THE NOTION OF STATE PROTECTION

Justice Catherine Branson1 and Paulah Dauns, LL.B.2,3

1. Introduction

1 The Convention Relating to the Status of Refugees (1951), as amended by the Protocol relating to the Status of Refugees (1967) relevantly defined a ‘refugee’ as a person who:

- owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.4

2 As Professor James Hathaway has observed:

Refugee law exists in order to interpose the protection of the international community in situations where resort to national protection is not possible.5

1 The Honourable Justice Catherine Branson, Judge of the Federal Court of Australia is a member of the International Association of Refugee Law Judges (IARLJ) and of the Human Rights Nexus Working Party (HRNWP).

2 Paulah Dauns is the Assistant Deputy Chairperson of the Refugee Protection Division, Western Region of the Immigration and Refugee Board of Canada (IRB) located in Vancouver, British Columbia. She is also the Rapporteur for the Human Rights Nexus Working Party of the IARLJ, a member of Council and the Chairperson of the Women Judges Forum, of the IARLJ.

3 The analysis and opinions in this paper are solely those of the authors and do not represent the position of the IRB, the Australian Federal Court or the IARLJ. This paper was a collaborative effort prepared with the contribution and assistance of others. These people should be acknowledged for their substantial contribution to the paper: Justice Rod Madgwick, Judge of the Federal Court of Australia and Associate Rapporteur of the Human Rights Nexus Working Party; James Simeon, Acting Executive Director of the IARLJ; Rolf Driver, Federal Magistrate, Law Courts, Sydney, Australia; Dr. Hugo Storey, Senior Immigration Judge, United Kingdom Asylum and Immigration Tribunal; Patricia Auron, Legal Advisor to the Immigration and Refugee Board of Canada; David Schwartz, Legal Advisor to the Immigration and Refugee Board of Canada; Joan Montgomery, Member, Immigration and Refugee Board of Canada; Lori Scalabba, past Chairperson, United States Board of Immigration Appeals; Sarah Murphy, Member, Refugee Status Appeals Authority, Wellington, New Zealand; Daimhin Warner, Legal Associate Refugee Status Appeals Authority, New Zealand; Professor James Hathaway, University of Michigan, USA and Professor Pene Mathew, University of Sydney, Australia. Special thanks go to research officer of the Australia Federal Court, Mr. David Braun for his significant contribution to the content of this paper.

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4 Article 1A(2).

5 Butterworths 'The Law of Refugee Status', (2001) at 135

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3 The jurisprudence of the United Kingdom, Australia, New Zealand, United States of America and Canada accepts the accuracy of the above observation. The 'international community' is relevantly those states which are parties to the Convention.

2. The meaning of 'the protection of that country'

(a) Australia

4 As Gleeson CJ pointed out in Minister for Immigration v Khawar, in discourse concerning the Convention there is a broader sense and a narrower sense in which the term 'protection' is used. In the narrower sense the protection is the diplomatic or consular protection extended abroad by a country to its nationals. In the broader sense the protection is the protection against ill-treatment or violence which a country ordinarily provides to its citizens.

5 In Khawar, after referring to articles by Professor Kalin and Professor Fortin, and observing that the inability or unwillingness of the refugee to avail himself of the protection of his country, referred to in Art 1A (2), by hypothesis, occurs when he is outside his country, the Chief Justice concluded that 'protection' was used in the article in the narrower sense.

6 His Honour observed, however, that the inability or unwillingness to seek diplomatic protection abroad may be explained by a failure of internal protection in the wider sense, or may be related to a possibility that seeking such protection could result in return to the place of persecution. That is, in the view of the Chief Justice of Australia, the opening portion of Art 1A (2) postulates a putative refugee who is outside his country of nationality owing to a fear of persecution inside that country; it is that fear which makes him unwilling to avail himself of the protection of his country rather than any fear of being persecuted by his country's diplomats.

7 The view of the Chief Justice was explicitly approved by three members of the High Court (one of whom was Gleeson, C.J.) in Minister for Immigration v S152/2003 and has been accepted as correct by the Federal Court of Australia.

9 Hor v. Gonzales, 400 F.3d 482 (7th Cir. 2005).
12 (2002) 210 CLR 1 at [17]-[21].
15 Justice McHugh and Gummow J.J. took the same view at [62].
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(b) Canada

8 The approach adopted by the Chief Justice of the High Court in Khawar had been earlier urged on the Supreme Court of Canada in Ward v Attorney General of Canada\(^{17}\) by the intervenor, Canadian Council for Refugees. However, the Court was not persuaded to read Art 1A (2) in the way urged.

(c) Other Jurisdictions

9 There seems to have been only limited judicial consideration of the intended meaning in Art 1A (2) of the phrase 'unwilling to avail himself of the protection of that country'. However, statements made in Horvath v Secretary of State for the Home Department\(^{18}\) and Butler v. Attorney-General (NZ),\(^{19}\) as well as in Ward favour the broader sense.\(^{20}\)

10 The explanation for the limited jurisprudence on the question may be that little of practical consequence flows from the difference between the two approaches. The choice of approach might prove significant, at least theoretically, where a putative refugee is outside his or her country of nationality notwithstanding that he or she could have escaped any real risk of persecution by relocating internally or where he or she could look to the diplomatic or consular protection of his or her country of nationality for the purpose of obtaining assistance to resettle safely in a third country.

