the scope of these provisions, the expulsion of a refugee *lawfully* in a territory is explicitly prohibited by Art.32 of the Refugee Convention and Art.13 of the Political Covenant. In addition, Art.4, Protocol 4 to the European Convention prohibits the collective expulsion of aliens. As for refugees *unlawfully* in a territory, they are covered by Art.31 of the Refugee Convention (as far as penalties, not including expulsion, are concerned) and Art.33 (as far as *refoulement* is concerned).

14. In *Ahmed* v. *Austria* (17 Dec. 1996, Reports of Judg. and Dec. (1996–VI) No.26), the E.Ct.H.R. considered that it was not competent to ask Austria to grant Mr Ahmed a residence permit (the Torture Committee made a similar statement in *P.L.Q.* v. *Canada*, Communication No.57/1996, 17 Nov. 1997). Following the Court's judgment, Austria refused to grant Ahmed a residence permit, thereby denying him the right to work (he committed suicide on 15 Mar. 1998). See also the separate opinion of Mr Cabral Barreto to the European Commission of H.R.'s report on the case *B.B.* v. *France*, Application No.30930/96, 9 Mar. 1998), in which he explains that, as far as he is concerned, an alien who is "forced" to live in a country without any "*protection sociale*", would be facing treatment contrary to Art.3.

15. It is nevertheless subject to no reservation (Art.42).

acts contrary to the purposes and principles of the United Nations.[16] Moreover, because of the particular nature of asylum, most asylum-seekers qualifying for protection against *refoulement* do so on a discretionary basis. No such limitations exist in the European Convention, the Torture Convention or the Political Covenant. Both Article 3 of the European Convention and Article 7 of the Political Covenant are subject to no derogation.[17] The absolute, but also unconditional, character of Article 3 was emphasised by the Court in the case of *Ireland* v. *United Kingdom*.[18] it was reaffirmed unequivocally in *Chahal* v. *United Kingdom*.[19] In contrast, the Torture Convention, though prohibiting both torture and *refoulement* in absolute terms, limits *non-refoulement* solely to cases of torture.[20] Thus, while a State may be authorised to expel an alien under the Refugee Convention, in order to protect the national community against a serious danger, it is nevertheless required to respect its legal obligations under these other treaties, i.e. Article 3 of the European Convention, Article 3 of the Torture Convention and Article 7 of the Political Covenant.

Protection against *refoulement* under the Refugee Convention may be supervised and enforced only by judicial and/or administrative authorities at the national level. The United Nations High Commissioner for Refugees (UNHCR) can do no more than ask States to change their differing practices.[21] In contrast, the judicial mechanisms for supervising and enforcing protection against *refoulement* are more uniform under the other treaties under analysis. Individual complaints are clearly only one aspect of the work of the Geneva Committees; another, perhaps more important, aspect is the examination of States' reports and, where

16. There are still doubts as to whether or not terrorist activities constitute "acts contrary to the purposes and principles of the UN" under Art.1F(b), despite the large support recently given to the view that such activities may give rise to actions based on Chapter VII of the Charter (see M. N. Shaw, *International Law* (1997) pp.805–806). Serious questions also arise concerning the political or non-political character of terrorist activities (*McMullen* v. *I.N.S.* 788 F.2d 591, 597 (U.S.C.A., 9th Cir. 1986)). In the UK the House of Lords ruled that Art.1F(b) applied to an asylum-seeker, Mr Tilmatine, allegedly found guilty of a terrorist attack in Algeria, his country of origin, thereby recognising the non-political character of terrorist activities (*T.* v. *Secretary of State for the Home Department* [1996] 2 All E.R. 865). In Canada, however, the Supreme Court decided that in the absence of any indication in international law designating drug trafficking as an act contrary to the purposes and principles of the UN, drug trafficking cannot amount to an exclusion clause (*Migration News Sheet*, June 1997, p.7).

17. Art.15(2) and Art.4(2), respectively.

18. The Court explicitly stated that "the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct". If further held that "Article 3 makes no provision for exception ... there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation" ((1978) 25 E.Ct.H.R., Ser.A, para.65).

19. *Supra* n.3.

20. Arts.2 and 3. *Mutombo* v. *Switzerland*, Communication No.13/1993, 27 Apr. 1994.

21. Preamble to the Refugee Convention and Art.35 and 36 of the Convention.

provided, the possibility of further enquiries, including visits to the State's territory. This is not true of the European Convention, which offers a sophisticated and indeed complex system for dealing with inter-State and individual complaint but a rather limited procedure for examining State reports.[22]The latter was nevertheless complemented with an advanced system for carrying out State inspections under the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Under all three instruments, examination of individual complaints takes place in two stages: the admissibility stage and the merits stage. In Geneva, both stages are dealt with before a single organ. In Strasbourg, until the reform introduced by Protocol XI, the admissibility stage was taking place before the European Commission of Human Rights and the merits stage before the European Court of Human Rights.[23] These two organs have since been replaced by a single one, the new European Court of Human Rights, which has compulsory jurisdiction.[24] This state of affairs, combined with the fact that the Strasbourg institutions started work long before either of the Committees, has resulted in the use by the Commission and Court of sophisticated criteria to decide cases and in a body of cases that the Human Rights Committee or the Torture Committee can simply not equal.

As far as enforcement is concerned, the Human Rights Committee and the Torture Committee offer limited scope. Neither Committee has legal means to enforce its "views".[25] In contrast, judgments of the European Court of Human Rights are legally binding and their execution is

22. Art.52 (old Art.57), European Convention. The creation of the Secretary General's Monitoring Unit of the Council of Europe reveals the concern of the institution for improving the supervision of the compliance by the member States with their commitments under the Convention.

23. The Court could nevertheless, in exceptional circumstances, use its powers to review the facts established by the Commission (*Cruz Varas* v. *Sweden*, 20 Mar. 1991, Ser. A, No.201).

24. Arts.33–34 (old Arts.24–25), European Convention. The new Court was inaugurated on 3 Nov. 1998. The Committee of Ministers will continue to fulfil its supervision role (Art.46, old Art.54).

25. Committees are not courts; they are of a non-judicial character and, therefore, they do not issue judgments but views which have no legal but, rather, moral authority. Michael O'Flaherty nevertheless notes that "since 1994, the [Human Rights] Committee has implicitly suggested in its Views on individual communications that the decisions of the Committee are of a binding nature" (see O'Flaherty, *Human Rights and the UN—Practice Before the Treaty Bodies* (1996), p.47, n.68). McGoldrick's assessment of the Human Rights Committee's work on Art.7, however, is highly critical. He describes the final views of the Committee as "often unhelpful, incomprehensible, or ambiguous" and goes as far as accusing the Committee of "arbitrariness in its findings". He notices the lack of co-operation between States, which persist in violating Art.7, and the Committee, and the lack of publicity of the Committee's views. He recognises that there is as yet no proof that States are following the Committee's recommendations. Finally, he concludes by stating that the views of the Committee "have only been of marginal significance in terms of effective human rights protection" (see McGoldrick, *op. cit. supra* n.11, at p.381).

supervised by the Committee of Ministers.[26] Finally, two developments lead us to conclude that the gap between Strasbourg and Geneva is closing rather than deepening. First, the practice of States shows that the views of the Torture Committee are being complied with.[27] Second, a Special Rapporteur was appointed, in 1990, and a procedure created to follow up the views of the Human Rights Committee.[28]

III. WHO IS COVERED BY THE PROVISIONS RELATING TO *NON-REFOULEMENT*?

THE scope *ratione personae* is considerably limited under Article 33 of the Refugee Convention. In order to benefit from the principle of *non-refoulement*, the person must be a refugee, or at least an asylum-seeker awaiting for a decision on refugee status.[29] The UNHCR defines "rejected asylum-seekers" as persons who are not in need of international protection but recognises the danger of this definition where too often persons who are refused the status of refugee remain nevertheless in need of protection. This is particularly the case, notes the UNHCR, of asylum-seekers rejected by application of the principle of "safe third country" or for reasons of national security.[30] In addition, recent instances reveal that the bad faith of any asylum-seeker has been used as evidence against the grant of refugee status by national authorities outside the scope of credible risk of persecution.[31] No such distinction between refugees or asylum-seekers awaiting a decision on their status and rejected asylum-seekers unlawfully in the country applies with regard to the other three instruments. Everyone is protected irrespective of conduct, nationality or citizenship under Article 3 of the European Convention, Article 3 of the Torture Convention and Article 7 of the Political Covenant.[32] The unconditional character of the prohibition of

26. Art.46 (old Arts.46 and 54), European Convention. This is not the case, however, for reports adopted by the Commission or decisions adopted by the Committee of Ministers where the case is not referred to the Court (old Art.32).

