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Defining the refugee

American and Dutch asylum case-law 1975-2005

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Migration Law Series

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When I look at all the people I had the privilege of meeting in the past years, I cannot help but quoting an old Polish inscription:

"Oh, Heavens, send more people like these!"
Niebiosa, zsyłajcie więcej podobnych im ludzi!

Amsterdam, 10 July 2007

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List of Abbreviations

AB – Administratiefrechtelijke Beslissingen
IA – Board of Immigration Appeals
DHS – Department of Homeland Security
IJ – Immigration Judge
IJRL – International Journal of Refugee Law
INS – Immigration and Naturalization Service
JuB – Jurisprudentiebulletin
JV – Jurisprudentie Vreemdelingenrecht 1999-2006
NAV – Nieuwsbrief Asiel- en Vluchtelingenrecht 1995-2006
NJ – Nederlandse Jurisprudentie
RV – Rechtspraak Vreemdelingenrecht

Introduction

In the early months of 2006, just as this PhD was supposed to be approaching its final stages, a refugee case hit the headlines. This time it was different. We were not presented with boat people, petrified women and children fleeing from violence, or the overcrowded refugee reception centers in Europe. No, this time the news item was markedly different.

The case was that of Mr. Abdul Rahman, an Afghani refugee who, while in Germany, became a Christian and, in the eyes of Muslims, was thus an apostate. He returned to Afghanistan to fetch his daughters. His life took a dangerous turn at that moment, for he not only failed to secure his daughters, but his apostasy was discovered. Threatened with death, his fate made the headlines, with western leaders visibly embarrassed at having liberated a country, where one could now be sentenced to death for practicing a religion of one's own choice. The case ended up in a compromise between the West and the Islamic courts in Afghanistan. The latter declared Abdul Rahman a mad man ("who in a sane frame of mind would renounce Islam?"), while the western countries quietly accepted the fact that such "mad men" had little chance of survival in Afghanistan, whether ruled by the Taliban or by the "westernized" government of Hamid Karzai.[1]

What was exceptional about this case was that several governments immediately stepped in to offer Mr. Rahman asylum. While his case was without doubt that of an asylum seeker, for anyone even faintly familiar with asylum law, it must have been a spectacle of farce and publicity, to see so many governments falling over themselves to offer asylum officially, while at the same time denying it to hundreds of other applicants. A friend of mine remarked soberly that this generosity was so universal because everyone knew that Mr. Rahman would not later be bringing over his family (his daughters stayed in Afghanistan).[2]

No matter how we feel about this particular public outburst of generosity on the part of politicians, the case raised some important questions: who is a person with a valid claim to asylum in the eyes of the authorities? When does his claim qualify as a valid one, and does this validation change over time? Why is it that some cases of asylum are accepted more easily than others? And finally, is it really so, that some countries are more lenient towards some asylum seekers than others, and, if so, why is that?

I wish I could say that this PhD is the result of deep philosophical questions that descended on me when I was reading the news about Mr. Abdul Rahman.

It was not.

In fact, it was conceived in 2001 when the asylum debate was raging all around Europe, and predated even the events of 9/11. It came to be within a bigger project, "Transnationality and Citizenship", where a group of researchers tried to look at the question does of how citizenship understood and construed. Since the granting of asylum is, in most cases, a first step

[1] http://en.wikipedia.org/wiki/Abdul_Rahman_%28Convert%29 (accessed March 20, 2007).
[2] http://news.bbc.co.uk/2/hi/south_asia/4856748.stm (accessed March 20, 2007.

to receiving citizenship, it was a good place to start looking, and to try to answer the question of how the meaning of the status of refugee changed over the years? What does the granting of refugee status tell us about citizenship?

This research was initially designed to cover three countries: The United States, The Netherlands and Germany, and to compare the case law and legislation in each country. As time went by, its scope changed considerably.

First of all, I decided to restrict my study to the first two countries, simply for lack of time to learn another language well enough to be able to read its case-law. Also, more importantly, the other two countries were as good a comparison as any other. The Netherlands is a small, and self-perceived liberal country, which, until recently, has pursued a liberal asylum policy (or so it thought). The United States on the other hand, was a big, immigrant-open country, whose self image was one of always granting refuge to those persecuted (or so it thought). The comparison between the two was also handy, since in both of them; refugee status claims based on the 1951 Geneva Convention Relating to Status of Refugees began to make their way up to the courts in large numbers around or soon after 1980.

Secondly, as time went by, it became clear to me that I needed to restrict myself to court decisions. Then a further pruning occurred when I realized that the sheer amount of case law was overwhelming. I decided to concentrate on those cases based on refugee status alone. Hence, cases based on humanitarian grounds, which in both countries are discretionary, and thus hard to review by either courts or scholars, were taken out of the picture. I decided to look at cases that were either precedents (United States case law) or cited by courts and/or by legal scholars (United States/The Netherlands).

Thirdly, as the next year passed by, it became clear to me that, while in theory I could write a comparison of all the issues in the 1951 Geneva Convention for both The United States and The Netherlands, there were practical reasons for not doing so. There are other books on those topics, published quite recently, which exhaustively cover the national legislation. That is not the point of this thesis. It is rather to compare them, and look at where they share some characteristics and where they seem to differ fundamentally, and then try to ask and answer the question of why this is so.

While writing and analyzing the cases, the questions I was trying to pose and answer changed too. Sometime in the process, the issue of what the granting of asylum tells us about citizenship faded away. Instead, new questions appeared. I tried to find problems and issues that were pertinent to one legal system and than look for them in the legal system of the other country. No matter what the answer was, I would then ask a question: "why is that?" Thus, the reader will not find here a handbook which meticulously lists all the elements of the refugee definition, and then compares them in each jurisdiction. Rather, there are some problems which are discussed, while some are not. Then, I tried to answer the question of why courts construe the refugee definition in that particular way and not in another? Does their position vis-à-vis the government and the legal doctrine have any effect on the final outcome? Finally, more generally, I tried to give answers by posing more questions (an annoying practice, I must admit) on what all this (the case-law, doctrinal problems, the role played by the courts and legal scholars) tells us about refugee status?

A couple of methodological points deserve to be made here. I use the term "refugee status" and "asylum" interchangeably. I do realize that, in the case of United States law, that might actually be legally incorrect, but, since I am only analyzing the decisions reviewable by the courts (thus strictly speaking "asylum"), and not those decided oversees by the U.S. authorities ("refugee"), I thought I could be excused in this, if only for the sake of grammar.

The second, and perhaps more important, point is why I chose case-law, and why this particular case-law. The answer to that question is that in asylum cases, when the government denies refugee status, normally that denial is ultimately reviewed by courts. Thus the courts decide between the applicant's and the state's interpretation of the refugee definition. It is that precise moment where the courts shape refugee law by agreeing or disagreeing with one or both parties. Thus, the courts articulate what they think should be the proper interpretation of the statute, and why they feel that way.

The second question, as to why I decided to choose these particular cases, is slightly more difficult to explain. First of all, I only looked at the published cases as they were thought to be sufficiently pertinent to deserve to be published (The Netherlands) or to be quoted as precedents (United States). I filed each case according to the issue(s) it discussed. Thus having gone through Dutch case law from the 1970s till 2005, I had a rough idea of what were the most common questions being asked and answered by the courts. Naturally, some issues attracted more attention at one time then at another. The same procedure was repeated for American case law. At the end, I arrived with different sets of case law for different problems. Having done that, I then needed to choose from these. What I was looking for were themes common to both jurisdictions. These might have a similar outcome and approach, or a contrasting approach in the two jurisdictions. Having found the common themes, I then proceeded to look for questions that were only asked in one of them, and whose presence in one jurisdiction was underlined by their absence in the other. Here the issue is more arbitrary, and indeed the reader might, perhaps, have made a different selection.

As the chapters emerged, it was clear that I could not deal with the whole of the refugee definition. I chose to discuss only cases that had something to do with the main issues in either American or Dutch law. Thus after five years of research, the reader will be presented with roughly 200 cases from each jurisdiction. Some cases might appear more than once, some will have just a one-page moment of fame. However, I do believe that because of the issues discussed, the case law selection I have made is quite representative.

There are also a few points I would like to make as to the structure of the book itself.

In chapter 1, I begin with a brief outline of the legal systems of The United States and The Netherlands, so that the reader may get some background knowledge on the subject. Since I doubt that many will be acquainted with the procedures of both countries, I have added those. The history and outline of these procedures might seem to an administrative procedural law expert to have been grossly simplified, but they will have to suffice for the sake of knowing how things changed in both countries between 1980 and 2005. They will also provide useful background knowledge on the procedural aspects of the cases described in the following chapters.

From that, I move on to discussing the refugee definition, and how the courts understood it. I decided to follow the well established pattern of looking at the refugee definition, as being made up of specific components, namely: well founded fear, the meaning of persecution, "on account of/for reasons of" (nexus), and persecution grounds. An earlier version of the book had a mix of Dutch and American case law in one chapter, but my supervisors and I found that to be very confusing and irritating to read.

In chapter 2, I discuss the American case law developments, and in Chapter 3 the Dutch case law developments. While I do mention the other jurisdiction at times, the chapters are meant to show the relevant developments in the context of national legislation and jurisprudence. The choice to describe first the American, and then Dutch law were based on alphabetical order and do not imply any personal preference.

In chapter 4, I come to the comparative points. I have tried to look at four questions in both jurisdictions, and to answer them by looking at each case law in particular and then contrasting these with the same question in the other jurisdiction. Some of the points there are or might be considered quite controversial or at least debatable. I do admit that, yet I hope the arguments I try to make there are at least plausible. I admit that, save one, none of the presumptions or intuitive feelings I had when I began this research, was fulfilled once I finished writing that chapter. Which naturally rules out soothsaying as my future occupation!

The book finishes with a list of case law and bibliography mentioned in the thesis.

In conclusion: Mr. Abdul Rahman is hopefully living quietly in Italy, enjoying life and worshipping God in a way dictated to him by his heart and soul. I hope that with this book, I will be able to contribute to the discussion of how countries receiving refugees construe them though their legal systems, especially when applied by the courts and the administration. Perhaps then, granting of refugee status based on the law will not be such a big deal as to make it headline news.

Chapter 1
Asylum Law in the United States and in the Netherlands

1.1 Introduction

In order to better understand the following chapters, a short and basic introduction to American and Dutch asylum law is necessary. Therefore the laws and procedures for applying for refugee status will be outlined here, dating back to the 1970s and extending till 2005. Since the aim of the chapter is to illustrate the changing of the law and not to serve as an immigration or asylum law manual, I will give only a broad overview of the laws and procedures here – at times graphs will be provided for further clarity. Where the reader might not be aquatinted with the principles of constitutional law, these will be explained but only insofar as they are pertinent to the subject of the book. However, since asylum law is based on the 1951 Geneva Convention relating to the status of Refugees and its 1967 New York Protocol, it is necessary to begin with a short explanation how international law operates in the American and the Dutch legal systems. Having explained the basic principles of both systems, I will proceed to outline the changes in the law and the procedure in both countries.

1.2 The Refugee Convention

The Geneva Convention Relating to the Status of Refugees was a direct result of World War II and the number of refugees in Europe (and other places) it created. The delegates of the states assembled decided to draft a comprehensive convention dealing with all the then known refugees. In this way it had been different from the previous refugee conventions and agreements which had sought to deal only with specific groups of refugees (e.g. the Armenians, the Nestorians, Jews feeling from Nazi Germany, White Russians etc.).[1]

The drafting of the Convention was marred from the beginning by the withdrawal of the delegates from Communist countries, who refused to participate unless the representative from communist China was seated at the conference. The remaining delegates then, with some interesting twists, proceeded to draft a definition, which while being broad and general on the one hand, effectively limited on the other hand its application to refugees that were such before January 1st 1951.[2] Another optional clause permitted the signatories to the Convention to opt for application of the Convention solely to those refugees in Europe. It is interesting to note here that both the Netherlands and the United States had been very active in all stages of the drafting of the Convention.[3] However, whereas the Netherlands ratified it fairly quickly, the United States did not ratify it in the end.

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[1] G. Goodwin-Gill, *The Refugee in International Law*, Oxford: Clarendon Press Second edition 1996, p. 18-19; J. C. Hathaway, *The Law of Refugee Status*, Toronto – Vancouver: Butterworths Canada 1991, p. 6-10; N. Robinson, *Convention Relating to the Status of Refugees. Its History, Contents and Interpretation*, New York: Institute of Jewish Affairs 1953, passim; A. Grahl – Madsen, *The Status of Refugees in International Law*, Leyden: A. W. Sijthoff, 1966 – 1972; I.C. Jackson, *The Refugee Concept in Group Situations*, The Hague: Martinius Nijhoff Publications 1999, *passim*.

[2] K. Bem, *The Coming of a 'Blank Cheque' – Europe, the 1951 Convention, and the 1967 Protocol*, International Journal of Refugee Law (hereinafter "IJRL"), vol. 16 (2004), p. 609-618.

[3] A. Takkenberg & C. Tahbaz, *Travaux Préparatoires. The collected Travaux Preparatoires of the 1951 Geneva Convention Relating to the Status of Refugees*, Amsterdam: Dutch Refugee Council 1990, vol. I –II, passim.

As time went by, new groups of refugees emerged and, despite some states' genuine efforts to apply the Convention in a liberal and generous way, despite the time clause, the need for its revision became more and more apparent.[4] This finally occurred with the 1967 New York Protocol, by which the signatories to it pledged to apply the 1951 refugee definition without the time clause that is also to refugees after 1 January 1951.[5] The United States, while never signing the Geneva Convention itself, became a signatory to the New York Protocol in 1970.

1.3 The status of international law in the legal systems of the United States and in the Netherlands

International law leaves the States discretion to decide for themselves in what way they will fulfill their international obligations and how they will implement the pertinent international rules within their national legal systems; they are internationally responsible only for the ultimate result of this implementation.[6] In this regard the Vienna Convention on the Law of Treaties (VTC) states that treaties are binding upon the contracting states and they may not invoke the provisions of their internal law as justification for their failure to perform a treaty.[7]

There are two contrasting views on the implementation of international law: the *dualistic* view and the *monistic* view.[8] In the dualistic view, the international and the national legal systems form two separate legal spheres. International law only has effect within the national legal system when it is been 'transformed' into national law. The rights and duties of legal subjects only exist under national law.[9] On the other hand, in the monistic system, treaties apply automatically, as such, within the national legal system. These treaties count as national law. Moreover, international law must be given priority over any national law conflicting with it.[10]

In the United States, similarly to most other common law countries the system seems to be *mostly* dualistic. According to it, international treaties are only a part of the national law if Congress has passed a necessary Act of Congress. Once incorporated, an international treaty is treated as a "normal" act of national legislation.[11] Article VI Section 2 of the United States Constitution stipulates that:

> "All Treaties made or which shall be made with the authority of the United States, shall be the supreme law of the land and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any state to the contrary notwithstanding."

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4 K. Bem, *The status*…, p. 618-624.
5 P. Weis, *The 1967 Protocol Relating to the Status of Refugees and Some Questions of the Law of Treaties*, British Yearbook of International Law, vol. 42 (1967), passim.
6 P. van Dijk & G.J.H. van Hoof, *Theory and practice of the European convention on human rights*, The Hague: Kluwer Law International 1998, p. 17.
7 Cf. Articles 26 and 27 VTC.
8 I. Brownlie, *Principles of public international law*, Oxford: University Press 2003, p. 31-33.
9 Van Dijk & Van Hoof 1998, *Theory and practice*…, p. 17.
10 C.A.J.M. Kortmann & P.T. Bovend'Eert, *Dutch Constitutional Law*, Den Haag: Kluwer Law International 2000, p. 28; Van Dijk & Van Hoof, *Theory and Practice*…, p. 17.
11 I. Brownlie, *Principles of*…, p. 44-48.

The American courts distinguish between "self-executing" treaties which operate automatically within the domestic legal order after their ratification, and the "non-self-executing" ones, which require national legislation in order to operate. This distinction is controversial among legal doctrine, and the courts seem to effectively adopt a case-by-case analysis.[12]

The question of what happens to international treaties, if subsequent legislation is contrary to them, has an interesting answer. The United States Supreme Court in *Boos v. Barry* held that: "*As a general proposition, it is of course correct that the United States has a vital national interest in complying with international law*"[13], but insisted that rules of international law were subject to the Constitution. In its *Breard v. Greene* decision, the Supreme Court held that "*absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State*."[14] The Supreme Court affirmed that international law is the 'supreme law of the land', but so too was the Constitution. An act of Congress was, therefore, on full parity with an international treaty, and therefore a later statute of Congress might override an earlier treaty provision.[15]

The New York Protocol Relating to the Status of Refugees falls within the category of non-self-executing treaties, and therefore, with some delay after its ratification, the United States passed the 1980 Refugee Act. As the United States Supreme Court said in one of its decisions:

> "If one thing is clear from the legislative history of the new definition of 'refugee', and indeed the entire 1980 Act, is that one of Congress' primary purpose was to bring the United States refugee law into conformance with the [Protocol], to which the United States acceded in 1968."[16]

The 1980 Refugee Act refugee definition incorporates (with some changes) the treaty's definition, as well as its *non-refoulement* protection, reflected in the statute's withholding of removal provisions.[17]

In the Netherlands, the current Constitution dates back to 1814, though it has since then been substantively amended, primarily in 1848, the most recent and substantive revisions occurring in 1983.[18] According to its provisions, it is the Dutch legislature – the States General (*Staten-Generaal*), comprised of the First (*Eerste Kamer*) and the Second Chamber (*Tweede Kamer*) together with the government (consisting of the Queen and the ministers) that are the supreme law givers and interpreters of the Acts of Parliament and the Constitution.[19]

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[12] M. Shaw, *International Law*, Cambridge: Cambridge University Press 5th Ed. 2003, p. 143-151.
[13] *Boos v. Barry*, 485 U.S. 312, 323, (108 S.Ct. 1157 1988).
[14] *Breard v. Greene*, 523 U.S. 371, 375 (118 S.Ct. 1352 (1998)).
[15] Ibid., p. 376-377; M. Shaw, *International Law*, p. 151.
[16] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (107 S.Ct.1207) (1987)).
[17] D. Anker, *Law of Asylum in the United States in the United States*, Boston: Refugee Law Center Third edition 1999, p. 9-10.
[18] C.A.J.M. Kortman & P.P.T. Boevneert, *Dutch Constitutional*…, p. 29.
[19] Ibid., p. 84-103.

Under the explicit prohibition of Article 120 of the Dutch Constitution, the Dutch courts are not allowed to test the constitutionality of Acts of Parliament against the Constitution. Its final interpretation rests with the legislature.[20] At the same time however, they may not under Article 94 of the same Constitution, apply national legislation if it were to mean violating international treaty provisions or decisions of international organizations which are binding on all people (*een ieder verbindend*). As one author has put it succinctly:

> "The current constitutional system has to be regarded as an anomaly. An illustration of this is the fact that Dutch courts may test Acts of Parliament against the prohibition of discrimination contained in Article 26 of the International Convention on Civil and Political rights, but may not do so against the comparable provision in Article 1 of the Dutch Constitution."[21]

In the Netherlands, international law is, as such, part of the national legal order by virtue of unwritten constitutional law.[22] As international law needs no transformation into national law, the Netherlands has *in principle* a monistic system only for all binding provisions in articles that have been published in the 'Tractatenblad'.[23]

Whether the citizens have the right to invoke a treaty provision or not before the courts, and whether or not a treaty provision has supremacy over national law, is ruled by articles 93-94 of the Dutch Constitution. According to article 93, provisions of treaties and of decisions by international organizations under public international law, which can bind everyone by virtue of their contents, shall become binding after they have been published. Article 94 states that statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of decisions by international organizations under public international law which can bind everyone.

In principle, the courts answer the question whether a treaty provision is self – executing (binding on all persons, *een ieder verbindend*) or not. The first question to be answered is what the contracting parties intended. This can be inferred from the text and history of the treaty. If not, according to Dutch Law only the *content* of the provision is decisive: does it oblige the Dutch legislature to introduce a national regulation or is it of such a kind that the provision can simply function as an objective rule in the national legal order?[24] This question is to be answered on the basis of the wording, nature, scope, historical development of the provision and if possible on the debate in parliament on the bill leading to the act Act of Parliament approving the treaty.[25]
Furthermore, according to the *Nyugat II* judgment of the Dutch Supreme Court the court

[20] Ibid., p. 21, 35.
[21] Ibid., p. 135.
[22] Dutch Supreme Court (*Hoge Raad*) 3 maart 1919, NJ 1919, 371 (*Grenstractaat Aken*) in: *Staats-en Bestuursrecht. Jurisprudentie 1849-2003*, Ars Aequi Libri 2003, p. 21-23.
[23] C.A.J.M. Kortmann & P.P.T. Bovend'Eert, *Dutch Constitutional*…, p. 172-173.
[24] HR 30 mei 1986, NJ 1986, 688 (*Railroad Strike judgment*), in: *Staats-en Bestuursrecht. Jurisprudentie 1849-2003*, Ars Aequi Libri 2003, p. 239-246.
[25] C.A.J.M. Kortmann & P.P.T. Bovend'Eert, *Dutch Constitutional*…, p. 173; *Railroad Strike judgment* and HR 14 april 1989, NJ 1989, 469 (*Harmonisatiewet*).

does not review national provisions against unwritten international law.[26] It is not clear how far this applies to non-parliamentary Acts. According to the *Landbouwvliegers* judgment the court is permitted to review non-parliamentary Acts against general principles of law. This may implicate that review of non Parliamentary Acts against unwritten international law, in the form of general principles of law, is admissible.[27]

In view of the foregoing, it can be concluded that treaty provisions which are binding on all persons are self-executing and can be invoked before the courts and have supremacy over provisions of national law. This makes the Dutch legal system predominantly monistic with some dualistic influences.

In practice this means the following: when a treaty provision is in essence directed to the national legislature which is instructed to implement the provision, the provision is, in general, not binding on all persons. The same holds true for treaty provisions concerning social human rights. For these provisions "*are concerning action by the government to citizens: in general these provisions can hardly function in the national legal order without further implementation, so that direct effect is not obvious.*"[28] On the other hand, treaty provisions concerning classical human rights are generally considered as binding on all persons. The question is what does this mean for the 1951 Refugee Convention and the New York Protocol? For the Dutch courts, provisions concerning definitions, like Article 1, are self-executing. Also the prohibitions of *refoulement*, as worded in Article 33 are binding on all persons and therefore considered to be self-executing.[29]

1.4 The American refugee legislation and procedure

Asylum law in the United States of America has a complicated history.[30] Though initially quite active in the drafting of the Geneva Convention Relating to the Status of Refugees, for the fear of signing a "*blank cheque*"[31], the United States never ratified the Convention. Instead, it chose to deal with the refugee question through a series of domestic acts, beginning with the Displaced Persons Act of 1948.[32] In 1962, one of its progenies, the Migration and Refugee Assistance Act was passed, where the term refugee was defined for the first time in a way resembling the Geneva Convention's definition. Refugees were defined as:

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[26] HR 6 march 1959, NJ 1962, 2; C.A.J.M. Kortmann & P.P.T. Bovend'Eert, *Dutch Constitutional*…, p. 173; L. Prakke & C. Kortmann, *Constitutional Law of 15 EU Member States*, Deventer: Kluwer 2004, p. 627.

[27] HR 6 maart 1959, NJ 1962, 2 (*Nyugat II judgment*) and comment under it in *Staats-en Bestuursrecht. Jurisprudentie 1849-2003*, Ars Aequi Libri 2003, p. 55.

[28] HR 14 april 1989, NJ 1989, 469 (*Harmonisatiewet judgment*), in: *Staats-en Bestuursrecht. Jurisprudentie 1849-2003*, Ars Aqui Libri 2003, p. 281-285.

[29] HR 13 mei 1988, RV 1988 no. 13 with note by Bolten, p. 67; T.P. Spijkerboer & B.P. Vermeulen, *Vluchtelingenrecht*, Utrecht: Nederlands Centrum Buitenlanders 1995 (hereinafter "Spijkerboer & Vermeulen 1995"), p. 182 note 7.

[30] For an overview of the legislation see the outstanding work by Loescher, G. & Scanlan, J.A., *Calculated Kindness. Refugees and American; s Half-Open Door. 1945 to the Present*, New York: Free Press / London: Collier Macmillan 1986.

[31] K. Bem, *The Coming of a*…, p. 612-616.

[32] K. Bem & R.P. Barnidge *Politics and Protection in American Refugee Law*, IMIS – Beiträge, vol. 24 (2004), p. 97-107.

> "Aliens who (A) because of persecution or fear of persecution on account of race, religion, or political opinion, fled from an area of the Western Hemisphere; (B) cannot return thereto because of fear of persecution on account of race, religion, or political opinion; and (C) are in urgent need of assistance for the essentials of life."[33]

However, the foreign policy interests where still explicit in the legislation, and refugees continued to be admitted to the United States by virtue of parole authority of the United States Attorney General.[36]

The United States ratified the New York Protocol Relating to the Status of Refugees in 1970 but the reasons for that are obscure, and it took the United States a decade before appropriate legislation was passed, enacting the Protocol in the domestic legal system.[35] This was done in the form of the Refugee Act of 1980.[36] Hailed by one member of Congress as "*one of the most important pieces of humanitarian legislation ever enacted by a United States Congress,*"[37] the Act made two major changes in refugee policy: a new definition of the term refugee and "*an admissions system that would allow both flexibility and usable standards through systematic consultations between Congress and the executive branch.*"[38]

Unlike previous American legislation, the Refugee Act defined refugee in ideologically neutral terms that did not expressly evidence a foreign policy allegiance or persuasion:

> "The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"[39]

Also, in a subsequent section, similar to the provisions of Article 33 of the Geneva Convention, the statute prohibits the removal of a non-citizen to a country if the people:

> "Life or freedom would be threatened in that country because of [his] race, religion, nationality, membership in a particular social group, or political opinion."[40]

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[33] Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat 121 (1962).
[34] G. Loescher & J.A. Scanlan, *Calculated kindness*…, passim; K. Bem & R.P. Barnidge *Politics and protection*…, p. 102-104;
[35] Ibid., passim.
[36] Pub. L. No. 96-212, 94 Stat. 102 (1980).
[37] C.P. Blum, A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms, Berkeley Journal of International Law, vol. 15 (1997), p. 719-750; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in various sections of 8 U.S.C.)).
[38] T. Tyson, The Refugee Act of 1980: Suggested Reforms in the Overseas Refugee Program to Safeguard Humanitarian Concerns from Competing Interests, Washington Law Review vol. 65 (1990), p. 921-938.
[39] Pub. L. No. 96-212, § 201(a), 94 Stat. at 102. INA § 101 (a)(42)(A); U.S.C. § 1001 (a)(42)(A).
[40] INA § 241 (b)(3); 8 U.S.C. § 1231 (b)(3).

By so doing, Congress brought the U.S. definition of the term into conformity with the U.S.'s obligations under the United Nations Protocol Relating to the Status of Refugees, which it had signed over a decade before.[41] The act also established a consultation process between the President and Congress in the formulation of yearly admissions ceilings,[42] which had to be "*justified by humanitarian concerns or . . . [be] . . . otherwise in the national interest*"[43] and retained the Attorney General's parole authority.[44]

Despite the act's ideologically neutral refugee definition, foreign affairs considerations continued to exert an influence for some time.[45] The Immigration and Naturalization Service (I.N.S.) still perceived the granting of refugee status as a move inherently hostile to the government of the applicant. Therefore, the I.N.S was cautious not to grant it to asylum seekers from countries allied with, or at least not opposed to, the U.S.[46]

Since 1980, the Refugee Act has been amended numerous times. In 1989, for example, Congress passed the Lautenberg Amendment[47] which established a prima facie eligibility for refugee status for Laotians, Vietnamese, Cambodians, and Soviet religious minorities, Jews, Evangelical Christians, Ukrainian Catholics, and Orthodox Christians. The Lautenberg Amendment was severely criticized for reintroducing the discriminatory policies of the 1950s and 1960s.[48] In 1996 the Act was again amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[49] These changes not only afforded some extra protection to victims of forced population control programs in China, but also have restricted the possibilities of appeal to federal courts from the administration's decisions.[50]

Following the September 11, 2001 attacks the United States Congress passed a sweeping change in the organization of its immigration services. Under the 2002 Department of Homeland Security Act, the old Immigration and Naturalization Service (INS) was abolished and its functions transferred to the newly created Department of Homeland Security (DHS), as of 2003.[51] Though a new body, nonetheless the procedure for applying for asylum remained essentially the same, as is the fact that both the INS and the DHS are administrative bodies. The reader should note here, that I decided to use the pre-2002 vocabulary – thus "INS" instead of "DHS", and thus "DHS" appears only in the decisions after 2003.

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[41] *See* T. Tyson, *The Refugee Act*…, 924 (citing 8 U.S.C. § 1101(a)(42) (1988).

[42] *See* E. Harris, *Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label*, American University Journal of International Law and Policy, vol. 9 (1993), p. 269-308; T. Tyson, *The Refugee Act*…, 922-925; B. Zall, *The U.S. Refugee Industry: Doing Well by Doing Good*, in: David E. Simcox, U.S. *Immigration in the 1980s: Reappraisal and Reform*, 1988, p. 258-268.

[43] Pub. L. No. 96-212, § 201(b), 94 Stat. at 104-05.

[44] *See* T. Tyson, *The Refugee Act*…, p. 925.

[45] J. D. Villiers, *Closed Borders, Closed Ports: The plight of Haitians Seeking Political Asylum in the United States*, 60 Brooklyn Law Review, vol. 60 (1994), p. 841-928.

[46] *Ibid*, passim.

[47] Foreign Operations, Export Financing and Related Programs Appropriations Act, Pub. L. No. 101-167, 103 Stat. 1195 (1989) § 599D (b).

[48] J. M. Cavosie, *Defending the Golden Door: The Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law*, Indiana Law Journal, vol. 67 (1992), p. 411-421.

[49] Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[50] *Lanza v. Ashcroft*, 389 F.3d. 917, 926 (9th Cir. 2004).

[51] Pub. L. No. 107-296, 116 Stat. 2135 (2002).

Another major overhaul of asylum legislation occurred with the passage of the Real ID Act in 2005 (a part of the Emergency Supplemental Appropriations Act for defense, the Global War on Terror, and Tsunami Relief),[52] when the possibility to petition for habeas corpus review of final removal orders was removed, leaving a petition to the federal courts as the sole means of challenging the final removal orders.[53]

The United States asylum procedure has been essentially the same since 1980, with only some changes in the late 1990s. I will therefore describe it as it stands today and only remark on the previous rules if these seem relevant to the discourse.

Initially, the refugee determinations process takes place within the administration – that is the DHS (former INS). An application for asylum in the United States may take two forms, depending whether the DHS has already instituted removal proceedings. A person who is not arrested, or in removal proceedings, applies "affirmatively" with the DHS for asylum. The term "affirmatively" comes from the fact that the asylum seeker is coming forward to ask for asylum, and before he is arrested. A person already in custody files the asylum application with the Immigration Judge.[54]

In the case of an affirmative application, the asylum seeker must file his application within one year of his arrival in the United States.[55] That time requirement has only two exceptions, namely, "changed circumstances which materially affect" the eligibility for asylum and "extraordinary circumstances relating to the delay in filing an application within the period specified."[56] The penalty for submitting a frivolous application may be permanent ineligibility for any benefits under the immigration law.[57]

Initially, it is the *administration* that deals with the application: first the Immigration Judge (IJ), and then the Board of Immigration Appeals (BIA), that are under the supervision of the Attorney General. The Immigration Judge issues a decision, either in writing or orally. In the absence of "exceptional circumstances" the final decision will be issued by the IJ within 180 days. Either side (DHS or the applicant) may appeal by filing a Notice of Appeal to the Board of Immigration Appeals (BIA) within 30 days of the IJ's decision.[58] The Notice of Appeal must name clearly the exact reasons for appealing; otherwise it will be summarily dismissed.[59] The scope of the Board's review is defined by regulation, and it may overrule findings of fact and may review de novo questions of law, discretion, and other issues raised in the appeal. The Board may not, however, engage in fact finding on its own, and should, if necessary, remand the case back to the immigration judge, so that he may determine what further fact finding is necessary.[60]

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[52] Pub. L. No. 109-13, Div. B, 119 Stat. 231 (codified at 8 U.S.C.§ 1252).

[53] For more see H. Motomura, *Immigration Law and Federal Court Jurisdiction through the Lens of Habeas Corpus*, Cornell Law Review, vol. 91 (2006), p. 459-496.

[54] 8CFR §[1]208.2, 208.14(c).

[55] INA §208(a)(2)(B); 8CFR §[1]208.4(a)(2).

[56] INA §208(a)(2)(D).

[57] INA §208(d)(6); 8CFR §208.3(c)(5) also see *Farah v. Ashcroft*, 348 F.3d.1153 (9th Cir. 2003).

[58] INA §208(d)(5); 8CFR §1003.1, 1003.38.

[59] 8CFR §1003.3 (b), 1003.1 (d)(2).

[60] 8CFR §1003.1(d)(3).

In 1999, the Attorney General adopted streamlining regulations to deal with a vast increase of the BIA's caseload.[61] This allows a single BIA member to affirm, without an opinion, the IJ's decision. Such an affirmation without opinion does not imply approval of any or all of the IJ's points of reasoning. It simply signifies that the BIA affirms the final decision of the IJ and considers any mistakes he might have made immaterial or insignificant. Despite the fact that this practice has generated growing court irritation, there are only a few exceptions to that rule (e.g. cases decided by a three member panel), and, quoting an attorney who wrote an extensive article describing the asylum process in detail:

> "Practitioners must review these regulations in detail so that issues are framed for review in order to avoid, if possible, the pitfall of affirmance without opinion and to maximize the possibility of reversal."[62]

The BIA may, at its discretion, grant the request for an oral argument. According to regulations, a single Board member should dispose of an appeal within 90 days of completion of the record of the appeals, while the three member BIA panel has 180 days to do so.[63] The BIA is a major source of administrative interpretation, as it may designate any decision as precedent, which means that Immigration Judges around the country are bound by it. Following the BIA decision, the applicant may either file a motion to reopen the case or a motion to reconsider. Generally, one may only file one motion to reopen an asylum application, though there are exceptions.[64] This should be done within 90 days of the final administrative decision (a BIA decision, or an IJ decision that has not been appealed). The motion to reconsider may also be filed only once, but within 30 days of the final administrative order. The BIA has the power to reopen proceedings regardless of the time limits, and has done so in the past when the law had changed significantly.[65]

The decisions of the BIA may be challenged before the applicable Federal Court of Appeals for the appropriate circuit – thus the procedure moving away from the administration, to the *independent judiciary*. They should be filed within 30 days of the final order of removal. The filing of a motion to reopen or reconsider a case, does not toll the running of the period for judicial review with the federal courts. The filing of petition for review does not automatically stay the order of removal, unless the court decides otherwise.[66] The forum is where the Immigration Judge completed the initial proceedings. The DHS, and before that the INS, hold the policy that they are not bound to follow the precedent of one federal circuit court, in similar decisions, under the forum of another federal circuit court.[67]

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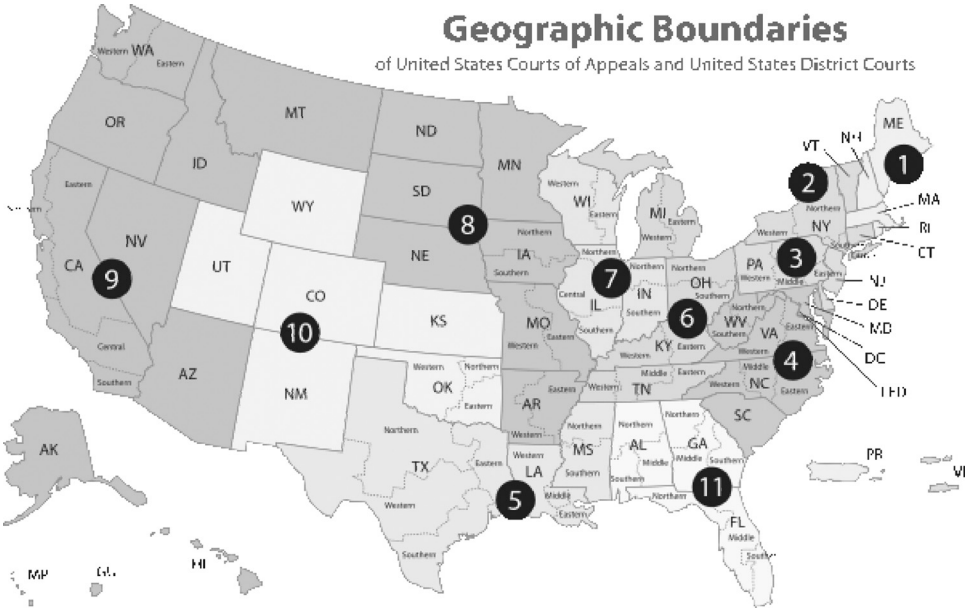
[61] Executive office of Immigration Review: Board of Immigration Appeals: Streamlining, 64 Fed.Reg.56, 135-136 (Oct.18, 1999).
[62] K. Resnick, *Asylum and Withholding of Removal*, Immigration & Nationality Law Handbook 2004-2005, vol. 1, p. 247.
[63] 8CFR §1003.1(e)(8).
[64] 8CFR §1003.1(e)(7).
[65] *Re X-G-W-*, 22 I&N Dec. 71 (BIA 1998).
[66] INA §242(b).
[67] *Cardoza –Fonseca v. INS*, 767, F.2d 1448, 1454 (9th Cir.1985).



Before the 1996 "Illegal Immigration Reform and Immigrant Responsibility Act" of 1996 ("IIRIRA")[68] federal circuit courts had jurisdiction over final deportation orders while exclusion orders could be challenged by application for *habeas corpus* to the federal district courts, whose decisions could be appealed to the federal court of appeal of the appropriate circuit. This was again altered by the Real ID Act which entered into force on May 11, 2005. Following the changes set out in that Act, applications for *habeas corpus* with the federal district courts were abolished, and appeals from final deportation orders can now only be filed with the federal circuit courts of appeal,[69] whose review of the decisions of the administration has been significantly curtailed. The standard for review of the BIA's decisions on whether or not to grant asylum

> "shall be conclusive unless manifestly contrary to law and an abuse of discretion."[70]

The federal courts of appeal may only decide on the basis of the administrative record before it. The findings of the administration are "*conclusive unless any reasonable factfinder would be compelled to conclude the contrary.*"[71] Recent United States Supreme Court decisions also stress that the federal courts may not substitute its findings for that of the administration but, when compelled, they should remand the questions back to the administration for reconsideration.[72]

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[68] Pub.L. No. 104-208,110 Stat.3009-546 (1997).
[69] H. Motomura, *Immigration Law and Federal*…, p. 486-487.
[70] INA §242(b)(3)(B).
[71] INA §242(a)(b)(4)(A), (B) also see INS v. Ventura, 537 U.S. 12 (2002) (per curiam).
[72] *Gonzales v. Thomas*, 126 S.Ct. 1613 (U.S. Supreme Court 2006).

As it was said, the practice of the BIA to summarily affirm the IJ's decisions has so far been upheld by the Circuit Courts as valid,[73] but, in a growing number of cases, the courts especially the Seventh Circuit, have expressed growing frustration with this practice. In one case the Court lashed out calling it a:

"Pattern of serious misapplications by the board and the immigration judges of elementary principles of adjudication."[74]

In 2004, the Ninth Circuit reversed and remanded a streamlined decision of the BIA when it was unable to discern the exact ground for a denial of asylum. Some of the BIA's findings in that decision were reviewable and some of which were not.[75] Similar decisions were handed down by the First[76] and Fifth Circuit, the latter calling such decisions "*jurisdictional conundrum*".[77] The legal doctrine has also shown growing dissatisfaction with the streamlining procedure.[78]

The decisions of the federal courts of appeal may be challenged by applying for *writ of certiorari* to the United States Supreme Court. This is a discretionary device used by the Supreme Court to choose which cases it will want to hear. Most writs of certiorari are denied by that court.[79] If such a writ is accepted, the Supreme Court will hear the case. Its decisions are final, and not subject to appeal.

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[73] *Albathani v. INS*, 318 F.3d.365 (1st Cir. 2003); *Dia v. Ashcroft*, 353 F.3d 228 (3rd Cir. 2003) (en banc); *Belbruno v. Ashcroft*, 362 F.3d. 272, 278-83 (4th Cir. 2004); *Soladjede v. Ashcroft*, 324 F.3d.850 (5th Cir. 2003); *Denko v. Ashcroft*, 351 F.3d 717 (6th Cir. 2003); *Georgis v. Ashcroft*, 328 F.3d 962 (7th Cir. 2003); *LouLou v. Ashcroft*, 354 F.3d 706 (8th Cir. 2003); *Falcon Carriche v. Ashcroft*, 350 F.3d. 845 (9th Cir. 2003); *Yuk v. Ashcroft*, 355 F.3d 1222 (10th Cir. 2004); *Mendoza v. U.S. Att'y General* (11th Cir. 2003).

[74] *Niam v. Ashcroft*, 354 F.3d. 652 (7th Cir. 2004) citing to other examples of similar findings. See also *Secaida - Rosales v. INS*, 331 F.3d.297, 312 (2nd Cir. 2003); *Hernandez v. Reno*, 258 F.3d. 806, 813-14 (8th Cir. 2001); *Reyes-Melendez v. INS*, 342 F.3d.1001, 1008 (9th Cir. 2003).

[75] *Lanza v. Aschcroft*, 389 F.3d. 917, 924-932 (9th Cir. 2004).

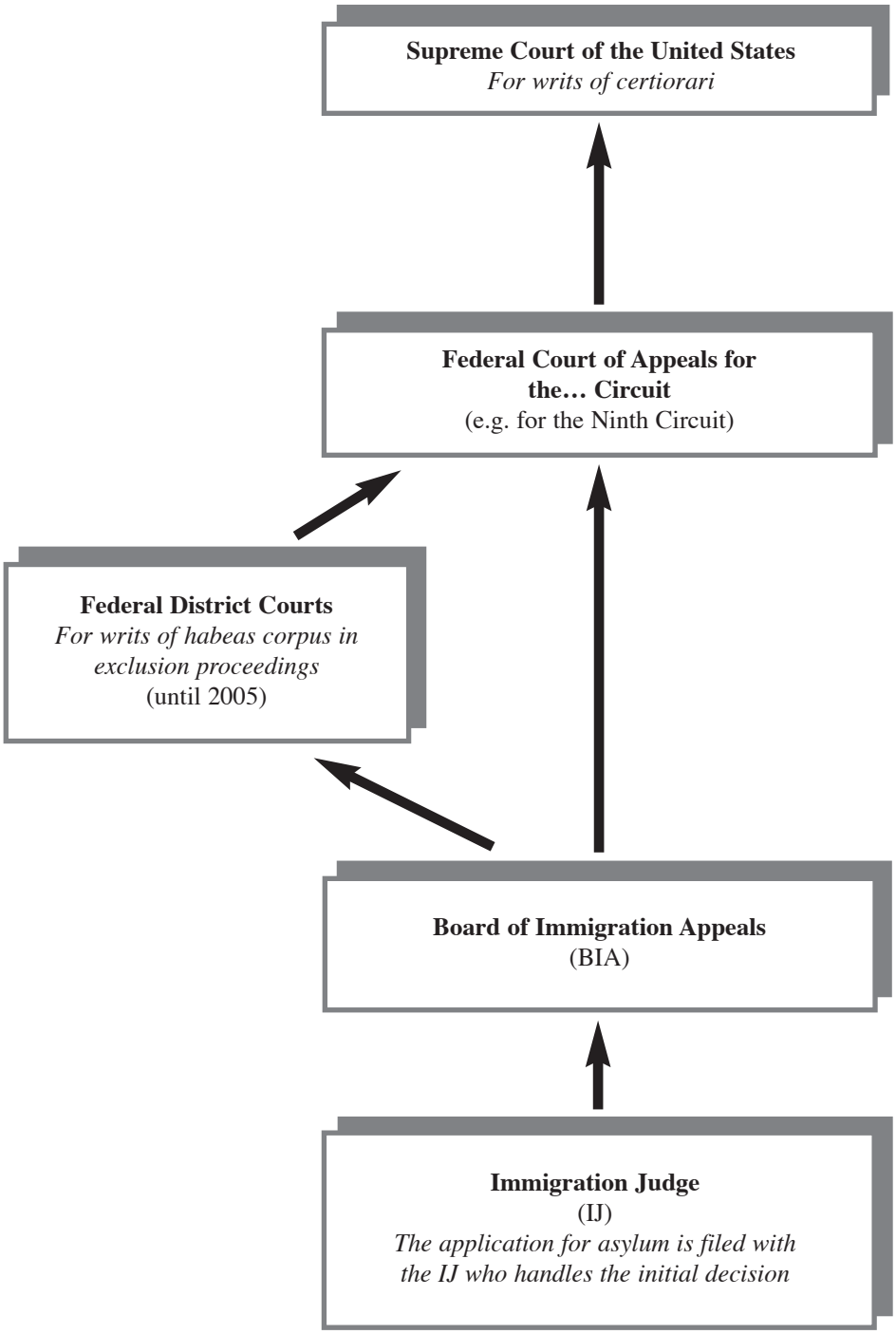
[76] *Haoud v. Ashcroft*, 350 F.3d. 201, 205 (1st Cir. 2003).

[77] *Zhu v. Ashcroft*, 382 F.3d. 521, 527 (5th Cir. 2004). For an appraisal of the streamlining decisions of the BIA see J.R.B. Palmer, S.W. Yale-Loecher & E. Cronin, *Why are so Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review,* Georgetown Immigration Law Journal vol. 20 (2005), p. 1-100.

[78] See E.H. Cruz, *Double the Injustice, Twice the harm: The Impact of the Board of Immigration Appeal's Summary Affirmance Procedures*, Stanford Law and Policy Review, vol. 16 (2005), p. 481-512; J.R.B. Palmer, S.W. Yale-Loehr & E. Cronin, *Why are so Many People…*, p.1-100.

[79] 28 U.S.C.A. § 1254; *Black's Law Dictionary*, 6th ed. 1991, p. 228, 1609.

A graph outline of the asylum procedure in the United States



1.5 The Dutch refugee legislation and procedure

The Netherlands, like the United States, were involved in the drafting of the Geneva Convention Relating to the Status of Refugees.[80] It was also one of the first countries to sign the Convention, which was done on 28 July 1951.[81] However, the ratification of the Convention proved to be more of an obstacle. At the same time, the Netherlands accepted ca. 12 000 people from the island of Ambon in their former colony in Indonesia. The Ambonese had been promised independence by the Dutch but the newly declared independent Indonesia had no intention on keeping that promise. Following a Dutch court order that barred their demobilizing in the Republic of Indonesia, thousands of Ambonese, called "Molukkans" (or in Dutch Molukkers), were transported to the Netherlands. The Dutch government was hoping that they would go back to Indonesia eventually, and so was apprehensive about ratifying the Geneva Convention. This might have given the Molukkans the right to stay in the Netherlands.[82] The discussions dragged on for years until finally, on 3rd of May 1956, The Netherlands ratified the Convention, with the additional interpretive declaration that the Dutch government considered the Dutch Ambonese people, evacuated to the Netherlands after 27 December 1949, not to be covered by the Convention.[83] The Netherlands acceded to the 1967 New York Protocol Relating to the Status of Refugees on 29 November 1969.[84]

The Geneva Convention ratified, for several years the Dutch asylum law was still governed by the 1849 Aliens Law (*Vreemdelingenwet 1849*) and the 1918 *Vreemdelingentoezichtswet* which gave only limited legal recourse to aliens. On 13 January 1965 a new law on Aliens (*Vreemdelingenwet*) was passed which came to effect as of 1 January 1967. Under its provisions Article 15 stipulated that:

> "Aliens coming from a country where they have a well founded fear of persecution because of their religious or political convictions, or their nationality, as well as membership of a particular race or particular social group may be allowed by Our Minister as refugees."[87]

The granting of refugee status was at the discretion of the minister. A negative decision could be appealed to the government, the Crown (*Kroon*) – meaning the King (Queen), and the appropriate minister.[88] According to Dutch law, the Crown had to seek advice in such matters from the Council of State (Raad van State). The Council of State was an advisory body dating back to the 16th century Netherlands. It mainly dealt with preparing legislation and advising on it. In order to assist the Crown in judicial decisions, the Administrative

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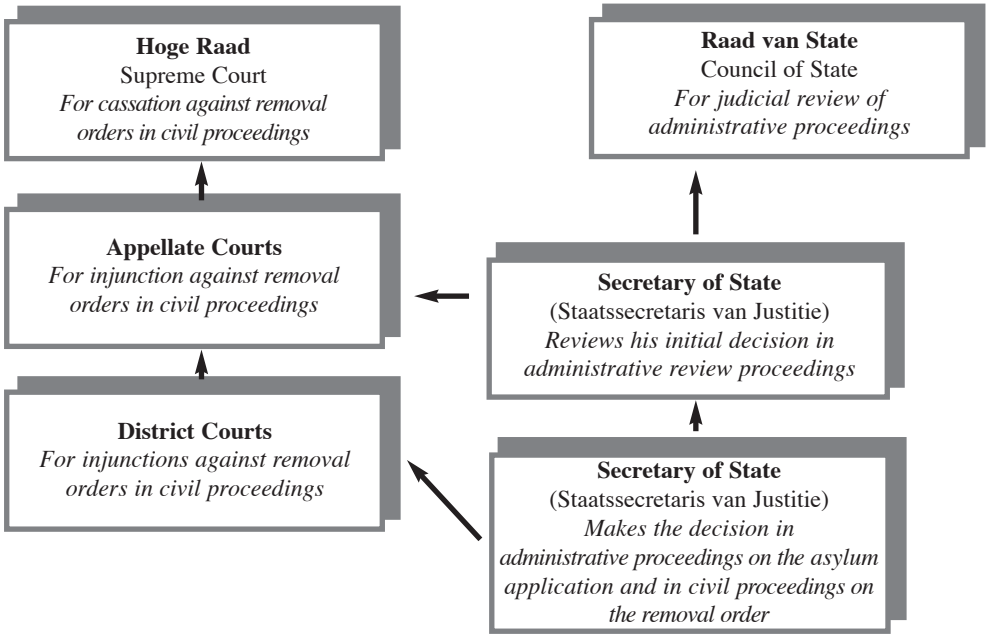
[80] *Travuax Préparatoires. The collected…, passim.*
[81] J. A Hoeksma, *Tussen vrees en vervolging. Een inleiding in het vluchtelingenrecht*, Assen: Van Gorcum 1982, p. 116.
[82] Ibid., p. 116-118.
[83] Ibid, p.118.
[84] Ibid, p. 129.
[85] Ibid., p. 105.
[86] Law of 13 January 1965 (Stb. 40).
[87] Ibid., Article 15.
[88] R.W.L. Loeb, *Inleiding Vreemdelingenrecht*, Nijmegen: Ars Aequi Libri 1983, p. 203.