3. The source of persecution

(a) Authorised State Agents

(i) General

11 The paradigm case of persecution contemplated by the Convention is persecution by the refugee’s country of nationality; ie. persecution by state agents. It is apparently uncontroversial in all jurisdictions that where the state itself is wholly complicit in the persecution which the person fears, the obligation of the state to protect the fundamental rights and freedoms of its citizens is breached. The person’s fear of persecution will be well-founded and his or her inability or unwillingness to avail himself or herself of the protection of that country self-evident. In such a case intentionally inflicted serious harm will without more constitute a failure of state protection giving rise to a need for the protection of the international community. That is, once the well-founded fear is established, the inability or unwillingness to look to the protection of the country of nationality is logically inevitable. Cases in which the state, for a Convention reason, pursues a policy of not providing protection against probable serious harm

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\(^{17}\) [1993] 2 SCR 689.

\(^{18}\) [2001] IAC at 975.

\(^{19}\) [1999] NZAR 205 at 216-217.

probably fall within this paradigm. But see [20] and [51] below concerning the position of the United States of America.

(b) Rogue State Officials

(i) General

12 National protection does not necessarily fail because protection from harm is denied by a rogue official. Rogue officials are found even in states committed to the protection of fundamental rights and freedoms. The case law seems to draw a distinction between jurisdictions that simply assume that there is a failure of state protection when the threat emanates from an official agent and those who qualify that proposition by reference to concepts such as “timely and effective rectification” (Svazas).

(ii) United Kingdom

13 Svazas v Secretary for State for the Home Department is a case concerning rogue state officials motivated by a Convention reason, namely political opinion. In Svazas the Court of Appeal of England and Wales considered the position of two members of the Communist party of Lithuania who feared maltreatment by the Lithuanian police. The evidence suggested that members of the Communist Party were arrested and detained in Lithuania and might be maltreated in detention. However, such conduct by the police was unlawful and the authorities tried to prosecute the officers responsible.

14 Lord Justice Sedley at [16] observed:

While the state cannot be asked to do more than its best to keep private individuals from persecuting others, it is responsible for what its own agents do unless it acts promptly and effectively to stop them.

His Lordship at [17] noted that the presumption that a state, and especially a democratic state, which is able to afford protection to its citizens will do so is not matched by an equally strong converse presumption. A country like Lithuania might be willing to afford protection but be impeded in doing so by the legacy of the very past from which it is extricating itself.

15 Lord Justice Simon Brown in Svazas at [54] summarised the position as follows:

In short, there will be a spectrum of cases between on the one extreme those where the only ill-treatment is by non-state agents and on the other extreme those where the state itself is wholly implicit in the ill-treatment. Within that spectrum, the question to be addressed is whether or not the state can properly be said to be providing sufficient in the way of protection. When, however,

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21 Circumstances such as those hypothesised by Lord Hoffmann in Shah and Islam v. SSHD [1999] 2 WLR 1015 at p (ie a policy of the Nazi government not to protect Jewish shopkeepers from serious attacks by gangs). See also Minister for Immigration v. Khawar (2002) 210 CLR 1.

22 [2002] I WLR 1891.
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one comes to address the question in this context rather than in the context of ill-treatment exclusively by non-state agents, one must clearly recognise that the more senior the officers of state concerned, and the more closely involved they are in the refugee’s ill-treatment, the more necessary it will be to demonstrate clearly the home state’s political will to stamp it out and the adequacy of their systems for doing so and for punishing those responsible, and the easier it will be for the asylum seeker to cast doubt upon their readiness, or at least their ability, to do so.

16 The approach adopted by the majority of the Court of Appeal in Svazas was approved by the House of Lords in R v. Secretary of State for the Home Department; ex parte Bagdanavicius. Significantly in this case the House of Lords did not demur from the summary of principles enunciated below by the Court of Appeal. This summary referred to the need for the state to afford ‘additional protection’ in certain cases; i.e. protection over and above that which a state is expected to afford to its nationals in the general run of cases.

(iii) Australia

17 In Minister for Immigration v. Khawar the High Court of Australia considered a hypothetical situation in which police protection from serious harm was withheld for a Convention reason although the serious harm was not inflicted or threatened for a Convention reason. The actual circumstances alleged in Khawar were that the Pakistani police force systematically failed to protect Pakistani women who were subject to serious domestic violence. That is, unlike the circumstances considered in Svazas, Khawar did not involve the direct infliction of harm by rogue state officials, but rather the failure of state officials, for a Convention reason, to protect against harm inflicted by a non-state agent for a non-Convention reason. Notwithstanding that the claim made was of systematic discrimination by the police for a Convention reason, namely membership of a particular social group, some members of the High Court of Australia gave consideration to the possibility that the police in Pakistan did not, as Ms. Khawar claimed, systematically discriminate against women who experienced domestic violence but rather that she had been let down by particular police officers. At [26] Gleeson C.J. observed:

[…] as a matter of principle, it would not be sufficient for Ms. Khawar to show maladministration, incompetence, or ineptitude, by the local police. That would not convert personally motivated domestic violence into persecution on one of the grounds set out in Art. 1A (2). But if she could show state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law, then it would not be an answer to her case to say that such a state of affairs resulted from entrenched cultural attitudes.

18 McHugh and Gummow J.J. at [84] said:

23 [2005] UKHL 38 at [30]; [2005] INLR 422, HL.
If the reason for the systemic failure of enforcement of the criminal law lay in the shortage of resources by law enforcement authorities, that, if it can be shown with sufficient cogency, would be a different matter to the selective and discriminatory treatment relied upon here.