27. See Andrysek, *op. cit. supra* n.11, at pp.402–414.

28. Rule of Procedure 95 of the Human Rights Committee.

29. Recommendation No.R(84)1 relating to the Protection of Persons who Fulfils the Condition of the Geneva Convention but Who are not Formally Recognized as Refugees nevertheless provides that the principle of *non-refoulement* applies to all persons who have a well-founded fear of persecution, whether or not a person has been recognised as a refugee.

30. EXCOM of the UNHCR, Standing Committee, 8th meeting, EC/47/SC/CRP.28, 5. Note also the emergence of the "Dublin principle" according to which the first "safe country" is no longer the EU country an asylum-seeker reaches first, but the EU country in which he or she first applies for asylum (Art.7, Dublin Convention): (1997) O.J. C254/1.

31. See e.g. in the UK, *R.* v. *Immigration Appeal Authority, ex p. B* [1989] Imm. A.R. 166. This view was rejected in *M.* v. *Secretary of State for the Home Department* [1996] 1 All E.R. 870. And in New Zealand, Refugee Appeal No.2254/94 *Re HB*, 21 Sept. 1994.

32. *Chahal*, *supra* n.3, at para.79. *Paez* v. *Sweden* (Communication No.39/1996, 7 May 1997) was recently decided by the Torture Committee in the same way as *Chahal*. Requirements with regards to the applicant under the Political Covenant are broadly similar to those under the European Convention. See Heffernan, *op. cit. supra* n.1, at p.104.

refoulement or torture in these instruments has resulted in protecting rejected asylum-seekers, criminals, drug traffickers and even terrorists from removal.[33]

IV. WHAT ARE THE ADMISSIBILITY REQUIREMENTS?

WHETHER under the Torture Convention, the Political covenant or the European Convention, specific requirements must be fulfilled for a petition to be declared admissible prior to its examination on the merits. Of the three instruments dealing with the subject, the Torture Committee offers the most liberal approach.[34] Admissibility is a difficult stage indeed to pass for asylum-seekers under the European Convention[35] and also, it would seem, under the Political Covenant.[36] The case law of the Human Rights Committee seems to reflect that of the Strasbourg organs, with one

33. E.g. *Chahal*, *idem* (rejected asylum-seeker and alleged terrorist); *D.* v. *United Kingdom*, *supra* n.5 (drug smuggler).

34. According to Suntinger, "By the end of 1996, [the Committee against Torture] had decided 6 refoulement cases on the merits, finding violations of Art.3 CAT in five of these, and declared another ten cases inadmissible. At the April/May 1997 session, five more decisions on the merits were taken, with violations of Art.3 found in three cases. One communication was declared inadmissible": "The prohibition of refoulement: the significance of Art.3 of the UN Convention against Torture", paper presented at the ELENA course, 1997 (unpublished).

35. The Commission found a violation of Art.3 in an expulsion case for the first time in 1994 (*M.N.* v. *France*, Application No.19465/92). Since then, other such cases include *Bahaddar* v. *The Netherlands* (Application No.25894/94) where the Commission found a violation of Art.3 if the applicant were to be expelled to Bangladesh (this decision was, however, overturned by the E.Ct.H.R. on the ground that not all domestic remedies had been exhausted, 19 Feb. 1998, Reports of Judg. and Dec. (1998–I) No.64), *Hatami* v. *Sweden* (Application No.32448.96), and *B.B.* v. *France* (*supra* n.14). Several cases have been rejected by the Commission on the grounds of lack of sufficient evidence showing that the applicant would face a "real risk" if returned (e.g. *Altun* v. *FRG*, No.10308/83, *Kozlov* v. *Finland*, No.16832/90, and *A. and F.B.K.* v. *Turkey*, No.14401/88). In a number of cases, however, a friendly settlement was reached before the Commission adopted a decision on admissibility.

36. In comparison with the Torture Committee or the Strasbourg organs, the Human Rights Committee has dealt with very few expulsion cases. More specifically, it reached views only in cases of expulsion alleging a violation of Art.9 (detention), Art.13 (expulsion of an alien lawfully in the country) and Art.14 (due process and fair trial); *Maroufidou* v. *Sweden*, Communication No.58/1979, and *A* v. *Australia*, Communication No.560/1993. So far, every single petition based on Art.7 has been declared inadmissible (*V.M.R.B.* v. *Canada*, Communication No.236/1987, and *Stewart* v. *Canada*, Communication No.538/1993). Views are nevertheless awaited in *L* v. *Canada*, Communication No.621/1995, *C* v. *Canada*, Communication No.558/1993, and *B* v. *Canada* Communication No.622/1995.

exception, i.e. the European Commission expects a much higher formalism than the Human Rights Committee.[37]

A. Competence of the Organ Authorised to Consider the Petition and Time Limit for Submission

A petition may be brought only against a State and that State must have accepted the individual complaints jurisdiction, i.e. it has made a declaration under the first Optional Protocol to the Political Covenant, Article 22 of the Torture Convention or Article 34 (old Article 25) of the European Convention.[38] In addition, all three instruments preclude the consideration of an application or a communication if the alleged violation is not covered by a provision of the instrument, or if it occurred before the entry into force of the instrument for the State party concerned, unless the alleged violations continue or have continuing effects which in themselves constitute a violation.

Article 35(1) (old Article 26) of the European Convention, in laying down an absolute time limit of six months for introducing complaints before the Commission, provides a further hurdle for applicants.[39] There is no such time limit before the Human Rights Committee or the Torture Committee following the exhaustion of local remedies. However, an extreme delay may be considered an abuse of the right of submission under Article 41(1)c of the Political Covenant.[40]

37. The Refugee Convention is outside the scope of this section. Its operation depends upon the decision of the competent national authorities. A whole range of admissibility devices, of a jurisdictional and substantive nature, have been developed by European States in order to introduce a presumption of inadmissibility and justify the recourse to accelerated procedures in cases which do not satisfy these requirements. These "exception" cases include, in particular, "safe third country" cases, "manifestly unfounded" claims and "safe country of origin" cases. For instance, in the UK, out of 28,945 refused asylum applications in 1997 (excluding dependants), 6,161 were rejected outright on "safe third country" and "non-compliance" grounds (Home Office Statistical Bulletin, *Asylum Statistics United Kingdom 1997*, Issue 14/98, Table 1.3).

38. In *Cruz Varas* v. *Sweden*, *supra* n.23, the European Court found that the right of petition had been obstructed by an expulsion order being carried out.

39. This six-month period runs from "service of the written text of the judgment" (*Worm* v. *Austria*, Application No.22714/93).

40. The Torture Convention is silent on this point, and one may find that, by extrapolation, the same rule would apply.

B. The "Victim" Requirement and the Role of Non-Governmental Organisations (NGOs)

An individual (or individuals) petitioning the Strasbourg organs[41] or the Geneva Committees must be a "victim" of a violation by a State party to the relevant convention/covenant of the rights set forth in that instrument. In addition, anonymous complaints or communications will not be accepted. Under all three instruments, individual complaints may also be brought by indirect victims acting as legal representatives. It is nevertheless significant that, under the European Convention, the requirement that the petitioner be a victim of the alleged violation extends to all categories of petitioners, whether legal or natural persons, individuals or groups, or NGOs; a difficult requirement to meet in the case of NGOs in particular. This is not the case under the two other instruments.[42] Each instrument will now be considered in turn.

First, under old Article 25 (now Article 34) of the European Convention, "the Commission [now the Court] may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation".[43] In assessing the victim requirement, the Commission refers to all relevant facts particular to each case. Thus, in cases of expulsion of aliens, it relies on medical reports, the state of health of the "victim" and the existing conditions in the country where the "victim" and the existing conditions in the country where the "victim" is to be expelled.[44] Second, Article 22 of the Torture Convention explicitly provides for communications to be submitted not only by the individual alleged victim but also by relatives, designated representatives (e.g. NGOs) or "others on behalf of an alleged victim when it appears that the victim is unable to submit the communication himself, and the author of the communication justifies his acting on the victim's behalf". It is for the third party to establish with sufficient proof his or her authority to act on

41. Before 1 Nov. 1998, an individual, a group of individuals or NGOs could only bring a case to the Court if they had lodged a complaint to the Commission, if the respondent State had ratified Protocol IX of the European Convention, and if their case had been screened by a special panel (Protocol IX, Art.5). Under Protocol XI, all applicants have direct access to the new Court.