Litigation Division of the Council of State was set up (*Afdeling voor Geschillen van Bestuur van de Raad van State*).[89] The advice of the Council of State was not binding on the Crown, and it could depart from it within a period of six months. If after six months no decision was taken, then the Crown had to follow the advice of the Council of State. The Crown rarely departed from the advice of the Council of State, yet, in the first refugee case, discussed below in Chapter 3 it did exactly that.[90]

The law and procedure of the 1965 law remained essentially the same until, in 1976 the Act on Administrative Jurisdiction as to the Decisions of the Administration (*Wet administratieve rechtspraak overheidsbeschikkingen* - "the AROB Act") came into force. It then established a system of judicial administrative appeal procedure for those instances where appeal to the Crown was not possible. The final decision was then to be taken by the newly created Judicial Division of the Council of State (*Afdeling Rechtspraak van de Raad van State*), and cases of appeals from a denial of asylum were to fall under this law.[91] Also, failed asylum seekers could apply for injunctive relief from removal from the country pending the outcome of their proper asylum application (the civil summary proceedings) by the district courts (*Arrondissementsrechtbanken*), with the possibility of appeal to the Court of Appeals (*Gerechtshof*), and then further to appeal in cassation to the Dutch Supreme Court (*Hoge Raad*).[92]

The Dutch Asylum procedure 1976-1993



[89] See ECHR 6 May 2003, Appl. no. 39343/98 and others (*Kleyn and others v. The Netherlands*), pnts. 118-124.
[90] ECHR 23 October 1985, Appl. no. 8848/80 (*Benthem v. The Netherlands*), pnts. 23-26; KB 9 augustus 1972, Stb. 1972, no. 427, RV 1972 no. 3.
[91] ECHR 6 May 2003, Appl. no. 39343/98 and others (*Kleyn and others v. The Netherlands*); Loeb, *Inleiding* ..., 204; A.H.J Swart, *De Toelating en Uitzetting van Vreemdelingen*, Deventer: Kluwer 1978, passim.
[92] Loeb, *Inleiding* …, 204-208.

In 1994 the Dutch Parliament, in a major overhaul of administrative law, passed the new General Administrative Law Act (*Algemene Wet Bestuursrecht* – "the AWB Act"), which set out new and uniform rules for administrative procedure. The Act came into force on 4 March 1994, repealing earlier legislation including the AROB Act. A new, judicial division was created in the Council of State, which now dealt with administrative appeals – the Administrative Jurisdictional Division (*Afdeling bestuursrechtspraak*).[93] Paralell to this, were the changes in Dutch refugee law. The rising numbers of asylum cases, together with the complicated procedure, with four different courts being competent to hear different parts of the same application (District, Appellate Courts and the Supreme Court in summary (removal) proceedings, and the Council of State in the asylum merits) gave impulse to a change of the 1965 Aliens Law. After some setbacks in the late 1980s, in 1993 the Ministry of Justice succeeded in a partial overhaul of the law, which came into effect as of 1st March 1994.[94]

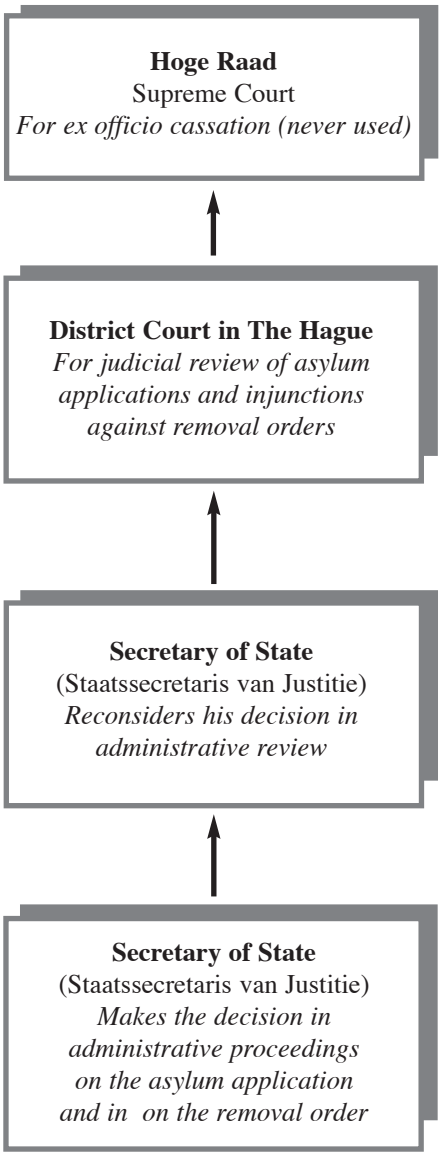
Interestingly, the new amendments to the Aliens Act did not provide initially for higher administrative appeal. The appeal to the Council of State was abolished altogether leaving only the possibility of recourse to the district court level – only cases filed before 1st of March 1994 were to be heard by the Council of State under the old regime. The District Court in The Hague was responsible for dealing with the asylum cases, in order to have a uniform case law. The same court was now, also, competent to hear appeals in the summary (removal) proceedings. There were initially four other places of sitting designated in other district courts, but these were officially designated as the court in the Hague, sitting in the appropriate city (*nevenzittingsplaats*). Thus, in fact, creating a total of five district courts in asylum cases: The Hague, Amsterdam, 's Hertogenbosch, Zwolle, and Haarlem.[95] In theory cassation to the Supreme Court was allowed from these decisions, with the Prosecutor General having the right to lodge it *ex officio*, but this procedure was never used.[96]

It was realized, almost as soon as the new law entered into force, that the new procedure might lead to divergent case law by the five different district courts. In the end the judges came up with the solution of a "Chamber of Legal Uniformity" (*Rechtseenheidskamer* – "The REK"). It consisted of three judges of the aliens chambers of the local district courts making the decisions, while, quite often, judges of the other courts sat and listened to the case.[97] The idea behind the REK was that the judges making the decisions would later ensure in their own district courts, that the REK line of case-law was be followed. There was no legal principle to force them to do so, but in fact the district courts almost always followed the REK decisions. The cases that were referred to the REK were those of the most compelling legal questions: in case of divergence of opinions, when new and important issues arose, or when the judges themselves decided that the case before them needed to be referred to the REK.[98] The position of the REK was unique in two ways: first, it was an *ad hoc* court but, in fact, that it was effectively the high court for asylum cases during its seven years of existence; and second, the authority it exercised was considerable and served as a case-law

[93] *Kleyn v. The Netherlands*, pnt. 124.
[94] Aanpassingswet AwB III.
[95] A. Terlouw, *Uitspraak en afspraak. Samenwerking tussen vreemdelingenrechters bij ontreken van hoger beroep*, Den Haag: Boom Juridische Uitgevers 2003, p. 65-80.
[96] Ibid., p. 76-78.
[97] Ibid., p. 74, 106-159.
[98] Ibid., p. 106.

maker for the years 1994-2001.[99] It should be mentioned here that in the Dutch judiciary of all kinds, i.e. the Afdeling, the district courts, the Supreme Court, there are no dissenting or concurring opinions allowed. There is always one unanimous decision from the whole court. This practice applied to the REK too, and in this context, its decisions were at times a true compromise between the opinions of the different judges. The REK held its last session in April 2001.[100]

The Dutch Asylum System 1994-2000



[99] Ibid., p. 356-357.
[100] Ibid., p. 74.

In the course of the late 1990s, it was considered that the 1994 changes to the Aliens Law were not sufficient and had not succeeded in the aim of substantially simplifying the Dutch Aliens and Asylum law.[101] Therefore, after much debate in Parliament, on 23 November 2000 a new Aliens Law was passed.[102]

The new law provided in Article 29 section 1 point (a) states that:

> "A residence permit may be issued by the minister to an alien who is a Convention refugee."

The law also substantively changed procedure eliminating the possibility of the Secretary of State to reconsider his decision, and by allowing higher appeal (hoger beroep) to the Council of State. Now, the decisions of the district courts could be appealed to the Raad van State.[104] The Act entered into force on April 1st 2001.

Since 2001, the Dutch Asylum procedure has not changed fundamentally. The application for asylum in the Netherlands is filed with the Minister of Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*). The case used to be decided by the Secretary of State (*Staatssecretaris van Justitie*), who could be roughly equated with a deputy minister, under whose jurisdiction alien and refugee cases were assigned. Since 2002, following major debate in Dutch Politics, the Secretary of State has been replaced by the Minister for Aliens and Integration.

The Minister decides on the asylum application, and a negative decision automatically implies a removal order. He used to have the power to reconsider his decision under administrative review but since 2001 that has been abolished. The decision of the Minister may be appealed to the district courts (often sitting with a panel of three judges), while removal cases are dealt by the presidents of those chambers, known as a remedy judges (*voorzieningenrechter*). These decisions are subject to higher appeal to the Aliens Chamber of the Council of State, which then issues an administrative judgment (*Afdeling bestuursrechtspraak*). This judgment is final and cannot be appealed.[105]

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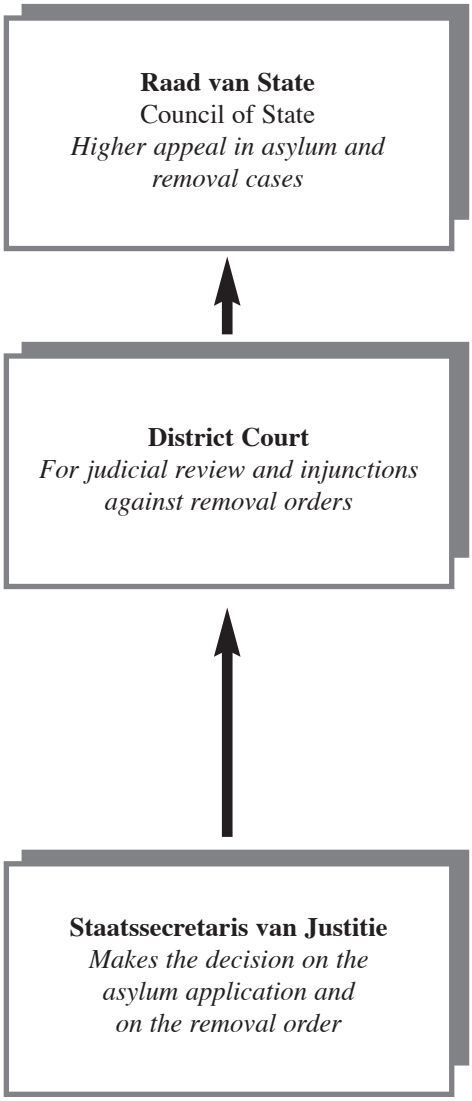
[101] K. Geuijen, *De Asielcontroverse: argumenten over mensenrechten en nationale belangen*, Amsterdam: Dutch University Press 2004, p. 179-185.
[102] Stb. 495.
[103] H.W. Groeneweg & J.H. van der Winde, *Vreemdelingenwet 2000. Commentaar*, Den Haag: Sdu Uitgevers, 2006, p. 187-194.
[104] Ibid., 469-480; T.P. Spijkerboer, *Het hoger beroep in vreemdelingenzaken*, Den Haag: Sdu 2002, passim.
[105] H. B. Winter, *Asiel in zicht? de Nederlandse asielprocedure: van aanvraag tot vergunning*, Ars Aequi: Juridisch Studentenblad, vol. 52 (2003), p. 274-281.

The Dutch Asylum procedure since 2001



Chapter 2
United States' refugee case-law

2.1 Introduction

In this chapter of the book, I will look at the question of the application of the Refugee Definition in the American legal system. I will sketch an overview of how both the administration and the courts have grappled with different, sometimes conflicting, interpretations, how these interpretations came to be and how they have evolved over time. The reader should keep in mind, that I will only give an *overview*, and not a detailed description, of the American case law developments in the past two and a half decades. A detailed description would certainly exceed the scope, not only this chapter, but of the book as well. Therefore, I have chosen for my analysis those American case–law developments, that are (or could be) parallel to similar developments in the Dutch case-law, as well as those indigenous to the American legal system based on the different parts of the refugee definition.

The format of this chapter will follow the components of the refugee definition. So, in turn, I will discuss questions connected with the "well founded fear", the meaning of "persecution", the nexus requirement, and, finally, the discussions around the issue of the persecution grounds.

In the "well founded fear" part, I will present the questions of different requirements in American law, the discussion around the problem of singling out, as well as American case law on the question of agents of persecution.

In the part on the meaning of "persecution", after a short description of the American case law development in that area, specific problems such as economic harm and forced conscription will be addressed in more detail, to be followed by the nationally important question of refugee status applications based on past persecution.

In the third section, the "nexus" between persecution and persecution ground will be addressed, followed by a short explanation of why this is so important in American law. Subsequently, an example of the nexus is given in the American doctrine of neutrality as a political opinion, as well as imputed political opinion theories. Also, a description of some of the discussion around the definition of a particular social group will be given.

Finally, in my conclusions, I will summarize American case law on the meaning of the term refugee.

2.2.1 Well-founded fear

In this part of this chapter I will try to show how American courts have grappled with the question of well founded fear. I will look at how this concept was understood by the administrative organs, as well as by the courts.

One of the first questions concerning the status of refugees in American law was the issue of different standards of proof a refugee applicant had to meet. In section 208 (a) of the 1980 Refugee Act there is mention of "well founded fear of being persecuted" – since it gives the

definition of the refugee as in the 1951 Geneva Convention – this is to reflect the Article 1A of the refugee definition. However, in section 241 (b) (3) the text speaks of "would be threatened" risk to life and freedom – this provision was to reflect the *refoulement* prohibition of Article 33 of the refugee definition. The difference is far from a cosmetic one and, as was explained in the preceding chapter, parallels the difference in the Geneva Convention.

The first provision, called "asylum", if granted, may lead to an immigration status within the United States. It is discretionary, which means that even if a claimant proves a well founded fear of persecution on account of one of the persecution grounds, the Attorney General may still not exercise his discretion and not grant asylum in the United States. The second provision, called by the legal doctrine, the "withholding of removal" is on the other hand mandatory. However, it does not lead to an immigration status within the United States and only protects the claimant from removal from the country. To qualify for this remedy of the U.S. law, the petitioner had to prove a "clear probability of persecution" upon his return to the country of origin. The "clear probability" standard of proof was the practice before the 1980 Refugee Act was passed. As it was said, it parallels the prohibition of refoulment in Art. 33 of the Geneva Convention.

The new Refugee Act of 1980, which was grounded on the 1967 Protocol and the 1951 Convention, incorporated the new "well founded fear" standard into the definition of asylum. Soon the INS and the BIA were faced with two legal questions. First of all, were the "would be threatened" and the "well founded fear" standards essentially the same? Secondly, if they were not, which one was more lenient? Here the courts wavered in their answers and the United States Supreme Court intervened to clear the issues for the federal courts and the BIA.

In 1984, *INS v. Stevic*,[1] the Supreme Court dealt with the first issue. Stevic, who was a Yugoslavian citizen, had appealed to the Second Circuit Court from a denial to reopen his case based on the withholding of removal from the United States. In it, he claimed that, since the passage of the Refugee Act of 1980, both provisions - 208(a) and 241(b)(3)[2] were supposed to be assessed by using the, as he claimed, more liberal standard of "well founded fear of persecution" rather than by the "would be threatened" one. The Second Circuit agreed and reversed the BIA decision,[3] finding that the Refugee Act had effectively changed the standards of proof for both asylum and withholding of deportation. It held that an applicant in deportation proceedings had to prove only a "well founded fear of being persecuted" rather than a clear probability that he would be threatened. It also held that by adhering to the 1967 Protocol, Congress wished to abandon the stricter "would be threatened" standard for the more generous "well founded fear" one. Based on that, the Second Circuit ruled that Stevic had the right to have his cases reopened.

The INS petitioned for certiorari to the Supreme Court. In its petition, it claimed that both of these terms are not self-explanatory but claimed, nonetheless, there was no "significant

[1] *INS v. Stevic 467 U.S.* 407, 104 S.Ct. 2489 (1984).
[2] Then it was section 243(h).
[3] *Stevic v. Sava*, 678 F. 2d 401, (2nd Cir. 1982).

difference" between them. If the court could find a difference, the INS contended that the intent of Congress in passing the 1980 Refugee Act had been to retain the pre-1980 "clear probability" standard in the Act. Stevic rejected these arguments, claiming that the terms are indeed different, and the "well founded fear" turns is a more generous one, as it turns "almost exclusively" to the state of mind of the applicant.

The Supreme Court tried to find a middle ground: "*[e]ach part is correct in one regard: in 1980 Congress intended to adopt a standard for withholding of deportation claims by reference to pre-existing sources of law.*"[4] It first analyzed the pre 1980 American law and found that for withholding of removal, the agencies and courts used the "clear probability" test. It also found that at least some circuit courts found the "well founded fear" and the "clear probability of persecution" standards to converge. Looking at the 1980 Refugee Act, it held that the intent of Congress was to bring its asylum law into accordance with the 1967 Protocol but also found that the section 241(b)(3) was intended to be applied in the same manner as before the 1980 Act. The Court therefore held that the "well founded fear" standard was applicable only to asylum, and the "clear probability of persecution" to withholding of removal. Thus, the court ruled that the standards to be different for the two provisions in question. However, since Stevic was not challenging a denial of asylum but only a denial of a motion to reopen his withholding of removal, the SC did not address then in substance the question of which of the two standards is more generous. It did state though in *obider dictum* , that it considers the "well founded fear" one to be more generous.[5]

The legacy of *Stevic* was mixed. The BIA pursued a policy of applying the "clear probability of persecution" to the 241 (b) (c) cases, but when it came to asylum it also insisted that the two standards are in fact the same. That position is clearly seen in the BIA decision in *Re Acosta* in 1985, rendered after the Supreme Court's decision in *Stevic*.[6] Acosta was an applicant from El Salvador, who had been a founder of a taxi cooperative in El Salvador which disbanded after they received several threats from an unknown source, and some of their members were murdered. Acosta applied for both asylum and withholding of deportation. The BIA gave a very detailed judgment and it addressed the issue of the different approaches to the abovementioned standards. Acknowledging that the Supreme Court in Stevic found the "well founded fear" standard to be more generous than the "clear probability of persecution" standard, and noting the diverging interpretation on the issue given by different Circuit courts, the BIA held nonetheless, that "*as a practical matter the showing contemplated by the phrase "a well founded fear" of persecution converges with the showing described by the phrase "a clear probability" of persecution.*"[7] The reasons for such an interpretation, as the BIA claimed were purely practical:

> "[t]he facts in asylum and withholding cases do not produce clear-cut instances in which such fine distinctions can be meaningfully made. Our inquiry in these cases, after all, is not quantitative, i.e., we do not examine a variety of statistics to discern to some theoretical degree the likelihood of persecution. Rather our inquiry is qualitative: we examine the alien's experiences and other external events to determine

[4] Ibid, at 413.
[5] Ibid, at 425.
[6] *Re Acosta*, 19. I. & N. Dec. 211 (BIA 1985).
[7] Ibid, 214.

> if they are of a kind that enable us to conclude the alien is likely to become the victim of persecution. (…) Accordingly, we conclude that the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, converge."[8]

What the BIA chose not to address was the problem that if the Congress had retained two different standards, as confirmed by the Supreme Court, then there must have been a reason behind doing so. In fact, in its Acosta decision the BIA silently ignored the Supreme Court's findings in Stevic, where the Court held that there were two different standards to apply.

The BIA approach was not shared by the Circuit courts. Only the Third Circuit held that there was no difference of the standards for asylum and withholding of deportation, which was based on a precedent before the Supreme Court's decision in *Stevic*.[9] The Seventh and Sixth Circuits have acknowledged that the standards are "very similar" but "not identical".[10] The Second, Forth, Fifth, and the Ninth Circuits found that these standards are different not only in theory but also in practice.[11] In *Guevara Flores v. INS* the Fifth Circuit heard a case of a woman from El Salvador who was apprehended by the border police and mistakenly assumed to be the left wing guerilla commander "Comandante Norma".[12] Turning to the issue of standards of proof required for different remedies, and remarking on the difference of opinions by sister Circuits, the court found that based on *Stevic*, and the statutory reading of the language, the "well founded fear of being persecuted" is different to that of "clear probability of persecution" and found furthermore that they are meaningfully different in practice. It relied on the fact that since withholding of deportation is mandatory, while asylum is not, and concluded saying:

> "[w]e agree that the evidentiary burden for establishing entitlement to withholding of deportation should be greater than that imposed on aliens who seek asylum, and we therefore decline to follow the Board's interpretation in *Acosta*."[13]

The problem of contradictory judgments given by different Circuit courts and the BIA was finally resolved by the Supreme Court in the case of *INS v. Cardoza-Fonseca* in 1987.[14] Luz Marina Cardoza-Fonseca was a woman from Nicaragua. She applied for asylum and withholding of deportation, but both the IJ and BIA denied her claims, assessing both under the "clear probability standard". In her appeal to the Ninth Circuit, she did not contend that she was ineligible for withholding of deportation but claimed that she was entitled to asylum instead, and that the BIA had applied the wrong standard in her claim. The Ninth Circuit agreed and reversed, finding that the BIA had applied not only the wrong legal standard but also ignored previous circuit case-law precedent. The INS applied to the Supreme Court for *certiorari*, which was granted, and the court heard the case.

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[8] Ibid, 229.
[9] *See Sankar v. INS*, 757 F.2d 532, 553 (3rd 1984) based on Rejaie v. INS, 691 F. 2d 139 (3rd 1982).
[10] *Carvajal-Munoz v. INS*, 743 F. 2d 562, 574-76 (7th Cir. 1984) and *Youkhanna v. INS*, 749 F. 2d 360, 362 (6th Cir. 1984) .
[11] *Carcamo-Flores v. INS*, 805 F.2d 60 (2nd Cir. 1986); *Cardoza–Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985); *Cruz –Lopez v. INS*, 820 F. 2d 1518, 1522 (4th Cir. 1986).
[12] *Guevara Flores v. INS*, 786 F. 2d 1242, (5th Cir. 1986).
[13] Ibid, 1249 –1250.
[14] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct.1207.

The arguments presented by the parties were essentially the same as in *Re Acosta*. The INS contended that as a practical matter the "well founded fear" standard was essentially the same as the "clear probability of persecution". The respondent pointed out to the *Stevic* decision, where the Supreme Court had already hinted that the "well founded fear" standard was more generous. It also mentioned the fact that most of the Circuit courts agreed with that interpretation and that it was the INS which had failed to adequately apply the proper standard in asylum and withholding cases for all these years.

In giving its decision, the majority of the Supreme Court drew heavily on the history of the legislative process, and so, similarly to *Stevic*, put much stress on the intent of Congress. The Court found that Congress had intentionally used different terms in different provisions. Since different statutory language is employed in the section regarding asylum and withholding of deportation, that difference of language is reflected by different standards of proof.[15] Having established that, the court turned to the 1967 Protocol and discussed the term "well founded fear of being persecuted." It concluded that, unlike the "clear probability" standard, it did not require a quantities element for the applicant to have a well founded fear of being persecuted:

> "There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening. (…) As we pointed out in *Stevic*, a moderate interpretation of the "well-founded fear" standard would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.""[16]

The Court also found the difference between the discretionary grant of asylum and the mandatory withholding of removal by the Attorney General to add weight to the conclusion, that the standards were meant to differ, and that the "well founded fear" standard was meant to be a the more generous one. The court remarked dryly the inconsequence of the government's position in these words:

> "We do not consider it at all anomalous that out of the entire class of "refugees," those who can show a clear probability of persecution are entitled to mandatory suspension of deportation and eligible for discretionary asylum, while those who can only show a well-founded fear of persecution are not entitled to anything, but are eligible for the discretionary relief of asylum (…) If anything is anomalous, it is that the Government now asks us to restrict its discretion to a narrow class of aliens".[17]

In a separate concurring decision with the majority, Justice Blackmun pointed out that the insistence of the INS on the convergence of these standards was "*purposeful blindness*" and it was only now that it could properly develop "*the standard entrusted to its care*."[18]

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[15] Ibid., 434-436.
[16] Ibid., 440.
[17] Ibid., 444.
[18] Ibid, 451-452 (concurring opinion of Blackmun).

Following the US Supreme Court decision of *INS v. Cardoza-Fonseca*, the issue of the different standards of proof slowly abated and died down. The BIA gave up its insistence that these two standards were identical or "practically the same", though not without a grudge. Until the end of the 1980s the Ninth Circuit especially was very scrupulous in making sure that the INS applied the right standard while under its jurisdiction. For example, in *Corado-Rodriguez v. INS* it held that:

> "[w]hen the BIA states that it views the "well founded fear" and the "clear probability" standards as identical, and thereby requires a showing that persecution is "more-likely-than-not" to be eligible for asylum, the BIA must be reversed."[19]

In another case the Ninth Circuit reversed the BIA and remanded the case for reconsideration, after the BIA quoted in its reasoning its own case-law, which equated both standards.[20] The explicit "*utterance of magic words*" was not necessary, provided the courts were satisfied that the BIA had applied the proper standard.[21] Though by the end of the decade the issue seemed to be positively settled, as late as in the 1990s there would be incidental cases, where the courts would reverse the BIA for using the wrong standard in addressing the applications for asylum and withholding of removal.[22]

The question of the standards of proof was profoundly important to United States law. First of all, it was the first issue based on the 1980 Refugee Act to reach to the United States Supreme Court, and arrived there on two occasions. Secondly, it illustrates how within a period of seven years, one doctrinal issue had been tackled and addressed by both the administration (IJ, BIA), as well as the judiciary. Indeed, though the Supreme Court in *Cardoza-Fonseca*, stated that it granted certiorari to "*resolve a Circuit question on this important question*",[23] as Justice Blackmun pointed out in his concurring opinion, in fact, there was almost no conflict, and, with the exception of one Circuit, all reached independently the same conclusion. He called it an effect that:

> "Can arise only when courts or agencies seriously grapple with the problems of developing a standard, whose form is at first given by the statutory language and the intimations of the legislative history, but whose final contours are shaped by the application of the standard to the facts of specific cases. The efforts of these courts stand in stark contrast to-- but, it is sad to say, alone cannot make up for-- the years of seemingly purposeful blindness by the INS, which only now begins its task of developing the standard entrusted to its care."[24]

In this part, we have seen that from the start there had been growing tensions between the American courts and administration on how to tackle the term "well founded fear". The courts began to reassert their opinion on the administration from the start, and within seven

[19] *Corado-Rodriguez v. INS*, 841F.2d 865, (9th Cir.1987).
[20] *Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988).
[21] *Rebollo-Jovel v. INS*, 794 F.2d 441, 444 (9th Cir. 1986).
[22] *See Adeboye v. Slattery*, 852 F. Supp.211, 217 (S.D.N.Y.1994); *Abankwah v. INS*, 185 F.3d 18, 22-23 (2nd Cir. 1999).
[23] *INS v. Cardoza-Fonseca*, 480 U.S. 421,426 107 S.Ct.1207.
[24] Ibid., 451-452.

years this question reached the Supreme Court twice. The conflict was resolved in both instances on relying on the domestic law and domestic constitutional law theories and concepts such as the "intent of congress" as well as references to international law obligations.

2.2.2 The "singled-out" for persecution notion

In this section, I will look at the potential parallels with the relevant Dutch case-law in the decisions of the American courts in respect to these two concepts. Attention will be given to questions such as "To what extent was this part of the definition considered a separate issue for American lawyers?", and "To what extent was it conflated with other parts of the refugee definition (e.g. the nexus of the persecution ground)?"

One of the first times the term "singled out for persecution" appears in American case law is a decision by the BIA in *Re Salim* rendered on 29 September 1982.[25] The applicant had been a citizen of Afghanistan, who fled forced conscription from the pro-Soviet troops of the Naijbullah regime. He claimed that his two older brothers had been forcibly conscripted earlier, while another brother had been taken by the Russian troops in Kandahar and he was never heard from again. The Immigration Judge found the applicant not to be a refugee but that he had left Afghanistan for economic reasons, thus the judge denied both his petitions for asylum and withholding of removal. Salim appealed and the BIA reversed the IJ. Based on a report supplied by the State Department Bureau of Human Rights and Humanitarian Affairs, it found that the applicant had indeed proven to have a well founded fear of being persecuted. It noted, that young men and boys in Afghanistan are forcibly recruited to the army, due to mass desertions, and thus are subject to persecution, since the majority of them oppose the pro-Russian regime. The BIA clearly differentiated this case from those where applicants "*merely seek to avoid military service in their country*."[26]

The decision carried a partial dissent and a partial concurrence with that of the majority.[27] The dissenting BIA member pointed out that other than the applicant's own testimony, there was no evidence to back his claim that he might be persecuted. Remarking that the Bureau's information did not contain "any specific" information about the applicant or his activities, and then went on to say:

> "An undocumented assertion or an apprehension which is purely subjective is not sufficient to support a persecution claim under the statute. An applicant must present objective evidence that he has a well-founded fear that he is likely to be **singled out for persecution** by government officials in the country of deportation."[28]

The dissent went on to state, that since the record contained no evidence of "*a particularized nature*", and just invoked general country conditions, he found that the applicant had failed to prove that he had a well founded fear of being persecuted on account of his political opinion. [29]

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[25] *Re Salim*, 18 I. & N. Dec. 311 (BIA 1982).
[26] Ibid., 313.
[27] Ibid., 317.
[28] Ibid., 318 (emphasis mine).
[29] Ibid., 319.

Later in 1984, the Ninth Circuit heard the case of *Bolanos – Hernandez v. INS*.[30] Bolanos, a citizen of El Salvador, had been a member of a right wing party in that country. After performing his military service, he joined a voluntary civilian squad that protected the government against infiltration by guerillas. The guerillas, contacted Bolanos nonetheless, and asked him to join them, threatening him with death if he refused. Earlier, they had recruited Bolanos' brother and probably killed him afterward. Five other friends of Bolanos suffered a similar fate. Not waiting for the threat to materialize, Bolanos fled to the United States, where he claimed asylum.[31] The IJ rejected his claim, based on credibility issues, but the BIA held that what Bolanos testified to was "*merely representative of the general conditions in El Salvador*." The Ninth Circuit disagreed strongly:

> "We are mystified by the Board's ability to turn logic on its head. While we have frequently held that general evidence of violence is insufficient to trigger section 243(h)'s prohibition against deportation, not once have we considered a specific threat against a petitioner insufficient because it reflected a general level of violence.(…) It should be obvious that the significance of a specific threat to an individual's life or freedom is not lessened by the fact that the individual resides in a country where the lives and freedom of a large number of persons are threatened. If anything, as we point out *infra*, that fact may make the threat more serious or credible."[32]

The court found that because of his special military training Bolanos was contacted by the guerillas, and because of that he received a specific and individual threat to his life. Though not once using the term "singled-out for persecution", the Ninth Circuit reversed both the IJ and BIA. It found that Bolanos was in a special position, and the fate of others in similar circumstances only strengthened and not weakened his claim.[33] Similarly, in 1985 the Ninth Circuit in *Hernandez – Ortiz v. INS*[34] found that when members of one family have been subjected to repeated beatings, threats and violence, the fact that the applicant resided in a country where life and liberty of large groups of population are threatened "*does not lessen the significance of evidence of a specific threat to the individual's life or freedom.*"[35]

In 1985, the First Circuit Court dealt with the case of a claimant from Ghana in *Ananeh–Firempong v. INS*.[36] She had belonged to a family associated with the former government on account of their ethnicity, education, and political sympathies. After a military coup in that country, her family in Ghana had been put under house arrest, their bank accounts frozen, and a nephew beaten up by the military, stationed in her house. Ahaneh–Firempong had applied for reopening of her deportation proceedings and for withholding of removal. She thus had to show, that her life "would be threatened" if she were

[30] *Bolanos –Hernandez v. INS*, 767 F.2d 1277, (9th Cir.1984).
[31] Ibid., 1280.
[32] Ibid., 1284-85.
[33] Ibid., 1284-85.
[34] *Hernandez –Ortiz v. INS*, 777 F.2d 509, (9th Cir. 1985).
[35] Ibid., 515.
[36] *Ananeh–Firempong v. INS*, 766 F.2d.621, (1st Cir. 1985).

returned to Ghana.[37] The court remarking that in re-opening of deportation proceedings, the applicant had to point out to "specific facts" that would support her claim, found that she had done so. Referring to the case law of the Ninth Circuit it found that:

> "The facts alleged here indicate more than a general "political upheaval" that affects "the populace as a whole." (…) Rather, they show a specific threat to the petitioner. The Board and the courts of appeals have consistently recognized evidence about treatment of one's family as probative of such a threat. (…) see also Handbook, supra, ¶ 43, at 13 (threat of persecution "need not be based on the applicant's own personal experience.... [Evidence concerning] relatives and other members of the same racial or social group may well show that his fear ... of persecution is well founded."). And, the facts of house arrest and beating make this case a stronger one than those cited here by the INS, in which a refusal to reopen deportation proceedings has been found proper."[38]

The court also pointed to other cases where applicants had "*failed to put forward evidence that they would be singled out for persecution*",[39] and re-stated that this had not been the case here, and reversed and remanded the case to the BIA.[40]

One of the most interesting cases in this area was the 1985 decision of the Fifth Circuit in *Guevara Flores v. INS*.[41] The applicant, Anna Estela Guevara Flores, a citizen of El Salvador, had been apprehended by the United States Border Patrol while trying to cross illegally to the country. She was in possession of tapes with sermons of the last Mass of the Roman Catholic archbishop Oscar Romero, and other materials, which the FBI considered to be "*classic Marxist rhetoric*". Based on that she was assumed to be a guerilla leader in El Salvador, "Comandante Norma". The FBI prevailed upon the American Embassy in El Salvador to furnish Commandante's fingerprints, which naturally caused considerable emotion in that country, and attracted wide media coverage. The fingerprints proved that Guevara Flores was not in fact Commandante Norma, but nonetheless, the Salvadoran government stated that because of her possession of "subversive literature" they were interested in her, and asked for Guevara – Flores' flight details, if she were to be deported from the United States.[42] After a serious of legal battles, she applied for a reopening of her asylum application, which the BIA refused, which she then appealed to court.

The Fifth Circuit, albeit very reluctantly, decided to reverse and remand the case back for reconsideration.[43] After detailing her case, it found that:

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[37] See Chapter 2.2.1 above for more details.
[38] *Ananeh–Firempong v. INS*, 766 F.2d.621, 626-627, (1st Cir. 1985).
[39] Ibid., 627.
[40] For similar cases see: *Chavarria v. INS*, 722 F.2d 666, 668 (11th Cir.1984); *Sanchez v. INS*, 707 F.2d 1523, 1527-28 (D.C.Cir.1983); *Shoaee v. INS*, 704 F.2d 1079, 1084 (9th Cir. 1983); *Chavez v. INS*, 723 F.2d 1431, 1434 (9th Cir. 1984); *Fleurinor v. INS*, 585 F.2d 129, 134 (5th Cir.1978).
[41] *Guevara Flores v. INS*, 786 F.2d 1242, (5th Cir. 1986).
[42] Ibid., 1244.
[43] Ibid., 1254.

> "Guevara has met her burden on appeal of proving a reasonable likelihood that she will meet the statutory requirements for asylum on reopening. (…) The FBI documents indicate that the head of the Salvadoran military has personally taken an interest in her case. In addition, the Salvadoran authorities expressed an interest in obtaining the date and number of Guevara's flight, and in obtaining copies of the documents she had in her possession when she was arrested--documents which the authorities described as subversive literature. In light of that factual context, we think that a reasonable person in Guevara's circumstances would fear persecution on return to her native country."[44]

Based on the fact that the authorities, have expressed a *personal* interest in the applicant, the court founded her to have an individual basis for an asylum claim. Interestingly, the court not once used the term "singled out" in its decision.[45]

The line of case-law described above continued throughout the 1980s and 1990s. In 1987 the Ninth Circuit in *Artiga Turcios v. INS* found that the applicant who had undergone special military combat training to fight guerillas and upon his release from the military was sought by guerillas, to either conscript him, or punish him if he refused, was "singled out" and eligible for withholding of deportation and asylum.[46] In *Blanco – Comarribas v. INS*[47] it also held that an applicant who belonged to a family whose property had been confiscated by the Nicaraguan government, and whose members were presumed to be killed by the government, and that the applicant himself was apprehended after taking part in an anti-government demonstration, had proven sufficiently that "*he* ***or those similarly situated*** *are at a greater risk than the general population, and that the threat is a serious one*", and thus was eligible for asylum.[48] Interestingly, the dissenting judge in this opinion stated to the contrary that neither the applicant, nor his family "*had been singled out for persecution*".[49] Also, in 1988, in *Rodriguez v. INS*[50] the Ninth Circuit held, that a woman whose family members had been killed by the anti-government guerillas for their support of the rural militia, point to "*numerous specific incidents in which members of her family – a small, readily identifiable group -- have been victims of threats and acts of violence*",[51] and reversed the BIA which had found that she had "*failed to show any reason why she individually would be singled out for persecution.*"[52] However, in 1991, the Second Circuit heard the case of *Gomez v. INS*, involving a female applicant from El Salvador who had been raped on five occasions by the guerillas and whose house was vandalized.[53] The court denied her asylum, stating that it could not find that raped women in El Salvador would be "*more threatened than any other young woman" and that she "would be singled out for further brutalization on this basis*."[54] Also

[44] Ibid., 1250.
[45] Ibid., passim.
[46] *Artiga Turcios v. INS*, 829 F.2d 720, (9th Cir. 1987).
[47] *Blanco–Comarribas v. INS*, 830 F.2d 1039, (9th Cir. 1987).
[48] Ibid., 1041. (emphasis mine).
[49] Ibid., 1044.
[50] *Rodriguez v. INS*, 841 F.2d 865, (9th Cir.1988).
[51] Ibid., 871.
[52] Ibid., 871.
[53] *Gomez v. INS*, 947 F.2d 660, (2nd Cir. 1991).
[54] Ibid., 664.

the Third Circuit in *Fatin v. INS*[55] in 1993, on the sideline of its main findings, rejected the contention that feminists in Iran would be singled out for persecution anymore than other women who refused to conform to the dress code.[56]

Probably one of the clearest restatements of the concept of singling out is to be found in the decision of *Kotasz v. INS* handed by the Ninth Circuit in 1994.[57] One of the applicants, Mihaly Kotasz had been a Hungarian citizen. He had been anti-Communist throughout his life. When he refused to perform military service, he had been sentenced to work in a labor camp. Thorough the 1980s he participated in anti-Communist demonstrations, after which he was always detained and beaten by the police. While in the United States, Mihaly and his family applied for asylum but where denied first by the IJ, and later by the BIA, which found in relation to Mihaly, that forasmuch as his asylum claim was concerned: "*there is no evidence in the record that [he] was singled out for persecution--rather he was arrested with numerous other demonstrators and incarcerated for a short period of time*."[58]

The court disagreed and went on to give a detailed assessment of the meaning of the term "singled out" in American case-law. After noting, that the phrase seems to be used by the courts, mainly as quotations from the BIA,[59] and that other phrases had been used as well,[60] it pointed out that there has never been a "requirement" to be singled out for the purpose of asylum law. To the contrary, the court pointed out the BIA had recognized the possibility that groups of people may be singled out for persecution.[61] Having said that, it then looked at Mihaly Kotasz's claim in particular. Noting that after each anti-communist demonstration he was arrested, as well a group of others, it found that a group of people may be singled out for persecution. The fact that such a group exists, does not weaken his claim, but to the contrary, strengthens it:

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[55] Fatin v. INS, 12 F.3d. 1233 (3rd Cir. 1993).

[56] Ibid., 1243.

[57] Kotasz v. INS, 31 F.3d 847 (9th Cir. 1994).

[58] Ibid., 850.

[59] "The Supreme Court's only mention of the "singled out" requirement has been by way of quoting from opinions of the BIA and of the Circuit courts. *See INS v. Stevic*, 467 U.S. 407, 411 & n. 3, 104 S.Ct. 2489, 2491, n. 3, 81 L.Ed.2d 321 (1984) (quoting BIA decisions at issue); *Cardoza-Fonseca*, 480 U.S. at 453 n. *, 107 S.Ct. at 1224 n. * (describing various formulations of the well-founded fear standard and quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir.1984)). The requirement has never been construed by the Court, nor was it even mentioned in *Elias-Zacaria*s, the Court's most recent asylum decision. In describing the well-founded fear standard, this court and other courts have on occasion relied on the formulation. *See, e.g., Abedini*, 971 F.2d at 192 n. 1 (stating that alien must show that government's persecution "stemmed from its desire to single him out for unique punishment because of his ... political or religious beliefs"); *Mendoza Perez v. INS*, 902 F.2d 760, 762 (9th Cir.1990) (alien was "singled out and sought by" men believed to be guerillas); *Vides-Vides v. INS*, 783 F.2d 1463, 1467-68 n. 2 (9th Cir.1986) (concluding that alien petitioner "has failed to show that he will be singled out for persecution"); *Aviles-Torres v. INS*, 790 F.2d 1433, 1436 (9th Cir.1986) (describing newspaper article as "singling out petitioner" for persecution); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1579 (9th Cir.1986) (quoting BIA opinion); *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir.1985) (quoting Carvajal-Munoz); *Moosa v. INS*, 760 F.2d 715, 719 (6th Cir.1985); Dally v. INS, 744 F.2d 1191, 1196 (6th Cir.1984)." Ibid., 851.

[60] "Besides using the phrase "singled out"--a formulation more commonly employed by the BIA than by this court--we have spoken of persecution being, for example, "directed at" the petitioner (*see Aviles-Torres v. INS*, 790 F.2d 1433, 1435 (9th Cir.1986)), being "targeted at him individually" (*see Mendoza Perez*, 902 F.2d at 762), or being "aimed at him in particular" (s*ee De Valle v. INS*, 901 F.2d 787, 791 (9th Cir.1990) (quoting *Sanchez-Trujillo*, 801 F.2d at 1581))."Ibid., 852.

[61] Ibid., 851-5.

"He was, however, personally targeted for government abuse, as were his fellow detainees. In fact, the existence of a group of persons similarly situated to Mihaly in some ways strengthens his claim by establishing that his case was part of a larger government tendency to detain and harass, rather than an isolated event. (Perhaps it is the BIA's preferred phraseology that gives rise to its reluctance to recognize that ten to twenty people may, at the same time, be "singled out" for persecution within the meaning of the asylum statute. If so, we suggest the BIA adopt a more felicitous formulation for expressing the idea of particularization: that such people have been "targeted" or "placed at risk," for example.) Although Mihaly was not a lone activist, he was part of the subgroup of anti-communists who were *active* opponents of the Communist regime--and who were, as a result, subject to a greater danger of persecution than were other anti-communists."[62]

They were targeted as active anti-communists, and were persecuted as such. Their numbers are of little significance, according to the court:

> "The BIA applied its "singled out" formulation with exaggerated literalness--disregarding Mihaly's arrests because "numerous other" demonstrators were arrested along with him. Even though, as Mihaly explained at his asylum hearing, ten to twenty demonstrators were arrested at each political demonstration he participated in, that fact in no way diminishes the personal threat to Mihaly represented by his arrests. As described above, it is irrelevant whether one person, twenty persons, or a thousand persons were targeted or placed at risk. As active opponents of the Communist regime, these demonstrators were part of subgroup of anti-communists facing an even greater threat of persecution than group members in general. Accordingly, the BIA erred in rejecting Mihaly's claim on the basis that he did not show that he was "singled out" for persecution."[63]

The *Kotasz* decision had been the most explicit elaboration on the concept of "singling out" and its possible interpretation problems in American case-law.

It is important to note that at least one other Circuit court found it not necessary to follow the Ninth Circuit's findings in this matter. In 1996, the Fifth Circuit heard the case of *Abdel–Masieh v. INS*.[64] The applicant was a Sudanese citizen of Coptic Christian origin from a well known and prominent Coptic family. After the Islamic government of Sudan introduced *sharia* (Muslim law) to all citizens irrespective of their religion, the applicant had taken part in demonstrations against this decision. After each one, he and group of others would have been arrested and beaten by the police. A year later, the funeral of his cousin, who was killed by the government, was transformed into a mass anti-government rally, during which he was again arrested with a group of other demonstrators, interrogated and beaten by the police. He also claimed that his mother had been fired from her job because of her religion, while his brother had been arrested and beaten by the police because of Abdel's activities.[65]

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[62] Ibid., 854.
[63] Ibid., 854-855.
[64] *Abdel–Masieh v. INS*, 73 F.3d 579 (5th Cir.1996).
[65] Ibid., 582.

Both the IJ and BIA dismissed his application, based, among other reasons, on the fact that he was not singled out for persecution. Though the Fifth Circuit reversed and remanded the BIA decisions on other grounds, it did share at least the BIA's opinion that Abdel Mashieh had not been singled out for persecution. Indeed, its reasoning is exactly opposed to that of the Ninth Circuit in *Kotasz v. INS*:

> "Abdel fails to establish that he was singled out and arrested on either occasion due to his religious or political affiliations. Abdel was twice arrested while participating in large, public demonstrations. He has not demonstrated that the treatment he received was different than that which would have been received by any other participant in a public disturbance in Khartoum. It seems plausible that Abdel may have been arrested on both occasions simply because he was at the front of the crowd. There is no evidence to the contrary. Each time he was detained, the authorities were apparently unaware of his identity. In short, it is by no means clear that Abdel's mistreatment was motivated by his "differ [ences] in a way regarded as offensive (e.g., race, religion, political opinion, etc.).""[66]

Thus, for the Fifth Circuit it was irrelevant why Abdel Masieh had been taking part in the demonstration in the first place. What is important to the court, is that because of that demonstration, he did not suffer any more than any other person that had been punished for taking part in it. Thus, he was not singled out, any more than a hypothetic person taking part, in what the court calls, a "public disturbance".

2.2.3 Group persecution

In the context of Kotasz and Abdel Masieh decisions it is poignant to look at the issue of group persecution, which as the Ninth Circuit observed in *Kotasz v. INS*: "*should not be confused with the INA's use of the phrase "particular social group," a term of art whose scope is considerably more circumscribed*."[67] The American courts and the BIA had allowed asylum claims based on group persecution, on occasion calling it "groups singled out for persecution", something which would not doubt utterly confuse the Dutch courts. It should be stressed here, that group persecution as discussed here, is different from the concept of the particular social group which is a persecution ground, and will be discussed further on in this chapter. In this section, I will be discussing "group persecution" as a standard of proof within the "well founded fear" concept.