19 It appears that the explanation for the different approaches adopted in Svazas and Khawar can be found in the different nature of the claims made in the two cases. In Svazas the rogue state officials were themselves alleged to be inflicting harm for a Convention reason; the state was responsible for their conduct unless it acted promptly and effectively to stop them. In Khawar members of the High Court hypothesised rogue state officials who did not withhold protection for a Convention reason but rather withheld protection by reason of maladministration, incompetence, ineptitude or shortage of resources. In the factual circumstances considered in Khawar, if the conduct of the police was not motivated by a Convention reason, the claims advanced would not fall within Art 1A (2) because the conduct in respect of which Mr. Khawar sought state protection was not itself motivated by a Convention reason. On that hypothesis neither the domestic violence which she experienced nor the failure of the police protection would be for a Convention reason.

(iv) United States

20 In Boer-Sedano v. Gonzalez, a Mexican national was forced to perform sex acts on a high-ranking Mexican police officer who was aware of his homosexuality and threatened him with death. Remarking that “[p]olice officers are the prototypical state actor for asylum purposes,” the Court found that “[t]hese persecutory acts by a single governmental or quasi-governmental official are sufficient to establish state action.” The Court noted that “[A]lthough the [Immigration Judge] faulted Boer-Sedano for not reporting the persecution he suffered to the police, the courts will generally consider whether an asylum applicant reported persecution to the police only when a non-governmental actor is responsible for the persecution”.

(v) Canada

21 There is no requirement in Canadian law for the persecution to be at the hands of the state. One aspect of protection that has not been addressed by the courts and that might have addressed the situation of “rogue state officials” is the adequacy or standard of protection. The Court in Ward referred to “adequate protection” but did not define what it meant by “adequate”. The Canadian courts have thus adopted the test “adequate though not necessarily perfect”. A rogue state official would be behaving in an unlawful manner and therefore if the authorities were prepared to prosecute the official, this would likely be “adequate” protection.

22 Where the state has effective control of its territory as evidenced by the presence of military, police and civil authority and makes “serious efforts” to protect its nationals,

25 418 F.3d 1082 (9th Cir. 2005), at 1088.

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the mere fact the state is not always successful in controlling (for example) rogue state officials, will not rebut the presumption of protection. The focus on the efforts of the state has been viewed as a "narrow" approach to protection whereas the "broad" view will grant refugee status to those who are able to establish that protection is "ineffective."

23 In the Court's view, the lynch-pin of the analysis is the state's inability to protect: "it is a crucial element in determining whether the claimant's fear is well-founded, and thereby the objective reasonableness of his or her unwillingness to seek the protection of his or her state of nationality."

24 This standard has been interpreted and applied differently by the Federal Court, thus leading to one school of thought that adopts a broad view of protection and another one that adopts a narrow view. The issue has not been resolved by the higher Court and thus the jurisprudence continues to develop along these two lines although the majority of cases seem to prefer and follow the narrow view.

25 The broad view of protection will grant refugee status to those who establish that the protection that is being offered is ineffective. In essence, what this means is that the willingness of a state to offer protection (through laws, police, prosecutions, etc) will not necessarily equate to adequate state protection where the efforts at protection do not reduce the risk that make the fear of the claimant well-founded.

26 The narrow view of protection focuses on the efforts the state makes to protect its citizens and as long as those efforts are adequate in relation to the circumstances of the particular case, the protection will be seen as meeting the Villafranca standard. In many cases that follow this approach, the Court will engage in a comparative analysis of what the Canadian state (or other Western democracies) could do for its own citizens in similar circumstances.

(vi) New Zealand

27 The approach taken in New Zealand to the issue of the agent of persecution was established by the RSAA in Refugee Appeal No. 71247/99. The Authority held that the source of the persecution is irrelevant to the question of state protection as it applies to the formula employed by the House of Lords in Horvath (that persecution = serious harm + a failure of state protection). Holding that state complicity was not a prerequisite to a valid refugee claim, the Authority recognised that a failure of state protection could exist in the following four situations:

28 For a recent application of this approach see Castro v. Canada (Minister of Citizenship and Immigration), 2006 FC 332, and C.P.H. v. Canada (Minister of Citizenship and Immigration), 2006 FC 367.
29 For example, where the state has a protection apparatus in place (laws, police and prosecutions) but the claimant fails to give the state enough information to allow it to investigate; the Court will view that as adequate state protection. The same approach has been used in analyzing cases where the refusal to protect can be traced to a single policeman and/or the local authorities and the claimant failed to approach higher authorities.
30 Canada (Minister of Employment and Immigration) v. Villafranca (1992), 18 Imm. L.R. (2d) 130 (F.C.A.).
(a) Persecution committed by the state concerned (that is, by a state actor).
(b) Persecution condoned by the state concerned.
(c) Persecution tolerated by the state concerned.
(d) Persecution not condoned or tolerated by the state concerned but nevertheless present because the state either refuses or is unable to offer adequate protection.

28 The Authority in this case concluded that in both state and non-state agent cases the enquiry is the same, that is, does the claimant have a well-founded fear of being persecuted for a Convention reason and are they unable or, owing to such fear, unwilling to avail themselves of the protection of their state of nationality.