42. The presence of the UNHCR (i.e. an IGO) in Strasbourg demonstrates the pressing need in having the Strasbourg organs working closer with the UNHCR but also with NGOs. Their involvement in the European system of protection of human rights should be of great value considering their experience in human rights protection.

43. The applicant must show that he or she runs the risk of being affected by the law. Refer to *Klass* v. *Germany* (1978, Ser. A, No.28), *Marckx* v. *Belgium* (1979, Ser. A, No.31) and, *Kirkwood* v. *United Kingdom* (1984).

44. J. Madureira, "The Conditions of Foreigners", Council of Europe, Demo MM4(94)30, p.26, n.80. For instance, in *Vijayanathan and Pusparajah* v. *France* (27 Aug. 1992, Ser. A, No.241–B), the Court refused to recognise the quality of "victim" in the applicant because no enforceable order of expulsion had yet been issued.

behalf of the victim.[45] Finally, under Article 1 of the Optional Protocol to the Political Covenant, the Human Rights Committee is competent "to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party". The jurisprudence of the Committee shows that "for a person to claim to be victim of a violation of a right protected by the Covenant, he or she must show either that an act or omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent".[46] This concept was somewhat expanded in *Kindler* v. *Canada* to encompass situations where there is "a real risk that his or her rights under the Covenant will be violated in another jurisdiction".[47] Provisions of the Political Covenant do not allow for other persons, e.g. NGOs or relatives, to take a case to the Committee, except in rare instances where it is possible to consider the relative as an indirect victim.[48] In addition, the Rules of Procedures of the Human Rights Committee allow for two exceptions: the alleged victim appoints a representative or the alleged victim is unable to submit the communication personally and a third party, e.g. an NGO, is authorised to do it.[49]

C. *The Claim Must not be Abusive and there Must Be a* Prima Facie *Case*

Applications or communications need to be sufficiently clear to avoid being found abusive and they must provide a minimum amount of information, in other words be sufficiently substantiated. The European Convention is restrictive on this point, with Article 35(3) (old Article 27) referring to the concept of "manifestly ill-founded" petitions in addition to "an abuse of the right of application". This is not the case with the Torture Convention (Article 22) or the Political Covenant (Article 3, Optional Protocol) which speak only of "an abuse of the right of

45. For instance, in *M'B* v. *Tunisia* (UN Doc.A/50/44, Annex V), the Committee declared inadmissible a communication brought by a person on behalf of a dead victim on the ground that this third party was unable to provide "sufficient proof to establish his authority to act on behalf of the victim".

46. *E.W. et al.* v. *Netherlands*, Communication No.429/1990.

47. Communication No.470/1991, para.13.2.

48. *Quinteros* v. *Uruguay*, Communication No.107/1981, para.14.

49. Rule 90(b) of the Rules of Procedure, CCPR/C/3/Rev.4.

submission of such communications or to be incompatible with the provisions of this Convention [Covenant]".[50]

D. The "Jurisdiction" Requirement and Extraterritorial Effect of Provisions

While provisions of the Political Covenant are rather unclear on the matter of "jurisdiction",[51] both the European Convention and the Torture Convention avoid similar unclear wording. The European Convention refers to "everyone within their jurisdiction" (Article 1) and the Torture Convention speaks of "acts of torture in any territory under its jurisdiction" (Article 2(1)).[52] The extraterritorial effect of Article 3 of the European Convention was first recognised in *Soering* v. *United Kingdom*,[53] where the Court ruled that the United Kingdom would be in violation of Article 3 if it were to extradite Jens Soering to the United States, a non-member of the Council of Europe, to face the death penalty in Virginia. It has since been applied to cases of expulsion and *refoulement*.[54] This effect was similarly recognised by the Torture Committee in cases of *refoulement*[55] and by the Human Rights Committee in a series of cases involving individuals awaiting extradition from Canada to the United States where they would face the death penalty.[56]

50. For instance, in *X.* v. *Spain* (Communication No.23/1995), the Torture Committee declared the communication inadmissible because it had "not been sufficiently justified". The author had failed to show serious grounds for believing that he risked being tortured if expelled to Algeria; there was no indication that he had previously been detained or tortured but, rather, a statement that he intended to seek work. And in *Lang* v. *Australia* (Communication No.659/1995), the Human Rights Committee stated that "sweeping allegations" which "do not in any way reveal how the author's rights under the Covenant might have been violated" are insufficient.

51. Art.1, Optional Protocol and Art.2(1), Political Covenant. Amerasinghe interpreted both provisions to mean that the Covenant should apply only in respect of persons within the territory as well as subject to the jurisdiction of the State. See C. F. Amerasinghe, *Local Remedies in International Law* (1990), pp.147–149. This view was not shared by Meron, who argued that "Most of the provisions of the Refugee Convention, in contrast to those of the Political Covenant, may be primarily territorial in character, in the sense that they apply to claimants who have reached the soil of the state of asylum" and concluded that a narrow territorial construction must be excluded. See T. Meron, "Extraterritoriality of Human Rights Treaties" (1995) 89 A.J.I.L. 81.

52. In *D.* v. *United Kingdom*, *supra* n.5, at para.48, the E.Ct.H.R. explained that even if the applicant never entered the UK in the technical sense, he had been within the jurisdiction of the UK, in custody, at Gatwick airport. Thus, for the Court, it was sufficient that "he had been physically present there".

53. *Supra* n.6.

54. E.g. *Chahal*, *supra* n.3.

55. E.g. *Mutombo*, *supra* n.20.

56. The principle was first held in *Kindler* v. *Canada*, *supra* n.47. It was reiterated in *Ng* v. *Canada*, Communication No.469/1991, and *Cox* v. *Canada*, Communication No.539/1993. However, a violation of Art.7 of the Covenant was found in only one case, *Ng* v. *Canada* (*ibid*).

E. Exhaustion of Domestic Remedies

The rule of exhaustion of local remedies has long been accepted in customary international law.[57] In all three instruments under review, the alleged victim must show that all domestic remedies have been exhausted.[58] More specifically, the Torture Convention and the Political Covenant (Optional Protocol) speak only of domestic remedies which are available and recognise that this includes situations where the application of the remedies is unreasonably prolonged.[59] In addition, the Torture Convention requires that the remedy be one likely to bring effective relief.

Although similar criteria (i.e. availability, not unreasonably prolonged, and likely to bring effective redress) are being used by the Strasbourg and Geneva organs to decide on this requirement, they are applied more restrictively by the European Commission than by the two Committees. And, indeed, many cases brought to the Commission are declared inadmissible on the grounds that domestic law provides an effective remedy.[60] For instance, in cases of deportation or expulsion to a country where the applicant would be faced with a life-threatening sentence, the European Commission, while recognising that a remedy needs to have suspensive effect in order to be effective, failed to take into account the special circumstances (i.e. the gravity of the treatment) and to assess the possibility of access to such remedy by the applicant.[61] More specifically, in cases involving asylum-seekers, the Commission considers that all domestic remedies under Article 35(1) (old Article 26) have not been exhausted where the "victim" did not request political asylum, or did not lodge an appeal against the decision of the State not to grant refugee status or against the decision of expulsion. The application will thus be declared inadmissible under Article 35(4) (old Article 27(3)) of the Convention.[62] Findings of the Torture and Human Rights Committees

57. *Interhandel Case*, I.C.J. Rep. 1959, 27.

58. Art.41(1)c, Political Covenant and Art.5(2)b, First Optional Protocol; Art.35(1) (old Art.26), European Convention; and Art.22(5)b, Torture Convention. See also Amerasinghe, *op. cit. supra* n.51, at pp.86–88. If a State chooses to dispute the exhaustion of local remedies, the burden of proof falls on it to offer substantiating evidence to support its argument.

59. In *Halimi-Nedzibi* v. *Austria*, Communication No.8/1991, the Torture Committee held that a delay of 15 months may be considered unreasonably prolonged.

60. In *Golder* v. *United Kingdom* (21 Feb. 1975, Ser. A, No.18) "remedy" was found to be wider under art.13 than under Art.26 (now Art.35(1)). However, in a quite unprecedented ruling, the E.Ct.H.R. refused to consider the merits of an application lodged by a rejected asylum-seeker (Mr Bahaddar) on the ground that his application had failed to exhaust all national remedies, in spite of the findings by the Commission that his expulsion would constitute a violation of Art.3 of the Convention (19 Feb. 1998, *supra* n.35).

61. *M.* v. *United Kingdom*, Application No.12268/86. The application was declared inadmissible on the grounds that national remedies had not been exhausted.