The BIA in 1990 granted asylum based on belonging to a singled out family in *Re Villalta*.[68] The applicant was a citizen of El Salvador. Because of his family's political opinions and actions they had been targeted for persecution by the Salvadoran army, as well as para-military death squads. In the course of the 1970s and 1980s the applicant's mother, and five out of

[66] Ibid., 584.
[67] *Kotasz v. INS*, 31 F.3d 847, 852 (9th Cir. 1994).
[68] *Re Villalta*, 20 I. & N. Dec. 142, (BIA 1990).

his seven siblings were killed by either the army or the death squads. Unable to protect himself he fled to the United States. The BIA found that his family had been "singled out for persecution" and granted the applicant asylum.[69]

In 1986, the Fifth Circuit heard the case of *Bahramnia v. INS*.[70] The applicant had been a citizen of Iran who had entered the United States in 1979 as a tourist. After unsuccessfully trying to change his immigration status he was ordered deported to Iran in 1980. He then changed his address, married an American citizen and requested permanent residence as a spouse of a U.S. citizen. Before his request was acted upon, the couple divorced. In 1981, the BIA dismissed his appeal from the deportation order but granted him voluntary departure. Bahramina failed to do so, and was arrested in 1985. He thereupon moved to re-open his deportation proceedings based on his request for political asylum, and a stay of his deportation order until this asylum application was addressed. When the stay was denied, he petitioned the federal district court for a writ of habeas corpus, which was granted until the BIA considered his motion to reopen. The BIA denied his motion, which he then challenged before the court. In his petition, Bahramina claimed that two of his cousins had been killed by the Khomenini regime, and that two others had been jailed, while he himself, since 1983, had been active in an opposition group "The Iran Society".[71]

The Fifth Circuit denied his petition. First, it noted that Bahramina had failed to show that ""***he as an individual*** *will be subjected to persecution if forced to return to his native land*" *or that he will be "singled out for persecution*""[72] Then, referring to the activity of the opposition group, the court followed the same standard – (namely, that the group itself was of special significance to the regime) in order to meet the burden of clear probability of persecution: "*He presented no evidence, however,* ***that members of this group*** *had been "singled out for persecution.*""[73] Thus, the Fifth Circuit had ruled that in principle, groups, as well as individuals, could be singled out for persecution.

In 1987, the Fifth Circuit heard the case of *Campos–Guardado v. INS* which involved a female applicant form El Salvador who came from a family opposed to the land reform that had taken place in that country.[74] While visiting her uncle, the house was raided by guerrillas, who dragged the family from the house, forcing the women to watch as they hacked to pieces the male members of the family. They then raped the women, while the woman accompanying the assailants was shouting political slogans. Ms. Guardado returned then to her home, and was introduced to a distant cousin, who proved to be one of the assailants, and who threatened her with death if she told anyone what had happened to her. The court restated that groups may be subject to singling out for persecution but dismissed the appeal on other grounds.[75]

The notion of group persecution was also acknowledged by the Sixth Circuit in 1986 in its decision *Yousif v. INS*.[76] Shamel Yousif was an Iraqi citizen of Chaldean origin and religion.

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[69] Ibid., passim.
[70] *Bahramnia v. INS*, 782 F.2d 1243 (5th Cir. 1986).
[71] Ibid., passim.
[72] Ibid., 1248 (emphasis in the original).
[73] Ibid., 1248 (emphasis mine).
[74] *Campos–Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987).
[75] Ibid., 287, 289.
[76] *Yousif v. INS*, 794 F.2d 236, (6th Cir. 1986).

He was opposed to the ruling Baath party and claimed asylum on grounds that Chaldean Christians in Iraq were being persecuted as a group, and due to the Iraq-Iran war they were especially hated by the majority of the Muslim citizens of Iraq. His claim for asylum was denied, based on the fact, that while individual cases of persecution of Christians in Iraq might indeed take place, Chaldean Christians were not persecuted as a group. He later re-submitted his claim but was denied reopening of his deportation case on the same grounds by the IJ and the BIA upon which he appealed to the court.[77]

The court dismissed his appeal from a denial of withholding of deportation. It found that the applicant must either prove why he as an individual is being persecuted or, when he claims the group he belongs to is being persecuted, he should prove why that group is singled out for persecution. And in the case of Yousif, the court found that: "*there is a complete lack of support for his claim that Christians or Chaldeans as a group are being persecuted*."[78]

The Ninth Circuit recognized persecution of groups in the case of *Sanchez-Truijllo v. INS* though in that particular case it dealt with persecution on account of membership in particular social group which might be confusing.[79] A better example is the decision of *Hartooni v. INS* that the court rendered in 1994.[80] The applicant was a citizen of Iran and a practicing Armenian Christian. In her application, she claimed that the Christian school she attended had been closed down by the authorities, the Armenian Christians had been forbidden to celebrate Christmas, and that on occasion, while she was in church, the buildings had been stoned by Iranian soldiers. Taking note of the Bureau of Human Rights and Humanitarian Affairs, that "*among those who have been singled out for mistreatment is the small community of Armenian Christians*", and that at the time of her application, the State Department was of the opinion that Armenians from Iran should be granted asylum "*unless otherwise ineligible*", the court found that it normally requires "*in addition to evidence of general persecution of a protected group (…) to demonstrate a specific inference of personal danger*."[81] In this case the court found that the applicant had met her burden and reversed and remanded the case back to the BIA for determination.

One of the clearest elaboration of the issue of group persecution can be found in the decision of the Ninth Circuit in the case of *Kotasz v. INS*, described in detail above.[82] The IJ and BIA claimed that the applicant, who was an anti–communist who had attended anti-communist demonstrations and was subsequently detained and beaten up, was not singled-out for persecution since what happened to him also happened to other people taking part in those demonstrations.[83]

The court disagreed and gave a short clarification of what it considered to be the singling-out criteria:

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[77] Ibid., 239-240.
[78] Ibid., 242 (emphasis in original).
[79] *Sanchez-Truijllo v. INS*, 801 F.2d 1571 (9th Cir. 1986).
[80] *Hartooni v. INS*, 21 F.3d 226 (9th Cir. 1994).
[81] Ibid., 341.
[82] *Kotasz v. INS*, 31 F.3d 847, 852 (9th Cir. 1994).
[83] Ibid., 850-51.

> There are, in contrast, more extreme situations in which members of an entire group--though perhaps not of an entire nation--*are* systematically persecuted. In such cases, group membership itself subjects the alien to a reasonable possibility of persecution, so that he or she will be able to satisfy the objective component of the well-founded fear standard simply by proving membership in the targeted group. (…) As the systematic attempt to annihilate the Jews in Nazi Germany conclusively demonstrates, persecution of an entire group can render proof of individual targeting entirely superfluous. Certainly, it would not have been necessary for each individual Jew to await a personal visit to his door by Nazi storm troopers in order to show a well-founded fear of persecution. Similarly, it would be unnecessary for members of other systematically persecuted groups to show that they have been selected on an individual basis as subjects of persecution. (…) Although past and even present-day events show that the INS has rightly attempted to deal with the problem of systematic persecution of members of oppressed groups, the problem of non-pattern and practice persecution of members of such groups is far more common. In such instances, although members of the disfavored groups are not threatened by systematic persecution of the group's entire membership, the fact of group membership nonetheless places them at some risk. That risk can rise to the level required for establishing a well-founded fear of persecution either as a result of an individual's activities in support of the group, or because an individual is a member of a certain element of the group that is itself at greater risk of persecution than is the membership of the group as a whole."[84]

The BIA was somewhat more reluctant to acknowledge group persecution. In 1996, in *Re H-*, [85] it found that membership in a persecuted clan in Somalia can make the applicant eligible for asylum if the applicant can prove that he is being persecuted "*on account of that membership*."[86] The BIA reversed the negative IJ decision and remanded it for reconsideration based also on the fact, that the applicant:

> "presented an individualized claim which reflected that he became the object of harm and was physically abused simply because he was identified with the former ruling faction by being a member of the Merehan clan."[87]

In another decision, in 1998, in *Re O-D-*,[88] the majority focused on the applicant's credibility. However, the dissenting BIA members found the applicant, an alleged citizen of Mauritania, to belong to the black Fulani people, who were being persecuted by the white Moors of that country.[89] It should be noted that in neither of these two BIA decisions, did the Board use the phrases "singled out for persecution" or "group persecution".

In 1990, the INS adopted a regulation in which it gave more attention to situations where members of a group are being persecuted and whereby proof of membership in that group

[84] Ibid., 852-853.
[85] *Re H-*, 21 I. & N. Dec. 337 (BIA 1996).
[86] Ibid., 333-34.
[87] Ibid., 345-346.
[88] *Re O-D-*, 21 I. & N. Dec. 1079 (BIA 1998).
[89] Ibid., 1091, 1098 (dissenting opinion).

is enough to prove that the applicant has a well-founded fear of being persecuted. The regulation now reads as follows:

> "In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:
> (A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable."[90]

The issue of singling out in American law is an interesting one. Before the 1990 codification it was used as a means of distinguishing the claims in terms of the potential risk to the applicant. Thus, if the risk was haphazard, indiscriminate or general, the courts would reject the claims.[91] In *Sanchez v. INS*[92] the Ninth Circuit rejected a claim of persecution based merely on the fact that, if the applicant were to be deported to El Salvador, he would sufferer "extreme hardship" because of the situation in his country. Similarly, in 1986, the Fourth Circuit in *Cruz–Lopez v. INS*[93] rejected the assertion that a single death threat from a gang in a country torn by civil strife was sufficient to establish a well founded fear of persecution. General violence in the country of origin was also insufficient to prove a well founded fear of persecution.[94]

What the courts were looking for were some characteristic that would make the applicant stand out, so to speak. According to the courts these factors could be his personal knowledge or skills,[95] membership in a political group or party,[96] even membership in a family,[97] or a religious or ethnic minority.[98] When the INS claimed that similar things have happened to other people in similar circumstances and that weakens the claim, the Ninth Circuit moved in quickly to reject that notion, saying in one case that this line of thought was "turning the logic on its head."[99] Even before the 1990 regulation, it was accepted by both the BIA and the courts that persecution could be proven by pointing to what had happened to people in similar circumstances.[100] In that respect, there had never been too much problem with the issue of group

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[90] 8 C.F.R. § 208.13(b)(2)(i) (1998).
[91] *Kotasz v. INS*, 31 F.3d 847, 852 (9th Cir. 1994).
[92] *Sanchez v. INS*, 707 F.2d 1523, (9th Cir. 1983).
[93] *Cruz–Lopez v. INS*, 802 F.2d 1518, (4th Cir. 1986).
[94] *See Zapeda–Mendelez v. INS*, 741 F.2d 285, (9th Cir. 1984) described above, as well as, *Vides –Vides v. INS*, 783 F.2d.1463 (9th Cir. 1986), and M.A. A26851062 v. INS, 899 F.2d 304 (4th Cir. 1990) (en banc).
[95] *Bolanos–Henrnadez v. INS*, 767 F.2d 1277, (9th Cir.1984), *Artiga Turcios v. INS*, 829 F.2d 720, (9th Cir. 1987).
[96] *Guevara Flores v. INS*, 786 F.2d 1242, (5th Cir. 1986).
[97] *Hernandez–Ortiz v. INS*, 777 F.2d 509, (9th Cir. 1985), *Ananeh–Firempong v. INS*, 766 F.2d.621, (1st Cir. 1985), B*lanco– Comarribas v. INS*, 830 F.2d 1039, (9th Cir. 1987), *Rodriguez v. INS*, 841 F.2d 865, (9th Cir.1988), *Re Villalta*, 20 I. & N. Dec. 142, (BIA 1990), *Ramirez-Rivas v. INS* 899 F.2d 864 (9th Cir. 1990),
[98] *Yousif v. INS*, 794 F.2d 236, (6th Cir. 1986); *Hartooni v. INS*, 21 F.3d 226 (9th Cir. 1994).
[99] *Bolanos –Henrnadez v. INS*, 767 F.2d 1277, 1284-85 (9th Cir.1984).
[100] *Re Mogharrabi*, 19 I. & N. Dec. 439, 446 (BIA 1987); *Ramirez-Rivas v. INS* 899 F.2d 864 (9th Cir. 1990).

persecution as the courts very often referred to it in terms of "similarly situated persons".

It may be said that the issue of singled out for persecution in American context has a different meaning than in the Dutch counterpart. First of all, the American doctrine seems to prefer the expression as used by the Ninth circuit in *Blanco–Commaribas v. INS* – "people in similarly situated" circumstances. That is, the applicant does not need to show that he fears more than people in similarly situated circumstances but rather, that others in similarly situated circumstances would also have a well founded fear of being persecuted. The difference while subtle is fundamental. In the American case law, the singled-out criteria is used to strengthen the claim of an applicant, rather than to weaken it.

The American preference for *Blanco–Commaribas* approach is also more workable in terms of group persecution. Instead of constructing complex theories about singling out and group persecution, and thus trying to mix fire and water, the courts (and to a degree the BIA) accepted that "groups" may also be singled out for persecution. Even the Fifth Circuit case law, which weighs much more toward the "targeting" aim, still recognizes that in particular situations, groups may be subject to persecution.

The relative lack of problem which "singling-out" presents is perhaps also in the fact that the American courts put so much stress on the nexus between the persecution and the persecution ground. When they are looking for a feature that will make the applicant stand out, they are in fact looking for a nexus to a persecution ground. The number of people who share that persecution ground is, according to the American courts, largely irrelevant. In *Kotasz*, the court ruled that the applicant had been targeted *because* of his political opinions. In other words, it was his political opinion that made him stand out in the first place. Since he acted upon them, he and people similarly situated (political dissidents) were targeted for persecution. By clearly linking the persecution ground and the nexus between it and the persecution, the courts (and later the INS guidelines quoted above) managed largely to avoid the entanglement in the singling–out theory the Dutch courts are caught up in. This point is clearly illustrated by the *Abdel–Masieh* case. There, the court did exactly the reverse of *Kotasz*, and went along the lines the Dutch case law. By ignoring the link between the persecution ground (religion) and what had happened to the applicant, the court found itself asking if participating in a demonstration is persecution. Again, ignoring the cause (religious persecution) of the demonstration, the court found that since others too were arrested, thus *Abdel-Masieh* was not singled out for persecution. By ignoring the persecution ground and the nexus between that and what had happened to the applicants, the court will hardly ever find someone to be singled out. In a very simplified version, the difference in the approach between the Dutch and the American courts may be brought down to the difference between *Abdel-Masieh* and the *Kotasz* decisions.

2.3 Persecution
2.3.1 Agents of persecution

In the following section, I will look at the topic of the "agents of persecution" and how this has been handled by the American courts and administration.

One of the most controversial issues in European asylum law has been the question of the agent of persecution. While it is generally acknowledged that the state can be the persecuting agent, in the early 1990s in some European countries, the issue arose of whether one can talk of persecution in the meaning of the Geneva Convention, when it is not the state that is the persecutor, but rather a non-state agent, such as a guerilla group or a clan, which the state is unable or unwilling to control.[101]

The United States courts faced the problem quite quickly but unlike their European counterparts there has never been any doubts that persecution may come from non-state agents. In 1981, the Ninth Circuit heard the case of *McMullen v. INS*.[102] The applicant had been a British national of Irish descent, who was moved to the Northern Ireland while serving in the army. Upon arriving there, he was disillusioned with the British army and deserted to the Provisional Irish Republican Army. After some time, he came to believe that PIRA was becoming a radical or terrorist organization. When he left the organization, he was arrested and sentenced to a few years in an Irish prison. During that time, he was kept in a separate wing to protect him from PIRA. Upon his release, PIRA forced McMullen to help them in arms and liquor smuggling, but when he was told to execute a innocent civilian, he refused. Fearing punishment for his disobedience, which meant being executed, he fled to the United States, where he applied for withholding of deportation.[103]

The IJ found McMullen not deportable because "*the Government of Ireland is unable to control the activities of the PIRA*". The BIA disagreed and reversed finding McMullen deportable. Though the substance of the case centered around political opinion and credibility issues, the INS in front of the Ninth Circuit conceded that persecution may by "*persecution by non-governmental groups such as the PIRA, where it is shown that the government of the purposed country of deportation is unwilling or unable to control that group*", with which the Ninth Circuit agreed.[104]

The McMullen decision became the leading precedent for the Ninth Circuit, which later accepted that persecution may come from anti-government guerillas.[105] Also, more importantly, the BIA decision in *Re McMullen* was designated by the BIA as precedent, therefore extending its binding force throughout other circuits and not just within the Ninth Circuit's jurisdiction.[106] In 1988, in the case of *Desir v. Ilchert* the Ninth Circuit accepted a claim of persecution by a governmentally condoned paramilitary in Haiti, called the Ton Ton Macoutes, which operating in a country described as "cleptocracy" extorted bribes and fines from civilians, and persecuting those who refused to pay.[107] The Ninth Circuit affirmed its case-law in 1997 in *Sangha v. INS*[108] where it acknowledged that persecution may come from "*persons or organizations which the government is unable or unwilling to control*"[109] though it dismissed the case on other

[101] For more literature on this issue see D. Anker, *Law of Asylum* …, p. 62-64.
[102] *McMullen v. INS*, 658 F.2d 1312, (9th Cir. 1981).
[103] Ibid, 1314-1315.
[104] Ibid, 1315.
[105] See *Artiga Turcios v. INS*, 829 F.2d 720, (9th Cir. 1987) involving threats of death or forced conscription to a former soldier.
[106] *Re McMullen*, 19 I. & N. Dec. 90 (BIA 1984) affirmed on other grounds, 788 F.2d.591 (9th Cir. 1986).
[107] *Desir v. Ilchert*, 840 F.2d 723, (9th Cir.1988).
[108] *Sangha v. INS*, 103 F.3d 1482, (9th Cir. 1997).
[109] Ibid., 1487.

grounds. Finally, in 2000, in the case of *Ladha v. INS* it found that persecution of a minority Shia group in Pakistan was inflicted by the majority Sunni mobs, which the government of Pakistan was unable or unwilling to control.[110]

The acceptance of the possibility of persecution by non-state agents was also adopted by other Circuits. In 1990, in the case of *Perlera–Escobar v. INS* the Eleventh Circuit agreed that persecution may come from anti-government guerillas, though affirmed the BIA denial of asylum on other grounds.[111] In 1994, the Second Circuit in *Sotelo-Aquije v. Slattery* found that a citizen of Peru had been persecuted by the Shining Path, a communist guerilla group, and that the government was unable to offer him effective protection.[112] It is interesting to note, that in this particular case, the court reaffirmed explicitly the fact that persecution may come from non-state actors:

> "the statute protects against persecution not only by government forces but also by nongovernmental groups that the government cannot control. *See, e.g., Elias-Zacarias*, 502 U.S. at 112 S.Ct. at 814-15 (forced recruitment by Guatemalan guerrilla organization); *Artiga Turcios v. INS*, 829 F.2d 720, 722 (9th Cir.1987) (persecution by anti-government Salvadoran guerrillas). The BIA opinion did not purport to say otherwise, yet by implication minimized Sotelo's claim of persecution by saying that it was "directed to his local hometown of Villa El Salvador" and that an "asylum claim is not established where a claim based on nongovernmental action involves a local area of a country,"[113]

Thus the issue in contention was not whether persecution can come from non-state actors, but rather whether the government able to offer the applicant effective protection anywhere.[114]

The BIA also acknowledged in *Re Villalta* in 1990 that persecution may emanate from death squads.[115] In 1996, in *Re H-*, in a case with a claimant from Somalia, the BIA also accepted that persecution may occur in the course of civil strife and that "*it may occur irrespective of whether or not a national government exists*."[116] In 1996, in *Re Kasinga*, a case involving a girl from Togo escaping forced marriage and FGM in Togo, the BIA held that a family and a tribe may be considered as agents of persecution if the government is unable to afford effective protection from them.[117] In 1998, in *Re O-Z- & I-Z-*, the BIA found that persecution may occur if anti-Semitic attacks go un-persecuted and un-punished by the Ukrainian government.[118] Finally, in 2005, the Seventh Circuit stressed that:

[110] *Ladha v. INS*, 215 F.3d 889, (9th Cir. 2000).
[111] *Perlera–Escobar v. INS*, 894 F.2d 1292, (11th Cir. 1990).
[112] *Sotelo-Aquije v. Slattery*, 17 F.3d 33, (2nd Cir. 1994).
[113] Ibid., 37.
[114] *Mohideen v. Gonzales*, 416 f.3d 567 (7th Cir. 2005).
[115] *Re Villalta*, 20 I. & N. Dec. 142 (BIA 1990).
[116] *Re H-*, 21 I. & N. Dec. 337, 344 (BIA 1996).
[117] *Re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).
[118] *Re O-Z- & I-Z-*, 22 I. & N. Dec. 23 (BIA 1998).

> "you cannot even claim asylum on the basis of persecution by a private group unless the government either condones it or is helpless to prevent it, but if either of those conditions is satisfied, the claim is a good one."[119]

When looking at the case law regarding the problem of persecution by non-state agents, it is interesting to observe that the American law showed a remarkable stability over the years. It was accepted with the McMullen decision of the Ninth Circuit in 1981 that persecution may come from non-state agents, and this position has been steadfastly adhered to since then. Indeed, the BIA has applied an open interpretation, acknowledging, for example, that persecution may emanate from death squads, tribes and clans, even in situations where the country ceased to exist as such. Assuming, *arguendo*, that the non-state agent doctrine might prove to be a useful tool in rejecting some asylum claims (El Salvador), the absence of any major debate or contention around this issue is quite remarkable. In fact, I have not been able to find a *single case* where an asylum application had been denied based on the fact that she feared persecution from a non-state actor. This might be partially explained by the fact that American courts tend to focus more on the "well foundedness" of persecution (see above), and even more on the nexus between the persecution and the persecution ground (see more below). Indeed, as one of the authors remarked some of the cases failed because it was considered that what they suffer was not persecution, or their fear was not well-founded, but never because their persecutor was a non-state agent.[120]

In this section I have tried to show that the agent of persecution was never a major issue in the American case-law. Ever since the McMullen decision, both the administration and the courts have accepted non state agents as potential persecutors, if the state had been unwilling or unable to provide protection. In most of these cases, the courts again relied heavily on the nexus between the persecution (and its agent) and the persecution ground. Just like in the case of the agent of persecution, American courts managed to avoid controversy here too, by clearly identifying the persecution ground, the persecution and the link between the two. The issue of who provided the link (the agent of persecution) was not important if there was no effective protection.

2.3.2 The meaning of persecution

In this section, I will present how the American courts and the administration construe the term "persecution". Firstly, attention will be paid to the question of the intent behind the action that results in harm. Then, questions of physical, psychological, and economic harm, and threat thereof will be addressed. Finally, a peculiarity of American law, the issue of past persecution as grounds for asylum will be discussed.

First of all, it should be pointed out that most international refugee law scholars view persecution as violations of basic human rights demonstrative of state protection.[121] The U.S. administration and the courts seem to concentrate on the seriousness of the harm suffered,

[119] *Hor v. Gonzales*, 421 F.3d 497, 501 (7th Cir. 2005). See also *Al-Fara v. Gonzalez*, 404F.3d 733(3rd Cir. 2003), *Andriasian v. INS*, 180 F.3d. 1033 (9th Cir. 1999), *Ochoa v. Ashcroft*, 406 F.3d. 1166 (9th Cir. 2005), *Estrada-Escobar v. Ashcroft*, 376 F.3d 1042 (10th Cir. 2004), *Yan Lan Wu v. Ashcroft*, 393 F.3d 418 (3rd 2005).
[120] D. Anker, *Law of the Asylum*…, 199.
[121] Ibid., p. 175-178; J. Hathaway, *The Law of Refugee*…, p. 105.

relegating the question of the absence of state protection to the background,[122] and my discussion below with follow this approach.

It is arguable that it is difficult to separate persecution from the persecution ground itself (discussed in the following section of this book), and it may in fact blur the picture rather than clear it. However, since most authors and commentators insist on separating the two, I will also follow this pattern.[123]

The issue of persecution has been glossed over in the U.S. Supreme Court decision of *INS v. Stevic*.[124] The case involved a citizen of Yugoslavia who had challenged the denial of withholding of deportation from the United States. Though the case was about the issue of standard of proof, the court *en passant* addressed the issue of the definition of persecution and stated that:

> "(…) one might argue that the concept of "persecution" is broad enough to encompass matters other than threats to "life or freedom" – deprivations of property, for example (…)."[125]

Since this comment was in *dicta* regarding the issue of the appropriate standard of proof, it was only an indication of what the Supreme Court might consider as persecution.

In 1985, the BIA gave the decision in *Matter of Acosta*.[126] The case involved a claimant from El Salvador who had been busy in setting up a cooperative of taxi drivers in his home country. After the cooperative refused to participate in an anti-government strikes, the leaders, including Acosta, started to receive death threats, and finally their taxis were seized and burned, and some members of the cooperative killed. The applicant himself received three threatening notes and was beaten up by men whom he believed to be members of the anti-government guerillas. Fearing for his life, he fled his country to the United States.[127]

In reviewing the IJ negative decision about asylum and withholding of deportation, the BIA addressed, amongst others, the issue of the meaning of the term "persecution". It said that before the 1980 Refugee Act, it was construed by the INS and the courts to mean: "*either threat to the life or freedom, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive*."[128] In certain cases, persecution was also held to include severe economic restrictions or deprivations, if they constituted a threat to life or freedom of the applicants. Finally, laws of general application were held not to be persecution, unless the punishment imposed was for "*individual reasons*".[129] According to the BIA the pre-1980 definition of persecution meant that it had to be suffering inflicted on someone for his or her

[122] D. Anker, *Law of Asylum*…, 178.
[123] See J.C. Hathaway, *The Law of refugee*…, p. 99-188; D. Anker, *Law of the Asylum*…, p. 171-414; Spijkerboer & Vermeulen 1995, p. 108-164; Spijkerboer & Vermeulen 2005.
[124] 104 S. Ct. 2489.
[125] Ibid., 440.
[126] *Re Acotsa*, 19 I. & N. Dec. 211 (BIA 1985) overruled on other grounds in *Re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).
[127] Ibid., 216-217.
[128] Ibid., 222.
[129] Ibid., 222.

characteristic, which the persecutor was trying to overcome, and that it had to be inflicted by either a government or a group of people the government was unable or unwilling to control. Having said that, the BIA then concluded the pre-1980 definition was also applicable to the 1980 Refugee Act as well and subsequently defined is as follows:

> ""persecution" (…) clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome. The word does not embrace harm arising out of civil strife or anarchy."[130]

Though *Re Acosta* was later modified by *Re Mogharrabi*[131] in 1987, this new decision did not effect the definition of persecution as was established in Acosta decision.

In 1993, in the case of *Fatin v. INS* the Third Circuit heard a case of a female applicant from Iran who had been living in the United States for some time when the Islamic Revolution in her home country occurred.[132] Claiming that if returned to Iran, she would be forced to submit to the Islamic dress code for women its regulation on women's behavior despite the fact that she did not wish to practice that religion, and that, moreover, it was abhorrent to her as a feminist. She appealed from a denial of refugee status and withholding of deportation. The court denied her petition for review and though it sympathized with her opinions, referring to the *Acosta* decision of the BIA it defined persecution with an important qualifier as: "*an extreme concept that does not include every treatment our society regards as offensive*."[133]

The courts have found that persecution may be the result of a series of similar or different incidents, that taken altogether may amount to persecution. In 1996, the Ninth Circuit heard the case of *Surita v. INS*.[134] The applicant had been a citizen of Fiji of Indian origin and of Hindu religion. In 1987, the ethnic Fijians staged a *coup d'etat* in the country, seized power and began discriminating against the Indian population, which constituted roughly half of the island population. The applicant, who worked as a nurse in a hospital following the 1987 coup, had been repeatedly forced to pay bribes on her way to work, because of her race and religion. Also, her house had been broken into and robbed by the military, while her family was threatened with death if they reported it to the authorities. The applicant did file a complaint nonetheless, but it was never acted upon by the police. Also, the temple that Surita used to attended with her family was desecrated and closed down, and the applicant and her mother were prevented by a mob from going to another temple, and her mother's jewelry had been stolen from her on that occasion.[135] The INS denied her asylum application stating that she both failed to present that she suffered past persecution and that she could not prove future persecution, which the BIA later affirmed. The Ninth Circuit reversed and remanded the case back to the IJ and BIA for consideration. It held, that while single incidents are not enough for finding persecution, in certain circumstances "*the cumulative effect of several incidents may constitute persecution*."[136]

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[130] Ibid., 223.
[131] *Re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).
[132] *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993.)
[133] Ibid., 1243.
[134] *Surita v. INS*, 95 F.3d 814, (9th Cir. 1996).
[135] Ibid., 817-18.
[136] Ibid., 819.

The American courts have naturally not produced one single definition of the term persecution. The case law of the administration and of the courts shows that by that they understand it to mean an "extreme concept", involving a threat of life, freedom, or even economic discrimination. The courts have also stressed that, not all behavior which in the U.S.A. would be regarded as offensive, can qualify as persecution.

2.3.3 Specific issues
2.3.3.1 Physical harm and threat thereof

It is well established in American case-law that physical harm may constitute persecution. In 1995, the Ninth Circuit heard the case of *Singh v. Ilchert*.[137] The applicant was an Indian male national of Sikh origin from Punjab. He was first approached by a Sikh separatist movement who asked to join them, but he declined. Shortly after that incident his house was raided by the Indian police, who arrested him and took him into detention, where he was beaten with a baton and a belt, hung upside down with his legs stretched far apart. Shortly after he was released, the separatists kidnapped him trying to coerce him to join them, also resorting to beatings. After the family had paid a bribe, he was released but the police again arrested him and his father soon after. The applicant was held incommunicado for a while, and beaten with a bamboo stick while suspended upside down with his legs stretched apart. After his release, he was approached yet again by the guerillas, who this time left him alone due to the injuries he suffered from the Indian Police. The applicant fled the region, and later the country.[138] The IJ and later the BIA dismissed his claim, based on *inter alia*, on the fact that what the applicant went through was not persecution but rather governmental prosecution and investigation of separatist movement. The Ninth Circuit disagreed and reversed finding that, what the applicant went through was enough to qualify as persecution. What had happened to him was a direct result of the Indian policy to suppress Sikh separatism by any means at its disposal. Continued beatings and torture were found to be enough to constitute persecution.[139]

Rape was also found to constitute persecution in the meaning of the 1980 Refugee Act. In 1996, the Ninth Circuit heard the case of *Lopez-Galarza v. INS*.[140] The applicant was a citizen of Nicaragua. Her father had been a supporter of the ousted Somoza regime. Because of that, he was arrested and sentenced for unspecified crimes for 23 years and tortured in prison. The applicant had been accused by her neighbor of supporting the ousted Somoza regime, and of being anti-government, which led to her arrest. While in detention she was beaten, repeatedly raped by the policemen and subject to other forms of physical abuse.[141] The IJ and BIA rejected her application based on the lack of well founded fear of persecution in the future, but the Ninth Circuit reversed and remanded the case back to the BIA. In its decision, the court stated that rape or sexual assault may constitute persecution, if it was inflicted based on one of the persecution grounds.[142]

[137] *Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995).
[138] Ibid., 1503-05.
[139] Ibid., 1508-09.
[140] *Lopez-Galarza v. INS*, 99 F.3d 954, (9th Cir. 1996).
[141] Ibid., 957.
[142] Ibid., 959. The court also quote here an earlier case *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987), overruled on other grounds by *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc).

The nexus requirement between the persecution and the persecution ground, which will be discussed in greater detail later in the text, is clearly visible in the case of *Re R-A-* involving a woman from Guatemala, who had been subject to physical and sexual abuse from her husband for years. Though the majority of the BIA was sympathetic to her case, it nevertheless rejected her claim.[143] The BIA found that she had been beaten, mishandled, raped and sexually assaulted, and that the authorities of Guatemala were unable and unwilling to offer her protection. Yet, according to the BIA, what happened to her was not on account of either her political opinion or any other persecution ground: "*The record indicates that the respondent's husband harmed the respondent regardless of what she actually believed or what he thought she believed.*" Thus while the severity of harm she suffered was met, she did not meet according to the BIA, the second requirement that it has be on account of one of the convention grounds.[144]

The harm caused does not have to be a harm that was repeated several times. In *Re Kasinga*[145] the BIA accepted a claim of a young female from Togo who sought refuge from a forced polygamous marriage and FGM that was widely practiced in her country. The BIA found that the level of physical suffering associated with FGM was severe enough to constitute persecution.[146]

Detention, if coupled with physical harm, was also found to constitute persecution. In a case of citizen of Uganda who had been active in a political party, and who had been arrested but not harmed by the army following a rally, the Fourth Circuit found insufficient grounds to constitute persecution.[147] In *Pitcherskaia v. INS*, the Ninth Circuit found that the confinement to a mental hospital and forced electro-shock treatment of a Russian woman for her lesbianism amounted to persecution.[148] Similarly, in the described above case of *Singh v. Ilchert*,[149] the Ninth Circuit found that detention coupled with physical abuse and torture did amount to persecution. The Third Circuit in *Senathirajan v INS*,[150] a case of a Tamil applicant from Sri Lanka, who had been detained on a number of occasions by the Indian Peace Keeping Forces, the Tamil Tigers, and the Sri Lankan army, found that the repeated detentions and torture that followed was enough to find persecution, and reversed and remanded a denial of asylum back to the BIA.[151] The Seventh Circuit found in *Kossov v. INS*[152] that a Latvian Evangelical Christian who during Soviet times had been detained because of her religion, and was beaten up so severely that she miscarried, had been subject to persecution.[153]

The *threat* of physical harm, if serious enough, may also constitute persecution according to the case-law. In 1981, the Ninth Circuit found in *McMulllen v. INS* that a threat of killing the applicant by the Provisional Irish Republican Army for disobeying their orders was suf-

[143] *Re R-A-*, 22 I. & N. Dec. 906 (BIA 1999) vacated by the Attorney General and remanded to the BIA for reconsideration in 2001.
[144] Ibid., 914.
[145] *Re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).
[146] Ibid., 365.
[147] *Gonahsa v. US INS*, 181 F.3d 538 (4th Cir. 1999).
[148] *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).
[149] *Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995).
[150] *Senathirajan v INS*, 157 F.3d 210 (3rd Cir. 1998).
[151] Ibid., 220.
[152] *Kossov v. INS* 132 F.3d. 405, (7th Cir. 1998).
[153] Ibid., 409.

ficient enough to amount to persecution.[154] A threat to life to a former right wing paramilitary fighter in El Salvador who had received them from a leftist guerilla organization was also recognized to constitute persecution.[155] In 1988, in the case of *Blanco-Lopez v. INS* the same court found that an applicant from El Salvador who had been falsely accused of belonging to a guerilla group and because of that was interrogated and threatened with death by the police and military, was being persecuted.[156] In *Korablina v. INS*[157] the Ninth Circuit held that a Jewish applicant from Ukraine, who had witnessed threats and violence and the disappearance of her Jewish boss, and was herself assaulted and received telephone death threats, was subjected to persecution.[158]

The issue of whether general conditions of violence and threats are enough to prove persecution was dealt with in a case-by-case approach. In 1994, the Second Circuit in *Sotelo-Aquije v. Slattery* held that a citizen of Peru, who had been threatened with death by the Shining Path, a communist guerilla group, and whose colleagues, who also opposed the Shining Path were killed after receiving such threats, demonstrated fear of persecution.[159] In 1995, in *Ghaly v. INS* the Ninth Circuit heard the case of a Coptic Christian from Egypt.[160] The applicant claimed asylum based on the fact that Coptic Christians were being systematically discriminated against in Egypt and that there were outbursts of anti-Christian violence which the government was unable to suppress. The Ninth Circuit rejected the claim, finding that general conditions of violence and unrest were not enough to constitute to persecution. The court found that the Egyptian government had indeed suppressed anti-Coptic clashes and punished its perpetrators. It held that the outcome would be different if discrimination were condoned by the government or the prevailing societal norm.[161] One example of when general violence against a certain group could be serious enough to amount to persecution is a Ninth Circuit decision given a year earlier than *Ghaly*, in the case of *Hartooni v. INS*.[162] The applicant was a young Armenian Christian from Iran whose school had been closed down by the authorities, who was forbidden to celebrate Christmas, and who had been worshipping inside her church when it was attacked by people throwing stones.[163] The court found that since the Armenian Christians in Iran had been singled out for persecution by the Islamic government, and that since Hartooni had experienced the violence herself – being inside the church which was being attacked with stones by soldiers – it all amounted to persecution.

Finally, in the case of a Jewish applicant from Ukraine decided in 1998, the Ninth Circuit found that:

> "violence against petitioners friends or family members may establish a well-founded fear of persecution. This court has however required that the violence: "create a pattern of persecution closely tied to the petitioner" (…) The key question is whether,

[154] *McMulllen v. INS*, 658 F.2d. 1312 (9th Cir. 1981).
[155] *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1985).
[156] *Blanco-Lopez v. INS*, 858 F.2d 531, (9th Cir. 1988).
[157] *Korablina v. INS*, 158 F.3d 1038, (9th Cir.1998).
[158] Ibid., 1045.
[159] *Sotelo-Aquije v. Slattery*, 17 F.3d 33, (2nd Cir. 1994).
[160] *Ghaly v. INS*, 58 F.3d 1425, (9th Cir. 1995).
[161] Ibid., 1431.
[162] *Hartooni v. INS*, 21 F.3d 336, (9th Cir. 1994).
[163] Ibid., 339.

> looking at the cumulative effect of all the incidents a petitioner has suffered, the treatment she received rises to the level of persecution"[164]

It should also be noted that, as far back as in 1989, the BIA made a similar finding in its decision *Re Chen*.[165] The applicant was a Chinese Christian, the son of a pastor. During the "Cultural Revolution", his church was closed, his father beaten on numerous occasions, forced to parade in the streets among angry mobs of communists, made to sign numerous confession of his "crimes". Later during a Bible burning crusade, his father was pushed into a bonfire of Bibles. He barely survived the heavy burns and died later from the treatment inflicted upon him by the Red Guards. The applicant himself was locked up for months in his grandmother's house, humiliated, physically assaulted and later sent to village "reeducation camps" where he was forced to write numerous "criticism" throughout the years. Though eventually released from the camp and allowed to work as a teacher, he lived nonetheless in complete social isolation prior to coming to the United States.[166] Based on these circumstances, the BIA found him to be a refugee.

There has also been debate in the American courts whether the Chinese one-child policy constitutes persecution.[167] Prior to 1997, the BIA seemed to have interpreted that the one-child policy of China was only persecution if it was being enforced on account of one of the persecution grounds. Thus, people normally subjected to this policy were not entitled to asylum. This was upheld by the courts.[168] In 1994, Gou Chun Di, a native of China, applied to the Virginia District Court for a writ of *habeas corpus* from a BIA decision denying him asylum based on his opposition to the Chinese one-child policy, and claimed fear of being persecuted for refusing to undergo sterilization.[169] The district judge called the BIA administrative record "inconsistent" and granted the petition, stating that the right to procreate is a fundamental human right, and opposition to its denial constitutes a valid political opinion, and thus the applicant has a well founded fear of being persecuted.[170] The BIA appealed that ruling to the Fourth Circuit, which in its decision of *Gou Chun Di v. Moscato*[171] reversed the district court and found that "*severe government sanctions in response to alien's violation of his country's population control policy do not necessarily amount to persecution*"[172] unless he can prove that the enforcement of such law was undertaken for other reasons, than just application of the law. The court relied here on its earlier ruling in *Chen Zou Chai v. Carrol*[173] where it decided a similar case in the same way.

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[164] *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir.1998).
[165] *Re Chen*, 20 I. & N. Dec. 16, (BIA 1989).
[166] Ibid., 19-20.
[167] For an overview of this issue see K. S. Barber, *Xin – Chang Zhang v. Slattery: Rejecting China's Coercive Population Control Policy as Grounds For Political Asylum in the United States, Villanova Law* Review, vol. 41 (1996), p. 521-557 and A. D. Sealove, *Shau–Hao Zhao v. Schiltgen: Persecution on Account of Political Opinion – Inconsistencies and Ambiguities*, Brooklyn Journal Of International Law, vol. 39 (1997), p. 309-337.
[168] See *Chen v. INS*, 95 F.3d 801 (9th Cir. 1996).
[169] *Gou Chun Di v. Carroll*, 842 F.Supp.858 (1994).
[170] Ibid., 872-873.
[171] *Gou Chun Di v. Moscato*, 66 F.3d 315, (4th Cir. 1995) (unpublished decision).
[172] Ibid., 2.
[173] *Chen Zou Chai v. Carrol*, 48 F.3d 1331, (4th Cir. 1995).

The change came in 1997 when the Congress amended the definition of refugee in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, effective April 1 1997 which stated:

> "For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion."[174]

Litigation based on these new provisions was swift to follow and in 1999 the Ninth Circuit heard the case of *Yong Hao Chen v. US INS*.[175] The applicants were a couple from China, and the husband had already one child from a previous marriage. Chinese authorities pressured the couple to abort the fetus but they managed to avoid it by paying bribes and promising to undergo sterilization. They didn't, and while in the United States they produced another child. The couple argued that with three children they would be forced to undergo sterilization, which under the new law provisions amounted to persecution. The court found that the applicants had not sufficiently proven, that they would be indeed forced to undergo sterilization if returned to China with a third child, but nonetheless did accept that if it were proven that coerced abortions or sterilizations did occur, under the new law, it would amount to persecution.[176]

In conclusion, the American law shows an agreement that serious physical harm or threats thereof will constitute persecution, unless they are purely incidental, of minor nature, and the government is unable or unwilling to provide effective protection. Accumulation of different incidents may combine to the level of persecution, if the cumulative effect is indeed serious. The litigation behind the one-child policy though complicated at times, does indicate, that courts are willing to accept that a forced sterilization or abortion will indeed constitute persecution.

2.3.3.2 Mental, emotional, and psychological harm and threat thereof

In U.S. case law, it is recognized that non-physical but psychological harm may amount to persecution in particular instances. In the 1983 case of *Re Laipenieks*, the BIA in deportation proceedings against a Latvian citizen who was accused of belonging to a anti-communist group that persecuted the Latvian communists during the Nazi occupation of Latvia for their alignment with Soviet forces occupying the country from 1940-41, gave the definition of persecution.[177] The BIA stated in it that:

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[174] Pub.L. No. 104-208, § 601(a)(1), 110 Stat. 3009-689 (1996).
[175] *Yong Hao Chen v. US INS*, 195 F.3d. 198. (9th Cir.1999).
[176] Ibid., 204.
[177] *Re Laipenieks*, 18 I. & N. Dec. 433 (BIA 1983) reversed on other grounds by *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985).

> "Generally this case law has described persecution as the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering **need not [only] be physical, but may take other forms**, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.)"[178]

Also in *Re Chen* in 1989, it was recognized that the constant ridicule and harassment of the applicant by the Red Guards was serious enough to constitute persecution.[179] In 1990, in the case of *Re Toboso–Alfonso*,[180] the BIA decided that the threats of imprisonment, being on a list of homosexuals on file with the Cuban police, as well as government hostility toward that group, was enough to establish a well founded fear of persecution.[181] Also, in the 1996 decision of the BIA in Re Kassinga, the Board ruled that the psychological trauma and suffering associated with FGM, as practiced in Togo, was enough to establish a fear of persecution.[182]

Another example of the meaning of persecution as construed by the American courts would be the 1994 case heard by the Ninth Circuit in *Kahssai v. INS*.[183] The applicant was a female from Ethiopia. She was born to an Ethiopian Jewish family. Her father and older brother had both been killed by the ruling Communists, her mother had been arrested and disappeared after giving birth. Kahssai was given to her uncle, who brought her up, but since he and his family had converted to Christianity, Kahssai and her siblings were being brought up as Christians. In a separate concurring opinion, Judge Reinhardt refuted the BIA argument that what has happened to Kahssai was not enough to amount to persecution and found that the deprivation of one's family and religion were "*equally serious forms of injury that result from persecution*."[184]

The problem whether forced renunciation of one's fundamental beliefs may constitute persecution also arose.

In 1993, in *Fatin v. INS*, the Third Circuit heard the case of a female applicant from Iran.[185] She had come to the United States to study and while there, the regime in Iran changed and became the strictly fundamentalist one. Fatin applied for asylum and withholding of deportation claiming that as a person who holds feminist views, and does not practice Islam, her return to Iran would put her in danger of persecution. The Third Circuit denied her application, as it reasoned, that since the applicant herself had testified that she would do as much as possible, to avoid breaking the Iranian law, thus she was in fact not so sincere in her beliefs, that any submission to them would amount to persecution. However, the court did acknowledge that in certain circumstances, when the beliefs were so "fundamental", forcing someone to live

[178] Ibid., 457 (emphasis mine).
[179] *Re Chen*, 20 I. & N. Dec. 16, (BIA 1989).
[180] *Re Toboso – Alfonso*, 20 I.& N. Dec. 819 (BIA 1990).
[181] Ibid., 822-23.
[182] *Re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).
[183] *Kahssai v. INS*, 16 F.3d 323 (9th Cir. 1994).
[184] Ibid., 329.
[185] *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993).

against them would amount to persecution. In describing the concept of persecution the Third Circuit stated that:

> "the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs."[186]

In another decision given by the Seventh Circuit in *Bucur v. INS*, the court heard a case of a Jehovah's Witness from Romania.[187] The IJ and the BIA dismissed his asylum application based on persecution on account of his religion, as they argued that the mere fact that he was not allowed to practice his religion was not enough to amount to persecution, as he was not also punished for being a Jehovah's Witness. The court called that reasoning "inadequate" and stated that :

> "That's like saying of a Christian in Rome in 100 A.D. that because he wasn't thrown to the lions in the Coliseum he can't have been persecuted. There are degrees of persecution. If a person is forbidden to practice his religion, the fact that he is not imprisoned, tortured, or banished, and is even allowed to attend school, does not mean that he is not a victim of religious persecution."[198]

The U.S. courts seem to have accepted that persecution may take the form of non-physical harm, such as a denial of freedom of worship and religion, deprivation of heritage and religion, as well as imposition of opinions "abhorrent" to one's conscience.

2.3.3.3 Forced conscription

According to American case law, in certain circumstances, forced conscription may amount to persecution. In 1982, in the case of *Re Salim*,[189] the BIA held that forcible conscription to the Afghan army, which was controlled by the Soviet invaders, may amount to persecution. It is interesting that some of the judges viewed this decision with suspicion, as one taken with ideological bias.[190] Indeed, in 1990, the BIA, in *Re Itzatula*,[191] heard another case of an Afghan national who claimed persecution on account of forcible conscription to the pro-Soviet army. This time, noting that the Soviet occupation of the country had ended, the BIA stated that:

> "an asylum claim based on a refusal to serve in the Afghan military is no different than any other alien's claim that he will be punished because he did not serve in his country's armed forces" [192]

but granted asylum on other grounds.

[186] Ibid., 1242.
[187] *Bucur v. INS*, 109 F.3d. 399, (7th Cir. 1997).
[188] Ibid., 405.
[189] Re Salim, 18 I. & N. Dec. 311 (BIA 1982).
[190] M.A. A26851062 v. US INS, 899 F.2d 304, 320-321(4th Cir. 1990) (dissenting opinion).
[191] Re Itzatula, 20 I. & N. Dec. 149 (BIA 1990).
[192] Ibid., 152-53.

In 1989, the Ninth Circuit gave the decision in *Maldoando-Cruz v. US INS*.[193] The applicant was a citizen of El Salvador who had been kidnapped by the guerillas, and after that forcibly conscripted to fight with them. After a short period the applicant fled the group, but fearing reprisals from both them (for desertion) and the government of El Salvador (for being a guerilla) he fled to the United States. The court found that a person who wished to remain neutral but was nonetheless forcibly conscripted, and later deserted the guerillas had a well founded fear of being persecuted.[194]

This was affirmed in 1990 in the Ninth Circuit's decision in *Barraza Rivera v. INS*, a case involving an applicant from El Salvador, who had been forcibly conscripted to the military, and deserted when ordered to kill two men, and where the court ruled that forcible conscription and punishment for disobeying an order violating one's conscience is tantamount to persecution.[195] The same year, in the decision of *Canas–Sergovia v. INS (I)* the court again followed that finding.[196] Brothers Jose Roberto and Oscar Iban Canas-Sergovia were both citizens of El Salvador. Both were Jehovah's Witnesses and both were required by law to undergo military service in their country. Unwilling to bear arms, the brothers fled to the United States. In their asylum application, they claimed that El Salvador's forcible conscription in violation of their religious beliefs amounted to persecution, and since the law offered no alternative military service, their refusal to bear arms and subsequent punishment by law was in fact persecution. The IJ and BIA dismissed their applications, but the court reversed and remanded finding (amongst others) that the act of forcible conscription by a government which allows no alternative military service for conscientious objectors is in fact tantamount to persecution.[197] It is very instructive here to follow the reasoning of the Ninth Circuit more closely. The INS argued that the law prosecuting draft evasion in El Salvador is of general application and applies to people regardless of their religion or lack of it. Thus, it cannot be maintained, that it persecutes the Jehovah's Witnesses such as the Canas brothers. The Ninth Circuit was not persuaded by this argument:

> "The BIA gave great weight to the facially neutral characteristics of the Salvadoran conscription policy. Because nearly all conscription policies will appear facially neutral, the BIA's reasoning effectively means that no such policy can ever result in persecution within the meaning of the INA. Such a result ignores an elementary tenet of United States constitutional law, namely, that a facially neutral policy nonetheless may impermissibly infringe upon the rights of specific groups of persons. This tenet has been deemed particularly important where religion is concerned. Although the principle also is at work in equal protection jurisprudence, those cases differ crucially from freedom of religion cases because the equal protection clause requires proof of discriminatory intent. *E.g., Village of Arlington Heights v.*

[193] Maldoando-Cruz v. US INS, 883 F.22d 788, (9th Cir. 1989).
[194] Ibid., 791.
[195] Barraza–Rivera v. INS, 913 F.2d 1443, (9th Cir. 1990).
[196] Canas–Sergovia v. INS, 902 F.2d 717, (9th Cir. 1990) (Canas I) vacated and remanded, 502 U.S. S.C. 1086 (1992).
[197] Ibid., 723-726.