29 This decision was applied in relation to an agent of persecution not easily distinguished as either state or non-state. In Refugee Appeal Nos 73898-9,\(^{32}\) the Authority considered the appeal of a Colombian national who claimed to have a well-founded fear of being persecuted by both FARC and the paramilitary group Autodefensas Unidas de Colombia (AUC). While FARC clearly constituted a non-state agent, the status of the AUC was less clear. The Authority noted that the AUC was distinguished from other armed non-state groups in Colombia by repeated allegations of links between it and the Colombian military. However, the Authority held that, in terms of the focus of the inquiry into state protection, it makes little difference whether the agent of persecution is the state or a non-state actor. In either case, the Authority considered, the steps taken by the state to protect must have the net effect of reducing the risk of harm to below the real chance threshold. Noting the decision of the UK Court of Appeal in Svazas, the Authority observed:

Indeed, Simon Brown L.J. in Svazas [...] appears to recognise that the state/non-state distinction, has effect in terms of the state protection inquiry, only at an evidential level in establishing the fact of [a] lack of state protection, [...] rather than raising/lowering the standard depending on which side of the state/non-state divide the claimed agent of persecution is said to fall.

30 However, the Authority declined to follow the decision in Svazas insofar as it suggested that, in relation to non-state agents, the standard of proof of a failure of state protection was somehow less. The Authority stated:

[...] it is far from clear that Sedley L.J. was doing anything other than making the simple point that it will be easier for a state to control its own agents, rather than private individuals [...]. Thus, while the starting point of the analysis may be different [depending upon the agent of persecution], ultimately, in either case, the question remains the same: it is the practical effect of the steps taken on the risk that counts [...]

\(^{32}\) (9 November 2004).
(c) Non-State Agents

(i) General

31 It is accepted in the UK, US, Canada, Australia and New Zealand that a 'well-founded fear of persecution' may be based on the conduct of non-governmental persecutors. In a number of jurisdictions adherence to the 'accountability theory' has meant that obligations under the Convention will only be recognised where the country of nationality is complicit in the persecutory conduct. However, Arts 6 and 7 of the EU Council Directive 2004/87/EC of 29 April 2004 are inconsistent with the accountability theory. The directive, which Member States were required to bring into force before 10 October 2006, provides:

**Article 6**

Actors of persecution or serious harm, which include:

a) the State;

b) parties or organizations controlling the State or a substantial part of the territory of the State;

c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organizations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

**Article 7**

1. Protection can be provided by:

a) the State; or

b) parties or organizations, including international organisations, controlling the State or a substantial part of the territory of the State.

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34 See McMullen v. Immigration & Naturalization Service, 658 F.2d 1312 (9th Cir. 1981); Arteaga-Turias v. Immigration & Naturalization Service, 829 F.2d 720 (9th Cir. 1987), at p. 723; Arteaga v. Immigration & Naturalization Service, 836 F.2d 1227 (9th Cir. 1988), at p. 1231; and Estrada-Posadas v. Immigration & Naturalization Service, 924 F.2d 916 (9th Cir. 1991), at p. 919.


37 See Refugee Appeal No. 18/92 Re JS (5 August 1992); Refugee Appeal No. 135/92 Re RS (18 June 1993); Refugee Appeal No. 523/92 Re RS (17 March 1995); Refugee Appeal No 2039/93 Re RN (12 February 1996); Refugee Appeal No. 7427/90 (16 August 2000).

38 Germany, France, Italy and Switzerland: See European Council on Refugees and Exiles, 'Non-State Agents of Persecution and the Inability of the State to Protect - the German Interpretation' (2000), 7. 14. However the Swiss Asylum Appeal Commission has recently rejected the accountability theory (see www.aif.crc.ch: "Preussenthurung vom 13.6.06" "Grundsatzurteil vom 8.6.06".

39 EU Council directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
2. Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

3. When assessing whether an international organization controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Council acts.

(ii) United Kingdom

32 In Horvath v. Secretary of State for the Home Department the House of Lords considered a claim of persecution at the hands of non-state agents. A Roma citizen of the Republic of Slovakia claimed that the Slovak police failed to protect Roma from physical attacks by skinheads. Lord Hope of Craighead, with whom Lord Browne-Wilkinson and Lord Hobhouse of Woodborough agreed, at 497 held that:

[...] in the context of an allegation of persecution by non-state agents, the word "persecution" implies a failure by the state to make protection available against ill-treatment or violence which the person suffers at the hands of his persecutors.

33 On the issue of the extent of the duty of the state to provide protection, his Lordship, at 500 observed:

[...] the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes to all its own nationals [...] Certain levels of ill-treatment may still occur even if steps to prevent this are taken by the state to which we look for our protection.

34 Lord Clyde, with whom Lord Browne-Wilkinson also agreed, at 511 approved the following formulation presented by Stuart-Smith L.J. in the Court of Appeal:

In my judgment there must be in force in the country in question a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes. The victims as a class must not be exempt from the protection of the law. There must be a reasonable willingness by the law enforcement agencies, that is to say the police and courts, to detect, prosecute and punish offenders.

35 The above observations should probably now be understood in the light of the failure of the House of Lords in the later case of Bagdanavicius to demur from the summary of principles enunciated below by the Court of Appeal (see [16] above).
(iii) Australia

Australia has rejected the accountability theory of the Convention. In *Re Minister for Immigration; ex parte MIAH* Gleeson C.J. and Hayne J. observed:

The distinction between a government's ability or power to protect a citizen against persecution, and the existence of a political will to do so, is not as clear-cut and obvious as the prosecutor's argument would have it. A distinction between the ability to do something and a willingness to do it is sometimes real and important. Here, however, the decision-maker was dealing with a contention about political reality. To ask whether an apprehended failure of the authorities in Bangladesh to control religious fundamentalists would reflect a lack of power, or a lack of political will, would be to make a distinction of little practical significance. To say that a democratically elected government is unable to control a certain group could mean that there are not enough police or soldiers at the government's disposal. But it could also mean that the government cannot take the political risk of alienating the group.