62. See Madureira, *op. cit. supra* n.44, at p.26, n.81.

show a more liberal application of these criteria. Inadmissibility on this ground seems to be declared only in quite clear-cut cases.[63] For instance, the Torture Committee considered the "new application" remedy (in the context of an application for refugee status in Sweden) as ineffective where a domestic authority was not given the opportunity to evaluate the new evidence submitted by the author before the Committee could examine the communication.[64] In another instance, the Torture Committee declared the communication inadmissible on the grounds that the expulsion order was still subject to an appeal and that no circumstances had been invoked showing that this remedy would be unlikely to bring effective relief. Indeed, the facts of the case showed that the appeal was pending and that a second expulsion order had already been quashed.[65] The plea of "special circumstances" is therefore accepted by the Torture Committee; rarely so by the Strasbourg organs.[66] The case law of the Human Rights Committee seems to suggest that such plea is accepted;[67] however, Nowak points out that its case law on deportation to a country of persecution where the remedy is without suspensive effect seems rather vague.[68]

F. No Similar Complaint is Being Considered (or Has Been Considered) by Another International Institution

Both the European Convention (Article 35(2)b, old Article 27(1)b) and the Torture Convention (Article 22(5)a) exclude from the scope of admission any petition already submitted to another procedure for

63. See Nowak, *op. cit. supra* n.11, at p.704, and Harris, Boyle and Warbrick, *Law of the European Convention on Human Rights* (1995), pp.608–621.

64. *P.M.P.K.* v. *Sweden*, Communication No.30/1995, and *K.K.H.* v. *Canada*, Communication No.35/1995.

65. *N.D.* v. *France*, Communication No.32/1995.

66. Harris *et al.*, *op. cit. supra* n.63, at p.621. There is some inconsistency, however, in the case law of the E.Ct.H.R., as highlighted in *Bahaddar* v. *The Netherlands* (Application No.25894/94). In this case, the European Commission unanimously interpreted broadly the plea of "special circumstances" in order to absolve the applicant from exhausting domestic remedies at his disposal (13 Sept. 1996). The Court adopted a more restrictive view, ruling (19 Feb. 1998, *supra*, n.35) that it would not consider the merits of the case because local remedies had not been exhausted (the applicant had failed to convince the Court that failure to submit grounds of appeal within the time limit was due to the unavailability of documentary evidence). This "excessive formalism" was strongly criticised by some of the dissenting judges as potentially undermining the absolute character of the prohibition provided in Art.3.

67. According to a "*jurisprudence constante*", in cases of the death sentence, a constitutional motion may not constitute an available remedy in the absence of legal aid (*Graham and Morrison* v. *Jamaica*, Communication No.461/1991).

68. In particular, he refers to Communications 173, 175/1984 declared inadmissible on the grounds of non-substantiation of allegations or lack of claim. See Nowak, *op. cit. supra* n.11, at pp.137, 705.

international investigation or settlement.[69] In contrast, Article 5(2)a of the first Optional Protocol to the Political Covenant merely requires that "the same matter is not examined under another procedure of international investigation or settlement", thus ruling out only the simultaneous examination of the same concrete, individual case submitted by the same individual, or by a third party but with his or her knowledge.[70] However, the effect of reservations entered by most member States of the Council of Europe has brought Article 5(2) of the Political Covenant (Optional Protocol) to read like Article 22(5)a of the Torture Convention, thereby preventing any potential competition between procedures before the European Commission and procedures before the Human Rights Committee.[71] Under all three instruments, non-conventional procedures such as those under the Human Rights Commission and its special rapporteurs are excluded from the scope of these provisions.[72]

G. Interim Measures of Protection

On average, a case which is found to be admissible can take from two and a half to four years to be decided upon by the Human Rights Committee, and two years in the case of the Torture Committee, except where the Committee may decide a case within a few months on grounds of emergency.[73] The sophisticated, and complex, character of the European Convention supervisory system has resulted in cases taking, on average, between five and six years for a ruling by the European Court of Human Rights. This does not take into account the initial delay of sometimes up to 18 months for the European Commission to consider an application due to a backlog.[74] This time element, coupled with the fact that, in cases involving "rejected asylum-seekers", an order of expulsion or deportation is usually imminent, gives to the issue of interim measures a certain urgency. Interim measures of protection against a deportation, expulsion

69. E.g. *Clacerrada Fornieles et al.* v. *Spain* (Application No.1751/90) declared inadmissible by the European Commission on the ground that substantially the same matter was being considered by the Human Rights Committee.

70. See Nowak, *op. cit. supra* n.11, at p.698.

71. This is the case, for instance, of the reservations entered by France and Spain (*Valentijn* v. *France*, Communication No.584/1994; *V.E.M.* v. *Spain*, Communication No.467/1991). See Nowak, *idem*, p.700.

72. *Estrella* v. *Uruguay*, Communication No.74/1980 (Human Rights Committee); *Mutombo*, *supra* n.20 (Torture Committee).

73. See O'Flaherty, *op. cit. supra* n.25, at pp.48, 158.

74. See M. Janis *et al.*, *European Human Rights Law—Text and Materials* (1995), p.92. It is further argued that the reform of the procedure following the entry into force of Protocol XI "should of itself shorten the length of proceedings by some 18 months to two years": *idem*, p.93. Also under the XIth Protocol procedure, the new Court has the opportunity to act promptly and with authority (*Ocalan* v. *Turkey*, judgment of 22 Feb. 1999).

or extradition order may be indicated under the Rules of Procedures of the European Commission (rule 39, old rule 36), the Human Rights Committee (rule 86), and the Torture Committee (rule 108(9)).[75] Since neither the Commission nor the Committees sit on a permanent basis, interim measures are usually considered by the President of the Commission and, in the case of the two Committees, by a special rapporteur. Under all three instruments, interim measures of protection may be granted only in cases where an asylum-seeker can show that "irreparable" or "irretrievable" damage would occur if he or she was expelled prior to the European Commission, the Torture Committee or the Human Rights Committee taking a decision on the admissibility or on the merits of a complaint. The rules are clearly designed to deal with emergency situations. The "irreparable" or "irretrievable" character of the damage is a difficult element to prove, particularly before the European Commission, because the Commission requires a certain degree of probability (i.e. factual or material evidence) that the applicant will risk being subjected to ill-treatment if returned to his or her country of origin before the Commission can decide on the case.[76] Applications for interim measures have suspensive effect in all cases of expulsion, deportation or extradition. Interim measures are generally not legally binding[77] and, notwithstanding some rare cases,[78] they are usually complied with by States.[79]

Finally, while some legal aid may be available in proceedings before the Strasbourg organs, there is no financial assistance for needy individuals who wish to bring a complaint to the Human Rights Committee or the Torture Committee.[80] Furthermore, Article 41 (old Article 50) of the

75. The term "indicate" was given preference over the term "request" to avoid any possible doubts on whether or not the Human Rights Committee, and by analogy the Torture Committee or the European Commission, could reasonably perform "implied powers" provided in the Rules of Procedure but not in the text of the treaty. See McGoldrick, *op. cit. supra* n.11, at p.131.

76. See Harris *et al.*, *op. cit. supra* n.63, at p.590.

77. This was confirmed by the E.Ct.H.R. in *Cruz Varas*, *supra* n.23, where the Court described the general practice of States as a mere illustration of "good faith compliance". See Harris *et al.*, *ibid.*

78. *Mansi* v. *Sweden* (Application No.15658/89) and *Cruz Varas* (*ibid*), both cases decided by the Strasbourg organs. See also *Nuñez* v. *Venezuela* (Communication No.110/1998) decided by the Torture Committee, and the *Ashby* case in which the Human Rights Committee vainly requested Trinidad and Tobago to suspend the execution of the applicant until a decision on the case had been reached by the Committee (1994 Report of the Human Rights Committee, A/49/40, pp.70–71).

79. E.g. *Soering*, *supra* n.6, *Mutombo*, *supra* n.20, and *Khan* v. *Canada* (Communication No.15/1994). The prompt compliance by a State depends very much on the power of persuasion of the authority indicating the measures that they are both necessary and desirable.

80. See O'Flaherty, *op. cit. supra* n.25, at pp.47, 158. It has been found that it costs an average of £30,000 to get an action into the E.Ct.H.R.: (1998) 68 B.Y.I.L. 508.