> *Metropolitan Housing Dev*., 429 U.S. 252, 265-70, 97 S.Ct. 555, 563-66, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). "[198]

Not without some irony it referred the INS to the U.S. constitutional law:

> "While we do not suggest that United States constitutional law is binding upon the Salvadoran government, we do believe that United States jurisprudence is relevant to analysis of new issues of United States refugee law. Here we consider solely whether the Canases are entitled to relief afforded under United States refugee law."[199]

Other Circuits did not follow the Ninth Circuit court's case law in this area. In the case of *M.A. A26851062 v. US INS*, the Fourth Circuit explicitly rejected the notion that a state forcing its citizen into conscription is in fact persecuting that person.[200] The court found that to be the case even if, as the circumstances in El Salvador are, that the conscripted soldier would be forced to take part in acts that might violate his beliefs.[201] The INS was so adamant on getting *Canas–Sergovia* overturned that it applied to *certiorari* to the United States Supreme Court, which was granted, and which overturned that decision.[202] The Supreme Court found there that in order to speak of persecution, the applicant must provide "some evidence" that what has happened to him or her was "on account" of one of the persecution grounds. I shall return to this problem later in this chapter, where I discuss the question of the nexus requirement.

Yet even after the *Elias-Zacarias* decision, the Ninth Circuit still recognized that forced conscription may in particular circumstances amount to persecution. In the 1995 case of *Ramos-Vasquez v. INS*, it dealt with the case of a citizen of Honduras, who was first forcibly recruited and then ordered to execute his friend, who had deserted the military service but was caught.[203] Not wanting to engage in an inhumane act, the applicant himself deserted the army and sought asylum in the United States. The IJ and BIA dismissed his application, but the Ninth Circuit reversed and remanded. Though essentially merging the forcible conscription and punishment for refusing to participate in an inhumane conduct, it nonetheless found that forcible conscription may in fact amount to persecution.[204]

It is interesting to observe that American case law recognizes not only the problem of conscientious objections to military service as such, but also to particular military actions. These are the cases when members of the military were forced to either break their deeply held beliefs or to obey orders given to them by their commanders. In 1990, the Ninth Circuit heard the case of *Barraza-Rivera v. INS*.[205] The applicant was a citizen of El Salvador who

[198] Ibid., 723.
[199] Ibid., 723 (text in footnote 10).
[200] *M.A. A26851062 v. US INS*, 899 F.2d 304, (4th Cir. 1990).
[201] Ibid. 312.
[202] 502 U.S. S.C. 1086 (1992).
[203] *Ramos–Vasquez v. INS*, 57 F.3d 857 (9th Cir. 1995).
[204] Ibid., 863.
[205] *Barraza–Rivera v. INS*, 913 F.2d 1443, (9th Cir. 1990).

had been earlier forcibly recruited to the military service. Before being discharged for a short leave, his commander had indicated to him that after the discharge was over he would have to follow an order of summarily executing someone. When Barraza Rivera objected, the officer threatened him that, in a case of disobedience, he would also kill Barraza Rivera. The applicant agreed to follow the order, but while away for leave, he fled to the United States. The IJ and the BIA dismissed his asylum application. The Court reversed and remanded. Remarking that he was given "*a terrifying choice: to murder others, or to be murdered himself*",[206] the court found that the punishment for refusing to participate in an inhumane act, was enough to constitute persecution. It restated the principle that people:

> "who, after submitting to mandatory conscription, are placed in a position that requires them to betray their conscience by engaging in inhuman conduct and refuse to engage such conduct"

have established that they are conscientious objectors.[207]

However, a decision given in the same year in similar circumstances but by the Fourth Circuit gave a totally reverse effect. In *M.A. A26851062 v. US INS*, that court heard a case from an applicant of El Salvador who refused to serve in the military of that country, as he claimed that he would be forced to participate in the wide human rights violations committed by the army of that country.[208] The Fourth Circuit denied his application. It noted that as a rule of international law, countries have the right to enforce conscription of its citizens. Only in "rare" circumstances ones had the right to refuse service:

> "(1) the alien would be associated with a military whose acts are condemned by the international community as contrary to the basic rules of human conduct, or (2) refusal to serve in the military results not in normal draft evasion penalties, but rather in disproportionately severe punishment on account of one of the five grounds enumerated in section 1101(a)(42)(A) of the Refugee Act."[209]

The court then remarked that:

> "Misconduct by reneged military units is almost inevitable during times of war, especially revolutionary war, and a country as torn as El Salvador will predictably spawn more than its share of poignant incidents."[210]

The court also noted that the conflict in that country had not been condemned by any international body, and calling the motives of the applicant "*distaste for the Salvadoran government and a fear of the general violence in that country as a result of its civil conflict*"[211] and dismissed his application.

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[206] Ibid., 1453.
[207] Ibid., 1451.
[208] *M.A. A26851062 v. US INS*, 899 F.2d 304, (4th Cir. 1990).
[209] Ibid., 312.
[210] Ibid., 312.
[211] Ibid., 316.

The Ninth Circuit, however, stayed with its case law. In the 1995 *Ramos – Vasquez v. INS* decision, it heard the case of a citizen of Honduras.[212] He had been recruited to the army at the age of fourteen and not allowed a discharge, as he seemed to be a good fighter. After serving for thirteen years in the army, he deserted when ordered to execute a friend who had deserted and was caught. The IJ dismissed his asylum and withholding applications, since it considered the shooting of deserters "*an unpleasant military duty*".[213] The BIA affirmed, and stated that "*if the Honduran army desires to punish its soldiers by placing them in water-filled tanks for 24 hours, this Board is in no position to pass judgment*"[214] The court, hardly concealing its indignation, reversed and remanded the case back to the BIA.[215]

Given the fact that the American courts recognize that persecution may take the form of non-physical harm, the Courts acknowledged that in some cases forced conscription may amount to persecution. This will involve the cases of refusing to be drafted into the army for religious reasons, though the Supreme Court has in its *Elias-Zacarias* case-law narrowed down the scope of such instances when it can be shown that punishment for such a refusal would be on account of one of the persecution grounds. Another feature of the American case-law would be the possibility of persecution when one is forced to obey a command that would violate the conscience of the applicant.

2.3.3.4 Economic sanctions and persecution

Apart from a considerable case law on physical and psychological forms of persecution, there is also a substantial body of jurisprudence dealing with the problem of economic deprivation and discrimination, and to what extent they amount to persecution.

As far back as in 1966, in the very succinct decision of *Re Salama*,[216] the BIA decided that a government campaign of discrimination which had led to the dismissal of Jewish professionals from their jobs in Egypt and a massive emigration of Egyptian Jews established persecution because of religion. The very succinct wording of the decision would suggest that the BIA considered as most important the fact that the discrimination based on religion was conducted by the state, as well as the fact that it made it impossible or difficult for Jewish professionals to work in their professions in Egypt.[217]

After the passage of the 1980 Refugee Act, one of the first decisions to deal with this issue was that given by the Eighth Circuit in 1983 in the case of *Minwalla v. INS*.[218] The applicant was a citizen of Pakistan and a member of the Zoroastrian faith, which constituted a tiny minority of five thousand members in a predominantly Muslim society of seventy million.

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[212] *Ramos–Vasquez v. INS*, 57 F.3d 857 (9th Cir. 1995).
[213] Ibid., 863.
[214] Ibid., 862.
[215] "Like the BIA dissent, we "would characterize being illegally ordered to execute someone [as] something more than an "unpleasant" duty," or even a "repugnant" one as the BIA majority suggests. We perceive such orders to be contrary to the basic rules of human conduct (…)", Ibid., 863.
[216] *Re Salama*, 11 I. & N. 536 (BIA 1966).
[217] Ibid., 536.
[218] *Minwalla v. INS*, 706 F.2d 831, (8th Cir. 1983).

Following the military coup in 1977, Pakistan was declared a Muslim state and Zoroastrians were removed from government jobs and harassed because of their success in business, as well as their involvement in the liquor trade. Furthermore Zoroastrians, as well as other religious minorities, were required by law to apply for new identification cards which clearly stated their religion. In his deportation proceedings Minwalla alleged that all these circumstances, in addition to the fact that he will not be able to practice law in Pakistan because of the new legal system, amounted to persecution. The court disagreed. It stated that the term persecution required either threat to one's life or freedom, or "*substantial economic detriment or disadvantage*."[219] The courts found that though the Zoroastrians were dismissed from government jobs and were unable to practice Islamic law, as in the case of the applicant, Minwalla had not shown that it was impossible for him to find employment in the private sector. It also dismissed Minwalla's claim that the requirement to hold an identity card with one's religion amounted to persecution or discrimination. The court did refer to a number of pre-1980 decisions, but it did not mention the BIA decision in *Re Salama*. The BIA seemed to require a substantial economic disadvantage too. In its 1985 decision of *Re Acosta*,[220] it decided that a taxi trade unionist member who, because of his organization's refusal to support the anti-government guerillas and because of the violence in El Salvador, was forced to abandon his job as a taxi driver, did not suffer persecution.[221] However, the Fourth Circuit, in its 1996 decision of *Abdel-Masieh v. US INS*, found that a Coptic Christian from Sudan, who came from a prominent Coptic family and whose mother had been fired from a government job because of her religion, could establish past persecution based on (amongst others) the fact of his mothers dismissal because of her religion.[222]

The Seventh Circuit tried to define the scope of the level of economic deprivation and persecution in its decision in *Borka v. INS* in 1996.[223] The case involved a female applicant from Romania. While working as a radiologist in a hospital, she uncovered and brought to the public attention the fact that the government might have been trying to cover up the number of people who died or were wounded during the 1989 revolution in her country. The secret police took an interest in her, searched her house, and interrogated her on a number of occasions, then she transferred to another town for work. In 1991, after taking part in an anti-government demonstration where she mentioned the alleged cover-up, she was fired from her position and informed that, apart from working as a farm laborer, she was barred from government employment.[224] The IJ and the BIA dismissed her asylum and withholding of deportation claims based on the fact that she did not show that "*the persecution is so severe as to deprive an applicant of all means of earning a living*."[225] The Seventh Circuit disagreed and reversed and remanded the case back to the BIA. It held that the requirement that economic persecution must deprive the applicant of "all" means of earning a living was a too stringent, derived from the misapplication of case-law. The court found that the IJ and BIA derived it from the

[219] Ibid., 835.
[220] *Re Acosta* 19 I. & N. Dec. 211 (BIA 1985) reversed on other ground by *Re Mogharrabi* 19 I. & N. Dec. 439, (BIA 1987).
[221] Ibid., 219-223.
[222] Ibid., 583.
[223] *Borka v. INS*, 77 F.3d 210, (7th Cir. 1996).
[224] Ibid., 212-14.
[225] Ibid., 215 (emphasis mine).

old definition of "persecution" (pre-1969) which required a "physical harm", and under the 1980 Refugee Act and subsequent case-law that was no longer tenable. Citing cases of its own and other Circuits, it held that:

> "to establish a well-founded fear of economic persecution, Borca must show that she faces a probability of deliberate imposition of economic disadvantage on account of her political opinion."[226]

Discrimination and its relationship to persecution was also dealt with by the Seventh Circuit in its 1993 decision of *De Souza v. INS*.[227] The applicant was born in Kenya but her parents were from the former Portuguese colony of Goa in India, which had been invaded and seized by India shortly after the birth of the applicant. Also, only a few months after she was born, Kenya received independence from the United Kingdom. However, because of her ethnicity, Kenya denied the applicant citizenship. Thus, the applicant was forced to attend a private high school. Following her studies in the United States, De Souza overstayed her visa and the INS instigated deportation proceedings, during which she applied for asylum. In her application she claimed that people of Indian descent were being discriminated against by the black population, she was being denied citizenship and appropriate educational opportunities. The court dismissed her application. It found that the denial of citizenship by the government of Kenya did not amount to persecution, as the applicant had no right to Kenyan citizenship, and the government of that country was free to decide who would and who would not be its citizens. The allegation that denial of free high school education to the applicant constituted persecution was dismissed as "*bordering on frivolity*" and the appeal was denied.[228]

The tenuous link between denial of educational opportunities and persecution was upheld later by the same Circuit in a 1997 decision in *Bucur v. INS*.[229] The case involved three citizens of Romania. Bucur was of mixed Romanian–Hungarian ethnicity, who claimed that because of this fact he was denied some educational opportunities offered to other Romanians. The court found that the BIA did not err in finding that what he suffered was minor discrimination but not of such gravity that it would compel the court to find persecution. The court also took this occasion to draw a distinction between persecution and discrimination. Remarking that "*there is, of course, no bright line between discrimination and persecution; policing the boundary is the responsibility of the Board of Immigration Appeals not of us*",[230] the Seventh Circuit nonetheless said about the difference:

> "The difference between persecution and discrimination is one of degree, which makes a hard and fast line difficult to draw. But we think it a reasonable generalization that the persecution of members of minority groups (such as ethnic Hungarians in Romania) differs from discrimination against them in being either official and severe, or nonofficial but lethal and condoned. Giving an official imprimatur to

[226] Ibid., 216.
[227] *De Souza v. INS*, 999 F.2d 1156, (7th Cir. 1993).
[228] Ibid., 1159.
[229] *Bucur v. INS*, 109 F.3d 399, (7th Cir. 1997).
[230] Ibid., 403.

> discrimination magnifies its gravity, as is implicit in the state action requirement of the Fourteenth Amendment. So a Romanian law requiring ethnic Hungarians to wear an armband identifying them as Hungarian, or forbidding them to attend college or to live in designated areas, would constitute persecution, even if it did not prevent them from earning a livelihood (…), while a wave of pogroms against Hungarians, or a campaign of expulsions from the country, would also constitute persecution even if the pogroms or the expulsions were merely condoned rather than orchestrated by the government. (…) But a law merely reserving a certain percentage of college places well short of 100 percent for Romanians, or requiring Hungarians to learn Romanian, would not be persecution; or a pattern of private discrimination or of low-level, ad hoc, official discrimination, such as the disparaging reference to Bucur's nationality in his interview with the secret police."[231]

A similar conclusion had been reached by the Ninth Circuit in *Ghaly v. INS*[232] in 1995. The case involved an Egyptian Coptic Christian doctor. In his application for asylum he claimed that Coptic Christians are being discriminated against by the Muslim Egyptian Society, and there have been instances of anti-Coptic pogroms. The Ninth Circuit quoting the *Salama* decision agreed with the applicant that he had been subjected to discrimination but found that alone was insufficient to find persecution. According to the court, discrimination may be in "*extraordinary cases, be so severe and pervasive*" to constitute persecution, if it be either condoned by the state or "the prevailing social norm."[233] The BIA was not convinced that it was the case and the court, finding that the evidence before it did not "compel it to find otherwise", denied the petition to reverse and remand.

The mere fact that one comes from a group that is economically disadvantaged is also insufficient to find persecution according to the courts. Thus, in 1996, in *Li v. INS*,[234] the court found that a Chinese citizen who belonged to a group of people with low economic status was insufficient to find persecution, as he needs to show that they were persecuted because of their low economic status.[235] However, if one proves that he belongs to a group targeted by the government, there might be talk of persecution. So, the Seventh Circuit in *Kossov v. INS* found that an Evangelical Christian from Latvia, who had been detained and while in detention beaten so severely that she miscarried, was later fired from her two jobs, had her accounts mysteriously closed, and had lost her house and business all because of her religion, was indeed persecuted.[236]

The cases described above point to the fact that, in principle, the American courts will find persecution in cases of economic sanctions. That statement needs to be qualified by the caveat that this is quite difficult. Merely being subjected to worse educational opportunities or to economic disadvantage seems insufficient to find persecution. It must be of such nature as to deny the applicant the means of making a living, obtaining any education, etc. The

[231] Ibid., 403.
[232] *Ghaly v. INS* 58 F.3d 1425, (9th Cir. 1995).
[233] Ibid., 1432.
[234] *Li v. INS*, 92 F.3d 985 (9th Cir. 1996).
[235] Ibid., 987.
[236] *Kossov v. INS*, 132 F.3d 405 (7th Cir. 1998).

courts here prefer to take a case-by case analysis, leaving the general opinion that economic discrimination amounts to persecution if it is "severe and pervasive".

2.3.3.5 Past persecution

The Unites States has what one commentator described as a dualistic definition of a refugee.[237] Thus, to qualify for refugee status, he must show that she either has a well founded fear of persecution (future oriented) or has been persecuted in the past.[238] It has been therefore accepted that once an applicant has established past persecution, it enough to grant asylum. If the INS wants the applicant deported, it should rebut a presumption that has been thus created: that the applicant has proven a well founded fear of persecution in the future because of past persecution.

One of the most detailed decisions has been that by the BIA in *Re Chen*.[239] The applicant who came from China and was the son of a Christian minister there. During the Chinese "Cultural Revolution", his father had been repeatedly humiliated in front of mobs, beaten by them, and once thrown into a fire lit with Bibles during a Bible-burning crusade. Because of his treatment, the father died soon after. The applicant was kept in his grandmother's house for months under house arrest. During that time and later at school, he was ridiculed and physically assaulted, forced to sign "self-criticisms" of himself and his family, and was later sent to a "reeducation camp" in the countryside. Even after the excesses of that period somewhat abated, he remained ostracized. The IJ found that the applicant had been persecuted in the past, but did not show a well founded fear of being persecuted in the future. The BIA agreed in the essence with the IJ and found that what the applicant had suffered in the past was enough to constitute past persecution. It also agreed that the applicant did not show that he will be likely to be persecuted in the future.[240] In this decision, the BIA adopted the standards that: 1) when the applicant has proven past persecution, she has created a presumption of a well founded fear of future persecution, which is now for the INS to rebut. 2) A denial of discretionary grant of asylum may follow only when there is "little likelihood" of future persecution; 3) Finally, if the past persecution suffered was of grave magnitude, the Service might nonetheless grant asylum.

This approach has been generally followed by the courts. Thus, in *Jagraj Singh v. Ilchert*,[241] a federal district court judge found that the BIA had not met its burden of proof of refuting the well founded fear of future persecution established on the past persecution of the applicant by simply quoting one sentence from a general Department of State report saying that "*Sikhs*

[237] D. Anker, *The Law of Asylum*…, p. 41.

[238] "The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country **because of persecution** or **a well-founded fear of persecution** on account of race, religion, nationality, membership of a particular social group, or political opinion" INA § 101 (a)(42)(A); U.S.C. § 1001 (a)(42)(A)" (emphasis mine).

[239] *Re Chen*, 20 I. & N. Dec. 16 (BIA 1989).

[240] Thought one member dissented on that issue. Ibid., 22-23.

[241] *Jagraj Singh v. Ilchert*, 801 F. Supp. 313, (N.D.Cal. 1992).

are leading tranquil and productive lives in other regions of India."[242] In a later decision, the Ninth Circuit remarked that the INS must give specific facts for the rebuttal of a well founded fear of future persecution based on suffered past persecution and not give "boilerplate" reasoning.[243] In other cases as well, the courts have found past persecution and that the INS (and not the applicants) must rebut it if it wishes to find the applicants ineligible for asylum.[244]

The BIA itself lessened the standard in its decision in *Re H-*[245] involving a claimant from Somalia who fled inter-clan violence. It ruled that once past persecution is established, there is also presumed to be well founded fear of persecution in the future unless:

> "it is demonstrated by preponderance of evidence (…) that conditions in the applicant's country have changed to such an extent that the applicant no longer has a well-founded fear of persecution in that country."[246]

Furthermore, the BIA also decided in cases based on established past persecution:

> "careful consideration should be given to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past."[247]

However, when it comes to granting asylum solely based on the severity of past persecution, both the courts and the BIA decision in *Chen* seem to have raised the standard quite high. Thus the Ninth Circuit set a requirement that the past persecution be atrocious in form and effect in order to warrant granting asylum based solely on those grounds. It denied the claims of two Polish nationals, whose treatment it found less severe than that described in *Chen*.[248] The Seventh Circuit in its *Bucur v. INS*[249] noted the applicant's harassment, beatings in school, interrogations by the secret police and subsequent detention with starvation and torture and still found it to be "*mild persecution*".[250] Cases like those of Jews from Nazi Germany, victims of the "Cultural Revolution" and the Cambodian Genocide "*and a few other extreme cases*"[251] were the type that would qualify under the Chen standard. This decision was also followed by the Tenth, Fifth, and the Sixth Circuit courts.[252]

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[242] Ibid., 322.
[243] *Salazar–Paucar v. INS*, 281 F.3d 1069, 1076 (9th Cir. 2002).
[244] See *Geberemichael v. INS*, 10 F.3d 28, 37 (1st Cir. 1993), *Dhine v. Slattery*, 3 F.3d 613, 619 (2nd Cir. 1993) *Prasad v. INS*, 101 F.3d 614, 617 (9th Cir.1996), *Bucur v. INS*, 109 F.3d 399, 404 (7th Cir. 1997), *Llana–Castellon v. INS*, 16 F.3d 1093, 1098 (10th Cir. 1994).
[245] *Re H-*, 21 I. & . Dec. 337 (BIA 1996).
[246] Ibid., 346.
[247] Ibid., 347.
[248] See *Acewicz v. INS*, 984 F.2d 1056 (9th Cir. 1993).
[249] *Bucur v. INS*, 109 F.3d 399.
[250] Ibid., 406.
[251] Ibid., 405.
[252] *Kapcia v INS*, 944 F.2d 702 (10th Cir.1991); *Rojas v. INS*, 937 F.2d.186 (5th Cir.1991); *Klawitter v. INS*, 970 F.2d 149 (6th Cir.1992).

2.3.3.6 Conclusions

In the directly preceding sections, I have tried to show how American courts construe the meaning of the term "persecution" for the purpose of asylum law.

Firstly, the American understanding of the term provides a good example of the way it has evolved over the years. In many cases, recourse was made to earlier definitions of persecution both from statutes and case law from the pre-1980 era. With the new Refugee Act the courts, and to some extent the BIA, have responded swiftly to the change in the law by giving a new understanding of that term. The *Acosta* decision of the BIA from 1985 has a separate section devoted to the "the meaning of persecution" where a new framework is clearly set.

Secondly, there seems to be a strong influence of domestic law on interpreting the meaning of the term. In cases of physical abuse, when the IJ or the BIA has tried to argue that in certain circumstances the native authorities have acted in an allowed though arbitrary way, the courts have tried to steer a middle course. On the one hand, they said that "*not every treatment we regard as offensive*" would constitute persecution. On the other hand, the courts have tried to draw a clear line demonstrating when certain activities were indeed persecution. So, when the IJ and BIA described "*as mere unpleasant duties*" the arbitrary treatment of deserters by submersion for hours in a water tank and later executing them, the Ninth Circuit reversed, stating that it is "*more than just an unpleasant experience*". When the continued torture of a suspected separatist by the police was again described by the BIA as "*legitimate prosecution*", the court stepped in, and held that torture may be persecution. Why? As the court states "*under no stretch of imagination*" can torture be viewed as legitimate prosecution. Though some courts, like the Fourth Circuit, prefer to remain aloof and claim that "*it is not in a position to pass judgment*", it is rather the exception than the rule. This is most clearly visible in the cases, where the courts have dealt with a forced renunciation of one's beliefs.

The concept that a forcible renunciation of one's fundamental beliefs may constitute persecution draws heavily on domestic constitutional law. When the court handed down the decision of *Canas–Sergovia*, it ruled, based on domestic jurisprudence, that a facially neutral law may be discriminatory, especially in cases based on religion and conscience. It thus found that since Jehovah's Witnesses have no alternative to military service in El Salvador, they are forced to abandon their religious or conscientious principles, which is, in fact, persecution. For similar reasons, it decided that if one refuses to take part in certain acts, it is a political choice, and that it is improper for the government to look into the intentions of an applicant. Similarly, in *Pitcherskaia*, the court ruled that even if the intention of the persecutor were benevolent, holy or there had been no foul intent when a law was passed or when an action taken, if it, in fact, amounts to persecution, the intent is irrelevant. It is the harm caused that counts in the asylum process, rather than the intent of the persecutor.

The appraisal of the case-law concerned with economic harm is more problematic, as the courts seem to prefer a case-by case analysis, which might often produce different results in the similar circumstances. Thus in *Salama*, the court found that economic discrimination may constitute persecution, while in *Minwalla* and *Ghaly*, it found the opposite. From the case-law, it is evident that, in this area, the courts, especially the Seventh Circuit, prefer to give a larger margin of deference to the BIA and INS findings. Perhaps it is the complexity

of these cases, as well as the difficulty of creating a generalized case-law, that causes judges to exercise more judicial restraint. That is, it must be said, not an absolute rule. In that respect, the Seventh Circuit decision in *Baka* is interesting as that court stepped in to halt an overly rigid interpretation of "its own previous case law.

Finally, the case of past persecution is a clear example of the American domestic law making way to asylum law. As it was said, it originated with the Refugee Act, where past persecution was inserted, as a potential asylum ground. Though, as we have seen through the Chen decision and others above, the concept is applied very narrowly, nonetheless it is still applied. Thus, according to American law if one has been persecuted in the past, she may still be eligible for asylum even with no well founded fear of future persecution.

2.4 Persecution grounds
2.4.1 The nexus requirement

One of the most salient and original features of American asylum law is the issue of "nexus" between the persecution and persecution ground. This issue, which appears merely academic at first glance, has, in fact, considerable influence on the development of case law in this field, as the American courts have attached great importance to the question of the relationship between these two. In this section I will first show the general application of the issue of the "nexus requirement" and than its practical effects in the cases of persecution because of political opinion and then because of membership in a particular social group. Finally, I will point to some potential problems associated with this doctrinal concept.

The American incorporation of the 1951 Convention slightly modified the definition of refugee status. While the 1951 speaks of persecution "for reasons of" one of the persecution grounds, the 1980 Refugee Act uses the expression "on account of". The change, though at first minimal, has more importance than semiotics of law. Goodwin–Gill writing in his "*The Refugee in International law*" has warned that such an change is far from "innocent", as it might create "additional evidentiary burdens for the claimant" and more importantly, "perhaps unwittingly, it may import a *controlling* intent on the part of the persecutor, as an element in the definition."[253] The quotations given above refer in the footnotes to American case law, as will be shown in this section, for a good reason. While in most books dealing with the refugee definition, the "nexus requirement" is dealt succinctly and briefly,[254] the American one is much more extensive.[255] In order to follow the American development of doctrine it, would be helpful to describe the understanding of that term, as put forward by the UNHCR and other sources.

The UNHCR requires that the persecution or fear of it be related to the persecution ground, so that the grounds result in the persecution.[256] The Canadian case law has developed a test of "but for". Hathaway describes it, as asking the question of whether the claimant be in risk "*but for her civil or political status*" and if there is "*some element of differential intent or*

[253] G. Goodwin–Gill, *The Refugee in International Law*…, p. 51 (emphasis in original).
[254] T.P. Spijkerboer & B. P. Vermeulen, *Vlucthelingenrecht*, Nijmegen: Ars Aequi Libri 2005, p. 52-55 (hereinafter "Spijkerboer & Vermeulen 2005"); J.C. Hathaway, *The Law of Refugee*…, p. 140.
[255] D. Anker, *The Law of Asylum*…, p. 268-290.
[256] See the UNHCR brief to the American Supreme Court in the case of *INS v. Elias-Zacarias*.

impact based on civil or political status…."[257] Grahl-Madsen in his work noted that "persecution acts" are "only pertinent if they are carried out "because of" one of the grounds"[258] Let us now look at the appropriate US case law development.

In 1985, the BIA decided the case of *Re Acosta*.[259] The applicant was a native of El Salvador who together with others established a taxi cooperative and was later involved in its management. The problems began when his cooperative refused to participate in an anti-government strikes, started by the guerillas. The members of the cooperative started receiving threats that unless they participated they would be killed. In 1979, the taxis were seized, burned, and five drivers were assaulted or killed after previously receiving death threats. When the applicant received the similar threat "we are going to execute you as a traitor", he was beaten up in his taxi. He fled El Salvador fearing for his life. During his deportation proceedings he applied for asylum and withholding of deportation.[260] The IJ rejected his request and Acosta appealed to the BIA. The BIA dealt in this case in a number of matters, one of which was the nexus one. Describing in general terms what an applicant for asylum has to prove in order to succeed, it touched on the nexus requirement saying, that he:

> "must demonstrate that (1) he possesses characteristics that the government or the guerillas seek to overcome by means of punishment of some sort; (2) the government or the guerrillas are aware or could easily become aware that he possesses these characteristics; (3) the government or the guerillas have the capability of punishing him; and (4) the government and the guerillas have the inclination to punish him."[261]

For the purpose of the nexus the points (1) and (4) seem most important. The BIA established in this part that first of all there is some trait of the applicant for which the persecutor will punish him. The "for which" is so important that, as we have seen earlier in the section regarding persecution, if that element is missing, there is no persecution according to the BIA. In point (4) though that refers equally to the "well foundedness of the claim", is again a pointer that because of that trait the applicant will be punished. How this concept operates in practice can be seen from the BIA decision on the merits in this case. The BIA found that it was general violence that the guerillas were trying to stir, and what has happened to the applicant, was not on account of any of the persecution grounds. Though Acosta tried to claim that he was persecuted and threatened with death on account of a political opinion, the BIA rejected that, saying that "*conduct undertaken to further the goals of one faction in a political controversy does not necessarily constitute persecution "on account of political opinion" so as to qualify an alien as a "refugee" within the meaning of the Act.*"[262] What happened to Acosta, happened not because he held a particular political opinion, but rather because things like that just happen in his country, the BIA rejected his appeal. Thus the Board was

[257] J.C. Hathaway, *The Law of Refugee*…, p. 140. J.C. Hathaway & M. Foster, *The casual connection ("Nexus") to a convention ground*, IJRL 2003, p. 461-476.
[258] A. Grahl–Madsen, *The Status of Refugees*…, p. 192.
[259] *Re Acosta* 19 I. & N. Dec. 211 (BIA 1985) reversed on other grounds by *Re Mogharrabi, I. & N.* Dec. 439 (BIA 1987).
[260] Ibid., 216-17.
[261] Ibid., 231.
[262] Ibid., 234.

ready to admit to persecution but not on any of the persecution grounds, as required in the US law.

In June 1985, the Ninth Circuit heard the case of *Bolanos – Hernandez v. INS*.[263] The applicant was a native of El Salvador, who had been earlier a member of a right-wing party in that country. He also served in the army and served in a voluntary civilian squad that guards against guerilla infiltration. Because of his skills, the guerillas contacted him and gave him a choice of either joining them or being killed. Earlier, five friends of Bolanos, who refused to join them, were killed. Without waiting for them to carry out their threat, Bolanos fled to the United States where he applied for asylum and withholding of deportation.[264] Both the IJ and the BIA denied his claims, saying that what has happened to Bolanos was not *on account* of his political opinion. The Ninth Circuit disagreed, reversed and remanded the case back the BIA. Having looked at the background of Bolanos, the court found that when he refused to join the guerillas, he expressed a valid political opinion, which was hostile (or perceived to be hostile) to the guerillas. The court found that since Bolanos refused to join them, the guerillas will now probably view him as their political opponent, and will seek to retaliate for that refusal. Therefore the threat to the life of Bolanos was "on account of" his political opinion.[265]

An even clearer causation between the persecution and the persecution ground came also in 1985 in another decision of the Ninth Circuit in the case of *Hernandez – Ortiz v. INS*.[266] The applicant was a female citizen of El Salvador who fled to the United States because of threats and violence directed against her family. During her asylum case proceedings she was erroneously deported and, aware of its error, the Unites States government agreed to arrange for her to travel back from El Salvador for the remainder of her case proceedings. While in El Salvador, her brother and sister in law were killed by the Salvadoran security forces, while another brother in law and sister were threatened with death. The IJ and BIA dismissed her asylum application, pointing out that her fears were of someone in a country torn by a civil war, the threats and violence was directed against her family members and not her in particular, and finally that there was no evidence, that what Hernandez–Ortiz had suffered was "on account" of any of the persecution grounds, namely political opinion.[267] The court stated that:

> "A clear probability that an alien's life or freedom is threatened, without any indication of the basis of the threat, is generally insufficient to constitute "persecution" and thus to preclude the Attorney General from deporting the alien. There must also be evidence that the threat is related to one of the factors enumerated in section 243(h)."[268]

However, the Court held that the government of El Salvador had exercised its military strength for political reasons, and therefore Adela Hernendez–Ortiz had been persecuted on account of her imputed political opinion. The decision was reversed and remanded the case back to the BIA for determination.

[263] *Bolanos – Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1985).
[264] Ibid., 1280.
[265] Ibid., 1286.
[266] *Hernandez – Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985).
[267] Ibid., 512-517.
[268] Ibid., 516.

In 1987, the Ninth Circuit gave a similar judgment in the case of *Lazo–Majano v. INS*.[269] The applicant was a female citizen of El Salvador who had worked as a domestic, and then took up employment with sergeant Zuniga of the Salvadoran Armed Forces. He systematically abused her physically, emotionally, and sexually. Over the years, Zuniga threatened her that he would kill her and her husband as "*subversives*" if Lazo Majno escaped or refused him. Finally, after years of torture and rapes, she escaped to the United States where she claimed asylum based on persecution by sergeant Zuniga.[270] Both the IJ and the BIA denied Ms Lazo – Majano's claims. While the Board said that it was "*not unsympathetic with this deplorable situation*" it regarded the fate of the applicant as a purely "*personal*" situation not covered by the Refugee Convention. According to both the IJ and the BIA, her persecution lacked the nexus to any convention persecution ground.[271]

The Ninth Circuit reversed and remanded. First it stated that what happened to the applicant was undoubtedly persecution. Having established that, it asked the question: "*Was Olimpia, however, persecuted by an agent of the government because she had a political opinion, or was the relation of Olimpia and Zuniga purely personal?*" Having reviewed the circumstances of the case, the court found that what has happened to Olimpia Lazo–Majano was on account of a her (imputed) political opinion. The sergeant cynically imputed a "subversive" political opinion to Olimpia, and then, again cynically, sought to punish her for that opinion, according to the court, what has happened to her, was caused by her imputed political opinion.[272] It should be noted that Judge Pool delivered a strong dissent to the majority opinion. Commenting that "*the majority has outdone Lewis Carroll in its application of the term "political opinion" and in finding that male domination in such a personal relationship constitutes political persecution*"[273] the judge found that Olimpia's case was a classical case of domestic violence. The fact that Zuniga attributed "subversive" political opinions to her was irrelevant, as far as they were not viewed as such by the authorities. Since Lazo-Majano did not report her abuse to the police or the authorities, she was not viewed as "subversive" by anyone other than her tormentor. According to the dissent, her fate was on account of the "carnal appetites" of sergeant Zuniga, rather than her imputed political opinion, and as such she did not meet the refugee definition.[274]

Both the dissenting and the majority decision in Lazo-Majano referred to the Ninth Circuit's decision in *Zayas–Marini v. INS*[275] in 1986, so it is instructive to look at that case too. The applicant had been a citizen of Paraguay born into a prominent family, and his family has maintained close relationship with the President of Paraguay. In 1972, one of his uncles led an unsuccessful revolt against the president, following which part of the family estates and businesses were confiscated and the applicant himself left the country. For a number of years he stayed abroad and traded with different countries, using a Paraguayan passport and obtaining the necessary visas without a problem. In 1979, Marini returned to Paraguay to help his father run his business. Upon his arrival, he was arrested by the police, held for 31 days, and

[269] *Lazo – Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987) overruled in part on other grounds by *Fisher v. INS* , 79 F.3d 955 (9th Cir. 1996).
[270] Ibid., 1433-34.
[271] Ibid., 1434.
[272] Ibid., 1436.
[273] Ibid., 1437.
[274] Ibid., 1439-1440.
[275] *Zayas–Marini v. INS*, 785 F.2d 801 (9th Cir. 1986).

was only released when it was announced that he would marry the daughter of the President's Chief security advisor. During the wedding, he was approached by Pastor Coronel, Chief of Investigations in control of a paramilitary police unit, who tried to interest Marini in a smuggling scheme. After Marini refused, he was threatened by the police in the home of the father in law, and finally forced to flee Paraguay with his marriage annulled. Even after that incident, Marini kept close contacts with the government of his country. In 1980, he was offered the New York consulate position and helped obtain a loan for the Paraguayan water system in 1982. In that same year, he also learned about a big embezzlement of money for that water project. When he met the main perpetrator (and beneficiary) of the embezzlement, he confronted him about it. He was warned not to return to the country under any circumstances by his brother, who was living in Paraguay and running the family business. His ex-father in law, with whom Marini had remained on excellent terms, also warned him not to return to the country.[276] In his removal proceedings Marini applied for asylum and withholding of deportation.

The IJ accepted with reservations, and the BIA more generally, the story of Marini but found that his fear of life and liberty were not on account of his political opinion but rather because of a personal and business dispute. The BIA found that the dispute with one of the men in government stems from the fact that he took over a part of Marini's father's business and was later rejected by Marini in his smuggling scheme. The dispute with the second man comes from the fact that Marini publicly accused him of corruption. These were found by the BIA to be personal disputes. The court agreed with the BIA and denied Marini's petition for review. Stating that, in order to determine what constitutes political persecution, the court should look at both the motivation of the persecutor and the victim "*and the relationship between the two*",[277] the court found against Marini. It noted that the government never tried to persecute Marini for his involvement in the 1972 unsuccessful coup, and even enlisted his help. The disputes with the two government officials only occurred over personal disputes between them and Marini, and "*neither man threatened Marini until a personal dispute arose*."[278] Therefore, according to the court, the threat of life and freedom Marini fears is on account of personal animosity, and *not* on account of any political opinion of his, and he was therefore ineligible for both asylum and withholding of deportation.[279]

In 1989, the Ninth Circuit heard the case of *Maldonado-Cruz v. US INS*.[280] Juan Maldonado–Cruz was a citizen of El Salvador, where he had worked as an agriculture worker. In 1983, while working in the field a group of guerillas forced him and his friend to follow them into their camp. After two days of political indoctrination, his friend tried to escape but was caught and executed by the guerillas. Maldonado was then forced to accompany the guerillas on a raid for food supplies, where he stood guard over the raided products. The following night he escaped the camp, stayed at his house for only for a few hours and moved to the capital. He met some neighbors there who told him that the guerillas had been looking for him, which his mother later confirmed. He left for Guatemala and Mexico and worked at menial jobs until he reached the United States. Caught in possession of an illegal weapon,

[276] Ibid., 803-805.
[277] Ibid., 806.
[278] Ibid., 806.
[279] Ibid., 807.
[280] *Maldonado-Cruz v. US INS*, 883 F.2d. 788 (9th Cir. 1989).

he was found deportable and applied then for asylum and withholding of deportation, based on his political opposition or perceived opposition to the guerilla movement.[281] The IJ and later the BIA rejected the claim. The BIA found that guerillas were not persecuting him, but merely imposing military discipline. According to the INS, these acts were not political but were sanctions for violating their rules. Thus, he could not prove the nexus between what has happened to him and the persecution ground.[282] One of the commentators was so distressed with this line of reasoning that she claimed that by refusing to take into account the persecutory intent, the BIA was in fact condoning human rights abuse in other countries by both guerillas and governments, and titled her article unambiguously "License to Kill".[283]

When hearing the case on appeal from the BIA the Ninth Circuit posed the legal question this way:

> "If an alien is forced to join a band of guerillas, but escapes, and the alien then fears persecution by the guerillas and by the foreign government's military, is the fear of persecution on account of "political opinion"?"[284]

The court disagreed with the IJ and the BIA and reversed and remanded. The Ninth Circuit found that by deserting the guerillas, Maldonado Cruz has expressed a valid political opinion, which was hostile or perceived to be hostile by the guerillas. Therefore, the punishment meted out to him by them was not for breaking their rules, but rather on account of his political opinion, as viewed by the guerillas.

In brief, before 1992, the Ninth Circuit and the BIA had managed to place themselves at the two different ends of the spectrum regarding the nexus. The BIA insisted in its case law that, in order for the applicant to be persecuted "on account of", she must show that persecution because of the convention ground was the sole or overwhelmingly dominant intent of the persecutor. The Ninth Circuit, on the other hand, especially with Maldonado Cruz, had swayed to other direction, creating that, in the lack of evidence to the contrary, it must be assumed that political entities persecute because of political reasons, etc. It was just a matter of time before the issue would have to be resolved.

The big change came in 1992 with the Supreme Court decision in *INS v. Elias–Zacarias*.[285] Elias-Zacarias was a citizen of Guatemala, who escaped from forced conscription by the guerillas in his country. The IJ and BIA dismissed his application for asylum and withholding of deportation since, they argued, forced conscription does not constitute persecution on account of political opinion. The applicant appealed to the Ninth Circuit court which reversed and remanded the BIA, holding that:

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[281] Ibid., 789-90.
[282] The BIA decision was published in *Re Maldonado–Cruz*, 19 I. & N. Dec. 509 (BIA 1988).
[283] C. P. Blum, *License to Kill: Asylum Law and the Principle of Legitimate Government Authority to "Investigate its Enemies"*, Willamette Law Review vol. 28 (1992), p. 719-750.
[284] *Maldonado-Cruz v. US INS*, 883 F.2d. 788, 792 (9th Cir. 1989).
[285] *INS v. Elias–Zacarias*, 502 U.S.478, 112 S.Ct.812 (S.C. 1992).

> "The person resisting forced recruitment is expressing a [political] opinion hostile to the persecutor and because the persecutor's motive in carrying out the kidnapping is political".[286]

The INS then appealed to the Supreme Court which granted *certiorari*, and in turn reversed the Ninth Court and remanded the case back to for reconsideration. Writing for the majority of the court, Justice Scalia relied heavily on the link between persecution and the persecution ground. In the opinion of the SC, the phrase "*persecution on account of political opinion*" means the political opinion *of the victim*, and that the guerillas will persecute him because of *that* political opinion. The nexus and its importance was clearly shown by the fact that the court put the words "because of" in italics.[287] The dissenting opinion in that decision, written by Justice Stevens, focused more on the definition of political opinion the majority adopted rather than the nexus requirement, with which they appeared to be essentially in agreement.

The Supreme Court decision was greeted with dissatisfaction in the academic sphere, and cautious optimism by the INS. Yet in fact, it was more ambiguous than both sides were ready to admit at first. While rejecting the presumption, that persecution by political entities (state, guerillas) is always persecution "on account of" a Convention ground, it also nonetheless rejected the requirement, that the applicant must produce evidence for the state of mind of the persecutors:

> "Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors" motives. We do not require that. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial."[288]

The SC stressed the causal interplay between the motivation of the persecuted and the persecutor and, at the same time, rejected the notion that persecution must essentially mean punishment, as the BIA was advocating. In did nothing more than to move the case law back to place the Ninth Circuit was at in *Hernandez–Ortiz.*

After the *Elias-Zacarias* decision, the courts focused in the nexus requirement more on the issue of link between the intent of the persecutor and the specific ground. Just after the Supreme Court's decision, and directly because of it, and the reversal of its previous decision in the matter, the Ninth Circuit re-heard the *Canas–Segovia v. INS (II).*[289] The case involved two Jehovah's Witness brothers from El Salvador, who because of reasons of conscience refused to undergo conscription. In its first decision, the Ninth Circuit found that the lack of alternative military service was persecution on account of their religion, and their refusal will be furthermore viewed as an anti-government position, and they will be punished for their imputed political opinion. After the SC reversed and remanded,[290] the Ninth Circuit again reheard the case. Based on *Elias-Zacarias*, it found that the mere lack of provisions for conscientious objectors is insufficient proof for persecution *on account* of religion. It did

[286] Ibid., 815.
[287] Ibid., 816.
[288] Ibid., 816-187 (emphasis in original).
[289] *Canas–Segovia v. INS*, 970 F.2d. 599 (9th Cir. 1992) (*Canas II*).
[290] 112 S.Ct.1152.

however find, that their refusal to serve in the army would be viewed as political opinion that is hostile to the government, and based on this reversed and remanded the case back to the BIA for consideration.[291]

This new "mixed intent" approach to the nexus question in refugee law is visible in Ninth Circuit's decision in *Singh v. Ilchert.*[292] The applicant was a Sikh citizen of India, who petitioned for writ of habeas corpus after the BIA denied his asylum and withholding of deportation. On one occasion, Sikh separatists visited his house and urged him to join them. Singh said that "he would think it over" in order to buy time. The separatists continued coming to his house, asking for food and provisions and continuing in their efforts to conscript him. In 1991, the Indian police raided his houses, beat him with fists and wooden rods, then arrested him without a warrant and transported him to the police station. There he was beaten with a baton and a wide leather belt while suspended upside down with his legs stretched apart, as a result of which he lost consciousness several times. The police wanted to know about the separatists, but fearing the guerrillas' retribution, Singh did not disclose any information. Singh was released from the police after ten days when his family paid a bribe to the officers. A few months later while working in the fields, Singh was approached by the guerillas, and when he refused to join their cause, they beat him, blindfolded him, and took him an unknown location, where he was kept for ten days. Singh was released when his family paid a ransom, this time to the guerillas. Within a period of two weeks, the Indian police arrested him again, and beat him up and tortured him with bamboo sticks. Upon his release, he was in such a bad condition, that when the guerillas called on him again, they let him be. Subsequently, he fled first to a nearby village, then to New Delhi and finally the United States where he requested asylum and withholding of deportation.[293]

Both the IJ and the BIA dismissed his applications, claiming that Singh has not sufficiently proven that what he had suffered was on account of his political opinion or the mere fact that he was a "Sikh", thus effectively questioning the existence of the nexus requirement. Sing applied to the federal district judge for a writ of *habeas corpus* against the IJ and BIA decisions. The district judge, disagreed and reversed and remanded the case back to the BIA. Later, the Ninth Circuit agreed with the judge. Pointing to *Maldonado – Cruz* it distinguished that governmental action is not always legitimate and may in certain cases constitute persecution in the meaning of the Refugee Act. The Court also rejected the notion that because Singh had not been actually a separatist, but was merely thought to be one by the Indian police, he could not have been persecuted "on account of his political opinion". The court found that persecution may occur on account of numerous factors and the persecutor may have more than one motive for his action: "*So long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied.*"[294] The Ninth Circuit also quoted the Second's Circuit decision in *Osorio v. INS*[295] where that court held that persecution on account of the political opinion "*does not mean persecution solely on account of the victim's political opinion.*"[296]

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[291] *Canas–Segovia v. INS*, 970 F.2d. 599, 601 (9th Cir. 1992) (*Canas II*).
[292] *Singh v. Ilchert*, 63 F.3d 1501, (9th Cir.1995).
[293] Ibid., 1503-05.
[294] Ibid., 1509.
[295] *Osorio v. INS*, 18 F.3d 1017, (2nd Cir.1994).
[296] Ibid., 1028. (emphasis in original).

Subsequently, the BIA accepted the mixed intent theory, as can be clearly seen in its decision in *Re S-P-* in 1996.[297] The applicant was a Tamil from Sri Lanka, who had been forced to work for the Tamil Tigers, was caught by the Sri Lankan security forces, interrogated about his activities and accused of supporting the Tamils. The BIA accepted that the asylum applicant is not obliged to show conclusively why he was being persecuted, however he should "*produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm caused was motivated in part by an actual or imputed protected ground.*"[298]

The courts have also dealt with the issue of whether persecution on account of the persecution grounds always has to be malignant in intent. Namely, is it necessary for persecution that the persecutor acts on a malicious intent, or does the intent not really matter, if the end result is persecution? In both *Re Acosta* and *Re Mogharrabi* decisions, the BIA ruled on circumstances where the persecutor was trying indeed to punish the claimants for some real or perceived characteristic. Thus, in both cases, the BIA found that the definition of persecution thus required a "*malignant intent*" on part of the persecutor himself. However, that was not the BIA's consistent approach.

In 1996, the BIA handed down the decision in *Re Kasinga*.[299] The case involved a young female from Togo who had fled the country after the death of her father, out of fear of a forced polygamous marriage to a much older man. She also feared FGM which was widely practiced in Togo on women, and against which the government was, both, unable and unwilling to offer effective protection.[300] In the debate whether FGM qualified as persecution, the BIA, recalling the *Acosta* and *Mogharrabi* decisions, stated clearly that though in its previous case-law the BIA often stressed the need for a

> ""seeking to overcome formula", this was only because of certain circumstances of those cases, and that , "this subjective "punitive" or "malignant" intent is not required for harm to constitute persecution."[301]

Thus, at least in *Re Kasinga*, the BIA seemed to accept that an intent to harm is not required.