37 The High Court of Australia expressed similar views in *Minister for Immigration v. Respondents S 152/2003* at [28] where Gleeson C.J. and Hayne and Heydon J.J. observed:

The fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify unwillingness to seek their protection. For example, an Australian court that issues an apprehended violence order is rarely, if ever, in a position to guarantee its effectiveness. A person who obtains such an order may yet have a well-founded fear that the order will be disobeyed. Paradoxically, fear of certain kinds of harm from other citizens can only be removed completely in a highly repressive society, and then it is likely to be replaced by fear of harm from the state.

(iv) Canada

A similar approach was adopted by the Federal Court of Appeal of Canada in *Canada (Minister of Citizenship and Immigration) v. Kadenko*. The court at [4] approved the comment made by Hugesson J.A. in *Canada (Minister of Employment and Immigration) v. Villafranca*:

No government that makes any claim to democratic values or protection of human rights can guarantee the protection of its citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation [...]
Interestingly the Federal Court of Appeal went on at [5] to observe:

*When the state in question is a democratic state the claimant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her.*

(v) United States

39 It appears that in the United States proof of past persecution greatly alleviates the evidentiary burden on an applicant of establishing a well-founded fear of future persecution, including persecution by non-state agents.

40 In *Nahrwani v. Gonzales*, an Iranian national who had been afforded permanent resident status in Germany sought asylum based on incidents of harassment, threats, and property damage by private individuals in retaliation for his conversion to Christianity. The Immigration Judge found that the incidents described by Nahrwani did not rise to the level of severity required to demonstrate past persecution and that he had not established that the German government was unwilling or unable to protect him from the alleged persecution. In upholding this decision, the United States Court of Appeals for the Ninth Circuit noted that Nahrwani admitted that he could not give the police the names of any suspects because he did not know who they were, that the police investigated the complaints, albeit unsuccessfully, and that there was no indication that racial issues affected the willingness of the police to help Nahrwani. On these facts, the court concluded that Nahrwani did not substantiate his claim regarding the German government's inability or unwillingness to control the asserted persecution from which he suffered and failed to demonstrate an objectively reasonable possibility of persecution in Germany.

41 By contrast, in *Mashiri v. Ashcroft*, past persecution by non-state agents of nationals living in Germany was established. The Mashiri family had received specific and menacing threats involving the terror of Germany's Nazi past and threatening death if the family did not leave Germany. Police made no arrests after a family member was beaten, school officials refused help to the family and the police quickly closed investigations of a property attack that was apparently motivated by racial hatred telling the family that such things happened all the time and that foreigners 'better try to take care of [themselves]'. The United States Court of Appeals for the Ninth Circuit confirmed that proof of past persecution shifts the evidentiary burden to the Government to rebut the presumption of a well-founded fear of future persecution and that, in this regard, the Government had failed to provide evidence that the relocation within Germany was a safe reasonable alternative.

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44 399 F.3d 1148 (9th Cir. 2005).
45 383 F.3d 1112 (9th Cir. 2004).
(vi) New Zealand
42 In *K v. Refugee Status Appeals Authority (No. 2)* Gendall J considered a claim by an Indo-Fijian police officer who claimed to have a well-founded fear of persecution at the hands of indigenous Fijians. At [19]-[21] Gendall J. stated:

> It has been frequently said that no Government adhering to democratic values or protection of human rights can guarantee protection of all its citizens at all times.

> It is not possible, or even desirable, to define in absolute terms the nature of the duty of protection which a State owes to its people, in terms of refugee principles. An isolated act might be a persecutory act (such as for example the painting of a swastika on the home of a Jewish citizen) but it would not amount to persecution in terms of refugee law unless the State, through its system or methods or weakness, was unable or unwilling to control such acts.

(d) Absence of an effective government

(i) United Kingdom
43 In *Adan v. Secretary of State for the Home Department* the House of Lords gave consideration to a claim for asylum made by a citizen of Somalia who feared to return to that country because of what was described as a clan and sub-clan based civil war which had broken out in the north. Lord Lloyd of Berwick, with whom the other Law Lords agreed, said:

> [...] where a state of civil war exists, it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show ... a differential impact. In other words, he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare. What I have said so far applies only so long as the state of civil war continues. Once the civil war is over, and the victors have restored order, then the picture changes back again. There is no longer any question of both sides claiming refugee status. If the vanquished are oppressed or ill-treated by the victors, they may well be able to establish a present fear of persecution for a Convention reason, and in most cases they would be unable to avail themselves of their country's protection.

44 In the subsequent decision *R. v. Secretary of State for the Home Department; Ex parte Adan* the Court of Appeal state the broad proposition that:

> Our courts recognise persecution by non-state agents for the purposes of the Convention in any case where the state is unwilling or unable to provide protection against it, and indeed whether or

47 [1999] 1 AC 293 at 311.
48 [1999] 3 WLR 1274 at 1289.
not there exists competent or effective governmental or state authorities in the country in question.