European Convention expressly provides for the award of "just satisfaction to the injured party". Though awards are on restrictive grounds, it remains an attractive option for applicants.[81] The practice of the Human Rights Committee shows that compensation is often suggested and accepted to be paid by States, despite the non-binding nature of such payment.[82]

V. WHAT KINDS OF ILL-TREATMENT MAY PROVIDE GROUNDS FOR *NON-REFOULEMENT*?

THE treatment which must be prevented varies between threats to the refugee's life or freedom (Article 33, Refugee Convention), torture (Article 3, Torture Convention), torture or inhuman or degrading treatment or punishment (Article 3, European Convention), and torture or cruel, inhuman or degrading treatment or punishment (Article 7, Political Covenant). Of these four instruments, the European Convention, as interpreted by its organs, is the most liberal on the issue of the particular treatment which must be prevented.

As a result of a restrictive interpretation of the definition of a refugee under the Refugee Convention,[83] protection against *refoulement* is increasingly becoming a matter of policy consideration and of government discretion.[84] In contrast, the European Court of Human Rights and the Human Rights Committee,[85] through a wide interpretation of the words "inhuman or degrading treatment", have allowed anyone, includ-

81. *Mansi*, *supra* n.78. Nevertheless in *Ahmed* (*supra* n.14) the Court ruled that Ahmed's repatriation would constitute a violation of Art.3 but denied his request for financial compensation on the ground that the judgment constituted sufficient just satisfaction. In view of the fact that Ahmed was refused a residence permit and denied the right to work, and as a result committed suicide, this raises the difficult issue of "just satisfaction" in the context of degrading treatment following a successful application on the ground of Art.3, an issue that the Court has not yet been willing to address.

82. *Bautista* v. *Columbia*, Communication No.563/1993, paras.8.6 and 10. See Heffernan, *op. cit. supra* n.1, at p.110.

83. The words "where his life or freedom would be threatened" are considered to have the same meaning as "well-founded fear of persecution" in Art.1A(2) of the Refugee Convention. See P. Weis (Ed.), *The Refugee Convention, 1951* (1995), p.341.

84. Many rejected applicants for the status of refugee are allowed to remain at least temporarily. For instance, in 1997, out of 36,045 first-instance decisions taken in the UK (excluding dependants), 3,985 (11%) recognised refugee status, 3,115 (9%) did not recognise refugee status but granted exceptional leave to remain and 28,945 (80%) refused asylum and exceptional leave. In addition, the British government has allowed groups of people to remain on an exceptional basis, without applying for asylum (e.g. former Yugoslavs). Home Office Statistical Bulletin, *op. cit. supra* n.37, at Table 1.2 and explanatory note 13.

85. The practice of the Human Rights Committee, although resembling that of the European Court on which it is based, seems, however, less consistent. See McGoldrick, *op. cit supra* n.11, at pp.368–371.

ing rejected asylum-seekers, to seek protection against *refoulement*.[86] However, the views of the Human Rights Committee lack reasoning, creating therefore undesirable uncertainty for authors of a complaint.[87] More particularly, the Strasbourg organs recognise the application of Article 3 from the cumulative effect of ill-treatment, which if taken individually would not reach the threshold of severity required by Article 3.[88] As regards the Torture Committee, it is restricted by the scope of the provisions of the Convention: *non-refoulement* is limited to torture and does not extend to less serious ill-treatments.[89] The three elements of intent and intensity of the pain, source of the act, and purpose, thus, constitute a stringent requirement for activating protection.[90] This is not the case under the Political Covenant or European Convention, where one or more of these elements may be lacking.[91] The distinction between torture and other treatments not amounting to torture is therefore crucial under the Torture Convention.[92] A further, and perhaps even more important, drawback is that the Torture Convention does not outlaw "pain or suffering arising only from, inherent in or incidental to lawful sanctions".[93] On this account, uncertainties remain as to whether the

86. In terms of protection against ill-treatment in the event of an expulsion, it does not really matter whether Art.3 (European Convention) or Art.7 (Political Covenant) applies on the basis of torture or degrading treatment, except perhaps that the Court or Committee will be more sympathetic towards a case where torture or death is at stake. Outside expulsion cases, the difference between torture and degrading treatment is mainly relevant for the E.Ct.H.R. in matters of compensation because the treatment has already occurred.

87. As observed by Nowak, *op. cit. supra* n.11, at p.135, the Human Rights Committee does not usually differentiate between categories of treatment and prefers referring to wider terms such as "severe treatment" or "ill-treatment", a satisfactory solution in practice as long as the treatment falls into the scope of Art.7.

88. *Ahmed*, *supra* n.14, *H.L.R.* v. *France*, 29 Apr. 1997, Reports of Judg. and Dec. (1997–III) No.36. In *D.* v. *United Kingdom*, *supra* n.5, the Court stressed the "very exceptional circumstances" and the "compelling humanitarian considerations at stake". See also *B.B.* v. France (*supra* n.14) where the Commission reported that confronting alone an illness such as AIDS at an advanced stage would constitute degrading treatment. However, it rejected a similar claim because the illness of the applicant was not yet in an advanced stage (*Karara* v. *United Kingdom*, Application No.40900/98).

89. Arts.3 and 16. J. Voyame, "La Convention des Nations Unies contre la torture", in A. Cassesse (Ed.), *The International Fight Against Torture* (1991), p.49.

90. Art.1, Torture Convention. Only torture is prohibited in absolute terms (Art.2(2), (3)). See A. Boulesbaa, "The Nature of the Obligations Incurred by States under Article 2 of the UN Convention Against Torture" (1990) 12 H.R.Q. 53–93.

91. The attitude of the European Court, however, lacks consistency on this matter. In *Ireland* v. *United Kingdom* (*supra* n.18), it seemed to suggest that the suffering needs to be caused intentionally and for a purpose in order to be regarded as torture, but not with regard to other ill-treatment, whereas, in *Abdulaziz, Cabales and Balkandali* v. *United Kingdom* (28 May 1985, Ser. A, No.94) intent seemed to be necessary in order to have degrading treatment.

92. There are as yet no views on this issue and one hopes that the Torture Committee will not follow the precedent set by the E.Ct.H.R. in *Ireland* v. *United Kingdom*. See Suntinger, *op. cit. supra* n.10, at section IV.

93. Art.1.

Convention establishes a common notion of lawful sanction or as to whether one should refer to the domestic legal system of each State.[94]

Finally, there is the question of the incidence of the source of the ill-treatment on the success of an application for protection against *refoulement*. Under the Refugee Convention, the reference to "is unwilling to avail himself of the protection of that country" in Article 1A(2), has led many contracting parties to recognise refugee status only to applicants who fear persecution by State agents or, when persecution is feared from non-State agents, only where the State is unwilling to provide protection.[95] This is not the position of the UNHCR, who does not distinguish between State and non-State agents of persecution where the State is unwilling but also unable to provide protection. Similarly, the Human Rights Committee and the Strasbourg organs do not consider the source of the risk of ill-treatment to be relevant. The Human Rights Committee nevertheless requires that the conduct be imputable to the State,[96] an element no longer required by the European Court of Human

94. Voyame (*op. cit. supra* n.89, at p.46), in particular, refers to certain practices (e.g. sexual mutilation and prolonged detention) rooted in the law of countries and raises the question of their legality under the Convention. He concludes by recognising the delicate character of the matter and by acknowledging that the Committee will have to deal with this. He also highlights problems related to customs and religions, to the country's lack of resources resulting in an emphasis on services such as education or health to the detriment of other sectors, e.g. prisons. The recent case of *P.L.Q.* v. *Canada* (*supra* n.14) nevertheless suggests that the Torture Committee chose to refer to the domestic legal system of the state in question.

95. See Joint Position defined by the Council of the European Union on the harmonised application of the definition of the term "refugee" in Art.1 of the Refugee Convention. See also the position recently taken by the UK (no refugee status but exceptional leave to remain granted to people fleeing the civil war in Somalia, *R.* v. *Secretary of State for the Home Department, ex p. Adan*, 2 Apr. 1998 (HL) (1998) 37 I.L.M. 1090), Germany (no refugee status and no protection against deportation for civil war refugees from Somalia, BVerwg, 15 Apr. 1997, 9 C 15.96 and 9 C 38.96; the key factor seems to be the risk of persecution from State-like organisations in all regions of the State in question, i.e. Afghanistan, BVerwg, 4 Nov. 1997, 9 C 34.94) and the Netherlands (well-founded fear of persecution may exist in a case where no central or *de facto* government exists, District Court of The Hague, 27 Aug. 1998, AWB 98/3068).