In 1997, the Ninth Circuit heard the case of *Pitcherskaia v. INS*.[302] The case involved a lesbian applicant from Russia. Because of her sexual orientation, she had been arrested on a number of occasions and institutionalized in a hospital. There, she received electric shock therapy and other "treatments" intended to cure of her sexual orientation. In custom with the former Soviet practice, she was diagnosed with "slow-going schizophrenia", a typical phrase used to diagnose homosexuality. After her incarceration she was ordered to attend "therapy sessions"" every six months, some of which she did. When she failed to appear, she would receive from

[297] *Re S-P-*, 21 I. & N. Dec. 486, (BIA 1996).
[298] Ibid., 486.
[299] *Re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).
[300] Ibid., 358-360.
[301] Ibid., 365.
[302] *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).
[303] Ibid., 644-45.

the local police "demands to appear."[303] Both the IJ and the BIA denied her asylum requests: the BIA arguing that, since the Russian authorities did not intend to harm her, but rather to help and cure her, she had failed to prove that she was persecuted in the meaning of the Refugee Act, as was established by the BIA in the *Acosta* and *Mogharrabi* decisions.[304]

The Ninth Circuit disagreed. Quoting the BIA decision in *Re Kasinga*, as well as its own case law in noted that it was nowhere required for the purpose of granting asylum, that the applicant must prove that persecution happened because the persecutor sought to punish its victim. According to the court the intent of the persecutor is immaterial:

> "That the persecutor inflicts suffering or harm in an attempt to elicit information, (…), for his own sadistic pleasure, (…), to "cure" his victim, or to save his soul (…) is irrelevant. Persecution by any other name remains persecution."[305]

According to the Ninth Circuit, the intent of the persecutor is relevant only as much as it establishes that his actions were triggered on account of any of the persecution grounds.[306] The intent - malignant or benevolent - behind his action is immaterial if the asylum applicant suffered harm as a result.[307] The court clearly stated that "*to the extent that Acosta and Mogharrabi require an alien to prove the persecutor harbored a subjective intent to punish, we reject their holdings.*"[308]

The requirement that the persecution comes from a malignant intent is, however, clearly endorsed by the Fifth Circuit case law. As far back as in 1986, the Fifth Circuit held in *Guevara Flores v. INS*[309] that the term "persecution" means that the alien has to show that she will by subject to harm or suffering inflicted on her because the persecutor seeks to "*punish her for possessing a belief or characteristic a persecutor sought to overcome.*"[310] That case involved a female from El Salvador who had been mistakenly identified by the FBI to be the famous guerilla commander, Commandante Norma, and the news of her apprehension with subversive literature had been leaked to the government of El Salvador, which then took interest in the applicant, even after it appeared that she was not the Commendante Norma. The Fifth Circuit found then, that Guevara Flores indeed feared potential persecution. In its reasoning the court relied explicitly on *Re Acosta*.
The reasoning behind the *Acosta* and *Guevera Flores* decisions was upheld by the Fifth Circuit in 1994 in its judgment in *Faddoul v. INS*.[311] The case involved a Palestinian who had lived in Saudi Arabia for a while, but had entered the United States and had overstayed his visa. During his deportation proceedings, he claimed that if returned to Saudi Arabia, he would be unable to obtain Saudi citizenship, travel within that country, take up certain jobs,

[304] Ibid., 647-48.
[305] Ibid., 647.
[306] This is also an example of the stress put by the courts on the nexus between the persecution and the persecution grounds. That issue is dealt with in greater detail in section 2.4.1 of this Chapter.
[307] Ibid., 648.
[308] Ibid., 648.
[309] *Guevara Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986).
[310] Ibid., 1249.
[311] *Faddoul v. INS*, 37 F.3d 185, (5th Cir. 1994).

receive education at certain level, as well as owning property or business. The IJ and the BIA dismissed his asylum claim, since it found that the limitations Saudi Arabia provided on foreign nationals, or stateless persons were insufficient to rise to the level of persecution. He appealed to the Fifth Circuit, which denied his claim. The Court found that according to its case law persecution required demonstration that the inflicted harm would be in order to punish the applicant.[312] The Court said that, since these restrictions on economic and educational activity were applied to any foreign or stateless nationals, there was no talk of any intent on the Saudi government to "punish the applicant" unless the Court would find the Saudi *ius sanguinis* in regards to citizenship, as "*persecution per se [which] we are unwilling to do so*."[313]

The difference in approach and understanding the term "persecution" between the Fifth and the Ninth Circuits was clearly acknowledged in *Pitcherskaia v INS* by the 9th Circuit when it stated: "*We similarly reject the definition of "persecution" adopted by the Fifth Circuit*."[314]

Another good example of the case law would be the 2000 decision rendered by the Ninth Circuit in the case of *Bandari v. INS*.[315] The applicant was a male citizen of Iran and belonging to the Armenian Christian Church. In high school, he had fallen in love with a Muslim girl in the neighborhood and they began to see each other. On one day, when embraced, they were stopped by the Morals police and taken into custody for breaking the law which prohibits public display of affection. At the police station, it was discovered that Banadri was a Christian and the girl a Muslim, which is strictly forbidden in the Islamic law of Iran. The police officers shouting that it was forbidden for him "a dirty Armenian" to date a "Persian girl" assaulted him physically at the station, whipped him in the cell and held him imprisoned demanding that he confess to raping the girl. During that time he was continuously beaten to the point of losing consciousness. After five days, he was taken in front of a judge, who ordered him to either to convert to Islam or face punishment for interfaith dating – being stoned to death. Bandari refused to apostatize, but the judge changed his sentence to lashing and one year of imprisonment because of his young age. Bandari's family managed to pay a bribe and had him released early, but after a few weeks, the police officers recognized him in the street and beat him up again, calling him a "rapist of a Muslim girl" and shouted "*You bastard Armenian. Leave and go and live in your Christian country*." Following that, Bandari fled to the United States.[316]
The IJ held that Bandari failed to establish persecution "on account" of a protected ground. She reasoned that what had happened to Bandari was a result of him breaking a law of general application, and was thus prosecution and not persecution. The BIA affirmed, finding that Bandari was punished for violating a law forbidding public display of emotions, and his fate had nothing to do with any persecution grounds.

The Ninth Circuit reversed and remanded the case back for consideration. It held that Bandari had suffered because of breaking the law that prohibited inter-faith dating. The court held explicitly that "*the police initially approached Bandari to enforce a neutral law*

[312] Ibid., 188.
[313] Ibid., 189.
[314] *Pitcherskaia v. INS*, 118 f.3d 641, 648 (9th Cir. 1997).
[315] *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000).
[316] Ibid., 1163-64.
[317] Ibid., 1168.

does not affect our holding that they later attacked him for interfaith dating."[317] Thus, what had happened to the applicant was persecution (beatings and torture) on account of his religion. The court here once again restated its position that:

> "We have consistently found persecution, where the petitioner was physically harmed because of his race, religion, nationality, membership in a particular social group or political opinion."[318]

In conclusion, the case law in this area shows an interesting dynamic between the INS on one side and the circuit courts on the other. The INS in its decisions pre *Elias–Zacarias* insisted that the persecution ground was to be the sole reason, or at least the dominant reason, why someone was persecuted. The courts on the other hand, especially the Ninth Circuit, were ready to accept that in cases when persecution came from political entities (state, guerillas) unless there was evidence to the contrary, there was an assumption that persecution was on account of a political opinion.

The intervention of the Supreme Court in this dispute tried to steer a middle course. While on one hand rejecting the Ninth Court's assumptions, it also rejected the INS stance implications: that the applicant must prove that persecution was based solely on a persecution ground. The Supreme Court held that the nexus between persecution and the persecution ground has to be established based on the applicant. Thus, it has to be the applicant's political opinion, religion, or race, which triggers the persecutor's action. On the other hand, the asylum applicant has to provide only some evidence to that. Thus, a mixed motive of the persecutor is allowed, provided some of it stems from a persecution ground.

Thus, the Supreme Court managed to correct both the INS and the circuit courts from falling to extremes in stressing the link between the nexus and the persecution ground. Both had to be properly identified, and then confusion either way would be avoided. The BIA also accepted the mixed motive theory in its post *Elias-Zacarias* decision of *Matter of S-P*.[319] This is an example of the close attention the American courts pay to clearly delineate the different components of the refugee definition in the decisions.

2.4.2 Political opinion

The origin of the case law is the Ninth Circuit. In 1984, it heard the case of *Zepeda–Mendez v. INS*.[320] The applicant was a citizen of El Salvador who had petitioned for review of order of deportation issued by the INS. Back in El Salvador, the applicant had a house situated in what the anti-government guerillas considered to be a strategic location. Both they and the government forces visited his house regularly – the government troops at night and the guerillas during the daytime, each without knowing about the other. The guerillas tried to recruit the

[318] Ibid., 1168. See also *Maini v. INS*, 212 F.3d 1167 (9th Cir. 2000) (finding that beatings, and death threats to a mixed religion marriage amounted to persecution on account of religion); *De Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) (finding that threats and insults to the applicant by his superiors because of his race and ethnicity amounted to persecution on account of race).

[319] *RE S-P-*, Interim Dec. 3287 (BIA 1996).

[320] *Zepeda–Mendez v. INS*, 741 F.2d 285, (9th Cir. 1984).

applicant into joining them. Zepeda-Mendez, who wished to remain neutral in the struggle, fled to the United States and requested asylum there, claiming that he would face persecution because of his political neutrality. Both the IJ and the BIA appeal denied his application for asylum based on the fact that what the applicant experienced was not any different to any other resident of El Salvador. The Ninth Circuit affirmed the findings of the IJ and the BIA. It found that the danger he faced because of his non-commitment to the any side of the conflict is similar to that faced by other Salvadorans, and that it was not "specific enough".[321]

The change came in *Bolanos–Hernandez v. INS* in 1984.[322] Bolanos was a citizen of El Salvador who had been trained in the army, and later joined an anti-guerilla self-defense militia protecting the government against infiltration by the guerillas. He later broke off all the ties he had with this militia and decided to be neutral in the struggle yet the guerillas approached him nonetheless. They thought that with his knowledge and training he would be useful in their operations, and so they offered him the choice of either joining them or risk being killed. Bolanos took their threats seriously, as five of his friends faced with a similar offer had been killed, as was his brother. His asylum claim was based on fear of persecution because of his political opinion. The IJ and BIA both dismissed his applications for withholding of deportation and asylum. They claimed that Bolanos decided to opt for neutrality, and that was not a political opinion, therefore whatever he feared was not "on account of" his political opinion. The court dryly commented that: "*we find it somewhat difficult to follow the government's arguments*."[323] The court decided that a decision to remain neutral is a political decision.

> "When a person is aware of contending political forces and affirmatively chooses not to join any faction, that choice is a political one. A rule that one must identify with one of the two dominant warring political factions in order to possess a political opinion, (…) would frustrate one of the objectives of the Refugee Act of 1980 – to provide protection to all victims of persecution regardless of ideology."[324]

The government also maintained that a decision to remain politically neutral may only be construed as a political one if it was taken because of political motives on the part of the applicant. The court again refuted that contention, opting for what the scholars would call mixed motive theory. It found that the motive underlying any political decision may prove to be wholly or in part non-political. However, it found that, for the purposes of the asylum provisions, a partially non-political decision is irrelevant for a number of reasons. When a person takes a stand, for whatever reason, it constitutes a manifestation of political opinion, and that the government should not be allowed to inquire into it deeply. Firstly, because

> "It is improper for the government to inquire into the motives underlying an individual's political decisions. (…) Second, the motives frequently will be both complex and difficult to ascertain (…) Third, and perhaps most important, it is irrelevant

[321] Ibid., 290. See also *Videz–Videz v. INS*, 783 F.2d 1463 (9th Cir. 1985) (young student fearing being drawn into conflict after seeing violence in the street, though he had no contact with either the guerillas nor the government).
[322] *Bolanos–Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1984).
[323] Ibid., 1286.
[324] Ibid., 1286. (emphasis in original).

> why the individual made his choice. It does not matter to the persecutors what the individual's motivation is. (…) they are concerned only with an act that constitutes an overt manifestation of a political opinion. Persecution because of that overt manifestation is persecution because of a political opinion."[325]

Having said that, the court found that by refusing to join the guerillas, Bolanos-Hernandez made an overt manifestation of his political opinion of neutrality, for which he was threatened with death by the guerillas. Thus, he had a well founded fear of being persecuted "on account" of his political opinion.[326] The court reversed and remanded the case back to the BIA.

Bolanos–Hernandez set the tone for a number of cases based on neutrality as a political opinion.[327] It left, however, a gap in terms of not answering the question, of whether a refusal to join in enough to constitute a manifestation of neutrality in an armed conflict. That question was partially addressed by the Ninth Circuit in *Del Valle v. INS*.[328] The applicant had been a student in his home country El Salvador, where he wished to remain neutral and amidst the ongoing civil strife he continued his studies. When one of the warring factions, the "Armed Forces" took over the University, his studies ended and he started working for the community organizing sports events for the youth. Del Valle was then approached by the Squadron of death and asked to join them, and each time he refused.[329] The IJ and BIA denied his claims but the court reversed and reminded the case back to the BIA. It held that Del Valle chose to be neutral in the ongoing civil war and that he continued his course throughout his stay in El Salvador. The court found that his behavior was an expression of a political opinion (neutrality) and because of that manifestation he would be subjected to persecution if returned to his country.[330]

However, the relatively clear link between the political neutrality of the applicant, and the subsequent persecution on account of it began to be slightly blurred by the Ninth Circuit in later case law. In 1988, the court heard the case of *Arteaga v. INS*.[331] The applicant came from El Salvador. The bulk of his claim centered around a visit the guerillas paid to his house in 1983. Some of them were former friends of the applicant and urged him to join them. When he refused, saying that he preferred to remain neutral in the conflict, they threatened that, despite his intention to remain politically neutral, they might conscript him anyway: "even if you don't come, we'll get you." Following that threat, Arteaga fled his country to the United States where he applied for asylum.[332] The IJ and the BIA denied his claims, since they argued that the guerillas tried to "voluntarily recruit him" to their movement. The court reversed and remanded. It found that Arteaga's political neutrality prevented him from joining the guerillas. In order to fill their ranks, they would have to kidnap him, and such a depravation for liberty "on account of" his neutrality would be persecution in the meaning of the Refugee Act. However, the court added in a footnote a curious passage:

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[325] Ibid., 1287.
[326] Ibid., 1286.
[327] See *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir.1985); *Turcios v. INS*, 821 F.2d 1396, 1401 (9th Cir. 1987).
[328] *Del Valle v. INS*, 776 F.2d 1407, (9th Cir. 1985).
[329] Ibid., 1413.
[330] Ibid., 1414.
[331] *Arteaga v. INS* 9836 F.2d 1227 (9th Cir. 1988).
[332] Ibid., 1228.

> "Lack of consent separates a willing traveler from a kidnap victim. It is Arteaga's political opinion that set his will against joining the guerillas, and it is the possibility that the guerillas would overbear his will that constitutes the threat of persecution. Therefore, that persecution is "on account of political opinion." It is not relevant that the guerillas may have been interested in conscripting Arteaga to fill their ranks rather than to "punish" Arteaga's neutrality. To find political persecution, all we need inquire of the guerillas" motive is whether that motive is political (…). Clearly, forced recruitment into war against the government is politically motivated."[333]

That passage while plausible and consistent in the first part, in the second part echoed the reasoning that the Supreme Court would overturn a few years later. The court seemed to have adopted a blanket assumption that since the aims of the guerrillas are political, therefore all their actions are political in nature. Any disagreement with them entails a manifestation of political opinion, and thus gives rise to persecution "on account of political opinion." However, while that might be true in some cases, it might not in others. The claim Arteaga had was quite weak: though he was threatened to be conscripted, this was not done because he was neutral. His neutrality, or any other opinion in fact, mattered little to the guerrillas: they just wanted to recruit. The line the court follows here was almost to ignore the political opinion of the applicant completely and focus solely on the assumed political aims of the guerrillas. The court seemed to be slowly disposing of a persecution ground on the part of the asylum seeker. It would have probably created the mirror reverse of the Dutch singling out –concept, this time asylum-seeker friendly. Provided we prove the aim behind the persecutor is connected to a persecution ground, the nexus is of little importance, as all action will be considered persecution on account of that persecution ground.

In the case of *Maldonado–Cruz v. US INS*[334] rendered by the Ninth Circuit in 1989, the court heard the case of a citizen of El Salvador. He had been working in the fields, when the guerillas approached him and forced him to go to a guerilla camp. He was then forced to undergo two days of political indoctrination and then to accompany them on one of their expeditions where he stood guard over the captured supplies. His friend, who was also captured with him, tried to escape but was captured and killed by the guerillas. On the third day Maldonado–Cruz escaped and fled to the United States where he applied for asylum based on his fear of persecution by the guerillas and the government (for presumed guerilla activity). The IJ and BIA dismissed his application, having taken the position that forced conscription to the guerillas was not persecution on account of Maldonado Cruz's political opinion. The court disagreed and reversed the case back to the BIA. The judges found again that neutrality could be a valid political opinion and that one could be persecuted for holding it. The court then found that Maldonado's refusal to join them was a manifestation of his neutrality for which he was persecuted by being forcibly conscripted to their ranks.[335] The court again restated the *Arteaga* decision in which, in essence, it ruled that since the guerillas are a political entity and so are their aims, hence their actions are presumed to be political.

[333] Ibid., 1232.
[334] *Maldonado–Cruz v. US INS*, 883 F.2d 788 (9th Cir. 1989).
[335] Ibid., 791.

The reception of the neutrality doctrine in other Circuit courts has been more than mixed. The Eight Circuit in *Lopez–Zeron v INS*[336] accepted in principle the fact the neutrality may be a valid political opinion, yet it could be invoked in asylum proceedings only when the applicants had established clear "political positions" and were subsequently persecuted "because of them".[337] The First Circuit in its decision *Nova–Umania v. INS*[338] also accepted the doctrine of neutrality in principle but put up certain thresholds. The applicant, who had been a citizen of El Salvador and feared persecution by both the government troops and the guerillas, had to prove that:

> "1) he either feared persecution on account of his neutrality because the guerillas "dislikes neutrals, or 2) that such a group intends to persecute him because he will not accept its political point of view, or 3) that one or more such groups intend to persecute him because each (incorrectly) thinks he holds the political views of the other side."[339]

Both these Circuits seemed to have stepped short of endorsing the neutrality concept as it was developed after *Arteaga*, and stayed with that of *Bolanos- Hernandez* stressing the need for a strong nexus between the neutrality and the fate of the applicants.

The other Circuit courts were even less willing than that. The Eleventh Circuit touched on the matter in *Perlera–Escobar v. INS* in 1990.[340] Perlera–Escobar was a native of El Salvador who belonged to a family that had a fall out with the local death squadron. After some members of his family were killed by them and their family house burned down, he joined the guerillas with whom he fought against the government for the next nine months. However, when he requested a few days" leave from the guerilla leader, which he was denied, he deserted the guerillas and fled to the United States. Here, he claimed asylum insisting that he was politically neutral, yet would face persecution if returned back to El Salvador: by the guerillas (for his desertion) and by the government (for being a guerilla). The IJ found him eligible under the neutrality theory, yet denied to exercise discretion because of the applicant's criminal record since his arrival in the US. He appealed to the BIA but it in case overturned the IJ finding of eligibility and upheld the denial of granting asylum, following which the applicant appealed to the court.[341] The court citing *Hernandez – Ortiz* referred to the fact that some attention has to be paid to the intent of the persecutor.[342] The court found that the adoption of the doctrine of neutrality "*would create a sinkhole that would swallow the rule*".[343] Nonetheless, it declined to make an explicit finding if it would allow the doctrine of neutrality, if the applicant never articulated his opinion and failed to show that the guerillas would persecute him on account of his neutrality. The court dismissed the appeal.[344]

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[336] *Lopez–Zeron v INS*, 8 F.3d 636 (8th Cir. 1993).
[337] Ibid., 638.
[338] *Novoa–Umania v. INS*, 896 F.2d 1, (1st Cir. 1990).
[339] Ibid., 3.
[340] *Perlera–Escobar v. INS*, 894 F.2d 1292, (11th Cir. 1990).
[341] Ibid., 1293-95.
[342] Ibid., 1298.
[343] Ibid., 1298.
[344] Ibid., 1298.

A similarly cautious attitude had been expressed by the Fourth Circuit in its decision of *Cruz–Lopez v. INS*.[345] Cruz–Lopez, a male native of El Salvador left his country after he found a handwritten note, presumably from the guerillas, which read: "Join the BPR [a guerrilla group] or you will regret it." Cruz–Lopez insisted that he was and is politically neutral and, before the note in question, was just a student. Both the IJ and the BIA dismissed his application for asylum, following which he appealed to the court.[346] The Court found that the applicant had not shown a well-founded fear of persecution and therefore did not address the merits of his claim, yet remarking on the Ninth Circuit's case law it noted that:

> "Case law in the Ninth Circuit suggests that a conscious and deliberate choice to remain neutral constitutes a political opinion (…) The "mere failure to join any side, absent a conscious choice" poses a more difficult question."[347]

Thus, while most courts were willing to assume neutrality as a valid political opinion if the applicant was persecuted because of that neutrality, they were on the other hand very reluctant to follow the Ninth Circuit in its *Arteaga* and its progeny case-law.

The problems with this doctrine were finally addressed in the US Supreme Court's decision of *INS v. Elias–Zacarias* in 1992.[348] The applicant had been a citizen of Guatemala who had been approached by the guerillas and asked to join them. He refused and they said that they would be back. Not wishing to join them, and fearing the retribution of the government, Elias-Zacarias fled to the United States. The Immigration Judge dismissed his claim, as she found that he had feared forced conscription by the guerillas, but that he did not fear persecution on account of any of the persecution grounds. The BIA dismissed his appeal on procedural grounds, and later denied his motion to reopen his deportation proceedings upon which he appealed to the Ninth Circuit. The court reversed both the IJ and the BIA and found that he feared persecution on account of his neutrality. Following that, the INS applied for *certiorari* to the Supreme Court which granted the request and heard the case.[349] In a majority decision of 6-3 delivered by the justice Scalia the Supreme Court reversed the Ninth Circuit's decision and upheld most of the arguments of the BIA.

The court addressed two problems of the neutrality doctrine. First of all, it looked behind the motive of the victim. Finding that the decision of Elias-Zacarias not to fight with the guerillas had not been taken for political reasons, it held that therefore it was unable to accept it to be a political opinion unless the guerillas themselves perceived it to be a political opinion.[350] Second, as to the question whether neutrality may itself be an expression of a political opinion, the court was more cautious and phrased the answer in a somewhat complicated fashion:

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[345] *Cruz–Lopez v. INS*, 802 F.2d 1518 (4th Cir. 1986).
[346] Ibid., 1519.
[347] Ibid., 1520 note 3.
[348] *INS v. Elias–Zacarias*, 502 U.S.478, 112 S.Ct. 812 (S.C. 1992).
[349] Ibid., 479-480.
[350] Ibid., 482.

> "Elias-Zacarias appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion. That seems to us not ordinarily so, since we do not agree with the dissent that only a "narrow, grudging construction of the concept of "political opinion," " *post*, at 818, would distinguish it from such quite different concepts as indifference, indecisiveness, and risk averseness. But we need not decide whether the evidence compels the conclusion that Elias-Zacarias held a political opinion. Even if it does, Elias-Zacarias still has to establish that the record also compels the conclusion that he has a "well-founded fear" that the guerrillas will persecute him *because* of that political opinion, rather than because of his refusal to fight with them. He has not done so with the degree of clarity necessary to permit reversal of a BIA finding to the contrary; indeed, he has not done so at all. (…) Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors" motives. We do not require that. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial."[351]

While not entirely dismissing the doctrine of neutrality, the Supreme Court opted for a stronger linking of it with the nexus requirement. If the applicant can prove that he had voiced his neutrality, and that because he took exactly that position he was faced with potential persecution by the persecution agents he might succeed. Since in the opinion of the majority of the Supreme Court Elias-Zacarias has failed to do so, his case had to be dismissed. Even though the decision of Elias-Zacarias was very badly received by the legal doctrine at that time, its impact proved to be less damaging than thought at that time. Indeed, one might argue that the Elias-Zacarias decision was nothing more but a forceful reiteration of the *Novoa–Umania* decision of the First Circuit cited above. This is very clear if we look closely at the case law following *Elias-Zacarias*.

Its effects on the Ninth Circuit case law, was to bring it back to the point of before the *Arteaga* decision. In the case of *Ramos–Vasquez v. INS*[352] involving a citizen of Honduras who escaped the military in order not to obey an order to summarily execute his friend and a deserter, the court quoting its earlier case law (but, interestingly, not *Elias-Zacarias*) restated that neutrality, if "articulated sufficiently", could be the basis of asylum.[353] However, a clearer restatement of the neutrality doctrine by the Ninth Circuit came in its decision given in the case of *Sangha v. INS* in 1997.[354] The applicant was a citizen of India and a Sikh whose father had been active in one of the political parties of that minority group. The supporters of another fraction came to their house, beat up the applicant's father and demanded that his sons join them. The opponents left, and the family fled the village but when they returned, sometime later, the opponents threatened the father and his sons with death following which the applicant left for the United States. The court this time taking careful note of the Elias Zacarias decision, stated that "*an applicant's refusal to fight in the context of a forced recruitment is not enough by itself to show that the persecutor acted "on account of" his political views*."[355]

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[351] Ibid., 483 (emphasis in original).
[352] *Ramos–Vasquez v. INS*, 57 F. 3d, 857, (9th Cir. 1995).
[353] Ibid., 863.
[354] *Sangha v. INS*, 103 F.3d 1482 (9th Cir. 1997).
[355] Ibid., 1490.

The court found that one way to establish a political opinion by the applicant would be:

> "to show political neutrality in an environment in which neutrality is fraught with hazard, from governmental or uncontrolled anti-governmental forces. (…) we have held that an applicant's political neutrality must be the product of his conscious, deliberate choice. Further, the applicant "must not merely avow his political neutrality, however, but must also show that this opinion was articulated sufficiently for it to be the basis of his past or anticipated persecution" *Ramos Vasquez*, 57 F.3d at 863"[356]

Having taken a look at the circumstances of the case it found that, even if the Sikh guerillas attributed political neutrality to Sangha, there was no evidence that they singled him out because of that or that they sought to recruit him because of this (presumed) neutrality. The Court dismissed his petition and affirmed the BIA's denial of asylum.[357] The doctrine of "hazardous political neutrality" was followed by subsequent case-law by the Ninth Circuit, despite some discomfort by some judges with it.[358]

The doctrine of imputed political opinion may be properly considered the offspring of the neutrality doctrine. Its origins lay in one of the first cases of neutrality as political opinion, that of *Bolanos–Hernandez v. INS*.[359] Bolanos, once a supporter of the government, an army trainee and a member of a citizens militia to protect the El Salvador government from guerilla infiltration, decided to break off his ties with them and stay neutral in his country's civil war. Shortly afterward, he was approached by the guerillas, who sought to enlist him because of his skills and training might be of special use to them. The recruitment offer was coupled with a threat that unless he complied, they would kill him. Bolanos, whose friends earlier refused and were indeed killed, fled to the Unites States where he applied for asylum.[360] The IJ and the BIA both refused his application based on their reasoning that deciding to be neutral was not a political opinion. The Ninth Circuit reversed and remanded and, while noting that neutrality may be and is a political choice, it also remarked on the position of Bolanos vis-à-vis the guerillas:

> "Because he refused to join their cause and infiltrate the government on their behalf, the guerillas are likely to consider him a political opponent, just as they would if he had spoken out publicly in opposition to their cause or tactics."[361]

Though the decision to reverse and remand the BIA and the IJ was made on other grounds, the court hinted at the fact that, in certain cases, the opinions (political or other) may be misconstrued by the persecutors to mean that the applicant is hostile to them, and thus be the cause of persecution.

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[356] Ibid., 1488.
[357] Ibid., 1491.
[358] See *Rivera - Moreno v. INS*, 213 F.3d 481,(9th Cir. 1999) with concurring opinion by Judge Hawkins in which he voices his displeasure with the style of Judge Aldisert (from Third Circuit, sitting by designation) which seems to have cast some doubt on the doctrine's compatibility with *Elias – Zacarias*.
[359] *Bolanos – Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1984).
[360] Ibid., 1280.
[361] Ibid., 1286.

A clearer articulation of this theory came in 1985 in the decision by the Ninth Circuit in the case of *Hernandez-Ortiz v. INS*.[362] The applicant was a female citizen from El Salvador who fled to the United States and applied for asylum, based on the numerous cases of threats to life, she and members of her family had received. Because the killings, threats, beatings, robbery and harassment were all coming from government officials, the applicant claimed that she was being persecuted on account of her political opinion. Adela Hernandez–Ortiz was in fact opposed to the government of her country, though she herself never took part in the conflict in her country. The court once again elaborated upon the issue of political opinions attributed to an applicant. Having had a look at the treatment meted out to Hernandez-Oritz the court asked itself how it can be explained. It reached the conclusion that if the individual or a group had not engaged in any criminal activity or any other that would warrant the government's retribution, then the court held that: "*the most reasonable presumption is that the government's actions are politically motivated*."[363] Having said that the court concluded:

"A government does not under ordinary circumstances engage in political persecution of those who share its ideology, only of those whose views or philosophies differ, **at least in the government's perception**. It is irrelevant whether a victim's political view is neutrality, as in Bolanos–Hernandez, or disapproval of the acts or opinions of the government. Moreover, **it is irrelevant whether a victim actually possesses any of these opinions as long as the government believes that he does**."[364]

This was a clear pronouncement by the court that it would allow claims based on imputed political opinions.

In 1987, the Ninth Circuit heard the case of *Lazo–Majano v. INS*.[365] Olimpia Lazo Majano was a citizen of El Salvador. After her husband left the country for political reasons, she became a domestic servant for another woman in order to support herself. After a few years she was contacted by her childhood acquaintance Sergeant Rene Zuniga, who asked her to wash his clothes for him. Olympia agreed but what followed was a nightmare: Zuniga raped her, and began to subject her to regular physical, sexual and psychological assault. In order to keep Olimpia coming to him, he threatened that if she told anyone about the assaults, he would tell them that she is a "subversive" and since he was a member of the Armed Forces they would readily listen to him. After some time, she fled El Salvador and arrived in the United States claiming asylum. Both the IJ and BIA dismissed her applications finding that what she has shown was mistreatment of an individual and not persecution. Lazo–Majano appealed to the court.[366]

Judge Noonan writing for the majority of the court found for the appellant and reversed and remanded the case back to the BIA. It held that when dealing with political opinion in refugee

[362] *Hernandez-Ortiz v. INS*, 777 F.2 509 (9th Cir. 1985).
[363] Ibid., 516.
[364] Ibid., 517 (emphasis mine).
[365] *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987), overruled on other grounds by *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc).
[366] Ibid., 1433-34.

law, "*it must mean "the political opinion" of the victim as seen by the persecutor*."[367] Having reviewed the case of Olimpia, the court found that she "*has suffered persecution because of one specific political opinion Zuniga attributed to her. She is, she has been told by Zuniga, a subversive*." The court took notice that it is not really a factual opinion she holds, but according to the court that opinion is indeed "imputed cynically" to her by Zuniga. However according to the court, that imputation is enough:

> "Even if she had no political opinion and was innocent of a single reflection on the government of her country, the cynical imputation of political opinion to her is what counts under both statutes. In deciding whether anyone has a well-founded fear of persecution or is in danger of losing life or liberty because of a political opinion, one must continue to look at the person from the perspective of the persecutor. If the persecutor thinks the person guilty of a political opinion, then the person is at risk."[368]

Thus, in *Lazo–Majano*, the court restated clearly the principle that what matters for the purpose of asylum determination in some cases is not the factual opinion on account of which the claimant is persecuted, but rather, the political opinion of the applicant, as it is viewed by the persecutor. The conclusion did not go well with all the judges of the panel, and Judge Poole filed a passionate dissenting opinion in which he wrote that the "*majority has outdone Lewis Carroll in its application of the term "political opinion" and in finding that male domination in such a personal relationship constitutes political opinion*."[369]

In the following years, the doctrine of imputed political opinion became further developed by the Ninth Circuit. In *Turcios v. INS*,[370] the court held that a student who had been politically neutral but was arrested while sitting in a park with a well known professor with left wing inclinations, subsequently detained for two months, beaten, tortured and asked to ""confess"" that he supported the guerillas, was found to have been persecuted on account of his imputed political opinion. Although the court decided the case on the base of the applicant's neutrality, it noted that he had been arrested while sitting with a well known opposition professor, and that the guards torturing him did not believe him that he did not support the guerillas. In *Desir v. Ilchert*[371] the Ninth Circuit held that the applicant was persecuted on account of his imputed political opinion. He was a citizen of Haiti who had refused to pay bribes to a paramilitary group called the Ton Ton Macoutes (a group connected to the government in a country functioning as a cleptocracy) and who, because of that refusal, was beaten up, forced from his home, and deprived of any means of earning a living. In the situation of Haiti, a refusal to pay the customary bribes to the Ton Ton Macoutes was regarded as being opposed to the government and that required retribution. The court in this decision again restated that for the purpose of the asylum legislation, Desir has to be viewed as one possessing a political opinion, "*because his persecutors, the Ton Ton Macoutes, both attributed subversive views to Desir and treated him as a subversive*."[372] In this case, the reprisal by the Ton Ton

[367] Ibid., 1435.
[368] Ibid., 1435.
[369] Ibid., 1437.
[370] *Turcios v. INS*, 821 F.2d 1396, (9th Cir. 1987).
[371] *Desir v. Ilchert*, 840 F.2d 723, (9th Cir. 1988).
[372] Ibid., 729.

Macoutes had been brought on by Desir without him taking a conscious political decision (like in Turcios) but according to the court that was of little significance once the persecutors attributed such an opinion to him.

An interesting case of the imputed political opinion is that of *Ramirez – Rivas v. INS* also rendered by the Ninth Circuit in 1990.[373] The applicant was a female citizen of El Salvador who came from a politically active (against the government) family, though she herself was neutral. After an encounter with the guerillas, she had made arrangements to leave the country. Before she did that, she visited her relatives in prison. Each time she was asked to show her identity and sign her name in the visitors" book. The lists of visitors are regularly given to death squads and the mere fact of visiting is considered an act of political hostility towards the government.[374] The Court reversed the BIA and found that since the applicant both came from a politically active family and had, moreover, visited her relatives in prison, which is viewed by the government as evidence of political hostility, there was ample evidence to suggest that she might be in the future persecuted on account of her imputed political opinions. The court here drew close attention the *Hernandez-Ortiz* case.[375]

Unlike the doctrine of neutrality, that of imputed political opinion was much better received in other Circuits. The Fifth Circuit in its decision on the facts similar to Desir found that:

> "to resist extortion is to become an enemy of the state. Moreover, it is not unreasonable to assume that when a single individual has the unfettered power to determine who is an enemy of the government, the individual's enemies are soon classified as the government's enemies. (...) Virtually any encounter with a member of the security forces is a political encounter."[376]

The First Circuit in the above-described decision of *Novoa–Umania v. INS* stated that an applicant may successfully invoke political opinion as a persecution ground if "*one group intends to persecute him because each (incorrectly) thinks he holds the political view of the other side*".[377] The Eleventh Circuit also seemed have been at least willing to recognize that theory in *Perlera–Escobar v. INS* described in detail above.[378]

The difference between the doctrine of political neutrality and imputed political opinion is most clearly visible in the effects of the United States Supreme Court ruling in *INS v. Elias–Zacarias*.[379] While dismissing Zacarias" claim in principle, it allowed that possibility for imputed political opinion persecution in one, albeit quite important, sentence:

> "Nor is there any indication (assuming, *arguendo*, it would suffice) that the guerillas erroneously believed that Elias–Zacarias" refusal was politically based."

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[373] *Ramirez – Rivas v. INS*, 899 F.2d 864, (9th Cir. 1990).
[374] Ibid., 865-66.
[375] Ibid., passim.
[376] *Haitian Refugee Center v. Civiletti*, 503 F.Supp. 442, 498-500 (S.D.Fla.1980), *aff'd as modified sub nom. Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982).
[377] *Novoa–Umania v. INS*, 896 F.2d 1, 3(1st Cir. 1990).
[378] *Perlera–Escobar v. INS*, 894 F.2d 1292, 1298 (11th Cir. 1990).
[379] *INS v. Elias – Zacarias*, 502 U.S.478, 112 S.Ct. 812 (S.C. 1992).

The impact of *Elias–Zacarias* is clearly visible in the two cases of Canas–Segovia brothers – both cases touching on the question of neutrality as a political opinion and imputed political opinion as a persecution ground. In 1990, so before the Supreme Court ruling, the Ninth Circuit heard the appeal of two brothers, natives of El Salvador from a negative decision of both the BIA and the IJ. Both brothers were Jehovah's Witnesses whose religious beliefs prevented them from participating in military service.[381] Since the country laws did not provide for alternative military service, they would both be subject to prosecution for resisting conscription and be subject to up to 15 years of imprisonment. Both the IJ and the BIA denied their applications, noting that the brothers had failed to show that they were targeted for persecution because they were Jehovah's Witnesses, and that the law on conscription in El Salvador punishes the offenders regardless of their religion, and thus is neutral. If the Canas brothers wanted to succeed, they should have provided evidence that the government intended to persecute them. They also argued that by refusing to fight for the government, a false political opinion would be attributed to them, namely that they are hostile to the government, which would result in their persecution on account of that false political opinion.[382]

The Court reversed and remanded the case back to the BIA on two grounds. It held that requiring to prove the intent of the persecutors by the applicants was contrary to the Act and its case law. In the neutrality case law it held that political entities are presumed to act based on political opinions, and that therefore constitutes persecution.[383] The court thus found that by refusing to fight and following their religious convictions, they would be persecuted by the government "on account of" their religious beliefs.[384] The court also found the imputed political opinion as the second ground on which the brothers could be granted asylum. The brothers are neutral, yet by refusing to fight they would be attributed a false political opinion, which will cause the government to retaliate against them.[385] Quite interestingly, one of the judges in a special concurring opinion stated that while he agrees with the court's findings as to imputed political opinion, he cannot join it in the conclusions regarded persecution on account of their religion.[386] The INS appealed both the *Elias-Zacarias* and the *Canas-Sergovia* cases to the Supreme Court, which following its first decision, granted certiorari, and reversed and remanded the Canas case back to the Ninth Circuit.[387]
Rehearing the decision the Ninth Circuit remarked that by adopting the "motive to persecute" the United States Supreme Court made it impossible by one of the brothers to seek asylum based on persecution on account of their religion. In a very succinct decision, the court rejected the arguments by the BIA that the applicant could have told the persecutor about his real motives:

> "Following the Board's line of reasoning, imputed political opinion could never provide a basis for relief. Any victim would simply correct his persecutor's mistake and suffer persecution for unprotected reasons."[388]

[380] Ibid., 816.
[381] *Canas–Segovia v. INS*, 902 F.2d 717 (9th Cir.1990) (*Canas I*).
[382] Ibid., 723-29.
[383] Ibid., 726-27.
[384] Ibid., 727.
[385] Ibid., 728.
[386] Ibid., 729 (concurring opinion).
[387] 502 U..S. 1086 (1992).
[388] *Canas-Segovia v. INS*, 970 F.2d 599, 602 (9th Cir. 1992) (*Canas II*).

Stating that while the Supreme Court mentioned the theory without explicitly endorsing it or rejecting it, the Court found "*Imputed political opinion is still a valid basis for relief after Elias-Zacarias*" and remanded the case back to the BIA for further consideration.[389]

In the following years, both the Circuit courts and the BIA itself accepted the doctrine of imputed political opinion as basis for relief. In 1992, the First Circuit found in a Tamil applicant from Sri Lanka, that:

> "An imputed political opinion, whether correctly or incorrectly attributed, may constitute a reason for political persecution within the meaning of the Act"

But dismissed that particular case on other grounds.[390] The Third Circuit found the same in a similar case.[391] The Seventh Circuit (in 1995) found that a citizen of Burkina Faso who had been aligned with the American Peace Corps and who had not joined the communist militia, had shown to have a well-founded fear of being persecuted on account of his imputed political opinion.[392] Finally, the BIA in its decision *Re S-P-* in 1996 found that:

> "in a mixed motive cases, an asylum applicant is not obliged to show conclusively why persecution has occurred or may occur; however, in proving past persecution, the applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was motivated in part by an actual or imputed protected ground."[393]

The Ninth Circuit again reaffirmed their adherence to that position in its decision in *Singh v. INS*[394] where it found that the Indian police had tortured the applicant on account of his imputed politician sympathies for the Sikh rebels, and the rebels had persecuted him on account of his imputed pro government sympathies.[395]

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[389] Ibid., 602.

[390] *Ravindran v. INS*, 976 F.2d 754, 760 (1st Cir. 1992).

[391] *Balasubramanrim v. INS*, 143 F.3d 157, 164-65 (3rd Cir. 1998).

[392] *Sanon v. INS*, 52 F.3d 648, (7th Cir. 1995). See also *Lwin v. INS*, 144 F.3d 505, (7th Cir. 1998) where the court found that the applicant a citizen of Burma, had a well founded fear on account of his imputed political opinion because of his son's activities in the opposition movement.

[393] *Re S-P-*, 21 I. & N. Dec. 486, (BIA 1996); See also *Re R-A-*, 22 I. & N. Dec. 906, 906 (BIA 1999) *vacated by the Attorney General 2001*.

[394] *Singh v. INS*, 63 F.3d 1501, (9th Cir. 1995).

[395] Ibid., 1508; See also *Lopez–Galarza v INS*, 99 F.3d 954, (9th Cir. 1996) and *Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998). For some articles on the issues of imputed political opinion and neutrality, see M. G. Artlip, *Neutrality as Political Opinion: A New Asylum Standard For a Post Elias–Zacarias World*, University of Chicago Law Review, vol. 61 (1994), p. 559-585; C.P. Blum, *License to Kill…*, passim; B.J. Einhorn, *Political Asylum in the Ninth Circuit and the Case of Elias – Zacarias*, San Diego Law Review vol. 29 (1992), p. 597-613; S. Porter, *Persecution Based on Political Opinion: Interpretation of the Refugee Act of 1980*, Cornell International Law Journal, vol.25 (1992), p. 231-276; M. R. von Sternberg, *Emerging Bases of "Persecution" in American Refugee Law: political Opinion and the Dilemma of Neutrality*, Suffolk Transnational Law Journal, vol. 13 (1989), p. 1-74.

2.4.3 Family and homosexuals as particular social groups

In this section I will try to show how the courts grappled with one of the components of the refugee definitions and came up with quite opposite conclusions. I will also try to show, how the same courts have tried to remedy this crack in their case law. Also, the questions surrounding the definition of the particular social group will quite possibly be the next big hot button of American asylum law in the years to come.[396]

The issue of defining a particular social group emerged quiet early: in the 1985 decision of *Re Acosta*.[397] Based on these two decisions, the BIA has applied the test to claims based on particular social groups more or less consistently ever since. The concept was used to acknowledge claims based on sexual orientation,[398] fear of female genital mutilation (FGM)[399] and in other cases.[400] The courts seemed to follow the BIA definition,[401] though some diverged on minor points.[402]

One of the most poignant questions was whether membership in a particular family may constitute membership in a particular social group. Here the federal courts split. The First,[403] Third,[404] Fourth,[405] Seventh,[406] Eighth Circuits[407] held, that it does. The Ninth Circuit however, produced two lines of case law. First in *Estrada-Posadas v. INS*,[408] and later in

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[396] T.A. Aleinikoff, *Protecting characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group*', in: (ed.) Feller, E. & Türk, V. & Nicholson, F., *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, Cambridge, Cambridge University Press 2003, p. 263-311.

[397] *Re Acotsa*, 19 I. & N. Dec. 211 (BIA 1985) *overruled on other grounds in Re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

[398] *Re Toboso-Alphonso*, 20 I. & N. Dec. 819, (BIA 1990); *Re Tenorio* NO. A72 093 558 (EOIR Immigration Court, July 26, 1993); *Pitcherskaia v. INS* 118 F. 3d 641 (9th Cir. 1997); *Hernadez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

[399] *Re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996); *Abankwah v. INS,* 185 F.3d. 18 (2nd Cir. 1999); *Mohammed v. Gonzales*, 400 F.3d 785, 796 (9th Cir. 2005), but see *Rreshpja v. Gonzlaes*, 420 F.3d 551, 555 (6th Cir. 2005) where the court disagrees with the Ninth Circuit's decision.

[400] See D. Anker, *Law of Asylum*…, p. 376-398.

[401] *Silva v. Ashcroft*, 394 F.3d 1, 5 (1st Cir.2005); *Fatin v. INS*,12 F.3d 1233, 1238- 40 (3d Cir.1993); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir.2002); *Castellano-Chacon v. INS*, 341 F.3d 533, 546-48 (6th Cir.2003); *Lwin v. INS*, 144 F.3d 505, 511-12 (7th Cir.1998); *Thomas v. Gonzales*, 409 F.3d 1177, 1184-87 (9th Cir.2005) (en banc) reversed on other grounds by *Gonzales v. Thomas*, 126 S.Ct. 1613 (U.S. Supreme Court 2006); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir.2005); *Castillo-Arias v. U.S. Atty. Gen.*, 446 F.3d 1190, (11th Cir. 2006).

[402] *Gomez v. INS,* 947 F.2d 660, 664 (2nd Cir.1991); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) *superceded by statute on other grounds recognized by Rife v. Ashcroft*, 374 F.3d 606, 614 (8th Cir.2004). For a general overview see K. Musalo & S. Knight, *Steps forward and Steps Back: Uneven Progress in the Law of Social Group and Gender-Based Claims in the United States*, IJRL, vol. 13 (2001), p. 51-70; M. Graves, *From Definition to Exploration*…, passim.

[403] *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir.1993); *Aguilar-Solis v. INS*, 168 F.3d 565, 571 (1st Cir.1999).

[404] *Fatin v. INS*, 12 F.3d 1233, 1239, 1240 (3rd Cir.1993); *Kanchaveli v. Gonzales*, 133 Fed.Appx.852, (3rd Cir. 2005) (not published); *Singh v. Gonzales*, 406 F.3d 191, 196 (3rd Cir. 2005).

[405] *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004).

[406] *Najafi v. INS*, 104 F.3d 943, 947 (7th Cir.1997); *Sharif v. INS*, 87 F.3d 932, 936 (7th Cir.1996); *Lwin v. INS*, 144 F.3d 505, 511 (7th Cir.1998).

[407] *Hamzehi v. INS*, 64 F.3d 1240, 1243 (8th Cir.1995).

[408] *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991).

Hernandez–Montiel v. INS,[409] the Ninth Circuit held that one cannot be persecuted on account of membership in a particular social group, if that group is a family.

In the first case, the Ninth Circuit heard an appeal from a female applicant from Guatemala. Upon being apprehended illegally in the United States, she sought asylum. In her application she claimed that members of her family were killed and others forced to relocate within the country because of persecution by the guerillas.[410] The IJ and the BIA denied her application finding her not to be a credible witness. The Court, in a brief decision, dismissed her claim based on membership in a particular social group. It held simply:

> "(…) she cites to no case that extends the concept of persecution of a social group to the persecution of a family, and we hold it does not. If Congress had intended to grant refugee status on account of "family membership"it would have done so."[411]

Later, the *Estrada-Posadas* case was used by the Ninth Circuit to define "particular social group" in such a way that made "family" fall outside the scope of the definition.[412]

At the same time, a different panel of the Ninth Circuit held exactly the opposite, calling the family a "prototypical example" of a particular social group.[413]

The conflicting jurisprudence led to a growing concern by the doctrine, and was finally addressed in the case of *Thomas v. Gonzales*.[414] The applicants, a white family from South Africa had fled from persecution by the black population, which was hostile to Mrs. Thomas' father-in-law, a well known racist. The IJ and then the BIA rejected their claims, finding that the Thomas family did not constitute a "particular social group". The applicants appealed to the court which handed a divided three-panel decision reversing the BIA, but then re-heard the case *en banc*. The Ninth Circuit held, that a family may constitute a particular social group in the meaning of the Refugee Act, and overruled all prior decisions of the Ninth Circuit that held to the contrary. Thus, by the dawn of the new century, the Ninth Circuit had joined other courts in holding that a family may constitute a particular social group. (NB. The Thomas decision has been overturned on other grounds by the Supreme Court.)

[409] *Hernandez – Montiel v. INS*, 225 F.3d 1084, 1092 (9th Cir. 2000).
[410] *Estrada-Posadas v. INS*, 924 F.2d 916, 918 (9th Cir. 1991).
[411] Ibid., 919.
[412] *Hernandez – Montiel v. INS*, 225 F.3d 1084, 1092 (9th Cir. 2000).
[413] *Sanchez – Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir.1999); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir.2000); *Molina-Estrada v. INS*, 293 F.3d 1089, 1095 (9th Cir.2002).
[414] *Thomas v. Gonzales*, 409 F.3d 1177, 1184-87 (9th Cir.2005) (en banc) *reversed on other grounds by Gonzales v. Thomas*, 126 S.Ct. 1613 (U.S. Supreme Court 2006).