45 The acknowledgment by the Court of Appeal in *Adan* that there will be a failure of state protection for the purposes of the Convention where no competent or effective government authority exists was approved by Lord Hope of Craighead, with whom Lord Browne-Wilkinson agreed, in *Horvath v. Secretary of State for the Home Department.*

(ii) Australia
46 The High Court of Australia in *Minister for Immigration v. Haji Ibrahim* also gave consideration to a claim for a protection visa made by a citizen of Somalia. The High Court described that country as in a state of anarchy rather than a state of civil war. The majority of the court did not accept the notion of ‘differential operation’ propounded by the House of Lords in *Adan*. They took the view that while it might be helpful to consider whether conduct of a certain kind was ‘systematic’, or treatment of a certain kind was discriminatory or ‘differential’, the test to be applied was to be found in the language of the Convention. Gleeson C.J. at [7] said:

> Persecution and disorder are not mutually exclusive. The existence of disorder may provide the occasion of, and perhaps the opportunity for, persecution of an individual or a group. In such a case, the ground of the persecution may or may not be a Convention ground. Nothing in the reasoning of the Tribunal was inconsistent with that. As the clans and subclans in Somalia struggle for power and resources, it is inevitable that from time to time, and from place to place, some will be in the ascendency and others will be vulnerable. In such a situation, an inquiry as to whether the motivation of those temporarily in the ascendency is to harm their enemies rather than to secure the benefits of domination is unlikely to be fruitful. The distinction, in a context of the kind revealed by the evidence in the present case, lacks practical content.

47Gunnow J, with whom Gleeson C.J. and Hayne J agreed, at [145]-[147] observed:

>[... ] the material [...] indicated endemic deficiencies in Somali civil society which in recent years have been reflected by the absence of the functioning apparatus of a nation state. The widespread disorder which this has entailed is not aptly described as a ‘civil war’ in the sense of that term described earlier in these reasons. To proceed as was done in *Adan* involves a risk that there will be a blurring of the distinction between the persecutory acts which the asylum seeker must show and the broader circumstances leading to those acts. It does not advance the inquiry called for by the Convention definition to ask of a particular individual whether that person was to be differentiated from other members of the general population who were all at risk so long as the ‘civil war’ continued. Nor does it assist to require the administrative decision-maker [...] to determine the “objectives”, as a matter of “reality”, of “the war”. The objectives of the various States which were

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combatants in the First World War were the subject of propaganda at the time and remain a subject for debate between historians with varying degrees of access to primary sources. [...] The reasons for a particular conflict may be virtually unfathomable. The notions of "civil war", "differential operation" and "object" or "motivation" of that "civil war" are distractions from applying the text of the Convention definition.'

Callinan J. at [227] expressed a similar view.

(iii) Canada

48 Absent a complete breakdown of the state apparatus, there is a presumption the state is capable of protecting its nationals. However, in cases where there is an actual breakdown of the state apparatus, the presumption will likely be rebutted. The leading case dealing with this issue in Canada is Zalzali.51 This was an appeal from a decision of the Refugee Division dismissing an application for refugee status. The Division concluded that the applicant did not present evidence of the grounds of persecution alleged and that he was not a credible witness. One of the points used to question the applicant’s credibility, and therefore his subjective fear, was the fact that he had never tried to obtain protection from the Lebanese army. He argued that he would probably be executed if he returned to Lebanon.

49 The appeal was allowed and the decision of the Refugee Division was set aside because the Division made a “gross error in its assessment of the evidence”. It was held that the applicant was unable to seek the assistance of his government since there was no government to which he could resort. This enabled him to meet one of the conditions imposed in the definition of refugee.

In this case the following factors were considered:

(1) The Lebanese government of national occupation exercised effective control over no part of Lebanese territory at the time of the incidents which led the appellant to flee; (2) in reality, there were as many governments as militias; (3) the appellant was approached and threatened both by the Amal militia and the Hezbollah militia; (4) if he had to return to Lebanon, the appellant would be regarded as a traitor by either of these militias and probably executed by one or the other (at [7]).

The court went on to say:

In most cases of claims for refugee status the State, while it may not itself be the agent of persecution, makes itself an accomplice by tolerance or inertia. It is then possible to speak in terms of persecution attributable to the State and to conclude that the refugee claimant had good reason to be unwilling to claim protection which a State was in all likelihood not going to give him (at [9]).

And further into the judgment:

*The essence of the question that arises in the case at bar, when it is reduced to its simplest and most practical form, is as follows: can there be persecution within the meaning of the Convention and the Immigration Act where there is no form of guilt, complicity or participation by the State? I consider that, in light of the wording of the definition of a refugee, the judgments of this Court and scholarly analysis both in Canada and abroad, this question must be answered in the affirmative (at [17]).*

50 The Court essentially affirmed that an individual may be entitled to refugee protection in cases where there is a complete breakdown of the state apparatus such that there is no longer any state to which the individual can turn for protection.

*There are probably several reasons beyond a person's control why he might be unable to claim the protection of a State, one of them being, and this is obvious, the non-existence of a government to which that person may resort. There are situations, and the case at bar is one of them, in which the political and military circumstances in a country at a given time are such that it is simply impossible to speak of a government with control of the territory and able to provide effective protection. Just as a state of civil war is no obstacle to an application for refugee status [Footnote: See Salibian v. Canada (Minister of Employment and Immigration, [1990] 3 F.C. 250.), so the non-existence of a government equally can be no obstacle. The position of the respondent in the case at bar would lead directly to the absurd result that the greater the chaos in a given country, the less acts of persecution could be capable of founding an application for refugee status (at [22]).]*

4. Issues of proof

(a) United States

51 Regulations promulgated by the Attorney General and the Department of Homeland Security (DHS) provide a comprehensive framework for determining whether an applicant has demonstrated a well-founded fear of persecution. These regulations require that the applicant prove that the relevant country of nationality failed or would fail to provide protection from persecution. As explained below, the regulation establishes certain presumptions in the case of applicants who have demonstrated past persecution.