96. In its General Comment on Art.7 of the Political Covenant, the Human Rights Committee recognised that "it is the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority". See also, *Johnson* v. *Jamaica* (Communication No.588/1994), *Chaplin* v. *Jamaica* (Communication No.596/1994), and *Stephens* v. *Jamaica* (Communication No.373/1989).

Rights since *H.L.R.* v. *France*.[97] As for the Torture Convention, it is clear and restrictive on the matter. According to Article 1(1), there must be an act of public officials (i.e. the pain or suffering must "be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity").[98]

VI. WHAT ARE THE EVIDENTIARY REQUIREMENTS?

STANDARD of proof, method of assessment of evidence, and decisive factors (i.e. particular circumstances) in the determination process of a legal claim are key elements in the appraisal of the effectiveness of a system offering to protect legal rights. The Refugee Convention does not deal with these requirements but the UNHCR guidelines require that "good reasons" be shown by the applicant that his or her fear be of "a reasonable degree" and that the applicant be given the benefit of the doubt.[99] Contracting parties to the Refugee Convention are nevertheless free to determine their own criteria in deciding who is a refugee, including the appropriate standard of proof. Some States are clearly more restrictive than others in assessing the well-foundedness of the fear of persecution. However, it is generally accepted that where no conclusive evidence on the facts exist to back up a *bona fide* request for refugee status, the applicant be nevertheless granted protection against *refoulement*. The Strasbourg and Geneva organs apply a higher standard of proof than that set by the UNHCR. An asylum-seeker must indeed show two things: first, the existence of "substantial grounds" (for believing that, in the event of expulsion, he or she would face ill-treatment);[100] second, the existence of a "real risk" (that, in the event of expulsion, he or she, personally, is expected to face ill-treatment).[101] More specifically, the

97. In both *Soering* (*supra* n.6) and *Vilvarajah* v. *United Kingdom* (30 Oct. 1991, Ser. A, No.215), the Court required that certain conditions be met. In *Chahal* (*supra* n.3), risk of ill-treatment was not coming from the State but from other factions. In *Ahmed* (*supra* n.14), the Court, by recognising a violation of Art.3 in spite of the lack of State authority in Somalia, indirectly supported the view taken by the UNHCR that protection should be given irrespective of whether the lack of national protection against persecution can be attributed to a positive intention to harm on the part of the State. But the principle that agents of persecution may either be public officials or private individuals, provided the risk is real and State authorities are unable to provide protection or alleviate the risk, was held only in *H.L.R.* v. *France* (*supra* n.88, at para.40). And this principle was enlarged, in *D.* v. *United Kingdom* (*supra* n.5, at para.49) to cases where the risk of ill-treatment emanating from the public authority or private group is not even intentionally inflicted, and "cannot therefore engage either directly or indirectly the responsibility of the public authorities of that country".

98. *G.R.B.* v. *Sweden*, Communication No.83/1997.

99. *UNHCR Handbook*, paras.45, 41, 196.

100. The requirement for "substantial grounds" means that expulsion, extradition or deportation *per se* do not in normal circumstances amount to ill-treatment or punishment; there need to be "certain circumstances" for Art.3 of the European Convention, Art.7 of the Political Covenant, or Art.3 of the Torture Covenant to become relevant.

101. The point of time to assess the risk is the situation when *refoulement* is taking place.

standard of proof is set extremely high under the European Convention and the Political Covenant. The importance given to the "right sort" of evidence by the Strasbourg organs and the Human Rights Committee makes the gathering of information a crucial element.[102] In addition, it is for the asylum-seeker to show "substantial grounds" and "real risk".[103] In contrast, the standard of proof seems much lower under the Torture Convention since the existence of mass violation of human rights in the country of origin may expressly be relied upon. The practice of European States in giving asylum-seekers temporary leave to remain on humanitarian grounds relies on similar assessments of generalised violations of human rights. Moreover, European States recognise that the burden of proof is shared between the asylum-seeker and the competent authorities. The Torture Convention is silent on who has to show "substantial grounds".

In proving a "well-founded fear" of persecution, European States generally require that sufficient facts be provided by the asylum-seeker to enable the competent national authority to conclude one way or another that, if returned to his or her country of origin, the asylum-seeker would face a serious risk of harm.[104] While the facts relied upon by the asylum-seeker must be proved on a balance of probability,[105] in some States the legal test for the risk is set lower. For instance, in assessing the "risk" element, the Swiss and German courts require a "considerable probability" that the asylum-seeker will be persecuted if returned.[106] This is not the case in the United Kingdom, where the House of Lords requires

102. This is often an impossible task to do without recourse to NGOs. The role of NGOs in this respect could be emphasised and formalised.

103. Nevertheless, the Human Rights Committee has come to recognise that the burden of proof does not rest alone on the author of the application but, rather, that it must be shared between the author and the State against which the application is brought. See McGoldrick, *op. cit. supra* n.11, at p.149.

104. See Goodwin-Gill, *op. cit. supra* n.11, at pp.349–352.

105. The facts put forward by the asylum-seeker in his or her testimony should describe a truthful set of events (e.g. torture, detention or discrimination) and establish a credible link between these events and himself or herself as an individual. In the UK the Court of Appeal, while deciding that a fraudulent claim based on false facts may not deprive an asylum-seeker from the protection of the Refugee Convention, nevertheless recognised that the asylum-seeker would be devoid of any credibility and would therefore be unlikely to prove to the required standard a genuine subjective fear of persecution: *M.* v. *Secretary of State for the Home Department* [1996] 1 All E.R. 870.

106. This is quite a restrictive test because, according to this standard, a fact is proved only if its existence is "more likely than not". So, persecution would be relevant only if the chances that it will take place are larger than 50%. See R. Marx, "The Criteria for Determining Refugee Status in the Federal Republic of Germany" (1992) 4 I.J.R.L. 165, and Art.12a of the Swiss Asylum Law 1979, as amended.

a "reasonable degree of likelihood".[107] As for Sweden, in spite of a reference to "reasonable grounds" in the legislation, the procedure has been questioned by both the European Commission and the Torture Committee for failing to apply the test to assess evidence provided in the law.[108] While the burden of proof in principle lies on the applicant, the duty to ascertain and evaluate information on the human rights situation in the country of origin is shared between the applicant and the examiner.[109] As a result of considerable difficulties faced by asylum-seekers and national authorities in obtaining reliable circumstantial evidence on countries of origin, two documentation centres, the Canadian Immigration and Refugee Board Documentation Centre (IRBDC) and the UNHCR's Centre for Documentation on Refugees (CDR), have been established. Their task is to gather and make available information from various sources (i.e. newspapers, broadcast reports, governmental and non-governmental agencies' reports, or embassies in countries of origin reports), and to corroborate it where possible. This is in response to recognition of credibility and truthworthiness of information as being "the essential foundation for good decisions".[110] Finally, European States have interpreted the Refugee Convention to preclude refugee status to applicants who cannot be "singled out" as individuals. The asylum-seeker may still be granted protection against *refoulement* on humanitarian grounds, where he or she is a member of a group against whom there exists a pattern of persecution.[111] Similar subsidiary protection may equally be granted where no conclusive evidence on the facts is found yet

107. *R.* v. *Secretary of State for the Home Department, ex p. Sivakumaran* [1988] 1 All E.R. 193. Lord Keith of Kintel considered the notions "reasonable chance" and "serious possibility" as appropriate expressions of the degree of likelihood to be satisfied for a fear of persecution to be well-founded.

108. Before the European Commission, *Hatami* (*supra* n.35), *Raguz* v. *Austria* (Application 26300/95). Before the Torture Committee, Communications Nos.39/1996, 41/1996, 43/1996, 89/1997, 101/1997, 88/1997. Note, however, that since the entry into force of the new Aliens Act 1997, a distinction has been introduced between cases involving victims of torture (where complete accuracy is no longer required) and other cases.

109. *UNHCR Handbook*, para.196.

110. See Goodwin-Gill, *op. cit. supra* n.11, at p.352, and J. Hathaway, *The Law of Refugee Status* (1991), p.81.

111. See Goodwin-Gill, *idem*, pp.76–77. E.g. in the UK the Court of Appeal decided that in order to be granted refugee status, an asylum-seeker must have an independent fear of persecution from the fear shared by an identifiable group of persons to which he or she belongs: *R.* v. *Immigration Appeal Tribunal and another, ex p. Shah* [1997] Imm. A.R. 584. See also Hathaway, *idem*, pp.89–97.

the asylum-seeker has a credible fear of persecution.[112] This is in compliance with UNHCR guidelines that asylum-seekers must be given the benefit of the doubt.