Another group that has received a lot of scholarly attention as a particular social group was homosexual asylum seekers.[415] Until 1990, the United States immigration laws contained a clause that prohibited the entry and grant of visa to gay men and lesbians, and therefore made them liable to deportation and removal proceedings,[416] as well as penalizing homosexual activity in certain states.[417] It is therefore of some surprise that the first asylum case based on sexual orientation appeared in 1990 in the *Matter of Toboso-Alfonso*.[418]

Toboso-Alfonso came to the U.S. from Cuba as part of the Mariel boat lift of 1980. He claimed that the Cuban Government repeatedly detained, incarcerated, and tortured gays, and that he himself was forced to flee Cuba when the government presented him with the ultimatum of either emigrating or being sent to a labour camp. Given his personal history, he chose to leave. While in the United States he was convicted of a drug trafficking offence, following which he was placed in deportation proceedings. Toboso-Alfonso applied for asylum and withholding of deportation based on the fact that he had a well founded fear of being persecuted in Cuba because of his sexual orientation. The IJ found that homosexuals did have a well founded fear of being persecuted and can constitute a particular social group as was the case for Toboso-Alfonso. However, based on his criminal record, the IJ refused to exercise its discretion and grant asylum. Instead, it granted only the withholding of deportation relief. The INS appealed this finding to the BIA claiming:

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[415] See Alan G. Bennett, *The "Cure" that Harms: sexual Orientation-Based Asylum and the Changing Definition of Persecution*, Golden Gate U. L. Rev. vol. 29 (1999), p. 279-309; Kristie Bowerman, *Pitcherskaia v. I.N.S.: The Ninth Circuit Attempts to Cure the Definition of Persecution*, Law & Sexuality, vol. 7 (1997), p.101; Daniel Compton, *Asylum for Persecuted Social Groups: A Closed Door Left Slightly Adjar – Sanchez –Trujillo v. INS, 801 F.2d 1571 (9th Cir.1986)*, Wash. L. Rev., vol.62 (1987), p. 913-939; Suzanne B. Goldberg, *Give me Liberty or…*, p. 605; Ryan Goodman *The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary "Medical" Intervention*, Yale L.J., vol. 105 (1995), p. 225-289; Stuart Grider, *Sexual Orientation as Grounds For Asylum in the United States -- IN RE TENORIO, NO. A72 093 558 (EOIR IMMIGRATION COURT, JULY 26, 1993)*, Harv. Int'l L.J., vol. 35 (1994), p. 213-224; Lucy H. Halatyn, *Political Asylum And Equal Protection: Hypocrisy of United States Protection of Gay Men and Lesbians*, Suffolk Transnat'l L. Rev., vol.22 (1998), p. 133-161; Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, Harv. Hum. Rts. J., vol. 9 (1996), p. 61-103; Brian F. Henes, *The origin and Consequences of Recognizing Homosexuals as a "Particular Social Group" for refugee purposes*, Temp. Int"l & Comp. L.J., vol. 8 (1994), p. 377-401; Robert C. Leitner, *A Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, U. Miami L. Rev., vol. 58 (2004), p. 679-699; Brian J. McGoldrick, *United States Immigration Policy and Sexual Minorities: Is Asylum for Homosexuals a Possibility*, Georgetown Imm. L. J., vol. 8 (1994), p. 201-226; David K. McGraw *Toboso-Alfonso Case to be Treated as Precedent for Gays Seeking Asylum*, Geo. Immigr. L.J., vol. 8 (1994), p. 635-636; Shannon Minter, *Sodomy and Public Morality Offences Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, Cornell Int. L. J., vol. 26 (1994), p. 771-818; Christopher Nugent & Lavi Soloway, *Racing the Asylum Deadline: Keeping Gays and Lesbians from Falling in the Cracks*, 219 N.Y.L.J. 2 (1998); Jin S. Park, *Pink Asylum…*, p. 1115; Erik D. Ramanathan, *Queer Cases: a Comparative Analyisis of Global Sexual Orientation-Based Asylum Jurisprudence*, Geo. Immigr. L.J., vol. 11 (1996), p. 1-44; John A. Russ IV, *The Gap Between Asylum Ideals and Domestic Reality: Evaluating Human Rights Conditions for Gay Americans by the United States' Own Progressive Asylum Standards*, U.C. Davis J. Int'l L. & Pol'y , vol. 4 (1998), p. 29; *Symposium Shifting Grounds for Asylum: Female Genital Mutilation and Sexual Orientation*, Colum. Hum. Rts. L. Rev., vol.29 (1998), p.467-531; Ellen Vagelos, *The Social Group that Dare not Speak its name: Should Homosexuals Constitute a Particular Social Group for the Purposes of Obtaining Refugee Status? Comment on RE: INAUDI*, Fordham Int'l L.J., vol.17 (1993), p.229-276.

[416] For a good overview see S. Minter, *Sodomy and Public Morality Offences Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, Cornell Int. L. J., vol. 26 (1994), p. 771-818.

[417] These statutes were struck down by the Supreme Court as unconstitutional a decade later in *Lawrence v. Texas* 123 S.Ct. 2472 (2003).

[418] *Re Toboso-Alfonso* 20 I. & N. Dec. 819 (BIA 1990).

> "that homosexuals were not a particular social group (…) socially deviated behavior, i.e. homosexual activity, is not a basis for finding a social group within the contemplation of the Act" and that such a conclusion "would be tantamount to awarding discretionary relief to those involved in behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well."[419]

The BIA rejected the arguments of the INS based on the premises that the INS failed to show homosexuality not to be an immutable characteristic (which was one of the requirements of the BIA when assessing a "particular social group definition") and that Toboso-Alfonso was not persecuted because of his actions but rather because he was presumed homosexual.[420]

It was only in 1993 in *Re Tenorio*[421] that asylum was granted for the first time to a gay man fleeing anti-gay violence and persecution based on his sexual orientation constituting a particular social group and found that gays and lesbians share a common trait that is fundamental to their identity and that it is, for the purpose of asylum law, an immutable characteristic.[422] It is following that case that in 1994 Janet Reno as Attorney General named the *Toboso-Alfonso* decision to be a precedent in further sexual orientation related claims for the BIA.[423]

In 1997, the Ninth Circuit decided the case of *Pitcherskaia v. INS*.[424] Pitcherskaia was a Russian citizen from a family of anti-Soviet dissidents. She was repeatedly subjected to police-enforced, involuntary psychiatric treatment because of her homosexual orientation. Her girlfriend was forced into a psychiatric institution for the same reason and, while there, forced to undergo electroshock treatment along with a variety of other "therapies" intended to change her sexual orientation. When Pitcherskaia visited her detained girlfriend, the clinic registered her as a "suspected lesbian" and was told that she must receive treatment at her local clinic every six months to cure her of her lesbianism. When Pitcherskaia refused to submit to "treatment," the police found her and forcibly took her to the clinic. She was assigned to a psychiatrist who told her to love men and who said that he wanted Pitcherskaia to fix what he called her "wrong sexuality." After eight of these "treatment" sessions, and although she denied being a lesbian in order to protect herself, she was diagnosed by the clinic as having "slow growing schizophrenia," a medical term used to label lesbians and gays by Russian authorities. After 1990, she was arrested on a number of occasions and also received several "Demands for Appearance" because the militia wanted to interrogate her further regarding her sexual orientation. Finally, in 1992 she fled and entered the United States claiming asylum.[425]

The IJ dismissed her application for asylum and Pitcherskaia appealed to the BIA. The BIA, in a majority decision, upheld the findings of the IJ because the action of the authorities to

[419] Ibid., 822.
[420] For a detailed analysis see especially Brian J. McGoldrick, *United States Immigration Policy*…, p. 216-219.
[421] *Re Tenorio* NO. A72 093 558 (EOIR IMMIGRATION COURT, JULY 26, 1993) For a detailed description of this unpublished decision see S. Grider, S*exual Orientation as*…, p. 213.
[422] A. G. Bennett, *The "Cure" that Harms*…, p. 287-88.
[423] See D. K. McGraw, *Toboso-Alfonso Case to be Treated* …, p. 635.
[424] *Pitcherskaia v. INS* 118 F. 3d 641 (9th Cir. 1997).
[425] Ibid., 643-644; See also Alan G. Bennett, *The "Cure" that Harms*…, p. 295-302.

"cure her" were not malignant, but rather benevolent.[426] The Chairman of the BIA dissented and stated that Pitcherskaia had established a well founded fear of being persecuted and that the BIA was wrong to demand that she prove that the persecutors had to have an "intent to harm" her.

The Ninth Circuit reversed the decisions of the IJ and the BIA in a very detailed and long ruling. It stated that there is no requirement that the persecutor has intent to harm the victim. It is simply what he does to her that counts:

""(…) subjective "punitive" or "malignant" intent is not required for harm to constitute persecution." (…) Neither the Supreme Court nor this court has construed the Act as imposing a requirement that the alien prove that her persecutor was motivated by a desire to punish or inflict harm. (…) We have defined "persecution" as "the infliction of suffering or harm upon those who differ ... in a way regarded as offensive." (…) This definition of persecution is objective, in that it turns not on the subjective intent of the persecutor but rather on what a reasonable person would deem "offensive." That the persecutor inflicts the suffering or harm in an attempt to elicit information, (…), for his own sadistic pleasure, as in *Lopez-Galarza, supra*, to "cure" his victim, or to "save his soul" ("Among the original aims of the [Spanish] inquisition ... was the intention to save misguided believers from the agony of hellfire, the pain inflicted by the inquisitors a pale imitation of the eternal punishment awaiting those who did not repent." *Larousse Dictionary of Beliefs & Religions* 243 (1994) (Inquisition). is irrelevant. Persecution by any other name remains persecution. (…) It is the characteristic of the **victim** (membership in a group, religious or political belief, racial characteristic, etc.), not that of the **persecutor**, which is the relevant factor. (…) The fact that a persecutor believes the harm he is inflicting is "good for" his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution. (…) Human rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as "curing" or "treating" the victims.""[427]

Three years later, the Ninth Circuit re-affirmed that homosexuals could constitute a particular social group in the case of *Hernadez-Montiel v. INS*.[428] The applicant was a gay male from Mexico who claimed that as a male with a female sexual identity in Mexico he was subject to rape, sexual and physical violence which amounted to persecution. Both the IJ and BIA found his testimony credible but denied his petition, claiming that he had failed to establish that he was a member of a particular social group, and that he could avoid some of the incidents he was subjected to by simply dressing as a man and, since he refused, his misfortune was only a consequence of his action.

The Ninth Circuit rejected all these arguments, reversed the BIA decision and remanded it for reconsideration. After a lengthy overview of all the different circuit's definitions of "particular social group" it found that "Mexican gay men with a female sexual identity" might constitute a PSG in the meaning of the Refugee Act. It also went on record to say that:

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[426] Previous cases have been decided based on this rationale. In re Chau, No. A71-039-582, at 2, 6-7 (Immigr. Ct. June 14, 1993) a IJ ruled that forced medical intervention in a case of a bisexual man from Hong Kong was not serious enough to constitute persecution see E. D. Ramanathan, *Queer Cases*…, p. 23-25.

[427] *Pitcherskaia v. INS* 118 F. 3d 641, 647-648 (9th Cir. 1997).

[428] *Hernadez-Montiel v. INS* 225 F.3d 1084 (9th Cir. 2000).

> "There is absolutely no evidence in the record that Geovanni's "mistreatment arose from his conduct," if conduct refers to criminal activity. There is no evidence in the record of any past convictions. In fact, the IJ explicitly noted that, despite police harassment in Mexico, Geovanni had "never been formally charged or convicted of any offence." Perhaps, then, by "conduct," the BIA was referring to Geovanni's effeminate dress or his sexual orientation as a gay man, as a justification for the police officers" raping him. The "you asked for it" excuse for rape is offensive to this court and has been discounted by courts and commentators alike."[429]

The issues of homosexuals as a particular social group came up again in 2005. That year, the Ninth Circuit heard an appeal from a denial of asylum to the applicant from a Shia family in Lebanon, who was living in a Hezbollah controlled southern Lebanon.[430] He had been engaged in several relationships, for which he was harassed by the Hezbollah militia. One of his partners was caught by the militants, and "confessed and repented of his sexual sin", outing the applicant to the militants. His cousin, also a homosexual, had been "outed too", taken by the militia, and shot in the anus, to "punish him for his sin", and later shot to death by the same militia for being gay. The Lebanese government turns a blind eye to those acts. The DHS denied his application, and argued before the court that while homosexuals might indeed constitute a particular social group, this was not the instance in the case at hand. Karuni was persecuted because of his "status as a homosexual", but rather because he committed "homosexual acts." This according to the Attorney General, meant that Karuni could avoid future persecution by avoiding in the future committing these homosexual acts.[431]

The court was thoroughly not impressed by the arguments as put forward by the DHS. First of all, it restated that according to its case law, as well as that of other circuits, homosexuals constitute a particular social group within the meaning of the Refugee Act, quoting its decision in *Hernandez–Montiel*.[432] The court was also very critical of the arguments as put forward by the DHS, namely, that Karuni may avoid further persecution by avoiding having homosexual intercourse. It held:

> As the Supreme Court has counselled, "when sexuality finds overt expression in intimate contact with another person, the contact can be but one element in a personal bond that is more enduring. (…) By arguing that Karuni could avoid persecution by abstaining from future homosexual acts, the Attorney general is essentially that the INA [Immigration and Naturalization Act – K.B.] requires Karuni to change a fundamental aspect of his human identity, id., and forsake the intimate contact and enduring personal bond that the Due Process Clause of the Fourteenth Amendment protects from impingement in this country and that "have been accepted as an integral part of human freedom in many other countries," *Lawrence, 539 U.S. at 577; cf: United States v. Marcum, 60 M.J.198, 208 (2004)* (recognizing that United States military "service members clearly retain a liberty interest to engage in certain intimate sexual conduct").[433]

[429] Ibid., 1098.
[430] *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005).
[431] Ibid., 1172.
[432] Ibid., 1171-1172.
[433] Ibid., 1173.

The decision of the administration was subsequently reversed and remanded back to the BIA for further consideration.[434]

In 2004, the BIA issued a decision, which was declared a precedent by the Attorney General two years later, dealing with the issue of defining a particular social group.[435] The applicant was a Columbian national who was a non criminal informant of the army against the Cali drug cartel. After his role as an informant became known to the cartel, he was threatened with a gun, assaulted, and had to close down his business. He went into hiding, and eventually fled to the United States, where he applied for asylum based, among other reasons, on his membership in a particular social group of non-criminal informants against the Cali Cartel. His application was dismissed by the IJ, and BIA following which he appealed to the Eleventh Circuit. The court affirmed in part the BIA decision, but finding the BIA had not addressed specifically the question of membership of a particular social group, reversed and remanded the case back to the BIA for reconsideration.[436] On remand, the BIA reviewed its case law from Acosta, through *Toboso-Alphonso*, to *Kasinga*. It also reviewed the case-law of the circuits, to finally hold that:

> "1) The members of a particular social group must share a common, immutable characteristic, which may be an innate one, such as sex, color, or kinship ties, or a shared past experience, such as former military leadership or land ownership, but it must be one that members of the group either cannot change, or should not be required to change, because it is fundamental to their individual identities or consciences. Matter of Acosta, 19 I&N Dec. 211(BIA 1985), followed.
> (2) The social visibility of the members of a claimed social group is an important consideration in identifying the existence of a "particular social group" for the purpose of determining whether a person qualifies as a refugee."[437]

In this particular case, the BIA held that the group, as put forward by the applicant, does not constitute a particular social group in the meaning of the convention, and dismissed his appeal.

The case of law in this area is very interesting indeed. First of all, just like the Dutch courts, the Americans were willing to recognize that homosexuals may constitute a particular social group right from the first-cited case. *Toboso-Alfonso* might have been problematic based on the unclear distinction that he was persecuted not because he *was* an active gay but because he was *presumed* to be gay. Both *Re Tenorio* and *Hernandez-Montiel* addressed this potential conflict. In the first case, the applicant was granted refugee status *because* of his sexual orientation, and in the second one, the court rejected the argument put forward by the BIA that the applicant could have avoided his ordeal by dressing like a man ("this case is about

[434] Also *Boer–Sedano v. Gonzales*, 418 F.3d 1082, (9th Cir. 2005); *Molathwa v. Ashcroft*, 390 F.3d. 551, 554 (8th Cir. 2004); But see *Kimmumwe v. Gonzales*, 431 F.3d 319, (8th Cir. 2005) where the court has accepted the contention, that the applicant will escape future persecution in Zimbabwe, if he were to abstain from homosexual activities. The court there agreed with the DHS, that he was not persecuted as a homosexual but for illegal sexual acts. Judge Heaney issued a strong dissent. Ibid., p. 322-325.

[435] *Re C-A-*, 23 I & N Dec. 251 (BIA 2006).

[436] *Castillo-Arias v. U.S. Attorney General*, 446 F.3d 1190 (2006).

[437] *Re C-A-*, 23 I & N Dec. 951, 951 (BIA 2006).

sexual identity not fashion" it stated dryly) and had he had brought it upon himself (see quote above). Thus based on these three cases there is no doubt that sexual orientation claims can be valid grounds for asylum.

Secondly, the American courts dealt with the issue of the persecutor's intent in these cases. Drawing a parallel between the Spanish Inquisition and the practice of institutionalising homosexuals for their own good, the Ninth Circuit rejected the argument from *Pitcherskaia* that "benevolence" (we don't want you to burn in hell) or good will (we will help you get better) behind the persecutor's actions makes it immune to being recognized as persecution. In fact, *Pitcherskaia* addressed the dissent in *Toboso-Alfonso* where the Judges Vacca and Morris claimed that most of the persecution the applicant encountered was motivated by an application of a law, which are "health measures". The Ninth Circuit correctly found that reasoning untenable.[438]

Thirdly, there is still one issue that has to be positively resolved: can a law prohibiting homosexual activity amount to persecution. The issue was raised first in the dissent in *Toboso-Alfonso*, when the US had in some cases still standing valid anti-sodomy laws, and the other three decisions were all taken before *Lawrence v. Texas* in 2003. It is maybe because of that, that the Ninth Circuit refused to entertain that argument when it was raised in *Hernandez-Montiel*.

2.4.4 Persecution based on religion

Given the fact that descendants of European refugees fleeing religious persecution established the United States, it is little surprise that religious-based asylum claims should find their way into the American case law and legal scholarly work.

The main problems within this persecution ground could be grouped around certain themes: (1) Persecution based on repression of religious belief or practice; (2) Whether discrimination and deprivation of means of earning a living based on religion can amount to persecution; (3) The issue of application of neutral laws and their effect on religious minorities; and finally (4) the issue of conversions.

There are surprisingly few cases based on repression of religious belief as such. In 1989, the Sixth Circuit dealt in *Doe v. I.N.S.* with the issue of a severe restriction on the exercise of religion in a country.[439] The case involved a Chinese student who came to the United States, where he subsequently converted to Christianity and had spoken against the anti-religious policies of communist China. The court granted the petition for review from the BIA decision and ordered it to confront two things in its evaluation: what the actual *practice* of the Chinese government is regarding religious freedom in that country and secondly how this practice would affect the applicant. The BIA was ordered to address the issue of ongoing persecution of Christians in China as well as the applicant's zeal to "continue to spread the Lord's words" there.

[438] For a good analysis historical and legal of the "medicine approach" and its relationship to Asylum Law see Ryan Goodman, *The incorporation*…., passim.
[439] *Doe v. I.N.S* 867 F. 2d. 285 (6th Cir. 1989).

The decision of the court is succinct but seems to center around the issue of the level of restrictions on religious attendance may amount to persecution and the effect they might have on the applicant.

In the same year (1989), the BIA nuanced this line of reasoning in a decision of *Matter of Chen*.[440] Chen was a Chinese Christian who had entered the United States as a student, and had overstayed his visa. He was a son of a Christian minister and was persecuted with his family by the Communist "Red Guards" during the Cultural Revolution. His father was forbidden to continue his ministry, put in prison, publicly humiliated, during one occasion thrown into a fire lit with Bibles. The family home was attacked and sacked by mobs and the applicant himself had suffered on numerous occasions because of his religion and his father's vocation, including undergoing humiliating sessions of writing "self-critics", as well as being sent to re-education camps. Chen argued that he had a well-founded fear of persecution based on past experiences of his family and the fact that neither the regime nor had its restrictions on worship had changed.

The BIA granted asylum on grounds that showing sufficiently harsh persecution in the past is enough to satisfy the "well-founded fear" test. However, it did address the issue of religious freedom in the country and its importance for asylum claims:

"While **religious freedom as we understand it** may still not be enjoyed in China, we are not persuaded by the evidence presented that a reasonable person in the respondent's circumstances would have a well-founded fear of persecution on account of his religion, if returned to the China of 1989."

The implicit notion in that passage that the freedom of religion may be relative or at least relative for the purposed of obtaining asylum or not. This notion was addressed in a concurring opinion by Board Member Heilman:

> "At the present, persons who practice any religion are "normally not allowed to join the Communist Party"and so are excluded from "many of the material, career, and other benefits" which accrue to membership. (…) This in turn "exerts a strong pressure against religious commitment. " Id. The right to religious freedom only applies to persons over 18 years of age. All religious denominations are controlled by the state and all "legally-recognized"religions must be affiliated with state-organized religious bodies. (…). In order to attend church, a person must obtain a pass issued by local authorities. Participation in "unofficial, clandestine "house churches""is forbidden, and reports of arrests of persons who have done so is noted. (…) Given this information, (…) the situation in China is far from certain. (…) I for one will express serious doubts as to the extent of religious freedom in China at present, and no great confidence that the very recent past will not be repeated."[442]

[440] *Matter of Chen* 20 I. & N. Dec. 16 (BIA 1989).
[441] Ibid. 20-21 [emphasis mine].
[442] Ibid 23-24. (Heilman concurring).

The opinion of Heilman is notable as he tried to emphasize the right of the applicant to freely profess his religion without any restrictions. It also pointed to the fact that when looking at this issue, one should look at the broad picture: not only is freedom of religion declared but also it is enforced, and there are instruments in place to curb it indirectly through other measures. In this he was in line with the Doe decision of the Ninth Circuit which asked that the BIA does not concentrate merely on the technical issue of whether religious freedom is technically guaranteed, but is it in fact adhered to.

In 2004 in *Muhur v. Ashcroft*, the Seventh Circuit also dealt with the issue of freedom to profess one's religion.[443] The applicant Yordanos Muhur was born in Ethiopia in an ethnically Eritrean family. She was an Orthodox Christian but converted to the faith of Jehovah's Witness. Subsequently she married a Muslim man, who renounced Islam to marry her. After a few years, her husband got a job in Saudi Arabia, where he not only re-converted to Islam but also browbeat his wife to become a Muslim and "*behave like a Muslim wife*". The applicant fled to the United States, where her family had emigrated from Ethiopia in the meantime. She claimed that she could not return to Ethiopia, as it discriminates against Eritreans, and she also cannot return to Eritrea, as it persecutes Jehovah's Witnesses. The IJ and later the BIA found, that since she does not attend religious services regularly and thus is not "*a religious zealot, and I do not believe that she would unreasonably draw attention to herself or her purported religion*."[444]

The court reversed and remanded, saying that the degree of zeal of the applicant is not the point:

> "Christians living in the Roman Empire before Constantine made Christianity the empire's official religion faced little risk of being thrown to the lions if they practiced their religion in secret; it doesn't follow that Rome did not persecute Christians, or that a Christian who failed to conceal his faith would be acting "unreasonably." ("I do not believe that she would unreasonably draw attention to herself or her purported religion. ") One aim of persecuting a religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining population."[445]

In 1994, the Ninth Circuit dealt with the case of *Hartooni v. I.N.S* which involved a young Armenian Christian girl from Iran.[446] She claimed persecution and continued harassment on account of her being a Christian. The Armenian school she attended had been closed as "non-Islamic", Christian churches had been stoned by soldiers while people were praying inside, and celebrating Christmas, a very important holiday for her, had been prohibited. The BIA rejected her claim, based mainly on the fact that her parents were living in Iran without any difficulty, and dismissed the rest of her claim without addressing these issues. The Court reversed and remanded based on these circumstances, as well as a general State Department presumption that Armenian Christians from Iran were subject to persecution.

[443] *Muhur v. Ashcroft* 355 F.3d 958 (7th Cir. 2004).
[444] Ibid., 960.
[445] Ibid., 961.
[446] *Hartooni v. I.N.S* 21 F. 3d 336 (9th Cir. 1994).

The issue of severity of persecution was also touched upon by the Seventh Circuit in 1997 in *Bucur v. INS*.[447] The case involved three applicants from Romania, one of whom, Dragos, claimed persecution on account of his religion. As a Jehovah's Witness during the Caucescu regime he was forbidden to practice his religion and was subject to numerous threats, discrimination, and violence. When he attempted unsuccessfully to flee the country and was caught, he was put in prison where he was beaten, starved and tortured. The BIA claimed that what he had endured was not persecution but merely discrimination. The court flatly rejected that argument:

> "If in fact the communist regime forbade Jehovah's Witnesses to practice their religion, just as the Roman Empire until Constantine forbade Christians to practice their religion, that would be persecution; **it is virtually the definition of religious persecution that the votaries of a religion are forbidden to practice it**. Whether it would be enough that there was a law on the books that the regime winked at, so that in fact Jehovah's Witnesses could practice their religion more or less freely, we need not decide. The only evidence in the record is that Jehovah's Witnesses were forbidden to practice their religion during the communist period; (…) The Board's analysis of this issue was inadequate. It said that the treatment meted out to Dragos, even if it was motivated by his religion, wasn't harsh enough to count as religious persecution; and the government's brief in this court adds that Dragos can't have been persecuted since he was allowed to graduate from high school. That's like saying of a Christian in Rome in 100 A.D. that because he wasn't thrown to the lions in the Coliseum he can't have been persecuted. There are degrees of persecution. If a person is forbidden to practice his religion, the fact that he is not imprisoned, tortured, or banished, and is even allowed to attend school, does not mean that he is not a victim of religious persecution. If a government as part of an official campaign against some religious sect closed all the sect's schools (but no other private schools) and forced their pupils to attend public school, this would be, we should think, although we need not decide, a form of religious persecution. The Board was also wide of the mark when it pointed out that the motive for Dragos's attempt to flee the country is unclear and hence that it is unclear whether the jailing and arrests and beatings that followed the attempt to escape can be attributed to his religion. If you are beaten as a direct or an indirect consequence of your religion, that is some evidence of religious persecution."[448]

The court here again decided to look at the bigger picture: not only is practicing a religion proscribed by law, but also at issue is whether there are other measures in force that effectively bar the freedom to practice one's religion. The court here focused on the actions taken "on account of" someone practicing religion rather than merely on the severity of the harm. As has been seen in *Re Chen* and *Doe v. INS* the severity of harm does matter too, but in Bucur the court determined that it is not the only factor that determines the outcome. In this particular case, based on the fact that the country conditions have changed and that the applicant's persecution was "mild" the court affirmed the BIA's decision denying asylum.

[447] *Bucur v. INS* 109 F. 3d 399 (7th Cir. 1997).
[448] Ibid., 405. (emphasis mine).

In 2000, the Seventh Circuit in *Ambati v. Reno* rejected claims from a Christian from India, who claimed Hindus were persecuting him on account of his religion.[449] The applicant's family had been living without any danger in India for years; he himself worked in a government position and was promoted, and regularly attended church while in India without any problems. His evidence that as Roman Catholics most Indians disliked him and his family was found by the court to be insufficient and it affirmed the BIA's denial of asylum.

In this context, it is also instructive to look at the case law of the Fifth Circuit. In 1996, this court dealt in *Abdel-Masieh v. U.S. I.N.S* with a Coptic Christian from an influential Coptic family who claimed he had been persecuted by the Islamic government of Sudan.[450] The claimant took part in anti-government demonstrations of the Copts, as well as of a highly politicized funeral of his cousin (a Coptic rights activist and staunch critic of the Islamic regime) after which the applicant was arrested and kept in detention. The BIA found that what he had suffered was not serious enough as to constitute persecution, and his arrests were a part of wider arrests during these two occasions, and thus he was not persecuted as a Copt. The court seemed to share that opinion and reluctantly vacated the case and remanded it back to the BIA due to a technicality.[451]

A year later in *Mikhael v. I.N.S* the same Circuit dealt with a claim of a Lebanese Greek Orthodox.[452] The applicant feared persecution by the Lebanese and Syrian forces there on account of his family ties with an anti-Syrian Christian party (Falanga), which resulted in his detentions, kidnappings and torture of his brothers who were members of that party. The Court seemed unconvinced by the applicants claim, yet again vacated the negative BIA decision and remanded it for consideration on a technicality.[453]

In 2000, the BIA gave an interesting decision on persecution on account of religion in *Re S-A*.[454] The applicant was a 21-year-old girl from Morocco. She had "liberal Islamic views" (which were not elaborated upon in any detail in the decision) and which contrasted with her father's conservative views that girls should not receive any education, stay at home and leave it only when veiled etc. The applicant was beaten up by her father when she transgressed his standards; on one occasion, he burned her legs with a razor for wearing a skirt that was too short in his opinion. The applicant did not seek assistance from the authorities, as previous attempts to do so by her mother proved to be unsuccessful. Furthermore, battered women were often returned to their oppressors. The BIA decided that this case was not about domestic abuse but religion:

> "We also find that because of the religious element in this case, the domestic abuse suffered by the respondent is different from that described in Matter of R-A-, Interim Decision 3403 (BIA 1999)."[455]

[449] *Ambati v. Reno* 233 F. 3d 1054 (7th Cir. 2000).
[450] *Abdel-Masieh v. U.S.* I.N.S 73 F. 3d 579 (5th Cir. 2000).
[451] Ibid., *passim*. The BIA noted after the asylum hearing that the applicant could safely relocate to the South of Sudan, which was predominantly Christian and the court ruled that the applicant should have the opportunity to address that claim.
[452] *Mikhael v. I.N.S* 115 F.3d 299 (5th Cir. 1997).
[453] Ibid., 306. This time the BIA applied the wrong standard in assessing his "well founded fear" of being persecuted.
[454] *Re S-A* 22 I. & N. Dec. 1328 (BIA 2000).
[455] Ibid., 1336.

The issue whether religious persecution may take the form of economic discrimination and deprivation has been discussed in detail in another part of this chapter. Without repeating the case-law developments, suffice it to say here that the courts were divided on this issue. In 1983 in *Minwalla v. I.N.S*,[456] the court gave a tentative "yes" to that question, yet in the particular circumstances of that case it affirmed a denial of asylum to the applicant who was a Zoroastrian from Pakistan.

In 1986, the Court of Appeals for the Sixth Circuit in *Yousif v. I.N.S.* denied a claim by an Iraqi Chaldean Christian, who claimed that because of his religion he would be subject to persecution. The court affirmed the BIA"s denial of reopening of deportation proceedings, as the applicant provided little evidence of any discrimination or persecution of Chaldean Christians in Iraq.[457] Later, in 1991, the Ninth Circuit in *Elnager v. U.S. I.N.S* found that an Egyptian convert from Islam to Christianity only experienced a "hard time" and not persecution, but it did not go into any specifics of the case, including what a "hard time" would be and what "persecution" would be in this case.[458]

In 1994, in the Ninth Circuit gave the decision in the case of *Khassai v. INS*.[459] Tsion Kahassai (and her siblings) were Jews from Ethiopia. The father, a merchant, had been killed by the Communists for being a "rebel", while their mother and elder brother had been abducted by the government troops and were never heard from again. Tsion and her siblings were placed in the care of her uncle, who, to avoid discrimination, had converted to Christianity with his family and also raised Tsion and the others in that religion. Tsion argued that the disappearance of her family members, the deprivation of her identity and her religion all amounted to past persecution, which entitled her to asylum. The BIA disagreed, saying that what had happened to her was just discrimination and since she did not suffer any physical harm, this did not rise to the level of persecution. The court disagreed, reversed and remanded the case to the BIA. It refuted the argument that for there to be persecution, there needs to be physical harm: "*There are other equally serious forms of injury that result from persecution*"[460] and gave as an example Tsion's deprivation of ethnicity, religion and family.

In 1995, the Ninth Circuit rendered its decision in the case of *Ghaly v. I.N.S*.[461] The applicant Farid Ghaly was a Coptic Christian from Egypt, who claimed that as a Copt he was subjected to discrimination and violence from the Muslim majority of the population of his country. He also pointed out to the recent anti-Christian riots in Egypt, which the government was unable to control, as an indicator of a prevailing anti-Christian climate in Egypt. The IJ and BIA both admitted that Copts are subject to discrimination and "occasional violence" in Egypt; however, they claim that these transgressions are not serious enough to be called "persecution." Neither the IJ nor the BIA addressed in particular the issue of depravation of livelihood. The court stated:

[456] *Minwalla v. I.N.S* 706 F 2d. 831 (8th Cir. 1986).
[457] *Yousif v. I.N.S.* 794 F.2d 236 (6th Circuit 1986).
[458] *Elnager v. U.S. I.N.S* 930 F. 2d 784 (9th Cir. 1991).
[459] *Khassai v. INS* 16 F.3d 322 (9th Cir. 1994).
[460] Ibid., 329.
[461] *Ghaly v. I.N.S.* 58 F. 3d 1425 (9th Circuit 1995).

> ""Showing of discrimination is insufficient. (…) We have cautioned that "persecution is an extreme concept that does not include every sort of treatment our society regards as offensive." (…). Discrimination on the basis of race or religion, as morally reprehensible as it may be, does not ordinarily amount to "persecution" within the meaning of the Act. The Board has held that discrimination can, in extraordinary cases, be so severe and pervasive as to constitute "persecution" within the meaning of the Act. *See Matter of Salama*, 11 I & N Dec. 536 (BIA 1966) (government campaign causing departure of 37,000 Jews and urging boycott of Jewish doctors and dropping of Jewish professionals from professional societies constituted persecution). In a case such as the one before us, however, where private discrimination is neither condoned by the state nor the prevailing social norm, it clearly does not amount to "913 F.2d 1443 913 F.2d 1443 "persecution" within the meaning of the Act.""[462]

The court dismissed the violence against Copts as "occasional" and centered on the fact that the applicant faced economic hardship. It did not look at the issue of what the cause of that hardship is and whether the government offers viable protection. In *Gahly* it was ruled that, since the government did not embrace the policy officially, it was insufficient grounds to call it persecution.

The Ninth Circuit clarified some possible misunderstandings it might have created with the *Ghaly* decision in 1998 when it heard the case of *Korablina v. I.N.S.*[463] The case involved a Ukrainian Jewish woman who had been subject to continuous discrimination in her job, physical and verbal violence based on her religion. Furthermore, she could not seek assistance from the authorities as they were known to turn a blind eye to rampant anti-Semitism in the country and people who sought redress disappeared without a trace. Based on the *Ghaly*, the IJ and BIA dismissed her application for asylum arguing that what *Korablina* suffered was mere discrimination not amounting to persecution. The Court rejected that assessment and, pointing out that the authorities refused to act and tolerated anti-Semitism, as well as the fact that *Korablina* was personally physically and verbally abused, decided that what she had endured did amount to persecution and remanded the case back to the IJ and BIA for reconsideration.

The *Korablina* reasoning was upheld in a 2000 decision of *Kumar v. I.N.S.*, when the Ninth Circuit stated that physical abuse and threats to a member of the Hindu minority and demands at gun-point by the Fijian army that he change his religion may constitute persecution but denied the application on grounds of changed country conditions.[464]

American courts have also addressed the issue of persecution by means of a seemingly neutral law. In 1990, the Ninth Circuit in the decision of *Canas–Sergovia (I) v. I.N.S.*[465] The applicants were two Salvadoran young men who were Jehovah's Witnesses who refused to serve in the military because of their faith. Since El Salvador did not exempt conscientious objectors on

[462] Ibid., 1431.
[463] *Korablina v. I.N.S.* 158 F. 3d 1038 (9th Cir. 1998).
[464] *Kumar v. I.N.S* 204 F. 3d 931(9th Cir. 2000).
[465] *Canas–Sergovia (I)* v. I.N.S 902 F. 2d 717 (9th Cir. 1990).

any grounds and offered no alternatives to military service, both brothers were subject to criminal prosecution for their refusal to bear arms, which they claimed was religious persecution. The BIA rejected this argument and insisted that since the law would punish the objector for a refusal to bear arms regardless of the objector's justifications, the law is thus neutral and has no intent to persecute on account of religious views. The court disagreed:

> "The BIA gave great weight to the facially neutral characteristics of the Salvadoran conscription policy. Because nearly all conscription policies will appear facially neutral, the BIA's reasoning effectively means that no such policy can ever result in persecution within the meaning of the INA. Such a result ignores an elementary tenet of United States constitutional law, namely, that a facially neutral policy nonetheless may impermissibly infringe upon the rights of specific groups of persons. This tenet has been deemed particularly important where religion is concerned. (…) A conscientious objector is one whose actions are governed by conscience, and persecution arises whenever that conscience is overcome by force or punishment meted out for the refusal to betray it. We hold that punishment of a conscientious objector for refusal to comply with a policy of mandatory conscription may amount to persecution within the meaning of the INA, if the refusal is based upon genuine political, religious, or moral convictions, or other genuine reasons of conscience."

The court used the domestic case law of the United States to look at legislation. How does it affect the minority in question? Even a facially neutral law may in some cases adversely and disproportionately affect a minority group and is thus in fact discriminatory. Here the applicants argued that based on their religion they could not serve in the army as soldiers. Since the law does not provide for any alternative military service and treats all refusal to bear arms as desertion, it discriminates against religious minorities *de facto*, as they have no choice but to either follow the law and defy their religion or vice versa.

The Ninth Circuit expanded the link between draft-evasion and religion in the decision of *Barraza Rivera v. INS* in the same year (1990).[466] Barraza Rivera was forcibly recruited into the military in his native country of El Salvador. After two years of training he received an order to execute two alleged opposition men without any legitimate court sentence. Not wishing to engage in acts contrary to his conscience, he fled the country and claimed that if returned to El Salvador, the government would persecute him for desertion and the guerillas for his government sympathies. The IJ and the BIA found that what he feared was not persecution but prosecution for desertion.

The Ninth Circuit disagreed and reversed and remanded the case for reconsideration. Noting, that Barraza was a conscientious objector, it said that even legitimate prosecution of him would stem from his religious or other beliefs. It then went on to give an extensive overview of what in those cases can be considered a religion in American law:

"The Immigration and Nationality Act does not specifically list persecution on account of "conscientious objection" as grounds for asylum eligibility. The Supreme Court, however,

[466] *Barraza Rivera v. INS* 913 F.2d 1443 (9th Cir. 1990).

has broadly defined "religion" in traditional conscientious objector cases. What is necessary ... for a registrant's conscientious objection to all war to be "religious" ... is that this opposition to war stems from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.... If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by ... God" in traditionally religious persons. *Welsh v. United States*, 398 U.S. 333, 339-40, 90 S.Ct. 1792, 1796-97, 26 L.Ed.2d 308 (1970) (quoting *United States v. Seeger*, 380 U.S. 163, 176, 85 S.Ct. 850, 859, 13 L.Ed.2d 733 (1965)); *see also United States v. Stock*, 460 F.2d 480, 483 (Ninth Cir.1972) (noting that "*Welsh* and *Seeger* stress that conscientious objector status ... is not dependent upon membership in a particular religion or organized church"); Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 Stan.L.Rev. 233, 258-64 (1989) (discussing *Seeger, Welsh*, and "[t]he transformation of religion from a theistic conception to a sincere and meaningfully held belief system"). Viewed in light of these authorities, refusal to engage in inhuman acts of violence out of a sincere, strongly held belief that the acts are wrong may be viewed as a result of "moral, ethical, or religious belief about what is right and what is wrong," *Welsh v. United States*, 398 U.S. at 340, 90 S.Ct. at 1796, and is tantamount to religious objection to participation in the acts. The Board's rulings that persecution based on refusal to participate in inhuman acts may be grounds for political asylum and our court's broad definition of conscientious objection in the asylum context are thus consistent with the terms of the Immigration and Nationality Act."[467]

It should be remembered that *Caneas–Sergovia (I)* has been overturned by the Supreme Court based on *Elia-Zaccarias v. INS*[468] and other circuits also upheld the rejection of the notion that a law punishing draft evasion constitutes persecution on account of religion.[469] The Seventh Circuit in *Sofinet v. I.N.S* (1999) rejected a claim by a Romanian Seventh Day Adventist who claimed that the punishment for his refusal to work on Saturdays, which was against his religion, constituted persecution on account of religion and the court described them as "disciplinary actions".[470]

In 1993, the Third Circuit heard a case of *Fatin v. INS* which involved a woman from Iran who had been living in America for most of her life, and went to school there.[471] She argued that she was a feminist, believed in equality between sexes in fields of education, work home and family, and all other areas of development. Returning her to Iran would also mean that she would be forced to practice Islam. Fatin argued that for her as a feminist the compliance with dress code laws as applied and enforced by Iran would amount to persecution. The court was not persuaded. It did acknowledge that feminism might be a valid political opinion, and to a deeply devoted feminist the Islamic dress code as enforced by the Iranian authorities would amount to persecution. However, it found the applicant did not to have strong enough views about feminism and equality of men and women to hold that the enforcement of the

[467] Ibid., 1451-1452.
[468] *Elias–Zacarias v. INS* 112 S.Ct. 812 (1992).
[469] *Dobrican v. I.N.S.* 77 F.3d 164 (7th Cir. 1996).
[470] *Sofinet v. I.N.S.* 196 F. 3d 742 (7th Cir. 1999).
[471] *Fatin v. INS* 12 F 3d 1233 (3rd Cir. 1993).

veil would constitute persecution in this particular case. The court did hold that in certain cases a neutral law enforced throughout the nation might constitute persecution.

There were however instances when the courts would find legislation to be persecution on account of religion. In 2000, the Ninth Circuit heard the case of *Bandari v. I.N.S.*[472] Andaranik Bandari was an Arminian Christian male in Iran who started to date a Muslim girl. Once, while holding hands in the street they were discovered by the police and detained. When the police agents discovered the mixed religious identity of the couple, they assaulted him physically, tortured and detained him. After a few days, he was taken in front of a judge who ordered Bandari to convert to Islam or to face death penalty. Bandari refused to convert, and, as a person found guilty of interfaith dating, he was sentenced to stoning to death but due to his youth it was reduced to 75 lashes and a year in prison. His grandfather bribed the prison officials, and Bandari was released and fled to the United States.[473]

The IJ found that Bandari was not a victim of persecution but rather of prosecution:

> "She reasoned, "[t]he Court believes that any man, whether Christian or Muslim who was caught openly kissing a woman in Tehran would have been subjected to the same type of treatment as the respondent." She elaborated that "the respondent was imprisoned because he violated the law.... The Court believes that this is indeed a case of prosecution and not persecution."[474]

The BIA agreed with the IJ, but the court rejected those arguments and found Bandari eligible both for asylum and withholding of deportation:

> "Contrary to the BIA's holding, the record shows that the police's initial stop may have been mere law enforcement, but the subsequent beatings they inflicted were clearly based on Bandari's religion. Indeed, the Iranian authorities beat, tortured, detained, and sentenced him not for violating a neutral law against embracing, but rather for interfaith dating. While the police beat him, they called him a "dirty Armenian," told him that he had no right to be with a Muslim woman, accused him of raping Afsaneh, and ordered him to return to his "Christian country." That the police initially approached Bandari to enforce a neutral law does not affect our holding that they later attacked him for interfaith dating. This is because as we have explained, an asylum applicant need only present "evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or implied protected ground. (…)."[475]

In this case, the court did follow up on *Canas-Sergovia (I)*. It stated that Bandari was not persecuted because he violated the neutral law that forbade people of different sex to hold hands in public. The guilt of Bandari was to transgress a law that forbade interfaith dating. That law was passed and applied to harass and intimidate the religious minorities in that country and as such was persecution on account of religion.

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[472] *Bandari v. I.N.S.* 227 F. 3d 1160 (9th Cir. 2000).
[473] Ibid. p. 1163-1165.
[474] Ibid., 1165.
[475] Ibid.,1168-1169.

The American case-law in the area of defining religious persecution is somewhat mixed. On one hand, the courts find the prohibition of a religion or of religious practice to be persecution on account of religion (*Bucur, Kassai, Kumar*). Also, some of the more sophisticated forms of religious persecution seem to succeed in convincing the court of persecution on account of religion (*Korablina, Bucur, Bandari*). However, it is not always the case, as the *Minwalla, Ghaly* or *Abdel-Mashieh* decisions illustrate. Where there was no lack of almost explicitly religious persecution, asylum seekers might have more problems in convincing the courts of the existence of persecution. Finally, the courts were also willing to follow American constitutional law practice and find persecution by neutral domestic laws (*Canas-Sergovia I, Barraza-Rivera*) but following the Elias-Zacarias, this has proven to be quite difficult indeed.

One of the most fascinating issues in religiously based asylum claims in U.S. case law is the question of conversions and their possible ramifications for asylum seekers.

As *Doe v. I.N.S* indicates, if an asylum applicant converts while in the United States, her conversion does not seem to raise any issues in terms of "refugee sur place" situations. The issue which does perplex the American court seems to be what the importance of the sincerity of a conversion is for an asylum claim.

This question was addressed by two decisions of the Seventh Circuit court. In 1992 in *Bastanipour v. I.N.S*, it dealt with the appeal of an Iranian man who, after serving prison time for smuggling heroin, was to be deported back to Iran. He then claimed of have converted to Christianity and, as an apostate from Islam, would face the death penalty in Iran.[476] The BIA argued that firstly, only one clergyman convert had been killed for his apostasy, and secondly, that Bastanipour's conversion was doubtful, to say the least, given the fact that he was not baptized and while in prison asked for a pork free diet appropriate for Muslims. The court was not convinced by the BIA's reasoning:

> "We must consider whether Bastanipour has a well-founded fear of persecution on account of his Christianity. On this critical question the reasoning in the Board's opinion is radically deficient. After reciting various facts or pseudo-facts bearing on the question, including that Bastanipour has never been baptised or formally joined a church, that he had requested a pork-free diet in prison, and that apostasy though a capital offense under Muslim religious law is not the subject of a specific prohibition in the Iranian penal code, the opinion concludes that Bastanipour "has not established that he has in fact converted to Christianity"--and that anyway there is no hard evidence that Iran has executed anyone for converting to Christianity, except for a man who became a Christian minister; and "we note that the respondent [Bastanipour] does not claim to be a Christian religious leader." (Do we detect a sarcastic note?) All things considered, the Board concluded, Bastanipour's fears are speculative--why, Iran might not even discover that he is a Christian. (…) The opinion does not consider what would count as conversion in the eyes of an Iranian religious judge, which is the only thing that *would* count so far as the danger to Bastanipour is concerned."[477]

[476] *Bastanipour v. I.N.S* 980 F.2d 1129 (7th Cir. 1992).
[477] Ibid., 1132.

Regarding the sincerity of the conversion and its relevance for the case, the court held the following:

> "Whether Bastanipour believes the tenets of Christianity in his heart of hearts or, as hinted but not found by the Board, is acting opportunistically (though at great risk to himself) in the hope of staving off deportation would not, we imagine, matter to an Iranian religious judge. The Board might have taken the position that an insincere profession of faith is not a ground for asylum no matter what danger the profession places the applicant in. (…) At argument we asked the government's lawyer whether *he* would fear persecution by Iran if he were in Bastanipour's religious and political shoes and he conceded that he would--and even conceded that he was a reasonable man! We accept both concessions. If Bastanipour has converted to Christianity he is guilty of a capital offense under Iranian law. No doubt there are people walking around today in Iran, as in every other country, who have committed a capital offense but have managed to avoid any punishment for it at all. Bastanipour might be one of these lucky ones. But his fear that he will not be is well founded."[478]

In 1997, the Seventh Circuit dealt again with the question of religious conversion and asylum in the case of *Najafi v. I.N.S*.[479] The applicant had been raised an Muslim in Iran, but he started attending a Christian church in 1984, after his arrival in the United States. He converted to Christianity five years later and participated in worship and the church activity such as Bible study. The BIA was not convinced however about the sincerity of his conversion and denied his application for asylum. The Court reached a similar conclusion to that in *Bastanipour*:

> "Determination of a religious faith by a tribunal is fraught with complexity as true belief is not readily justiciable. (…) we must ask whether the alien is an apostate: that is, whether he has turned away from Islam. (…) The immigration judge is certainly correct that Najafi's Christianity would be evidence of apostasy. However, by this semantic distinction between convert and apostate, we mean to shift the focus of the immigration judge from Indianapolis to Iran, for it is on Najafi's future treatment in Iran that our inquiry must center. (…) Thus, extending the judge's reasoning, if Najafi can prove that he is an convert, it would follow that he has a well-founded fear of persecution. The immigration judge limited the potential of this logic by requiring that Najafi establish that the Iranian government could have become aware of his beliefs. (…). **Apart from the degree of commitment to his new faith, what we must inquire of is whether this evidence might result in a prosecution for apostasy**."[480]

In both cases, the courts reasoning is as follows: it does not matter whether the conversion is sincere or not nor what the reasons for conversion were. What matters is whether he would be persecuted by the Iranian authorities. If the answer to that question is affirmative, than he would face persecution. Though in *Najafi* the court does acknowledge that a degree of

[478] Ibid., 1133.
[479] *Najfi v. I.N.S* 104 F.3d 943 (7th Cir. 1997).
[480] Ibid., 949. (emphasis mine).

commitment to the espoused faith is required but stops short of saying how it is to be evaluated and what is its importance for the case.