(i) Applicants who have shown past persecution

52 In order to establish eligibility for asylum based on past persecution, an applicant must show (1) that he or she was subjected to harm amounting to persecution, (2) that the harm was inflicted on account of one of the five statutorily protected grounds, and (3) that *he or she is unable or unwilling to return to, or avail himself or herself of the*

As a practical matter, the failure of state protection requirement is rarely addressed as a threshold requirement for finding past persecution once the applicant has demonstrated the requisite nexus and level of harm. Rather, whether the state could afford protection is addressed in the context of whether the applicant currently has a well-founded fear of persecution.

53 Once an initial showing of past persecution has been made, there is a regulatory presumption that the applicant continues to have a well-founded fear of persecution. Under this presumption, the burden shifts to the DHS to produce evidence regarding the state's ability to provide protection. In order to rebut the presumption of a well-founded fear, the DHS must establish by a preponderance of the evidence either of the following:

1. A fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the country of nationality on account of a protected ground, or,
2. Reasonable internal relocation possibilities such that the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality, and that under all the circumstances it would be reasonable to expect the applicant to do so. In determining whether the DHS has demonstrated the reasonableness of internal relocation, the Immigration Judge is directed to consider whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.

54 If the DHS proves either of the above, it establishes, in essence, that state protection is available such that the applicant no longer has a well-founded fear of persecution.

55 An applicant who proved past persecution but whose well-founded fear of persecution is rebutted by the DHS showing of a fundamental change in circumstances or reasonable internal relocation possibilities in the country of nationality, may nonetheless be granted asylum in the discretion of the Immigration Judge if the applicant shows either:

1. Compelling reasons for being unwilling or unable to return to the country of nationality arising out of the severity of the past persecution, or
2. A reasonable possibility that he or she may suffer other serious harm upon removal to that country.

(ii) Applicants who have not shown past persecution

56 An applicant for asylum who has not demonstrated past persecution has the burden of showing that he or she has a well-founded fear of persecution if he or she is returned to the country of nationality. An applicant does not have a well-founded fear of persecu-


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tion if he or she could avoid persecution by relocating to another part of the country of nationality and the relocation would be reasonable. The burden of proof as to reasonableness of relocation is on the DHS if the applicant fears persecution by the government and upon the applicant if the fear of persecution is not by the government.

57 An applicant does not have a well-founded fear of persecution if he or she could avoid persecution by relocating to another part of the applicant’s country of nationality if, under all the circumstances, and taking into consideration all relevant factors, it would be reasonable to expect the applicant to relocate. If the applicant fears persecution by the government, there is a presumption that internal relocation would not be reasonable unless the DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate. If the feared persecution is not by the government or government-sponsored, the applicant has the burden of demonstrating that internal relocation would not be reasonable.

(iii) ‘Complete helplessness’ standard

58 The following cases from the 5th, 6th and 8th Circuits have referred to an arguably more stringent “complete helplessness” test in considering the issue of state protection.

Menjivar v. Gonzalez:54 To demonstrate a failure of state protection, the applicant must show more than the government’s difficulty in controlling private behavior. Rather, the applicant must show that the government condoned the persecution or demonstrated a “complete helplessness” to protect the victims. The court found that the applicant from El Salvador who feared violence from a criminal gang which had targeted her and family members had not met this standard.

Hor v. Gonzales:55 “Persecution is something the government does, either directly or by abetting (and thus becoming responsible for) private discrimination by throwing in its lot with the deed or by providing protection so ineffectual that it becomes a sensible inference that the government sponsors the conduct.” The court found that the Algerian applicant, a supporter of the government, did not demonstrate that the government was unwilling or unable to provide protection from the GIA opposition.

Shehu v. Gonzales:56 The court found that the DHS had effectively rebutted the presumption of a continuing well-founded fear of persecution where incidents of past persecution were at the hands of the Serbian-dominated police or paramilitary forces and the evidence showed that the Kosovo administration and police were no longer dominated by Serbs. In so finding the court stated that “[w]hatever harassment or violence against former KLA members and their families still exists cannot be labeled ‘persecution’ absent some proof

54 416 F.3d 918 (8th Cir. 2005).
55 400 F.3d 482, 485 (7th Cir. 2005).
56 443 F.3d 435 (5th Cir. 2006).
that the current UNMIK and Albanian-controlled Kosovar government 'condoned it or at least demonstrated a complete helplessness to protect the victims'.”

(b) Australia

59 The principal criterion for the grant of a protection visa under Australian law is that the applicant is a non-citizen in Australia to whom the decision-maker is satisfied Australia has protection obligations under the Convention (i.e. there is a subjective element to the criterion).57

60 The decision to grant or not to grant the visa is made at first instance by a delegate of the Minister for Immigration. That decision is subject to independent administrative review on the merits by a specialist tribunal. The decision of the tribunal is subject to judicial review but not to merits review. While an applicant is required to place evidence or other material before the decision-maker in support of his or her claims, it is not appropriate for the decision-maker to proceed as if determining civil litigation. The decision-maker is involved in an investigative enquiry in which concepts of onus of proof and the requirement to establish factors on the balance of probabilities have no part to play.58

61 The ultimate question for the decision-maker on the fear test is whether he or she is satisfied that the visa applicant has a genuine fear founded upon a real chance of persecution for a Convention reason in his country of nationality; that is, a substantial (albeit possibly less than 50%) chance as distinct from a remote chance of persecution occurring.59