The European Court of Human Rights has recently recognised the relevance of Article 3 of the European Convention to the expulsion of asylum-seekers "whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State".[113] The principle was first held in 1989, in *Soering* v. *United Kingdom*,[114] in the context of extradition. It was further extended to cases of expulsion, removal and deportation of asylum-seekers in *Cruz Varas* v. *Sweden*,[115] *Vilvarajah* v. *United Kingdom*,[116] *Vijayanathan and Pusparajah* v. *France*,[117] *Chahal* v. *United Kingdom*,[118] and *Ahmed* v. *Austria*,[119]unaccompanied children in *Nsona* v. *Netherlands*,[120] and even drug smugglers in *H.L.R.* v. *France*[121] and *D.* v. *United Kingdom*.[122] In assessing the existence of "substantial grounds" in cases of expulsion, the European Commission and Court of Human Rights consider whether reasonable grounds exist that expulsion is going to take place.[123] In particular, it will look at whether the applicant is going to be expelled for certain and

112. In the UK the asylum-seeker will be granted exceptional leave to remain. This is a decision taken by the Home Office outside the immigration rules. See, in particular, the Secretary of State's public policy statement that "We use exceptional leave to remain to respond to cases that are outside the [Refugee] Convention but within the terms of our other obligations, including the European Convention of Human Rights" (*Secretary of State for the Home Department* v. *Jafar Danaie* [1998] Imm. A.R. 87). Figures for the last ten years, however, indicate a constant drop in the number of first-instance decisions granting exceptional leave to remain (64% of total decisions in 1987, 10% in 1997) but a rise in the number of decisions refusing asylum and exceptional leave (23% in 1987, 77% in 1997), while the number of decisions recognising refugee status has remained generally the same (13%). See Home Office Statistical Bulletin, *op. cit. supra* n.37, at Table 1.2.

113. *Chahal*, *supra* n.3, at para.80.

114. *Supra* n.6, at para.91.

115. *Supra* n.23.

116. *Supra* n.97.

117. *Supra* n.44.

118. *Supra* n.3.

119. *Supra* n.14.

120. 28 Nov. 1996, Reports of Judg. and Dec. (1996–V) No.23.

121. *Supra* n.88.

122. *Supra* n.5.

123. In *Soering* the Court concluded that "the likelihood of the feared exposure of the applicant to the 'death row phenomenon' has been shown to be such as to bring Article 3 into play" (*supra* n.6, at para.99). In *Vilvarajah* the Court held that "A mere possibility of ill-treatment, however, in such circumstances [i.e. the personal position of the applicants was not any worse than the generality of other members of the Tamil community] is not in itself sufficient to give rise to a breach of Article 3" (*supra* n.97, at para.111).

imminently,[124] and at whether the country to which the applicant is to be expelled may subject this person to such treatment. The Court requires that the individual be singled out from a situation of general violence.[125] Once reasonable grounds that expulsion is going to take place have been found the element of "real risk" can be assessed. The Court recognises a "real risk" when "the foreseeable consequences" of the State party's decision to extradite (expel or deport) is that the applicant will be subject to treatment contrary to Article 3 in the requesting country.[126] In assessing such foreseeability, the Court takes various considerations into account (e.g. the general and special circumstances of each individual case, the relevant national legislation and practice relating to expulsion, the situation in the country of destination, in particular the current probability of torture, persecution, inhuman or degrading treatment, according to the reports and conclusions of investigations carried out by the national authorities, the United Nations and even sometimes certain non-governmental organisations). In this regard, the *Soering* case was quite simple "because the ill-treatment which Mr Soering risked was going to be administered by the State of Virginia in accordance with its law".[127] In less clear cases, a high degree of proof is required. For instance, in the *Chahal* case, the defence team gathered an unprecedented amount of evidence, including a report by Amnesty International showing that the Punjab police were exercising activities violating human rights inside as well as outside their jurisdiction, and a violation of Article 3 was found.[128] However, the Court did not find a violation of Article 3 in *H.L.R.* v. *France*, despite the similarities between these two cases.[129] And, in the *Ahmed* case, a key factor for the Court in finding that the risk was serious was the recognition of the applicant as a refugee by the Home Secretary, in 1992. Thus, *H.L.R.* v. *France*, and also *Cruz Varas* v. *Sweden*, demonstrate the importance of evidence, particularly when submitting a

124. In *Vijayanathan and Pusparajah* the Court held that as "no expulsion order has been made with respect to the applicants ... Mr Vijayanathan and Mr Pusparajah cannot, as matters stand, claim 'to be the victim[s] of a violation' within the meaning of Article 25(1) of the Convention" (*supra* n.44, at para.46).

125. This was clearly stated in *Vilvarajah* (*supra* n.97, at para.111) and more recently in *H.L.R.* v. *France* (*supra* n.88, at para.42). The risk of being sent on to a third country may also be considered, although the Strasbourg organs have not yet taken a position on this.

126. *Soering*, *supra* n.6, at para.90. See also e.g. *H.L.R.* v. *France*, *idem*, para.39.

127. C. Ovey, "Prohibition of Refoulement: The Meaning of Article 3 of the E.C.H.R.", ELENA International Course (1997), p.11 (unpublished).

128. The Court considers objective independent reports as high-level evidence. Amnesty International reports are based on individual affidavits and therefore constitute a lower level of evidence. However, such reports carried considerable weight in *Chahal* (*supra* n.3, at paras.99–100).

129. In particular, Judge Pekkanen argued in his dissenting opinion that the risk of ill-treatment was serious in both cases, but the Court found that concrete evidence of such a risk was much stronger in *Chahal* than in *H.L.R.*

case involving national security. Both these cases show that a case before the Strasbourg organs is more likely to fail on a matter of evidence than on a matter of principle.[130] Note, however, that in the recent case of *Hatami* v. *Sweden*, the European Commission of Human Rights considered that "complete accuracy is seldom to be expected by victims of torture".[131] The Court has not yet ruled on the possible contradictions and inconsistencies of victims of torture.

As under the European Convention, it is in cases of extradition that the Human Rights Committee has developed important principles that may be applied to expulsion cases.[132] In particular, it held that extradition of a person from a country to another country is not unlawful[133] but that "If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be in another jurisdiction, the State party itself may be in violation of the Covenant".[134] And "real risk" exists when the "necessary and foreseeable consequence" of the State party's decision is that the person's rights under the Covenant will be violated in another jurisdiction. It further stated that this "would mean that there was a present violation by the State party, even though the consequence would not occur until later on".[135]The approach of the Human Rights Committee is clearly based on the jurisprudence of the European Court of Human Rights, in particular *Soering* v. *United Kingdom*.[136] Its work is nevertheless characterised by the narrow scope of the evidence which it is allowed to consider. Under Article 5(1) of the Optional Protocol to the Political Covenant, the Committee may consider only "written information made available to it by the individual and the State Party concerned". Thus, oral submissions (e.g. oral examination of the parties or witnesses) may not be relied upon, nor may the written results of on-site inspections by the Committee, except where brought to the attention of the Committee in written form by the individual or State concerned. This is also true of other documents, such as State reports or reports by UN agencies or

130. Once "substantial grounds" and "real risk" have been shown, a minimum level of severity must still be shown for the treatment to be considered as torture or inhuman or degrading treatment: *supra* Part V.

131. *Supra* n.35. Note that the same view has been held by the Torture Committee since *Alan* v. *Switzerland* (Communication No.21/1995)

132. In a more general context, the Human Rights Committee stated that "States parties must not expose individuals to the anger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement": General Comment 20/44, para.9, on Art.7.

133. *M.A.* v. *Italy*, Communication No.117/1981, para.13.4.

134. *Kindler*, *supra* n.47, at para.13.2. This view was confirmed in *Ng* and *Cox* (both *supra* n.56).

135. *Kindler*, *idem*, para.6.2.

136. *Idem*, para.15.3.

non-governmental organisations.[137] As a result, the Committee found that extradition to face execution by gas asphyxiation amounted to a violation of Article 7 in only one case, *Ng* v. *Canada*.[138]

The principle that expulsion to a country could constitute a violation of Article 3 of the Torture Convention was first recognised in 1994, in *Mutombo* v. *Switzerland*, whenever "there are substantial grounds for believing that [the applicant] would be in danger of being subjected to torture", and torture was found to be the "foreseeable and necessary consequence" of expulsion on account of all relevant considerations, including the general situation in Zaire, which was found to be one of mass violation of human rights.[139] This case further reveals that the author of a communication must show that the risk or danger of being subjected to torture concerns him or her personally.[140] Expulsion, in the event that it would take place, was again found to constitute a violation of Article 3 in, for instance, *Alan* v. *Switzerland*,[141] *Kisoki* v. *Sweden*,[142] *Tala* v. *Sweden*,[143] *Paez* v. *Sweden*,[144] *A.* v. *The Netherlands*,[145] and *Aydin* v. *Sweden*.[146] The Committee, however, found no such violation in *X.* v. *Netherlands*,[147]

137. There is nothing, however, preventing the Committee from referring to such reports as part of its own expert knowledge heritage. See Nowak, *op. cit. supra* n.11, at p.693.