The Seventh Circuit case-law in this area has been challenged by the Tenth Circuit. In *Refahiyat v. U.S. Dept. of Justice I.N.S.* (1994), it came in a similar case to a different conclusion.[481] Refahiyat entered the US as a student, conducted a fraudulent marriage to gain immigration status, after which it was discovered. He was placed in deportation proceedings during which he claimed asylum as a non-practicing Muslim and a member of a pro–Shah family. After his application was dismissed by the IJ, he then moved to reopen the application on account of his conversion to Mormonism and as a practicing Christian he would face death penalty in Iran. The Board concluded that he had not proved a prima facie case for religious persecution on account of his conversion to the Mormon Church. The court took the position that: "*Merely asserting that one is aligned with a minority religion is not sufficient to establish a prima facie case of religious persecution*" and affirmed the BIA decision in all respects. The court reasoned that a conversion is not enough to grant him asylum and the applicant must point to facts or circumstances that would lead to him being persecuted on account of his conversion.

The appraisal of the case law in this area is very problematic for a few reasons.

First of all, the case-law in this area shows a remarkable diversification between the circuits and although the Ninth Circuit has heard the most cases described in this section (10/23), there is a considerable amount of case law coming from other circuits as well, especially the Seventh (6/23), the Sixth (2/23) and the Fifth (2/23). This leads to diverging interpretations, as different circuits approach the same topic in different manner, which in turn hinders coherence.

The courts have little problem in the obvious cases were the practice is of a religion is being explicitly prohibited. In *Doe* the court said that restrictions on the freedom of religion constitute persecution, something the BIA admitted rather clumsily in *Re Chen*, and the courts affirmed again in *Bucur*. The courts here also do not require physical harm as such ("*That's like saying to the Christians in Rome 100 AD that because they were not thrown to the lions they were not persecuted*") and are satisfied by the mere statutory prohibition or discrimination. The freedom of religion is understood quite broadly, and it even seems to encompass the right to proselytize others: see *Doe v. INS*. Also, government intervention by forbidding practicing religious holidays or closing down parochial schools was found to be persecution on account of religion.

The case is more complicated when it comes to indirect persecution through seemingly neutral laws and their application. In *Canas – Sergovia (I)*, the Ninth Circuit assessed that if a neutral law compels an applicant to a conflict with his religion, and he has no option but to either face "prosecution" or violate her belief, then that law is in fact persecutory in nature, whether or not that was the sole or one motives of the legislature. To back itself up, it quoted extensively from domestic case-law where the same was found. Though it stopped short of saying so explicitly, it did in fact say in that decision that a lack of alternative military service for con-

[481] *Refahiyat v. U.S. Dept. of Justice I.N.S.* 29 F.3d 553 (10th Cir. 1994).

scientious objectors is persecution on account of religion. A more elaborate, and grounded in the SC case-law definition of religion in cases of draft evaders was found in the *Barraza-Rivera* case. The SC rejected that argument in *Elias–Zaccarias* and the applicant has to prove that the law was passed with *intent* to punish her on account of her religion.[482] That stringent requirement was met in the case of *Bandari*. There, the applicant was not "prosecuted" because of violating a neutral blanket ban on holding hands in public, but was in fact "prosecuted" because he committed the crime of inter-faith dating, which was passed to persecute on account of religion.

On the other hand, despite over 40 years of claims in the area, the courts have not answered some of the most fundamental questions: when does discrimination in religious cases rise to the level of persecution? In *Salim* the BIA assessed that a general discrimination policy against a religious minority that results in a loss of means of either employment or earning a living is in fact persecution based on religion. The main factors for consideration were: 1) the scale of discrimination; 2) the effect on the minority situation; 3) the behavior of the state; 4) the need serious harm, either physical or other. However, in *Ghaly*, the court decided that physical harm is required. The presence of violence against the minority is only relevant if the state condones it or incites it. If it is not encouraged by the state than it's not persecution. This was reversed in *Korablina* (state indifference) and also in *Khassai* (no physical harm suffered).

The case law regarding conversions is interesting, too. The Seventh Circuit seemed very disinclined to inquire deeper into the sincerity of the conversion, fearing that it might transform the court into an ecclesiastical institution. It holds to the minimalistic approach: he says he's a Christian, and we believe him. The decision in *Bastanipour* is an example, where the court passed over the issue of the credibility of the conversion and went on to decide the case. This turns the logic of that particular claim on its head: *Bastanipour* will be persecuted because of his conversion and thus should be granted asylum since he has a well founded fear of being persecuted on account of his conversion and the issue of whether the conversion really happened is irrelevant. On the other hand in *Refahiyat* the Tenth Circuit court clearly took the other extreme by saying that the conversion is merely "*association with a religious minority*" and ignored the issue of both the genuineness of such an association and the possible consequences for the applicant.

Despite the importance of the religious right in American politics and an upsurge of religious rhetoric in the public debate, the legal doctrine on the subject of religious-based persecution seems to be inversely proportional to the amount of case law. Until 2004, there were no articles specifically dealing with the issue of religious based persecution case law.[483] Authors that seemingly took on the subject, preferred to ponder more upon the religious origins of asylum or the international framework of the freedom of belief rather than address the issue of religious

[482] For the analysis see Karen Musalo, *Irreconcilable differences? Divorcing Refugee Protections from Human Rights Norms*, Mich. J. Int. Law, vol. 15 (1994), p. 1179-1240 as well as Karen Musalo, *Swords into Ploughshares: Why the United States Should Provide Refugee to Young Men who Refuse to Bear Arms for Reasons of Conscience*, San Diego L. Rev., vol. 26 (1989), p. 849-886.

[483] K. Musalo, *Claims for Protection Based on Religion or Belief*, 16 IJRL 165 (2004), p. 165-226, where the author gives an overview of American, British, Canadian, Australian, and New Zealand case law in the field.

claims cases in more depth,[484] the one exception being a universal critique of the *Elias-Zaccarias* decision and its ramifications for these claims.[485] In an article describing the case-law regarding non-physical harm in asylum cases, the two authors described numerous situations, but did not see fit to distinguish a "religious based claims" even though they quoted the *Ghaly, Minavalla* and *Salama* decisions. It was only in their conclusions that they stated:

> "If the Pilgrims were to land at Plymouth Rock today, most courts would likely affirm a decision to deny them asylum because they were merely subjected to "unpleasant official harassment" and not physically harmed."[486]

The courts seemed happier to move religion cases into other grounds and decide them there, rather than to address the issue on the spot. Truth be told, religious cases are like all refugee cases (complex and sometimes bordering on different grounds) but it seems that courts find it easier to either push the religion question out of picture, move the application to another ground or only deal with it as last resort. In *Abdel-Mashich v. INS* the court did not discuss the question of religious-based persecution but remanded it to the BIA to consider the problems of statewide persecution. *Fatin v. INS* was decided not on the issue of religion even though the applicant said that if returned to Iran she would be "*forced to practice the Muslim religion*". Sometimes, the courts do prefer to decide upon religion, rather than an even more "uncomfortable" ground: the RE S-A- was decided based on religion, since the BIA did not want to address it based on gender and domestic violence – as the reference to the Re M-A- underlines. The judges looked at and decided the case in terms of political opinion (feminism) and particular social group and did not address that issue at all. This might also explain the lack of any substantive legal analysis of religious-based asylum claims.

2.5 Conclusions

American case law has undergone considerable development in the period between the passage of the Refugee Act in 1980 and the rough closing date of this assessment, that is the year 2005. It has taken on and developed through case law such problems as standard of proof for asylum, the nexus requirement, the meaning of persecution, the broad concept of political opinion, as well as the problem of the meaning of a particular social group.[487] Although these

[484] L. Hapton, *Step Away from the Altar, Joab: The Failure of Religious Asylum Claims in the United States in Light of the primacy of Asylum within Human Rights*, Transnational Legal & Contemporary Problems, vol. 12 (2002), p. 453-486; C. B. Mouisn, *Standing with the Persecuted: Adjudicating Religious Asylum Claims after the Enactment of the International Religious Freedom Act of 1998*, Brigham Young University Law Review, (2003), p. 541-592.; T. J. Gunn, *The Complexity of Religion and the Definition of "Religion" in International Law*, Harv. Hum. Rts. J., vol. 16 (2003), p. 189-215.

[485] It should be remarked on the side that it is ironic that Justice Scalia, who otherwise is a favorite within the religious right and can hardly be construed as an enemy of religion, delivered the majority decision here.

[486] W.B. Davis & A.D. Atchute, *No Physical Harm, no Asylum: Denying a Safe Heaven for Refugees*, 5 Tex. F. on C.L. & C.R. 81, 120 (2000).

[487] *Thomas v. Gonzales*, 409 F.3d 1177, 1184-87 (9th Cir.2005) (en banc) *reversed on other grounds by Gonzales v. Thomas*, 126 S.Ct. 1613 (U.S. Supreme Court 2006). See also T.D. Parish, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and The Legal Concept of the Refugee*, Columbia Law Review, vol. 92 (1992), p. 923-953; M. Graves, *From Definition to exploration…*; Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, Cornell International Law Journal, vol. 26 (1993), p. 505-563.

developments may be of different quality, as viewed by the legal doctrine, the vast amount of theoretical and practical discernment done by the courts is impressive.

The first main characteristic that springs immediately to mind is the American preoccupation with the nexus requirement. It would be easy, and perhaps a bit too simplistic, to attribute this preoccupation simply to the language of the statute. Indeed, it is questionable that there is really any meaningful difference between the wording of "persecution on account of" to that of "persecuted for reasons of". The difference is, in my opinion, only substantial because the American courts chose it to be so. It is clear from the case law described above and sources referred to that the "nexus requirement" allows the courts to link the persecution with a clear persecution ground. This link has practical consequences. By stressing the nexus requirement between the persecution and the persecution ground, the American courts have managed to avoid being lured into the muddy waters of some legal doctrine which has mired some European legal systems.

Consider the agent of persecution theory, which had plagued the European jurisdictions for some time in the 1990s. In the American system it was virtually non-existent as a problem. The stress on the issue of the "nexus" and not on the "source" of persecution is clearly evident in three cases. In *Desir v. Ilchert*, the Ninth Circuit accepted persecution by a gang tolerated by the Haitian government mainly on the fact that the refusal to pay to them bribes, and fees, was viewed by the gang, and the authorities, as an imputed political opinion. It was the persecution "on account of" that was important for the court, and not persecution "by". Similarly, in *Lazo-Majano v. INS*, the Ninth Circuit accepted a claim by a domestic servant, who had been abused physically and sexually over the years by her employer who was a member of the military.[488] The court found her eligible for asylum based on the fact that this was being done to her because she was imputed a certain political opinion. This was done against the opinion of the (then) INS, which strongly disagreed with the Ninth Circuit and its interpretation of the "imputed political opinion theory". By contrast in *Re R-A-* involving a woman from Guatemala, the BIA rejected that claim.[489] It found that she had been beaten, mishandled, raped and sexually assaulted by her own husband (non-state agent), and that the authorities of Guatemala were unable and unwilling to offer her protection, yet the refusal was based on the fact that what had happened to her was not on account of either her political opinion or any other persecution ground: "*The record indicates that the respondent's husband harmed the respondent regardless of what she actually believed or what he thought she believed*."[490] It may be, as some authors point out, that in gender-related cases of domestic abuse, where the persecuting agent is the spouse, the insistence on the nexus by the immigration authorities is more stringent than in other cases,[491] but nonetheless, it does not weaken the

[488] *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir.1997) *overruled in part on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996).

[489] *Re R-A-, 22 I. & N. Dec. 906 (BIA 1999) vacated by the Attorney General and remanded to the BIA for recon sideration in 2001.*

[490] Ibid., 914. While that particular case was vacated, it nonetheless shows the reasoning of the Board.

[491] D. Anker, *Law of asylum…*, 264-266; Kristin E. Kandt, *United States Asylum Law: Recognizing Persecution Based on Gender Using Canada as a Comparison*, Geo. Immigr. L.J., vol. 9 (1995), p. 137-180; Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, Cornell Int'l L.J., vol. 26 (1993), p. 625-674; Pamela Goldberg, *Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence*, Cornell Int'l L.J., vol. 26 (1993), p. 565-604.

argument, even if it does not strengthen it altogether. The fact is that for American courts the issue of persecuting agent is secondary to that of the nexus between persecution and the persecution ground. If the refugee is persecuted because of a Convention ground, he is a refugee regardless of who persecutes her. *A contrario*: if he is persecuted, but not for a Convention ground, he is thus not a refugee, again, regardless of the agent of the persecution. By framing the question in this way, the American courts have managed to avoid imposing great theories about the sources of persecution, which would have proven to be very problematic in their application. It is also worth noticing that this approach was taken even though the vast number of refugees from El Salvador or Guatemala fled persecution by non-state agents (death squads, guerillas, paramilitary gangs etc.).

The same can be said about the discussion around the problem of singling out. While in some other jurisdictions, this has proved to be a considerable problem, the courts or agencies demanding that the applicant show that he would be singled out for persecution, this has not been generally the case in American case law. Here the issue is worked out again mainly in the nexus discussion. The courts first focus on whether persecution really occurred (what kind of rights have been violated), then on whether it has been on account of a convention ground. If both questions are answered in the affirmative, then the courts will generally find persecution. The difference between the singling out criteria and the American approach of "people in similarly situated circumstances" is far from subtle. While the first one requires that the applicant have an "extra element" to her claim, the second does exactly the opposite. The fact that people in similar circumstances had been targeted actually strengthens the claim. Why? If they had been targeted on account of a persecution ground, there is reason to believe that the applicant may have a well-founded fear of being persecuted. The discussion here is centered around the nexus rather than around the well-foundedness of the fear. As I tried to point out in the relevant section, most of the confusion that surrounds that Dutch singling-out case law, had been avoided by the American courts. By managing clearly to identify a persecution ground and its link to the persecution (or lack thereof), the singling out has not been an issue. In fact, the cases where the phrase "singling out" has been problematic were those where the courts or INS did not look for an persecution ground and dwelled only on the well founded fear.[492] The 1990 regulations (predating that decision) seem to rule out further drift in that direction.[493]

The importance of the nexus between the persecution and the persecution ground is clearly visible in cases regarding the imputed political opinion and the neutrality doctrine. The courts and the Supreme Court have both stressed that the applicant should have been persecuted on account of his actual or imputed opinion. Interestingly, that position makes the Supreme Court inquire into the mind of the persecutor, as was clearly established in the *Elias Zaccarias* decision. To restate the Supreme Court's reasoning, if the Convention requires that the refugee be persecuted "on account of" her political opinion, that means two things: the applicant's opinion must be made clear to the persecutor, and the persecutor must wish to take action because of that opinion. Thus, what matters is the state of mind of both the refugee applicant and the persecutor. The American courts do not require definite proof but

[492] Compare *Kotasz v. INS*, 31 F.3d 847 (9th Cir. 1994) and *Abdel – Masieh v. INS*, 73 F.3d 579 (5th Cir.1996). For analysis see section 3.2.2. of this Chapter.

[493] But see *Petrovic v. INS*, 198 F.3d 1034, 1037 (7th Cir. 2000) where membership in an ethic group which is being persecuted as a group, is not enough to find well founded fear of persecution.

"some evidence, direct or circumstantial" to the persecutors intent. Also, the *Pitcherskaia v. INS* decision of the Ninth Circuit and the BIA have both affirmed that the intent of the persecutor does not have to necessarily be to punish or harm the victim. It is the effect (harm) that matters for establishing the persecution. For the nexus requirement, all is required is that the victim possess a characteristic, or is presumed to possess one, of which the persecutor is aware, or can become aware of. Then the analysis shifts to the state of mind of the persecutor, when it seeks to analyze whether it may be assumed that the persecutor acted "on account of" (because of) that characteristic and that action had caused harm that is serious enough to be found as persecution.

This line of reasoning has been described most clearly for the issue of political opinion (neutrality) and an imputed political opinion theory. The detailed development and description of both of these doctrines by the INS and the courts has been precisely possible, because of the nexus link. The nexus link has also worked in other cases, such as religion cases, cases based on sexual orientation,[494] and particular social group claims. The attachment to the nexus is so strong, that when the Ninth Circuit began to sway away from it in its neutrality decisions post-*Arteaga*, the Supreme Court stepped in to check that development and put it back "on track."

Truth be told, the strong stress on the nexus in American case law has led to confusion on a number of occasions. As it was said earlier, the strict division between persecution and the persecution ground is not always so easy to delineate, even if commentators insist on the necessity of such an action. Thus, in many of the cases the heading in the court's decision is titled "persecution", while what is being discussed is the question of "on account of". The courts continue to repeat that behavior X is persecution on account of ground Z, sometimes blurring the distinction. Thus in *Pitcherskaia*, the court finds that a "therapy" of electroshocks and detention to lesbians is persecution if it is instigated on account of a persecution ground. Similarly physical violence may be persecution if it is unleashed because of a persecution ground. When in *Re R-A-*, the BIA found that physical abuse over a period of many years was serious enough to constitute persecution, it was nonetheless not persecution as the applicant did not prove that what had happened to her was "on account of" any of the persecution grounds. Contrariwise, when a member of a family known for anti-government feelings was taken into detention and there repeatedly raped, the court found that what had happened to her was "on account of" one of the grounds. Finally, in its extreme version, the nexus requirement as elaborated in the *Abdel-Masieh* decision of the Fifth Circuit has the potential to be equally restrictive as the singling-out criterion. That issue will be elaborated upon in Chapter 4, but it is worth signaling here.

The second feature of the American law would be the very strong domestic law influences on asylum. The question of the standard of proof for asylum and the withholding of deportation is a classic example. The courts struggled with the INS for years to clarify the issue of which standard of proof is required for which legal remedy, and what is the precise meaning of

[494] S. Goldberg, *Give me Liberty or Give me Death: political Asylum and the Global Persecution of Lesbians and Gay Men*, Cornell International Law Journal, vol. 26 (1993), p. 605-623.; J. S. Park, *Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy*, UCLA Law Review, vol. 42 (1995), p. 1115-1156.

each. The friction between the INS and the courts was a result of a fundamental difference between the courts and the INS over the meanings. In the debate, in which the Supreme Court stepped in twice to resolve the issue, recourse was made to both international law and national law arguments.

On one hand, a renowned legal scholar remarked that the *Cardoza-Fonseca* decision and arguably the whole debate around the issue of standard of proof was:

> "the recognition of the roots of the U.S. domestic statute in international law. (…) The Court's approach in Cardoza-Fonseca has legitimized the use of international sources in the interpretation of the well founded fear standard and other aspects of the refugee definition."[495]

Both in *Stevic*, but even more in *Cardoza – Fonseca*, the Court relied not only on legislative history but also on works such as the UNHCR Handbook, as well as on writings by Grahl-Madsen to back up its interpretation of the law. The Supreme Court used international law and international legal doctrine, as well as domestic law and doctrine to interpret and define an American concept of asylum law. This resulted in a uniquely American concept, whereby the standards based on the refugee definition and the prohibition of refoulment differ substantially, with the second one being more strict and harder to achieve.[496]

However, at the same time, domestic legal issues have proven to be equally, if not even more important. The *Stevic* decision was made primarily based on the doctrine of the intent of Congress. The US Congress, by keeping two different standards in the Refugee Act, intended to keep two different standards, and thus they are two distinct legal remedies. In the same way, the *Cardoza-Fonseca* decision of the Supreme Court is a reflection of the same doctrine. It was the intent of Congress to have separate standards for asylum and withholding of deportation and therefore, that distinction should be maintained by the INS. It was the intent of Congress to introduce a new and more generous standard of proof for asylum, and that intent is binding on the INS. It is interesting to see that the *Cardoza-Fonseca* decision held a substantive concurring opinion of Justice Anthony Scalia devoted to questioning one of the constitutional principles on which the decision was made, though he agreed with the end decision of the court. Thus, the asylum cases were a place where constitutional and administrative theories and doctrines were being fought, apart form just deciding the issues of the case.

The solid grounding of the American asylum law in the legal system can be seen in other instances too. When the INS found it proper, it decided not to be bound by the case-law of the decisions of other Circuits jurisdictions. It also tried in the case of *Cardoza - Fonseca* to avoid the Ninth Circuit's established case-law as well.[497] The Ninth Circuit would have none of that. Calling that avoidance "its own construction", it pointed out that such an attitude was unacceptable, under the long established American constitutional and administrative law:

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[495] D. Anker, *Law of the asylum*…, p.18.

[496] Ibid., 6.

[497] "At oral argument, counsel for the government frankly acknowledged that the Board did not apply the law of our Circuit in either of the cases before us and that it continues to refuse to apply that law." *Cardoza–Fonseca v. INS*, 767, F.2d 1448, 1454 (9th Cir.1985).

"*In this respect the Board appears to feel that it is exempt from the holding of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), and not constrained by Circuit court opinions.*"[498]

In the case of *Bolanos Hernandez*, the court refuted the argument that neutrality may not be a political opinion in the meaning of the Refugee Act, since neutrality may be embraced for different purposes. The Ninth Circuit held simply that:

> "It is simply improper for the government to inquire into the motives underlying an individual's political decisions"[499]

Why?

"Our constitution requires that an individual be able to "maintain his own beliefs without public disclosure," *see Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 100, 100 S.Ct. 2035, 2050, 64 L.Ed.2d 741 (1980), because the freedom to speak and the freedom to refrain from speaking are "complementary components of the broader concept of "individual freedom of mind." " *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 1435, 51 L.Ed.2d 752 (1977) (quoting *Board of Education v. Barnette*, 319 U.S. 624, 637, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943)). While this principle may not be directly applicable here, the reasons underlying the right of citizens to be free from similar governmental inquiries are certainly instructive."[500]

In other cases, the courts found that it was improper to inquire into the sincerity of someone's religious beliefs,[501] that torture can under "no stretch of imagination" be accepted as legitimate government action,[502] and rejected the argument that a gay man raped by the police officers had asked for it by wearing women's clothes and behaving in an effeminate manner.[503] In all these instances, the courts made the decisions citing domestic case law, which had little to do with asylum. Though in one case, it said explicitly that the domestic case law was not binding, it called it "instructive" and applied it in the asylum case before it.[504] In religious-based asylum claims, arguments were made based on the First Amendment of the US Constitution, that it is illegal for the courts to ask the sincerity of belief of the asylum applicant.[505]

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[498] Ibid., 1454. Marbury v. Madison (1803) is a landmark case in United States law and the basis for the exercise of judicial review of Federal statutes by the Supreme Court of the United States under Article Three of the United States Constitution.

[499] *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1287 (9th Cir. 1985).

[500] Ibid, 1287, later quoting further domestic constitutional case law.

[501] *Bastanipour v. INS*, 980 F.2d 1129, (7th Cir. 1992.)

[502] *Ramos – Vasquez v. INS*, 57 F.3d 857, 862 (9th Cir. 1995).

[503] *Hernandez –Montiel v. INS*, 225 F.3d 1084, 1098 (9th Cir. 2000).

[504] See also K. Muslao, *Irreconcilable Differences? …, passim* where the author makes her arguments based on American domestic law and principles.

[505] C. B. Mousin, *Standing with the Persecuted…*, p. 568-69 with extensive case-law discussed. See also T.N. Samahon, *The Religious Clauses and Political Asylum: religious Persecution Claims and the Religious Membership-Conversion Imposter Problem*, Georgetown Law Journal, vol.88 (2000), p. 2211-2238. For case law: *Bastanipour v. INS*, 980 F.2d 1129, (7th Cir. 1992).

In the first *Canas-Sergovia* case, the Ninth Circuit again pointed to the INS to the relevance of the domestic constitutional case law.[506] Whereas the INS had tried to argue that a law of general application punishing draft evaders is not persecution based on religion, the court dismissed that argument. It reminded the INS that under the U.S. case law, especially under the religious freedom clause, that is often quite the contrary.

> "The BIA gave great weight to the facially neutral characteristics of the Salvadoran conscription policy. Because nearly all conscription policies will appear facially neutral, the BIA's reasoning effectively means that no such policy can ever result in persecution within the meaning of the INA. Such a result ignores an elementary tenet of United States constitutional law, namely, that a facially neutral policy nonetheless may impermissibly infringe upon the rights of specific groups of persons. This tenet has been deemed particularly important where religion is concerned. Although the principle also is at work in equal protection jurisprudence, those cases differ crucially from freedom of religion cases because the equal protection clause requires proof of discriminatory intent. *E.g., Village of Arlington Heights v. Metropolitan Housing Dev.*, 429 U.S. 252, 265-70, 97 S.Ct. 555, 563-66, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). "

In a very important passage, interestingly, to be found in a footnote to that decision, the Ninth Circuit held:

> "While we do not suggest that United States constitutional law is binding upon the Salvadoran government, **we do believe that United States jurisprudence is relevant to analysis of new issues of United States refugee law**."

The process of "internalization" or "domesticization" of American asylum law naturally has consequences. The different burden of proof for asylum and the withholding of deportation is one of them. Another would be that the American case law developed a unique legal concept: that severe past persecution may be the basis for granting asylum even in cases if there is no fear of persecution in the future. This concept, though applied only in extreme circumstances, has been nonetheless upheld by the courts and the BIA ever since 1989, with slight modifications and a lessening of the burden of proof by the BIA in the late 1990s. It is a particular way of farming humanitarian status. It was based on the American law, where one can be granted asylum if she has a well founded fear of being persecuted or was persecuted in the past. The paradox is that this construction has no or very little actual basis in international law and yet it is derived in theory from a legal norm based on the 1951 Geneva Convention.

Finally, another tenet of American law is the importance of the courts in developing new ideas and the somewhat secondary role of legal doctrines in putting them forward. It was the courts who came up with the neutrality theory, and later developed it with more or less success till the *Elias-Zacarias* decision and in a much reduced form afterwards. The same can be true for concept of the imputed political opinion. The courts tend to build up case law on

[506] *Canas – Sergovia v. INS*, 902 F.2d 717, (9th Cir. 1990) (*Canas I*) vacated and remanded, 502 U.S. S.C. 1086 (1992).

their own and if needs arise develop the issues further. Again, it was the courts who came up with the different standards of proof required for the withholding of deportation and asylum claims, and it was the courts that managed to prevail on the INS to follow their suit.

The importance of the courts as inventors and developers of legal doctrine can be widely seen in the case of *Elias-Zacarias*. After it had been rendered, the legal doctrine reacted with unanimous dissatisfaction with that decision, calling even for legislative intervention to curb its negative effect.[509] The INS expressed cautious optimism that some of the most contested issues had been given a definite blow by the Supreme Court. Yet the reaction of the Ninth Circuit, arguably the most affected by that decision, has been restrained. The Court did back down from its post-*Arteaga* neutrality case law, yet it has insisted that the *Elias-Zacarias* decision did not affect the imputed political opinion case law, and decided the remanded *Canas–Sergovia II* case exactly on that principle. Later, it also managed to rescue from the *Elias-Zacarias* decision, a much reduced neutrality theory, calling it the "hazardous neutrality" doctrine. A judge from another district, sitting on occasion on the Ninth Circuit bench, had doubts about its sustainability and expressed great dissatisfaction with it.[510] The doctrine followed suit, and one author described it a decade after the *Elias-Zacarias* decision as "ambiguous" and as "leaving key issues unresolved."[511] It sees that a decade later, the INS member writing so enthusiastically about the *Elias-Zacarias* decision might possibly reconsider re-writing his article.[512]

This is not to say, that the courts do not draw on the legal doctrine in developing new theories. The American courts are quite willing to quote legal articles where a particular asylum issue had been discussed, especially to back up their arguments. In the case of particular social group case law, given the complexity of the case, the court were more than willing to call in experts or quote articles that try to clarify the issues. Also, in cases based on sexual orientation, the courts have resolved to quoting legal doctrine. Finally, given the huge number of cases before the courts, the legal doctrine has been very good in checking the consistency of the case law and trying to arrange it in clear and understandable way.[513]

The importance of the courts in laying down doctrine also has its disadvantages. As was shown above, it is not the case that the different courts *always* agree on the same topic. Each

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[507] Ibid., 723.

[508] Ibid., 723 (text in footnote 10).

[509] S. D. Adarkar, *Political Asylum and Political Freedom: Moving towards a Just Definition of "Persecution on Account of Political Opinion" Under the Refugee Act*, 42 UCLA Law Review 181, 197-206 (1994); D. Anker et al, *The Supreme Court's Decision in INS v. Elias Zacarias: Is there Any "There" There?*, 69 Interpreters Releases 285 (1992); C. Fielden, *Persecution on Account of Political Opinion: "Refugee" Status after INS v. Elias – Zacarias, 112 S. Ct. 812 (1992)*, 67 Washington Law Review 959, 977-78 (1992); A. C. Helton, *Resistance to Military Conscription or Forced Recruitment by Insurgents as a Basis for Refugee Protection: a Comparative Perspective*, 29 San Diego Law Review 581, 594 (1992); G. S. Porter, *Persecution Based on Political Opinion*…, p. 273-277.

[510] See M. G. Artlip, *Neutrality as Political Opinion*…, p. 559 dealing more calmly with the *Elias – Zacarias decision.*

[511] D. Anker, *The Law of*…, p. 274.

[512] B.J. Einhorn, *Political Asylum in the Ninth Circuit* …, p. 610 (1992) saying that: "*The Supreme Court majority dealt a firm, if not fatal blow to the doctrine of imputed political opinion applied by the Ninth Circuit from the time of Bolanos-Hernandez and Hernandez-Ortiz.*"

[513] See M. Graves, *From Definition to exploration*…, p. 739 (1989) giving an extensive overview of the case law concerning the particular social group concept.

Circuit has its own case law, and the INS has maintained from the beginning that precedents from other circuits will not be binding upon it in other circuit jurisdictions. This has led not only to a limited amount of forum shopping by the INS itself (with the Ninth Circuit being the least favorite forum to shop), but also to considerable differences of opinion between the circuits themselves. The neutrality principle, accepted in some jurisdictions, modified in others, and rejected in a third group, is one example. Even in some cases, the same circuit court may have to completely divergent interpretations on the same problem.[514] Such tensions within the American system have only been partially remedied by the three decisions of the US Supreme Court, which stepped in to clarify conflicts between different circuits. Where such an intervention is lacking, it remains for the circuits themselves to point to potential differences, and try to remedy them and for the legal doctrine to do the same.

However, all these features put together, also with their potential drawbacks testify to the fact that the American asylum law has been thoroughly rooted in the American legal system for the past quarter of a century, and the courts feel easy dealing with the issues and working out their own problems. It has now become a living part of the law, and the Refugee Act is interpreted and applied as any other act in the system. In a way, asylum had become "domesticated" and put in a national context.

[514] *Thomas v. Gonzales*, 409 F.3d 1177, 1184-87 (9th Cir.2005) (en banc) *reversed on other grounds by Gonzales v. Thomas*, 126 S.Ct. 1613 (U.S. Supreme Court 2006).

Chapter 3
Dutch asylum case-law

3.1 Introduction

In this chapter, I will map out for the reader the developments that took place in the Dutch legal system from the late 1970s till 2005. As in the American chapter before, this should not be understood to be an exhaustive description of all the Dutch case-law, or of all the Dutch asylum law developments. Rather, I have tried to distinguish the genuine trends unique only to Dutch cases, and describe them, as they evolved.

For comparative reasons, some issues are also isolated even if their importance was minimal to the Dutch case-law, yet depicted the same doctrinal issues faced by American courts at the same time. If that is so, I will indicate this in the relevant sections. Possible explanations and comparisons will be provided in the following chapter.

3.2 Well-founded fear

In the refugee law doctrine there is considerable debate as to the exact meaning of the phrase 'well-founded fear' – namely, when fear is well-founded. Numerous theories have been advanced of this problem, and courts have spoken on this issue extensively. All the different positions may be brought down to two basic stands: 1) that the well-founded fear requirement has an objective and a subjective element. The subjective element is the fear of the applicant, which is always subjective, while the objective component is the fear's potential well-foundedness in real life.[1] The second theory claims that the definition does not contain any subjective element, but is strictly objective. The question before the relevant authorities is whether or not the fear of the applicant is well-founded in the eyes of a neutral adjudicator. In the words of Hathaway:

> "well-founded fear has nothing to do with the state of mind of the applicant for refugee status, except insofar as the claimant's testimony may provide some evidence of the state of affairs in her home country."[2]

Hathaway and other scholars argue that by stressing both the subjective element, as well as the objective one, the courts thus place additional burden on the applicants, by forcing them to prove that they are, or were, actually in anguish. The critics of the second approach have remarked, that by over-emphasizing the objective element, the adjudicator fails to root its focus on the state of mind, and perspective of the refugee, often substituting his or her own judgement for that of the applicant. They argue that both the theories are mutually reconcilable. While the applicant decides on the subjective elements, such as country conditions, reasons for fleeing, the adjudicator decides on the objective facts: was the decision to flee by the applicant reasonable.[3]

The Dutch legal doctrine has been unanimous on that matter, pointing out to the fact that it is "future oriented" and thus really objective. Writing in 1982 Hoeksma, gave examples of

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[1] Grahl -Madsen, *The Status of Refugees*…, p. 174-175; UNHCR Handbook, pnt. 40.
[2] J. Hathaway, *The Law of*…, p. 65.
[3] D. Anker, *The law of asylum*…, p. 28.

two different cases of Iraqi Kurds. The claim of one was denied by the Court, because he had taken opportunity of an amnesty in his country, and lived there for a while unhindered, even being enrolled at the university in Baghdad.[4] The claim of the second one, was however upheld, since he did not take advantage of the amnesty, and was still considered to be an enemy by the state.[5] In his description of the second case, Hoeksma wrote that the definition in principle "*binds the subjective element of fear with the objective situation of persecution together*"[6] but later on clearly stated that the Dutch understanding of this concept is future oriented, and thus objective.[7] Writing a decade later Fernhout, with more case-law to back his point, also pointed out to the future oriented Dutch understanding of the term "well-founded fear", and linked it to the objective nature of it.[8] In the mid 1990s and in 2005, in their two books Spijkerboer and Vermeulen also point to the future orientation of the Dutch understanding of that term, and construe it as concurring with the idea that it is an objective criteria.

To give an example. In 1984, the Raad van State heard an appeal from an citizen of Ethiopia, of Eritrean ethnicity.[10] The applicant had been imprisoned and tortured by the Ethiopian authorities because of his involvement in the Eritrean Peoples Liberation front, and was later sentenced by a military judge to a prison sentence of three years. He was, however, released early, and stayed in Ethiopia for five months, before fleeing abroad. The Dutch Secretary of State argued that by that fact he had demonstrated the lack of a well-founded fear of future persecution. The Raad van State disagreed, and held that the mere fact that the applicant, after his detention, had stayed for a while in Ethiopia, does not mean that "he is no refugee." The court was of the opinion, that future persecution was still a possibility, and accordingly quashed the decision of the Secretary of State denying the applicant refugee status, and sent it back for reconsideration.[11] In his note commenting on the decision, Swart drew attention to the issue of probability of future persecution by saying: "*the fact that the applicant, after his detention, still stayed for a while in Ethiopia, does not mean that he has no longer a fear of persecution*."[12]

This line of reasoning was followed in later case-law. In 1992, the Raad van State heard a case of a Tamil refugee applicant from Sri Lanka.[13] He had been an active supporter of the Tamil Tigers in their fight for an independent state, donated money to them and their cause, and helped Tamil refugees. For these activities he was imprisoned by the governmental forces. After paying a bribe of 25 000 roupies, he was released from jail. The Secretary of State held, that since he was released without charges, and continued to live in Sri Lanka for a while, there can be no talk of a well-founded fear of being persecuted, and dismissed his application. The court disagreed:

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4 ARRvS, 27 maart 1980, in RV 1980, no.3.
5 ARRvS, 17 augustus 1987, RV 1978, no. 6.
6 J. Hoeksma, *Tussen vrees en vervolging*… p. 162.
7 Ibid., p. 166-167.
8 R. Fernhout, *Erkenning en tolerating als vluchteling in Nederland*, Deventer 1990, p. 55-59, 69.
9 T.P. Spijkerboer, *Gender and Refugee Status*, 1999, p. 62-67; T.P. Spijkerboer & B.P. Vermeulen, *Vluchtelingenrecht*, Nijmegen 2005 (hereinafter "Spijkerboer & Vermeulen 2005"), p.28-30.
10 ARRvS 7 juni 1984, RV 1984, nr. 5 with note by Swart.
11 Ibid., p. 22.
12 Ibid., p.22.
13 ARRvS, 10 februari 1992, RV 1992, nr. 1 with note by Spijkerboer, p. 1.

> "The accusation itself implies well-founded fear of persecution, and the release of the applicant from his detention, viewed in the circumstances that had led to them, do not lead to a conclusion, that the applicant does not have a well-founded fear of being persecuted."[14]

In this context it is instructive to look at what is the importance of past persecution for the refugee definition, in the eyes of the Dutch courts. The presence of past persecution is a strong argument in favour of finding that the applicant may have a well-founded fear of persecution in the future, unless circumstances say otherwise. In the above quoted decision of the Eritrean from Ethiopia, rendered by the Raad van State in 1984,[15] it was the *past* persecution of the applicant, that made the court find fear of *future* persecution well-founded, and the same reasoning applies to the decision of the Tamil case.[16] Conversely, in the case of an Iraqi citizen, who had been active in the opposition, and fought against the government, but after an amnesty had been declared, took advantage of it, enrolled as a student in Baghdad, and lived a quiet life, the court found that though there was past persecution, nonetheless, under new circumstances, there was no reason to presume a well-founded fear of persecution in the future.[17]

Earlier persecution is not viewed as necessary, for finding of refugee status. In 1984, the Raad van State heard the case of a citizen of Morocco of South Saharan ethnicity. He had deserted while serving in the military forces of that country, as he was unwilling to fight the Polisario army, fighting for the independence of the South Sahara.[18] The Secretary of State argued that the applicant did not have any previous conflicts with the authorities, and thus there was not well-founded fear. The court eventually found for the Secretary of State and dismissed the applicants appeal, but in its reasoning it did not take up the argument of a requirement of past persecution. Rather, it concluded, that the possible future punishment for desertion from the Moroccan army, would not be disproportionably severe, and thus amount to persecution.[19] Also in the case of a homosexual applicant from Nigeria who had escaped lynching, the court ruled that there was no fear of future persecution.[20]

In conclusion: the Dutch understanding of the term "well-founded fear of being persecuted" is, and was from the beginning, future oriented. Though the courts did not ever elaborate theoretically in great detail, the way it was constructed meant that the courts were applying only the objective criteria. They were looking for concrete evidence, not for the feeling of the refugee.[21] Potential past persecution therefore, obviously strengthened the applicant's claim to refugee status. If there was none that did not mean, that his claim would fail. He just needed to show that he will be or might be persecuted in the future. This construction

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[14] Ibid., p.2.
[15] ARRvS 7 juni 1984, RV 1984, nr. 5 with note by Swart.
[16] ARRvS, 10 februari 1992, RV 1992, nr. 1 with note by Spijkerboer; See also, Rb. 's – Gravenhage 7 mei 1999, NAV 199/115 with note by Bruin.
[17] ARRvS, 27 maart 1980, in RV 1980, no.3.
[18] ARRvS 23 augustus 1984, AB 1985 no. 585 with note by Fernhout, p. 1516-1520; also published in RV 1984, no. 4, p. 15-19 with note by Swart.
[19] Ibid., p. 18.
[20] Rb. 's –Gravenhage zp. Haarlem 9 juli 1999, NAV 1999 no. 136 with note by Heijnnenman, p. 587-591.
[21] See ARRvS 10 februari 1992, quoted in Spijkerboer (1999) where the court said: "*The applicant is afraid that something will happen. That does not lead to refugee status.*"

of the understanding of the well-founded fear requirement, allowed the Dutch courts to develop two quite conflicting theories: that of group persecution, and later of the singling out criteria, as it will be shown in the next section of this chapter.[22]

3.2.1 Group persecution

In contrast to the American law described in the chapter above, the Dutch jurisprudence first discussed the issue of group persecution, then limited it and turned to the concept of singling out. This process took place from the late 1970s till the mid 1980s and was only partially reversed in particular cases in the 1990s. Therefore, I will first describe separately the development of the concept of "group persecution", then move on to that of "singling out" and give summation remarks at the end of this section.

It should be made clear that both the phrases "singed out" and "group persecution" are, *par excellence*, doctrinal phrases. The first one will not be found in any of the cases listed below. It was first used by Fernhout, when he described a particular idea of Dutch jurisprudence, but it has never been explicitly defined nor elaborated upon by Dutch courts. The attempts to define singling out stem from comments on Dutch case-law, by commentators and scholars.[23] Rather, the Dutch courts instead use the term "*persoonlijk*" (personal), to demand evidence of persecution. Also, the term "group persecution" has been avoided, though it was mentioned in a few cases. Therefore, while reading this section of the chapter, one should be aware, that whenever I use the term "singled out" it is a description of a concept, rather than a direct quote from the case. Nonetheless, this does not in any way affect the general problem as described in this section.

The question of whether one can invoke refugee status, by belonging to a group, be it religious, social or ethnic, that is being persecuted, was raised for the first time in Dutch case-law in the cases of Turkish Christians, fleeing from religious violence and strife in the early 1970s. The Dutch courts then avoided the question and turned to the issues of persecution and its meaning. These cases will be described in detail in a later section of this chapter. Suffice it to say, however, that these applicants had based their claims on the fact, that by belonging to a group of Orthodox Christians in a predominantly Muslim Society, they had been persecuted because of membership in such a group. Alternatively, by being middle-class Christian citizens caught in between the Turkish army and the Kurdish rebels, they were unable to defend themselves and, as such, were targeted by both parties for persecution.

In at least in one of those cases, the Raad van State *implicitly* acknowledged that group persecution is possible.[24] The applicant S.D. was an Eastern Orthodox Christian from the east central part of Turkey. The applicant claimed that daily harassment by his Muslim neighbours had reached the point where the situation for Syrian Orthodox Christians was unbearable. They were unable to develop and mention any aspect of their own culture and religion. Any

[22] For more on the future – oriented understanding of the term "well-founded fear" see Spijkerboer & Vermeulen 2005, p. 28-32.
[23] RV 1990, no.9 note.
[24] ARRvS 7 Februari 1980, RV 1980 no. 3 with an anonymous note, p. 24-34.

complaints to the police were useless and in fact dangerous themselves, as the police were themselves lending a hand in the persecution of Christians. The ongoing upheavals in Cyprus and Lebanon all had repercussions for the few Christians living in Turkey. Finally, the applicant claimed that his return to Turkey was impossible, as the land and houses abandoned by the Christians were immediately seized by Muslims, and in the case of his return to his place of origin, he would face certain death. The UNHCR representative, J.A. Hoeksma, began by pointing out that persecution can come not only from state agents but also from other sources and can in fact be a accumulation of severe repressive and discriminatory actions. This seemed to be so in the case of the Syrian Orthodox in Turkey. However, he went on to say:

> "refugee status can not be invoked (…) by a member of this group, who has a well-founded fear of being persecuted based on his religious convictions, who can move to some other place in Turkey to avoid such persecution and such a move would only amount to a deterioration of his economic and social status."

The Raad van State agreed with his reasoning, and found that the applicant could move safely to Istanbul, where members of his group live relatively unmolested, and denied his appeal. The court in this case did acknowledge that what had happened to the applicant, was because of his membership of an ethnic and religious group in Turkey. Though the questions of membership of a group, and persecution of that group were not addressed fully, and the decision was rendered on other grounds, it was clear, that the Raad van State was willing to look at groups and their circumstances, when assessing persecution of individuals belonging to those groups.[25]

The issue of group persecution was better addressed in another group of refugees that came to the Netherlands in the 1980s –the Eritreans from Ethopia. On 10 April 1979 the Council of State heard the appeal of an Eritrean married couple who had fled Ethiopia.[26] Their claim was based solely on the general situation of Eritreans in Ethiopia, as evidenced by what had happened to close family relatives. The couple had not been active politically and had not been attacked or targeted personally. The court accepted their claim to refugee status:

> "Based on the presented evidence and statements made before the court the applicants belong to a group of Eritreians living in Ethiopia. In their claim to refugee status the applicants have stated that Eritreians are subject to persecution by the Ethiopian authorities and that their city of origin, Asmara, had been a center of fighting. (…) Based on these circumstances above and what has been a deterioration of the general situation in Eritrea, the Court is of the opinion, that not being members of a political group supporting the Eritreian secession, is not decisive, in an answer to the question if the said alien of Eritriean background can be recognized as a refugee, based on the well-founded fear of being persecuted on account of belonging to a ethic group of Eritreians. Taking that into account, as well as the statements made by the applicants, the court is of the opinion that one can speak of a presence of a well-founded fear of being persecuted."[27]

[25] Ibid., p. 30.
[26] ARRvS 10 April 1979, RV 1979 no. 3, p.16-22.
[27] Ibid., p. 20-21.

The commentator writing his evaluation in RV described this decision quite rightly as "important."[28] The Raad van State accepted that, in some particular circumstances, the mere fact that one belongs to a group may lead to refugee status. There is no additional requirement that the applicant be active in any movement, political or religious, nor that he or she has experienced any personal incidents of persecution or even discrimination themselves. It is the mere membership of a persecuted group that leads to refugee status. Here, the applicants of Eritrean nationality were caught in the middle of a civil war, where the ethnic Eritreans were targeted for persecution by ethnic Ethiopians, and there was no history of past persecution. Yet, that membership was deemed enough, to find the presumption of the possibility of future persecution.

A year later that decision was slightly altered by the Raad van State.[29] The applicant was again an Ethiopian of Eritrean ethnicity, studying in Ethiopia's capital Addis Ababa. He was also a sympathizer of the Eritrean People's Liberation Front, a group which advocated secession of Eritrea from Ethiopia. He never experienced any personal problems with the Ethiopian police, though, as he claimed, because of his high school activities and pro-Eritrean sympathies, he was expelled from school. Following the deterioration of the situation for Eritreian students in the capital, he fled to Kenya, where he stayed for a period of three months. The applicant's brother had fled the country, his sister had been harassed, and his father had been imprisoned. Though as the applicant acknowledged, it was not clear if that happened because of his or their political activities. The Secretary of State argued that the mere fact that the applicant belonged to an "ethnic group of Eritreans" was insufficient grounds to award him refugee status.[30]

The court did not agree with the Secretary of State but it did slightly change its reasoning from that of year earlier:

> "The Court (…) is of the opinion that a well-founded fear of being persecuted can be found (…) in belonging to the ethnic group of Eritreans. The presence of such a fear cannot be however invoked, when the personal situation of the applicant and the circumstances in which he fled and which led to his escape, and that the danger of uncontrolled repressive treatment of the Ethiopian authorities of the people belonging to such a group, are not sufficiently present."[31]

The Raad van State restated that Eritreans do belong to a persecuted group and it is therefore presumed, that they are refugees. This presumption may be rebutted by the Secretary of State if he produces convincing evidence to the contrary, that is, that notwithstanding them being Eritreans, they have no fear of persecution based on their individual circumstances. In this particular case, the Raad van State found that the applicant had indeed not shown sufficiently, any indication of future persecution, and upheld the Secretary of State's denial of refugee status.[32]

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[28] Ibid., p.2.
[29] ARRvS 13 juni 1980, RV 1980 no. 6, p.46-49.
[30] Ibid., 47-48.
[31] Ibid., 48.
[32] Ibid., 49.