62 It would not be appropriate for an Australian decision-maker to proceed on the basis of presumptions of any kind (e.g. that a particular state is able to protect its nationals).60 An Australian decision-maker is obliged to recognise that no state can guarantee the safety of its citizens from attack by non-state agents and that where a state is itself complicit in persecution material evidencing this state of affairs is likely to be available. However, the Full Court of the Federal Court of Australia has held that:

There is no golden rule which says that a person may never be given refugee protection if they come to Australia from a democratic country governed by the rule of law and with generally effective judicial and law enforcement institutions.61

(c) Canada

63 In Ward, the Supreme Court of Canada laid down a number of principles, including two presumptions that govern the analysis. The first presumption is that if the fear of

57 Migration Act 1958 s. 36.
58 Minister for Immigration v Wu Shan Liang (1996) 185 CLR 259 at p 282.
60 A v Minister for Immigration (1999) 53 ALD 545 at [41] where the approach adopted in the Canadian case of Ward was expressly rejected.
61 A v. Minister for Immigration (1999) 53 ALD 545 at [39].
persecution is legitimate (i.e., credible) and there is an absence of state protection, persecution is likely and the fear is well founded. The second presumption is that except in situations where a state is in a condition of complete breakdown, the state must be presumed capable of protecting its citizens. This presumption can be rebutted by “clear and convincing” evidence of the state’s inability to protect.

64 To rebut the presumption of state protection, absent an admission by the country that it is unable to protect, a claimant can establish that state protection would not be reasonably forthcoming where (a) there is a complete breakdown of state apparatus, (b) there are similarly situated individuals who were let down by the state protection arrangements, and (c) there were personal incidents in which state protection did not materialize.

(d) New Zealand

65 In Butler the Court of Appeal stated:62

A person claiming refugee status has the burden of establishing the elements of the claim. That rule should however not be applied mechanically.

66 The RSAA expanded on this requirement in Refugee Appeal No. 72668/01:

Both at first instance and on appeal the respective decision-makers are free, subject to the constraints imposed by the Act, the Immigration (Refugee Processing) Regulations 1999 (SR 1999/285) and to the requirements of fairness, to determine their own procedures: s 129G(7) and Schedule 3C, para 8. The Authority also has the powers of a Commission of Inquiry under the Commissions of Inquiry Act 1998: Schedule 3C, para 7. It is not bound by any rules of evidence: Schedule 3C, para 9(1). The procedures at both levels are informal and non-adversarial. They can be described as investigative or inquisitorial: Practice Note No. 2/99 (1 October 1999), para 6.1 and Refugee Appeal No. 70656/97 Re KB (10 September 1997). This is the preferred model of refugee adjudication.

5. Conclusion

67 It is suggested that the above material shows a high level of consistency in the interpretation of Art 1A(2) of the Refugees Convention so far as the notion of state protection is concerned. It is apparently now uncontentious that a failure of national protection will be demonstrated not only where the state itself is an agent of persecution but also where the state is unwilling or unable to provide protection against persecution by non-state agents or rogue state agents. It is also apparently now uncontentious that the critical issue is whether the individual claimant will be afforded appropriate protection in his or her country of

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nationality; not simply whether that state affords an appropriate level of protection to its nationals generally.

68 The most significant differences between the jurisdictions considered, appear to concern methods and standards of proof, including the operation in some jurisdictions of rebuttable presumptions.

69 The reference by Lord Justice Sedley in Swazas (see [13] above) to a presumption that a state, and particularly a democratic state, which is able to protect its citizens will do so, should probably be understood merely as an acknowledgement that a claimant carries an onus to show failure of state protection where that failure is not self-evident. The more inherently unlikely the case of the applicant appears to be in this regard the more that will be required by way of proof. Notwithstanding that it is not appropriate for an Australian decision-maker to proceed on the basis of presumptions of any kind (see [59] above), the same acknowledgement will ordinarily inform the decision-making process in Australia.

70 By contrast, in the United States, proof of a state’s ability to provide protection is, at least in part, governed by rebuttable regulatory presumptions (see [39] above). In some United States jurisdictions a claimant must go so far as to establish that the state condoned the persecution or demonstrated complete helplessness to provide protection (see [57] above).

71 The position in Canada appears to fall somewhere between the UK and Australian positions and that of the United States. The Supreme Court of Canada in Ward indicated that only clear and convincing evidence will rebut the presumption that, absent a situation of complete state breakdown, a state is presumed capable of protecting its citizens (see [63] above).

72 The above analysis suggests that, notwithstanding the high level of consistency in the interpretation of Art 1A(2) of the Refugees Convention, the ideal of consistency of outcomes between jurisdictions may remain elusive.

73 The United Nations 2005 World Summit Outcome included a resolution of commitment to safeguarding the principle of refugee protection and to upholding the responsibility of the international community in resolving the plight of refugees. This resolution reminds us of the desirability of ensuring, so far as we are able, that the normative framework of the Refugees Convention is not implemented in our respective jurisdictions selectively or arbitrarily but rather in a way which gives substance to the protection obligation which member states have assumed.

74 The UNHCR agenda calls upon States to strengthen protection capacities in refugee-receiving countries. Such capacity building goes beyond training in basic concepts. Each country’s policies must take into account not only the needs of its own citizens but the also the needs of others. It is a goal of sharing burdens and responsibilities more equitably. Such consensus will be between wealthy and poor nations for we all share responsibility for each other’s security.

63 2005 World Summit Outcome Art. 133.

64 United Nations General Assembly, Executive Committee of the High Commissioner’s Programme, October 2005.