138. Mr Kurt Herndl, in his dissenting opinion, however, pointed out that the Committee failed to rely on enough evidence, in particular, scientific evidence. In both *Kindler*, *idem*, and *Cox* (*supra* n.56) the Committee reached the conclusion that there would be no violation of Art.7. See also *Chaplin*, *supra* n.96 (no compelling circumstances, no violation of Art.7), *Graham and Morrison*, *supra* n.67 (no compelling circumstances, no violation of Art.7), and Stephens, *supra* n.96 (severe beating, violation of Art.7).

139. Art.3 of the Torture Convention requires the existence of "substantial grounds for believing that [a person] would be in danger of being subjected to torture". In the light of the Committee's practice, the terms "danger" and "real risk" have been used to mean the same.

140. *Mutombo*, *supra* n.20, at para.9.3.

141. *Supra* n.131.

142. Communication No.41/1996.

143. Communication No.43/1996.

144. *Supra* n.32.

145. Communication No.91/1997. This is an unusual case because the applicant was never politically active, nor did he claim to be, and he had been lying about his identity and story. The Committee nevertheless ruled that since the applicant had been tortured in the past (no doubts existed that he had), he could be tortured again in view of his more recent activities. It nevertheless refused to recognise such past persecution as sufficient evidence in *I.A.O.* v. *Sweden* (Communication No.65/1997).

146. Communication No.101/1997.

147. Communication No.36/1995. His claim lacked substantiated evidence since he claimed to have been maltreated only during his first detention, not his second, the periods of detention had been very short, and there was no risk coming from the authorities.

P.L.Q. v. *Canada*[148] or *E.A.* v. *Switzerland*.[149] In the latter, the Committee recognised that the words "substantial grounds" in Article 3 "require more than a mere possibility of torture but do not need to be highly likely to occur" as contended by Switzerland.[150] In assessing the existence of "substantial grounds" and "danger", the Torture Committee relies on written evidence as well as on oral statements.[151] Its approach to such assessment is quite unique in that "the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights"[152] strengthens the findings of "substantial grounds", thus contributing to lowering the standard of proof. However, as repeatedly stated by the Committee, it "does not as such constitute sufficient grounds".[153] Information provided by non-governmental organisations and UN agencies, as well its own country reports,[154] constitute therefore crucial sources of evidence.[155] Other relevant considerations in the assessment of "real risk" or "danger" include circumstances specific to the author (e.g. ethnic background, political affiliation, detention history, desertion from the army and internal exile) and particularities of the State to which he or she is to be returned.[156] Furthermore, the Torture Committee considers that "even if there are doubts about the facts adduced by the author, it must ensure that his security is not endangered".[157] And in three further cases, it took the clear view that "complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist

148. *Supra* n.14. The Committee considered that the "mere fact" that a person "would be arrested and retried would not constitute substantial grounds for believing that he would be in danger of being subjected to torture". Also, the author failed to demonstrate that he would be personally at risk.

149. Communication No.28/1995, 10 Nov. 1997. The author failed to establish that he would face a "foreseeable, real and personal risk" if returned to Turkey. See also *G.R.B.* v. *Sweden*, *supra* n.98.

150. This was reaffirmed by the Committee in *Aydın* (*supra* n.146) in the following terms: "the risk does not have to meet the test of being highly probable". Like the E.Ct H.R., the Torture Committee requires more than a mere possibility of risk (*Vilvarajah*, *supra* n.97).

151. Rule of Procedure 110, Torture Committee. Note that this is also the case for the Strasbourg organs.

152. Art.3(2), Torture Convention.

153. The Committee established this principle in *Mutombo* (*supra* n 20, at para.9.3). It was confirmed in e.g. *X.* v. *Netherlands* (*supra* n.147) and *Kisoki* (*supra* n.142).

154. *Alan*, *supra* n.131.

155. In *Valentijn* (*supra* n.71), the Committee nevertheless made it clear that it would not question the evaluation of the evidence made by the domestic courts, except in cases where this assessment was manifestly arbitrary or amounted to a denial of justice.

156. In *Mutombo* (*supra* n.20), for instance, the Committee recognised the fact that Zaire was not a signatory of the Torture Convention to be a relevant factor in finding real risk. And in *Alan* (*supra* n.131), its view was that although Turkey was a party to the Convention and had recognised the Committee's competence to receive individual communications, this did not necessarily constitute "sufficient guarantee" against *refoulement*. Finally, it recognised that there was no safe area in Turkey for Mr Alan because his native place was not safe and the police were looking for him.

157. *Mutombo*, *supra* n.20, at para.9.2.

in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims".[158]

VII. CONCLUSION

STATES have a legal obligation to prevent the *refoulement* of refugees and asylum-seekers; they must implement their duty in good faith through the establishment of effective procedures for the determination of refugee status. However, refugee law is limited to asylum-seekers and refugees seeking protection with "clean hands". Hence the need to look for protection against *refoulement* under human rights law. With the exception of rejected asylum-seekers in Andorra, Albania and the United Kingdom, who may seek protection only under the European Convention, asylum-seekers in Europe may alternatively choose to start proceedings before one of the two UN Committees. The similarities between these proceedings make it difficult to identify one clear winner among the three instruments. However, this article reveals some discrepancies which are worth taking into account before considering submitting a petition.

The Political Covenant stands out as the least suitable instrument. Indeed, views of the Human Rights Committee in extradition cases reveal no more than a restrictive application of the principles developed by the Strasbourg organs. The shorter length of proceedings and the simplicity of the views of this Committee may certainly count as an advantage but this does not compensate for the restrictive use of evidence by the Committee. In the long run, however, it is not excluded that the Committee may gradually incorporate the principles held by the Strasbourg organs but, as things stand, reliance on the European Convention or the Torture Convention seems to constitute a safer option. Both the Strasbourg organs and the Torture Committee can claim a proven record of successful applications and yet so many features distinguish one from another. Among the factors playing in favour of petitioning the Torture Committee, one may find the short length of proceedings, the absence of a time limit for making a petition, and the almost total lack of formalism with regard to making an application and with regard to the Committee's views. Furthermore, the Torture Committee applies relaxed evidentiary requirements. However, the Torture Convention limits the scope of *non-refoulement* to cases of torture. In contrast, *non-refoulement* under the European Convention extends to inhuman and degrading treatment, whatever the source, but admissibility requirements are stringent and every single one is strictly applied. In sum, the best option lies in proceedings before the Strasbourg organs, provided particular effort is

158. *Alan, supra* n.131, at para.11.3, *Kisoki, supra* n.142, at para 9.3, and *Tala, supra* n.143, at para.10.3. Express reference was made in particular to paras.198–199 of the *UNHCR Handbook*.

put into the procedural requirements (i.e. formalism) and the presentation of evidence.

Liberal recent developments in the application of Article 3 of the European Convention by the Strasbourg organs must be welcome for at least two reasons. First, they must be welcome for their direct impact on the protection of asylum-seekers in Europe, by the Strasbourg organs themselves but also by national courts. At least two recent cases demonstrate that the right of States to expel has come under greater scrutiny than ever before by human rights law. For instance, during 1997, both the European Commission and the European Court of Human Rights no longer had to deal with an application (by Mr Tilmatine against the United Kingdom)[159] and a case (*Jorge A. Paez* v. *Sweden*),[160] respectively, because a temporary residence permit had been granted by the competent national authority. In both cases, the precedential value of the principle held in the *Soering* case played a crucial role. The yardstick is clearly international law, not national law. Second, the recent developments by the Strasbourg organs must be welcome for their impact on the protection of asylum-seekers in other forums, as demonstrated by the views of the Human Rights Committee and of the Torture Committee considered in this article, which often embrace the European Court's approach. In this sense, by reaching far beyond the limits of its own decisions and jurisdiction, the work of the Strasbourg organs on *non-refoulement* is of a norm-creating character.

159. *Supra* n.16. See also *Raguz* (*supra* n.108).
160. Reports of Judg. and Dec. (1997–VII) no. 56.