The Council of State kept this line of reasoning for the next few years when dealing with other cases. These, while being dismissed based on the individual circumstances of the applicants, still recognised group persecution. Thus, in 1982 the court, quoting word by word its own decision from 1980, dismissed an appeal by an Eritrean resettled in Southern Sudan in a difficult rural area. Though the court accepted that the applicant belonged to a persecuted group, it nonetheless upheld the denial of refugee status, based on the fact that the Sudanese government did provide him with protection within the meaning of the Geneva Convention.[33] The same reasoning allowing for group persecution, with inquiring into the particular circumstances of the case, was later upheld in a couple of decisions in 1984.[34]

In one of them, the applicant's father had been executed with a group of other Eritreans. The applicant himself was involved in actions supporting the Eritrean insurgents, for which he was arrested, detained for months, interrogated and tortured in order to illicit information. He was later released, rearrested, tortured again and, finally, sentenced to three years in jail. Though released from prison earlier, he was not able to flee Ethiopia for the next few years, during which he took up some menial jobs to support himself and his family. The Secretary of State dismissed his application, claiming that his fear of persecution was based solely on grounds of his ethnicity, and the fact that he took up employment while in Ethiopia showed that he did not fear any persecution. The Council of State disagreed, and restated, that a well-founded fear of persecution may stem from membership of the ethnic group of Eritreans and the applicant's personal (family) circumstances showed that clearly. The court quashed the decision of the Secretary of State and sent it back for reconsideration.[35]

Finally, in 1985 the Raad van State struck down a interpretation of the Geneva Convention by the Secretary of State, whereby:

> "the alien must show clearly that the authorities of his country of origin, based on his political opinion, will invoke or had invoked prosecution, which will be furthermore discriminatory because of political motives"

calling that line of reasoning "restrictive" and quashing the decision of the Secretary of State.[36]

However, this line of decisions came to an end in 1986.[37] In that year the Raad van State completely reversed itself in terms of allowing group persecution.[38] The applicant was an Ethiopian of Eritrean background, as were the other claimants before him. However, this time the Council of State found that "*the applicant's testimony as to his course of life in Ethiopia does not lead to more, than to the acknowledgement that the applicant belongs to the ethnic group of Eritreans*." Thus, as Vermeulen and Spijkerboer put it, "came an end to the special status of this group"[39] and in future Eritrean cases were never decided upon the

[33] ARRvS 4 maart 1982, RV 1982 no.5 with note by Swart, p.18-21.
[34] ARRvS 1 juni 1984, RV 1984 no. 3 with note by Swart, p. 12-15.
[35] ARRvS 7 juni 1984, RV 1984, no. 5 with note by Swart, p. 19-23.
[36] ARRvS 7 juni 1985, RV 1985, no.1, p. 1-3.
[37] See also Spijkerboer & Vermeulen 1995, p. 85.
[38] ARRvS 13 November 1986, Werkoverzicht 1987, 2.21.
[39] Spijkerboer & Vermeulen 1995, p. 85.

basis of group persecution.[40] In the coming years appeals to group persecution by Kurds,[41] Lebanese,[42] Somalis,[43] Tamils,[44] would ultimately fail. In the coming years, the cases of Tamils and Somalis were to be dealt with as described in the section on "singling out" of this chapter below.

Successful recognition of asylum applications based on group persecution came only in the 1990s, when the cases were being heard by the district courts rather than the Raad van State. On 9 June 1998 the court in 's- Gravenhage sitting in Zwolle dealt with a claim filed by a man from the Nuba people in South Sudan.[45] The applicant was a nomad, who had sympathy for a rebel group in the Southern Sudan, the SPLA led by John Garang, whom he supplied with information about the positions of the North Sudanese army. On one occasion that army descended on the village, killing a number of men (the applicant's father), raping the women and kidnapping children. The applicant who was found to be in possession of a gun, was sentenced to flogging and a prison term. Later, his village was raided by the army and burned as it was suspected to be supporting the SPLA. The applicant who had fled first to another part of Sudan, and later to the Netherlands claimed asylum on grounds that he was persecuted as a member of the Nuba people, who were being subjected to group persecution by the North Sudanese Islamic government.[46]

The Secretary of State argued along his standard line of reasoning rejecting group persecution:

> "The mere fact that the applicant is of Nuba origin is insufficient for a successful invocation of refugee status. The individual story of the applicant, as much as it can be credible, is insufficiently severe to invoke refugee status. It has not been shown that the applicant as a political opponent of the regime has been branded with a specific negative view by the Sudanese authorities."[47]

However, the court this time disagreed:

> "The court has established, even though the defendant has raised some doubts about the applicants membership in the Nuba ethnic group, that he comes from the Nuba Mountains region. It has also been established that the North Sudanese army has within a period of half a year, raided twice the village of the applicant, where they have been guilty of violations of human rights. (…) The Court is of the opinion that, based on the fact that the applicant has from the beginning of the asylum procedure made his claim on the concept of group persecution, (…) the defendant cannot dismiss his claim by simply saying that it has not been shown that the applicant has not shown that he has no personal fear of being persecuted because of his ethic

[40] See eg. ARRvS 16 februari 1989, RV 1989 no.1 with note by Fernhout and other cases quote by Spijkerboer & Vermeulen 1995 p. 85.
[41] Ibid., p. 85 fnte.85.
[42] Ibid., p. 86 fnte. 87; See also ARRvS 31 januari 1984, AB 1984 no. 439, p. 1302-1306, where the court dismissed the applicants contention that Lebanese Maronites were being persecuted "as a group".
[43] Spijkerboer & Vermeulen 1995, p. 86 fnte. 86.
[44] Ibid., p. 86-87. See also the proceeding paragraphs of this chapter.
[45] Rb. 's-Gravenhage zp. Zwolle 9 juni 1998, RV 1998 no. 8 with note by Vermeulen, p. 25-28.
[46] Ibid., points 2 p.26.
[47] Ibid., points 4, p.27.

> background or his political activities. The facts which have been presented to the court by the defendant, failed to convince it, that there can be no talk of group persecution of the Nuba people or of people residing in the Nuba Mountains area."[48]

This was an interesting development, as the decision was rendered at the time, when for over a decade no successful claim had been made based on group persecution. Furthermore, the court in Zwolle accepted group persecution for the Nubas as a possibility at the same time when it was dismissing similar cases of Somalis and Tamils. The Nubas and refugees from Southern Sudan in this and other decisions, were one of the few to successfully invoke the concept of "group persecution" in their asylum claims.[49]

In the late 1990s. there was another case where the Dutch courts came very close to acknowledging the existence of group persecution – that of the Reer Hamar clan from Somalia. In a decision of 16 September 1999 the court in 's – Gravenhage sitting in Haarlem dealt with an appeal form X, a member of that clan, who after enduring the burning down of her house and the killings of several members of her family, finally fled the country.[50] The Secretary of State argued that belonging to a particular social clan is insufficient to invoke refugee status. The applicant argued that the situation of the clan in Somalia is a clear case of group persecution.

The court stopped short of calling it group persecution, but did acknowledge that the situation of the members of the clan "*is so bad, that has become untenable*" and that members of this clan can invoke persecution based on membership of that clan, if they can provide evidence that their position is linked to their ethnicity. In this case the court preferred to link it rather to their ethnicity and their previous and current social status. In an interesting pointer to the Secretary of State, the court remarked, that one cannot simply dismiss an application for asylum from a member of a persecuted group simply by pointing out, that some of its members find life more tolerable than others. The denial of refugee status was quashed and the case sent back for reconsideration.[51]

This second case of reintroduction of the possibility of group persecution caused a stir in the Dutch legal doctrine. Commenting on the case, Spijkerboer quoted the history of the concept, yet remarked that the court in Haarlem stopped short of officially branding it group persecution. He also pointed out other decisions by the district courts in Amsterdam,[52] Zwolle,[53] and 's - Hertogenbosch,[54] where the courts in similar circumstances seemed to be going in the same direction. There were however, important differences. The courts in Haarlem and in

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[48] Rb. 's – Gravenhage zp. Zwolle 9 juni 1998, RV 1998 no. 8 with note by Vermeulen, pnt. 5.5-5.6, p. 28.

[49] ABRvS 21november 1996, NAV 1997 no. 2, with note by Heijnneman, p. 5-7; Rb. 's – Gravenhage zp. Zwolle 25 mei 1998, JV 1998/113, NAV 1998 no. 114 with note by Bruin, p. 519-526 (Nubas); Rb. 's – Gravenhage zp. Zwolle 9 juni 1998, NAV 1998 no. 175, p. 759 (Nubas); Rb. 's – Gravenhage zp. Haarlem 29 october 1999, JV 2000 no. 32, p. 184-188 (Southern Sudan); Pres. Zwolle 18 october 2000, NAV 2001 no. 39, p. 74-75 (Nuba); Rb. 's – Gravenhage 19 januari 2001, JV 2001 no. 97, p. 345-347 (Nuba).

[50] Rb. 's – Gravenhage zp. Haarlem 16 september 1999, RV 1999 no. 9 with note by Spijkerboer, p. 45-49.

[51] Ibid., pnt.29., p. 47.

[52] Rb. 's – Gravenhage zp. Amsterdam 27 oktober 1999, JuB 2000 nr. 2-33.

[53] Rb. 's – Gravenhage zp. Zwolle 31 maart 1999, JUB 1999, 15-4; Rb. 's – Gravenhage zp. Zwolle 17 November 1999, NAV 2000, p. 121-123.

[54] Rb 's – Gravenhage zp. 's Hertogenbosch 16 November 1999, JuB 2000 nr. 3.

[55] Rb. 's – Gravenhage (Rechtseenheidskamer) 14 juli 2000, RV 1974/2003, no.11 with note by Bruin, points 12-13: Also published in JV 2000, nr. 190, p. 748-753.

's - Hertogenbosch, did implicitly allow for group persecution if the applicants could link their group persecution to a persecution ground (class or ethnicity). The district courts in Amsterdam and in Zwolle took a different approach. While rejecting the idea of group persecution, they nonetheless accepted a construction, where in a country of civil war, where a particular clan is targeted with human rights violations, the applicant's burden of proof in showing the possibility of future persecution is somewhat smaller, than in other circumstances.

A year later, another Reer Hamar case went up to the Rechtseenheidskamer. The decision was rendered on 14 July 2000.[55] The court held that there could be talk of group persecution if one can prove that "*all who belong to a group of people, are in fear of persecution*". While the court rejected in that there is group persecution in the case of Reer Hamar it did say that "*From the evidence it is certain that Reer Hamar are in a precarious position and have a higher probability of becoming victims of human rights violations*" and quashed the Secretary of State's denial of refugee status. One author remarked that in this decision the Court found there to be "almost group persecution".[56]

The issue of group persecution seemed to have been closed with a decision of the Council of State in 2003.[57] The case again involved another applicant from the Reer Hamar case. The Raad van State however, took a different approach, than the REK and the district courts in 2000. The Council of State rejected the applicant's appeal against a denial of refugee status. It found that the applicant's enslavement, physical violence, and abuse stemmed not from personal circumstances but rather the clan background of the applicant. Thus, they were not specific enough to allow for refugee status. It would seem that this invocation of the singled-out premise, in a case group persecution, seems to cast doubt on the durability of group persecution in the Netherlands jurisprudence.[58]

In January 2007, the European Court of Human Rights reviewed the case of *Salah Sheekh*, an applicant from Somalia, a member of the Reer Hamar clan, who claimed asylum based on group persecution, but whose application had been denied by the Dutch administration and the district court in Amsterdam.[59] In his application, Mr. Sheekh admitted that the did not lodge an appeal with the Dutch Raad van State, as his lawyer advised him it would be pointless, given that court's case-law.[60] The European Court of Human Rights agreed with him, stating that:

> "The Court considers that, although the Administrative Jurisdiction Division may in theory have been capable of reversing the decision of the Regional Court, in practice a further appeal would have stood virtually no prospect of success. In this context it notes, firstly, that on the same day the Regional Court rejected the applicant's appeal, the Administrative Jurisdiction Division specified – and has ever since

[55] Rb. 's – Gravenhage (Rechtseenheidskamer) 14 juli 2000, RV 1974/2003, no.11 with note by Bruin, points 12-13: Also published in JV 2000, nr. 190, p. 748-753.
[56] Ibidem, see especially the extensive note to this decision by R. Bruin p. 89-91.
[57] ABRvS 22 augustus 2003, JV 2003 nr. 526, p. 1694-1697. Also published in NAV 2003 nr. 313.
[58] Spijkerboer and Vermeulen 2005, p.31-32.
[59] *Salah Sheekh v. The Netherlands*, App. No. 1948/04 (11 January 2007).
[60] Ibid., par. 120.
[61] Ibid., par. 123.

> repeated – that an individual member of a group against which organised, large-scale human rights violations are committed must make a plausible case for believing that specific facts and circumstances exist relating to him or her personally in order to qualify for the protection."[61]

So underlining the fact that the Afdeling's case-law does not include the possibility of group persecution.

In this section I have tried to show how the doctrine of group persecution was first used in the late 1970s and early 1980s, especially in the cases of Eritreans. After 1986 it was abandoned and the Dutch courts started invoking the doctrine of singling-out. In the decade after 1986 all attempts to invoke that concept in the cases of Tamils, Kurds, Somalis failed. Group persecution resurfaced only in the late 1990s in two cases: refugees from Southern Sudan and the Reer Hamar clan members. In the Sudanese cases it was successful. The Nubas, and Christian women from the south of Sudan were deemed to have been persecuted as a group. In the Reer Hamar the situation was more complex. The district courts seemed to have accepted *in fine*, if not in principle, that there was talk of "almost group persecution". Though the accents were laid down differently, it would seem that in those cases the courts were prepared to find that in circumstances where the applicant came from a persecuted group, and he or she could point out to individual instances of past persecution or reasons to believe future persecution was possible, refugee status would be granted. However, this renaissance of the "group persecution" concept had been cut short by the decision of the Raad van State in 2003, which has cast serious doubt on the tenability of the group persecution concept in the future, which was acknowledged by the European Court of Human Rights Decision in early 2007. It is not clear how this latest judgment will affect the Afdeling's case-law.

3.2.2 Singling out

Since in the previous section I have made increasingly frequent comments on the doctrine of singling out, it is time that I present how it worked its way into the case-law of the Dutch courts. Its antecedents may be found in the reasoning the Secretary of State adopted in a number of cases from Latin American countries in the early 1980s.

In 1982 the Raad van State gave a decision on a refugee claimant form Argentina.[62] The applicant had been previously working as a costal guard in one of the provinces of Argentina, and as such came to know about the secret political killings conducted by the military junta by discovering bodies of political opponents washed off the beach. He reported them to the local police. Warned by the police officers never to speak about that ever again, he was put on police files and interrogated later on a number of occasions. Finally, after some years he fled to the Netherlands. In his application he claimed, that because he knew of the extra-judicial killings, he was regarded as someone of special interest to the Argentinean junta. The Secretary of State argued that the mere knowledge of the killings was

[61] Ibid., par. 123.
[62] ARRvS 29 juni 1982, RV 1982 nr. 3 with note by Swart, p.4-6.

insufficient to claim refugee status, and that since the applicant had been never politically active, he had no reasons to fear any problems and could, in any case, move to another part of the country where he would be able to live normally. The authorities had thus no special interest in him, and there could be no talk of future persecution.

The court disagreed, and quashed the decision denying refugee status, sending it back for reconsideration. It held that the applicant did in fact encounter difficulties with the authorities because of his *particular* knowledge, and taken together with the fact that he had fled Argentina it might be assumed that the authorities had marked him down as a potential enemy of the junta and that the authorities might have attributed a particular political opinion to him.[63]

In another case, in the same year, the court reviewed an appeal of an applicant from Chile.[64] He had been active for years in local politics, supporting the left wing parties, though his political involvement had ceased after 1977. During those years he had been detained on a number of occasions and mistreated by the authorities. That fact, of his withdrawal from politics, was sufficient for the Secretary of State to argue that, as such, he was of no importance to the Pinochet authorities and had insufficient grounds to ask for refugee status. As his activities had ceased, the Secretary of State argued that his political opinions and activities were in the past and he was no longer of interest to the government. Therefore, he stood little chance of being persecuted in the future because of those activities.

The Raad van State rejected the argument of the Secretary of State, that the Chilean authorities had no interest in him personally.

> "The Court took the following into consideration. From the statements made by the applicant – which the defendant does not challenge – facts and circumstances show that the applicant, based on his political activities and/or sympathies that have lasted for years and even after 1977, has become known to the authorities, and because of them has endured prosecution, arrests and interrogations coupled with mistreatment by the authorities, and because of these has had and still has, substantial physical and psychological difficulties. (…) The reasoning of the defendant that there can be no well-founded fear of being persecuted, when authorities have detained the defendant for a period that has not been too long and later released him, can according to the Court not be supported. Also, the fact that the applicant after 1977 has not been active politically, does not lead, according to the Court, to the conclusion that he does not have a well-founded fear of being persecuted."[65]

In this decision the court found that the past activities of the applicant, taken together with the fact that the Chilean right-wing junta is in power, and that it is actively persecuting its political opponents, may lead to a well-founded fear of persecution of the applicant in the future. Though not targeted individually now, nonetheless, it is his past, that may lead to his persecution in the future.

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[63] Ibid., 5-6.
[64] ARRvS 12 juni 1982, RV 1982 nr. 7, p. 22-26.
[65] Ibid., 25-26.

On 21 January 1986, the Raad van State heard an appeal of a refugee applicant from Uruguay.[66] M.A.R.C had never been politically active himself, but that was most unusual in his family. Two brothers Ruben and Carlos were well known political leaders, who were recognized as refugees respectively in Belgium and Sweden, and his ex wife was another political dissident, having been recognized as refugee in France. With all these family connections, though not politically active himself, the applicant had made critical remarks about the plans of educational reform proposed by the junta. This led to him being arrested eight times in the period from August 1979 till January 1980. The Secretary of State argued, that since he was released on each occasion, and no further action was taken against the applicant, he was not singled-out and thus could not be recognized as refugee. The activities and persecution encountered by his family were of no relevance to his case. Arguing on the same line, as in the two cases described above, the Secretary of State claimed that the applicant has not been targeted yet and any fear is in fact of a hypothetical and of anticipated character.

The court disagreed:

> "Taken together all the above mentioned facts and circumstances, and bearing in mind that the ex-spouse of the applicant was from 1972 till 1976 imprisoned on political grounds, the defendant (…) has incorrectly assumed that the applicant in the time of the issuing of the decision has had no-well-founded fear of being persecuted."

The court went on to make a explicit criticism of the line of reasoning of the Secretary of State:

> "Such a formulation of the decision can lead to a conclusion that the defendant demands that an alien must be tortured first, to be able to invoke article 1A [of the Geneva Convention – K.B.] (…) The court of course knows that one can speak here of a unhappy edited reasoning and the defendant did not have in mind a limitation of the meaning of the word 'refugee'".[67]

It is interesting to note that the author of the comment under the case complained of an increasingly narrow interpretation of the term "well-founded fear" by the Dutch Secretary of State.[68] The court's line of judgments was maintained in 1987 in a case of a Salvadorian asylum seeker, where the Raad van State quashed a negative decision based on the fact that "*the Secretary of State has paid insufficient attention to the fact of the general human rights situation in Salvador*."[69]

Though, at first glance, these cases are not strictly about the singling out requirement but more about the well-foundedness of fear. However, when one takes a closer look, one can see that it was in the 1980s that the Secretary of State began applying an increasingly individual

[66] ARRvS 21 januari 1986, RV 1986 no. 1 with note by Bolten, p. 1-3.
[67] Ibid., 2-3.
[68] Ibid., 3.
[69] ARRvS 22 juli 1987, RV 1987 nr. 4, with note by Bolten, p. 12-14; A similar case of a refugee coming from Chile, where his family ad been politically active against gen. Pinochet, happened in 1992 and the outcome was similar to this case (ARRvS 7 mei 1992, RV 1992 nr.5, with note by Spijkerboer, p. 12-15.)

test for asylum seekers. It was not enough that the applicant came from a politically active family - he had to be active himself; it was not enough that the applicant knew about the extra judicial killings of the Argentinean junta - he had to actually do something, so that the authorities would take a personal interest in him. Finally, it was not enough that the applicant had been once politically active – he had to prove that, now or in the future, under changed circumstances, he would be persecuted again because of his personal status or knowledge. The stress was moving increasingly on the individual fear and individual actions, thus stressing to the point of absurdity the fear of future persecution. As the Raad van State correctly pointed out, this line of reasoning, could only lead to the conclusion, that a refugee had a well-founded fear of being persecuted *in the future*, if he had been persecuted, preferably tortured, individually in the past.

The development of the singling out criteria for asylum cases can be seen clearly on the example of Tamil cases, as heard by the Council of State. On February 24th 1988, the Raad van State gave a considerably long decision on a case put forward by a young male applicant form Sri Lanka.[70] He had belonged to certain Tamil organizations and student unions, and had claimed to have been persecuted by the government forces as a young Tamil man, which meant that in their eyes he had been a sympathizer of the Tamil United Liberation Front. The Secretary of State denied his asylum application as he argued that what had happened to the applicant was not something uniquely tied to him, but that most young Tamil men in Sri Lanka had similar problems with the Singhalese authorities. Therefore, these, as such, did not constitute persecution.

The ruling is lengthy and detailed. The court paid careful attention to the arguments of the applicant, the Secretary of State and finally to the general situation in Sri Lanka. It first dealt with the issue of whether one can talk of group persecution in respect to Tamils in Sri Lanka. The court found that actions taken by the government of Sri Lanka to suppress rebellion:

> "are not indiscriminately applied to every member of the Tamil ethnic group. Only those who participate in terrorist activities (…), may have a anxiety of persecution. There is thus no talk of group persecution."[71]

Having thus dismissed group persecution, the court went on to analyze whether there could be grounds for finding individual fear of persecution. After lengthy examination of the political and legal situation in Sri Lanka, having heard from both the government, the Council of Churches, and the UNHCR, the Raad van State decided to decide on the individual fear issue.

> "The court is of the opinion that merely belonging to an ethic group, of young male Tamils is insufficient evidence for fear of persecution in the meaning [of the Geneva Convention – K.B.]. It is the opinion of the court, that the starting point should be, that general measures taken to ensure the unity of the state against those who wish to challenge that unity, cannot be regarded as acts of persecution in the meaning of the aforementioned sentence. (…) The court is not of the final conclusion that under such circumstances there can be talk of persecution."[72]

[70] ARRvS 24 februari 1988, RV 1988 nr. 4 with note by Fernhout, p.13-23.
[71] Ibid., p.16.

This ruling has also been the subject of an extensive analysis by Fernhout who criticized it completely and fiercely.[73] This case has been viewed by the Dutch legal doctrine as a "grand entrée" into Dutch case-law of the doctrine of singling out.[74] It not only clearly rejected the notion of group persecution, but also required that the applicant be confronted with actions by the State that were directly and primarily aimed at him or her personally. Later in the same 1988, the Raad van State made other decisions in Tamil cases, where the group persecution claims were repeatedly rejected.[75] The Tamil case-law of the Raad van State was applied throughout the 1980s and 1990s to their asylum claims.

Illustrative of the development of the singling-out theory might be the two cases of Rasiah. Rasiah was a Tamil female from the North of Sri Lanka. She was young and unmarried and, as such, was easy victim to the Indian Pace Keeping Forces (IPKF) which had been deployed in the North of Sri Lanka for peacekeeping. They were known to have committed wide-spread human rights violations against the Tamil population there. The raping of Tamil women was a particularly widespread practice. Rasiah arrived in the Netherlands and applied for refugee status, claiming to have a well-founded fear of being persecuted on account of her membership in a group of "young Tamil women from Sri Lanka" who faced rape and sexual assaults from the IPKF. The Secretary of State denied her application for refugee status, which decision she appealed to the Raad van State. Also, in lieu of her removal proceedings, she applied to the President of the district court in Haarlem, for an preliminary injunction against her removal order, pending the outcome of her appeal to the Raad van State. The President denied her application, and though she filed an appeal by the appellate court in Amsterdam against that decision, she was in the meantime removed from the Netherlands. In her appeal she petitioned the court for an order to bring her back to the Netherlands, and a mandatory injunction barring the Dutch authorities from deporting her again based on the fact that she was a young female Tamil from Sri Lanka, who feared persecution by the IPKF and may be subject to inhuman and degrading behavior, namely rape. Her appeal was again refused, and she filled a cassation to the Dutch Supreme Court, which heard her case in 1990.[76]

The case before the Supreme Court touched, in fact, on the issue of refugee status, though formally that was to be decided by the Raad van State (see below). The Supreme Court first reviewed the decision rendered by the President of the Court in Haarlem, where he found that there was no group persecution of the Tamils in Sri Lanka. The President of the Haarlem court held that:

> "The court has taken into account that the fact that Tamil women (in Sri Lanka) are in danger of becoming victims of sexual violence by the IPKF or the Sri

[72] Ibid., p. 22.

[73] ARRvS 24 februari 1988, RV 1988 nr. 4 with note by Fernhout, p.13-23; See also Spijkerboer & Vermeulen 1995, p. 146-151 and the case-law there cited.

[74] Spijkerboer& Vermeulen 1995, p. 86.

[75] ARRvS 24 februari 1988, RV 1988, nr. 4 with note by Bolten, p. 13-23.; ARRvS 2 augustus 1988, RV 1988, nr. 5, p. 23-26 with not by Bolten; ARRvS 14 september 1988, RV 1988 nr. 6 with note by Bolten, p. 26-32; ARRvS 29 maart 1989, RV 1989 nr. 3 with note by Fernhout; ARRvS 16 augustus 1989, RV 1989, nr. 7 with note by Fernhout; ARRvS 20 october 1989, NAV 1989, p. 467; ARRvS 16 juli 1990, RV 1990 nr. 2 with note by Fernhout; ARRvS 4 februari 1991, NAV 1991, p. 151.

[76] HR 14 december 1990, no. 14.329, RV 1990 nr. 9 with note by Fernhout, p.26-34.

> Lankan army, cannot on its own, and without anything else, lead to a conclusion that the applicant has personally a well-founded fear of persecution."

He also remarked that: "*many women are being raped by the soldiers*" which led to a conclusion that her position in Sri Lanka is nothing unusual, and thus cannot constitute persecution.[77]

Arguing before the Supreme Court, the State Attorney General, Mr. Mok, supported the applicant's claim for a quashing of the decision of the court of in Haarlem. Pointing to the similarities of the case and that of Jewish refugees from Nazi Germany, he stated:

> "It follows, in my opinion, that one cannot entertain without a doubt the thought, that a woman belonging to a group which in the land of origin is threatened with rape, does fall short of the definition of a refugee. It would be fair to say, that Tamil women from Sri Lanka, who are in danger of sexual assault, can be recognized as prima facie refugees".[78]

His line of thought was that, if certain things happen to members of a particular group because of their gender, race or religion, it serves to strengthen the claims of people in similarly situated circumstances. Thus, the fact that Tamil women in Sri Lanka are faced with sexual assaults by the IPKF, does not weaken Rasiah's claim, but rather strengthens it. The fact that all Jews were being persecuted, cannot lead to a conclusion, that in order to succeed in their claims for asylum, they should show individual reasons and grounds for persecution.[79]

The Dutch Supreme Court found otherwise. It summed up the arguments of the case with two questions: 1) is there group persecution of Tamils in Sri Lanka? and 2) what are the requirements to prove a well-founded fear of being persecuted? The court upheld the Haarlem's court finings that there can be no talk of group persecution in the case of Tamils in Sri Lanka. It then stated that, in order to be recognized as a refugee, one has to put forward personal circumstances, not just the general situation in the country of origin. The SC simply stated that:

> "[being a"– K.B.] Tamil women in danger of sexual assault from the IPKF or the Sri Lankan army, this on its own cannot lead to a conclusion that that the applicant had a **personal** [emphasis mine -K.B.] well-founded fear of being persecuted in the meaning of the refugee convention."[80]

Thus, the Dutch Supreme Court found that the President of the court in Haarlem kept in line with the apparent case-law of the Raad van State, and made his judgment of the facts, which as such was not subject to review in cassation proceedings and dismissed the cassation.[81]

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[77] Ibid., p.30.
[78] Ibid., p. 29-30, points 6.4.
[79] Ibid., p. 30, point 6.5.3.
[80] Ibid., p. 33, point 3.5.
[81] Ibid., p. 33.

Nearly a year later Rasiah's appeal from a denial of refugee status by the Secretary of State was heard by the Council of State.[82] The same arguments were put forward by both Rasiah and the Secretary of State. Rasiah claimed, that since 1987 when a provisional peace treaty was signed, things have changed for the worse, as the Indian Peace Keeping Force engage in a campaign to intimidate the Tamil population by systematically raping their women. She claimed, that as a young, unmarried woman, she had a well-founded fear of being persecuted, the persecution being rape. The Secretary of State restated, that according to it, the situation was exactly the opposite of what Rasiah was claiming. There was no talk of group persecution of Tamils, the I.P.K.F. did not systematically target Tamil women for rape, though, admittedly, individual cases of rape occurred, and finally that the situation in Sri Lanka was slowly normalizing.[83]

The Raad van State dismissed Rasiah's application. It did admit that the fighting in Sri Lanka was far from over and that there were cases of sexual assault against women. However, according to the court, none of the documents put forward by the applicant supported the conclusion, that the Tamils were being treated in such a way or that merely being a Tamil entitled a refugee to protection.[84] Having thus dismissed the argument of group persecution of the Tamils, the court turned to the claim that Tamil women were being targeted for persecution. Again, the court found that the applicant had failed to show that the I.P.K.F. was using systematic rape as a tactic to intimidate the Tamil population. Therefore it found that Rasiah had failed to produce convincing evidence that she has a well-founded fear of being persecuted by rape, on account of her Tamil ethnicity.[85] Vermeulen, writing his comment on this case, was very critical of the reasoning adopted by the court. He pointed out that the Raad van State first looks at group persecution in order to rule it out, based on the premise that the human rights situation is not desperate enough to find group persecution. Once that is done, the court the looks at individual reasons for persecution but does it completely without reference to the general situation in the country of origin. Thus, the rejection of group persecution also serves the purpose of rejecting all arguments in an individual claim that might be derived from people in similar circumstances.[86] He then criticized the approach which the court took in rejecting the claim by Rasiah, that Tamil women were being persecuted by means of rape. Vermeulen points out, that the court required her to show, and prove, that the I.P.K.F. were raping her with the explicit intention of humiliating the Tamil population. That is, that persecution may only be viewed as such, if the persecutor embarked on it with a specific purpose of persecuting on one of the Geneva Convention grounds (sex, ethnicity etc.), and moreover, did so against that particular person. Thus, unless the I.P.K.F. embarked on raping Rasiah, because she was Rasiah, there is no way she can be recognized as refugee.[87]

One of the rare cases where a Tamil applicant was singled out by the court, was a decision by the district court in Assen in 2000.[88] The court quashed the Secretary of State's decision

[82] ARRvS 28 october 1991, RV 1991, nr. 11 with note by Vermeulen, p. 29-38. The case and the note were also published in RV 100, nr. 1, p. 1-9. I will refer to the publication in RV 100.
[83] Ibid., p.1-4.
[84] Ibid., p. 5.
[85] Ibid., p.5.
[86] Ibid., pnt. 2, p. 8.
[87] Ibid. pnt.4, p.9.
[88] Rb. 's – Gravenhage zp. Assen 23 november 2000, NAV 2001 no. 58, p. 130.

to deny the applicant refugee status. The district judge in one of the few decisions, tried then to define the singling out concept. It said:

> "The defendant's [Secretary of State's – K.B.] claims that the applicant's arrests and detentions, the length of the detentions and the abuse suffered there, cannot lead to the conclusion that the applicant is viewed negatively by the authorities because of reasons that link to a persecution ground, isolate the political and situational contexts wherein all this had happened, and cannot thus be accepted [by the court – K.B.]"[89]

Here the court seemed to have shared most of the doctrine's criticism of the singling out criterion, and rejected the administrations contention, that all that had happened to the applicant has no link to a persecution ground – namely him being a Tamil.

However, the singling out criteria was used to reject most other Tamil cases.[90] Later the same line of reasoning was later also applied to the cases of Somali citizens fleeing from persecution in their country. A good example here would be the decision by the Raad van State from 2003.[91] The applicant had been a member of the Reer Hamar clan, which, after the collapse of the Somali government, found itself without any militia to defend itself against other clans and their militias. Quoting incidents of torture, enslavement and non-judicial killings of the members of his clan, the applicant applied for refugee status but was denied by the Dutch Secretary of State. She appealed to the court. The district court in 's- Gravenhage sitting in Assen found for the applicant, agreeing with other district courts that, in the case of Reer Hamar, there is the possibility of group persecution. The Secretary of State appealed to the Raad van State, which overturned the district court in Assen. The Afdeling found that the Secretary of State was right when he claimed that the facts as presented by the applicant did not strengthen his personal asylum claim. They referred to the general situation of the Reer Hamar clan and

> "are not specific enough for the person of the alien in their negative impact, save for the general situation in the land of his origin at the time the decision [of the Secretary of State-K.B.] was made."[92]

The reasoning behind this decision is the following: what had happened to the applicant was the result of his clan background and not of his personal circumstances. Clan membership was not considered specific enough and thus, according to the court, there is no singling-out of the applicant. What happened to the applicant, happened because of the treatment of the clan he belongs to. Because the courts have ruled out group persecution, these circumstances are irrelevant to his individual claim of refugee status. He may only succeed if he produces concrete evidence that he was singled out for special mistreatment from all the other members

[89] Ibid., p. 130.

[90] ARRvS 24 februari 1988, RV 1988, nr. 4 with note by Bolten, p. 13-23.; ARRvS 2 augustus 1988, RV 1988, nr. 5, p. 23-26 with not by Bolten; ARRvS 14 september 1988, RV 1988 nr. 6 with note by Bolten, p. 26-32; ARRvS 29 maart 1989, RV 1989 nr. 3 with note by Fernhout; ARRvS 16 augustus 1989, RV 1989, nr. 7 with note by Fernhout; ARRvS 20 october 1989, NAV 1989, p. 467; ARRvS 16 juli 1990, RV 1990 nr. 2 with note by Fernhout; ARRvS 4 februari 1991, NAV 1991, p. 151.

[91] ABRvS 22 augustus 2003, JV 2003 no. 526, p. 1694-1697; Also published in NAV 2003 no. 313.

[92] Ibid., p.1696.

of the oppressed clan. Thus, while in principle refugee status is not barred from members of the Reer Hamar, in fact, only special cases will succeed in the Raad van State.[93]

It is also worth noticing that singling out criteria, as developed by the Raad van State, was also on occasion adopted by the local courts. A good example is that of a decision rendered by the court in Haarlem in the case of a Nigerian homosexual in 1999.[94] He had been caught with his partner while having sex, was dragged out of his house and taken to the village elders. His partner was subsequently lynched and killed, while the applicant escaped with his life, severely beaten. When he went to the police to ask for protection, the police, instead, imprisoned him for causing public unrest. The court dismissed his application using the standard singling out criterion. It held in the beginning that merely coming from Nigeria was not enough to claim persecution. Also being a gay man in Nigeria, was according to the court not enough,:

> "Of pertinence are the personal circumstances and events of the applicant, taken against the background of the overall situation of homosexuals in Nigeria."[95]

Having said that, the court went on to dismiss the particular circumstances of the claim. The arrest of the police was, according to the court, "insufficient", as there was no proof that the police would arrest the applicant again. The lynching by the mob was characterized by the court as "*a single (…) incident, which does not lead to the conclusion that there are specific negative circumstances for the applicant.*"[96] The court further elaborated that persecution by fellow citizens can only be accepted if it is systematic and unrelenting, and that the authorities are unable or unwilling to provide protection. The court was not convinced of either, as the Judge rendering the decision wrote: "*The applicant had before 8 June 1999 never had any serious problems in Nigeria due to his homosexual orientation*".[97] In the end, the court agreed with the suggestion of the Secretary of State that the applicant move to another part of Nigeria, and dismissed his appeal.

This case is symptomatic of the most strict version of singling-out as developed by the Raad van State, even if this particular decision was handed by a district court. First, the court rules out group persecution, or that a group is persecuted as a group in the country of origin. Having said that, it then moves on to discuss "personal circumstances of the applicant" against "the general situation in the country of origin", with the note of the findings it just made. The lynching had nothing to do with the sexual orientation of the applicant (it lacked the nexus to a persecution ground), and therefore it was just a one-time event, and will not be repeated again – there is no well-founded fear of future persecution. Thus, here, the strict singling out concept is surprisingly similar to the American strict nexus requirement, as espoused by the Fifth Circuit.[98]

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[93] For more discussion on this case see Spijkerboer & Vermeulen 2005, p. 32-33.
[94] Rb. 's –Gravenhage zp. Haarlem 9 juli 1999, NAV 1999 no. 136 with note by Heijnnenman, p. 587-591.
[95] Ibid., p. 588.
[96] Ibid., p. 589.
[97] Ibid., p. 589.
[98] For the American understating of the nexus, see Chapter 2.4.1. of this book. For a more detailed discussion on the Dutch singling out concept see Spijkerboer & Vermeulen 2005, p. 32-33. For a discussion on the similarities see Chapter 4 of this book.

The doctrine of singling out perhaps suffered a strong setback in the mentioned above case of *Salah Sheekh v. the Netherlands*, handed down by the European Court of Human Rights in January 2007.[99] It should be remembered that this case was concerned not with the Refugee Convention, but rather, The European Convention of Human Rights. Nonetheless, it did touch upon the singled out concept as applied by the Dutch Council of State. Commenting on the Dutch case-law regarding Somali refugees from the Reer Hamar clan, that they were not targeted personally but suffered from the general violence in the country, the Court held:

> "The Court would further take issue with the national authorities' assessment that the treatment to which the applicant fell victim was meted out arbitrarily. It appears from the applicant's account that he and his family were targeted because they belonged to a minority and for that reason it was known that they had no means of protection; they were easy prey, as were the other three Ashraf families living in the same village (…). The Court would add that, in its opinion, **it cannot be required of the applicant that he establishes that further special distinguishing features, concerning him personally, exist in order to show that he was, and continues to be, personally at risk**. (…) in the present case, the Court considers, on the basis of the applicant's account and the information about the situation in the "relatively unsafe" areas of Somalia in so far as members of the Ashraf minority are concerned, that it is foreseeable that upon his return the applicant will be exposed to treatment in breach of Article 3. **It might render the protection offered by that provision illusory if**, in addition to the fact that he belongs to the Ashraf – which the Government have not disputed –, **the applicant be required to show the existence of further special distinguishing features**."[100]

It remains to be seen what the repercussions will be of this decision for the Dutch singling out concept.

It is interesting to observe that, with all the stress put by the Secretary of State and the Raad van State on the singling-out criteria, there seems to one group of cases where the singling out criteria is applied less restrictively: family members. We have seen that, as early as in the 1980s, the Raad van State consistently found for the applicants and quashed the Secretary of State's decisions where he had not fully addressed the issues of well-founded fears that might arise because of family connections to political, religious, and labor union leaders. In 1983, the Raad van State gave a decision in a case of a citizen from Argentina, who applied for refugee status.[101] In his application he put forward not only his political opinions and activities which were anti junta, but also the facts that his brother had been arrested in 1979 and disappeared since, and his parents' house had been searched on a number of occasions. The Secretary of State denied his petition, and the applicant appealed to the Raad van State. The court found for the applicant, and held that, the fate of family members and their political activity was relevant in asylum determination.[102] Three years later, in a similar decision

[99] *Salah Sheekh v. The Netherlands*, App. No. 1948/04 (11 January 2007).
[100] Ibid., par. 148 (emphasis mine).
[101] ARRvS 24 november 1983, AB 1984 no. 408 with note by Fernhout, p. 1203-1209; also published in RV 1983 no. 5, with note by Swart, p. 19-30.
[102] Ibid., p. 24-25.

in a case from Uruguay, it held that the family connections of the applicant, and their possible implications for his detentions, had to be examined and addressed by the Secretary of State.[103] Also, in 1986 it found that the Secretary of State:

> "Has paid insufficient attention to the instances of persecution, as put forward by the applicant, of his politically active brothers and the deportation of the family to Iran."[104]

Even if the singling out criterion was applied to deny Tamil refugee cases, this nuanced theory when it came to families, was applied to these cases as well. In 1988 the Raad van State heard the appeal of a Tamil male from Sri Lanka.[105] He had been an active supporter of the Liberation Tigers of Tamil Elam, for which he provided money, clothes and other support. For these activities he had been detained on a number of occasions by the governmental forces. During his detentions he was abused physically and tortured. The Secretary of State denied his application for refugee status, pointing out the fact that there was no group persecution of the Tamils, and what had happened to him was not uncommon, in the civil war situation in Sri Lanka, for young Tamils. However, the court quashed the Secretary of State's decision and sent it back for reconsideration. It held that the fact, that the applicant's brother had been arrested in 1983 and never heard of since, that his sister shot dead by the government soldiers, and that his parents had fled to India was of relevance to the merits of the case before it. The court said that all these circumstances might make the applicant in danger of future persecution if sent back to Sri Lanka.[106]

The relevance of experiences of family members and other similarly situated people was again reaffirmed explicitly in 1991 in a decision by the Raad van State in the case of an applicant from Zair.[107] His father, brother and uncle had been arrested and detained for political reasons. The Secretary of State denied his application, claiming, that he did not point to any personal circumstances that might warrant the grant of refugee status. The Raad van State disagreed and states that:

> "The appraisal of the well-foundedness of fear of the applicant does not have to necessarily come exclusively from his personal experiences. Family members and others in similar circumstances can, under certain circumstances, give evidence to the existence of a well-founded fear of persecution."[108]

Finally, in 2003, a Somali man from the Reer Hamar clan applied for refugee status.[109] In his application he claimed that, as a member of a small clan, he was subject to beatings, torture and assault. His parents had been killed in such incidents and his sister raped. The Secretary of State dismissed his application, based on the ground that these incidents could have been caused by criminal motive, and not by persecution of the applicant. The applicant appealed to the district court in Amsterdam, which held that the Secretary of State should address

[103] See ARRvS 21 januari 1986, RV 1986 no. 1 with note by Bolten, p. 1-3.
[104] ARRvS 22 juli 1986, Weekoverzoicht 2.159.
[105] ARRvS 14 september 1988, RV 1988 no. 6, with note by Boten, p.26-33.
[106] Ibid., p.30.
[107] ARRvS 29 januari 1991, NAV 1991, no. 2, with note by Fernhout, p.3-4.
[108] Ibid., p.3.
[109] ABRvS 28 november 2003, JV 2004 no. 47.

those issues in his decision, in light of the situation of the clan in Somalia, and it quashed the decision of the Secretary of State. He appealed this ruling to the Raad van State but the Afdeling affirmed the decision of the court in Amsterdam. The Raad van State held that the Secretary of State must explain in his decision why the fate of family members of the applicant have no bearing on his asylum application, and why he assumed the reasons behind their and his fate were just criminal and not persecutory motives.[110]

Of course, recourse to family circumstances and similarly situated people does not always work. In 1984 the Raad van State denied an appeal from a Lebanese citizen who feared persecution because his brother had been politically active, and involved in the assassination of the son of the ex-president of Lebanon.[111] Similarly, the Raad van State denied an appeal by a citizen of Ethiopia whose brothers had been politically active in the opposition but who herself, had not experienced any problems with the authorities in Ethiopia.[112] In another Sri Lankan Tamil case, where the applicant's cousin had been killed by the government troops, and where he himself had has his house raided, where was beaten and threatened with arrest, and later having again his house raided, and where his brother had been killed, the Raad van State quashed the Secretary of State's decision denying refugee status. It held that the Secretary of State should address those incidents specifically in its decision, yet it added "*perhaps the applicant can be allowed in not as a refugee*."[113]

In this section I have tried to show the evolution of the concept of singling out, as it has been seen in Dutch case-law. Its origins lay in the emphasis of the Secretary of State and Raad van State that the applicant produce personal or individual circumstances by which he would come to the attention of the authorities and be subject to persecution. In the early 1980s it was the Raad van State which insisted on these personal circumstances when it quashed the decisions of the Secretary of State in the South American cases. Those were the times when applicants could claim either group persecution, or, in the absence of such, personal circumstances and events which showed why they should be granted refugee status. The "personal" requirement here served as an additional doctrinal framework by which applicants could acquire refugee status.

In 1986 things changed and the Raad van State closed the avenue for group persecution. The "personal circumstances" were now turned round from being one of the possibilities into a requirement which the applicant had to fulfill to be granted refugee status. With group persecution barred, the applicants now could no longer invoke general circumstances in their countries of origin, as these were deemed irrelevant. Or, better put, they were relevant for establishing that there is no group persecution. For the purposes of individual stories, they were deemed highly irrelevant and sometimes counterproductive. The Rasiah cases show that clearly. The applicant had to provide evidence, to show that she were targeted in a particular way simply because she was herself. This line of decisions developed initially on Tamil cases in mid 1986 and was systematically maintained throughout the 1990s and applied to the Somali cases. When in the late 1990s the district courts started to nuance the singling

[110] Ibid., p. 164-165.
[111] ARRvS 31 januari 1984, GV (oud) D12-99.
[112] ARRvS 22 januari 1992, no. R.02.88.0247.
[113] ARRvS 29 maart 1989, no. 3 with note by Fernhout, p. 7-9. See also ARRvS 8 december 1989, RV 1989, no. 8 with note by Fernhout, p. 22-24.

out criteria, and slowly move towards group persecution, the Afdeling stepped in again in 2003.[114] It reaffirmed its earlier decision, and closed off the possibility for group persecution. The reasoning behind this decision can be summed up like this: 1.) what has happened to the applicant, was the result of his clan background; 2) Clan membership is not of a "personal circumstance", and, thus, there is no singling-out of the applicant.

Finally, notwithstanding all the above, throughout the 1980s and 1990s the courts maintained a milder version of the singling out criterion when it came to family membership. As far back as 1983, the Raad van State drew attention of the Secretary of State that perhaps, due to family ties, the applicant may come to the particular attention of the authorities. This line of decisions became the exception to the singling out criterion after 1986. The courts, more or less consistently, acknowledged that, in certain circumstances, family ties or family experiences might have a bearing on the well-founded fear of future persecution. The continuous existence of such an exception sometimes created confusion in the legal doctrine, and one author remarked in his note to one of these cases, that this decision is hard to explain in light of other Tamil decisions.[115]

Therefore in chronological order the Dutch case-law in this area may be described as follows:

1970s - 1986
1. Acceptance of group persecution, demonstrated by the Eritrean case-law
2. Family law exception to the requirement of individual circumstances, in cases where there is no group persecution.

1986-1998
1. No group persecution → the individual-singling-out criterion becomes the dominant doctrine (Tamil & Somali case-law)
2. Family law exception to the requirement of singling out.

1998-2003
1. In principle, no group persecution → the singling-out still stands
2. Group persecution accepted for the Nubas in Sudan, and initially too for the Reer Hamar from Somalia, but in the end not
3. Family law exception to the requirement of singling out

Post 2003

1. Reversal to the situation from before 1998 → no group persecution, the singling-out doctrine (Somalis)
2. Family law exception to the requirement of singling out, still stands

[114] ABRvS 22 augustus 2003, JV 2003 no. 526; Also published in NAV 2003 no. 313.
[115] ARRvS 14 september 1988, RV 1988 no. 6, with note by Bolten, p.26-33.

3.3 Persecution
3.3.1 General remarks

It is interesting to observe that, unlike the American courts where there were attempts to phrase a definition of persecution, the Dutch courts have never attempted to embark on such a course. Instead, the courts in the period from the late 1970s till the beginning of the 21st century preferred to take a case-by-case approach, asking what is persecution or, more often, answering what is not persecution.

One of the most interesting questions when it comes to the definition of persecution according to Dutch case-law, is the question, whether in order to find persecution, there must be a malignant intent on behalf of the persecutor or not. That is, must the persecutor have persecution in mind, when he confronts the refugee applicant or not? Following that, does a benevolent intent of the persecutor (public order, peace, want of "healing" etc.) exonerate his actions so that they may not be construed as persecution? The case – law in this area is complicated, and it is good to give some examples.

In 1986 the Raad van State heard an appeal from a decision of the Secretary of State denying a Chilean citizen refugee status.[116] The applicant had been a member of a labour union and a political party that had been banned by a right wing military junta that took over in her country. Because of her political activities, she was detained on a number of occasions by the police and interrogated by the secret police, but was released each time after a few days, with no charges were brought against her. Following her departure to the Netherlands, two of her friends that were also active in the movement had been arrested and killed by the military regime. Her sister, who had also been active in that party, had been granted refugee status in the Netherlands somewhat earlier. The Secretary of State argued that the applicant's detention, and political activities alone, where not enough to find a well-founded fear of being persecuted. The Raad van State agreed with the Secretary of State, and affirmed the decision. It held, that the fact that her detention, though for political reasons, and in a country in which "*the authorities have a bad reputation for respecting human rights*", was not enough to find that the applicant had a well-founded fear of being persecuted.

Later in the same month of 1986, the Raad van State handed another, similar decision in the case of an Eritrean woman.[117] She had been an active supporter of the Eritrean People's Liberation Front, for which she distributed pamphlets and materials. During one of these occasions, she was arrested by the Ethiopian police who held her in detention without charges for five months, after which she was released without charge. The Secretary of State denied her refugee application, based on the fact that, following her detention, she never encountered any further problems with the authorities, and that she lived there unhindered till her departure to the Netherlands. The Raad van State again affirmed the Secretary of State's decision to deny refugee status. It agreed with the Secretary of State that a detention, with no charges being brought against the applicant, were insufficient to find a well-founded fear of persecution.

These two cases are difficult to interpret. Frenhout claimed, that based on them it might be

[116] ARRvS 4 maart 1986, RV 1986 no 5. with note by Bolten, p. 15-18.
[117] ARRvS 21 maart 1986, RV 1986 no. 7 with note by Swart, p. 20-24.

assumed that the Raad van State requires not only an arbitrary detention, but also additional elements (such as formal prosecution afterwards, torture or mistreatment) in order to find persecution.[118] Thus, not only arbitrary detention but also an additional "malignant element" is required in order to find persecution. However, Spijkerboer and Vermeulen in their book of 1995 disagreed and claimed, that what was at stake in these two cases was the issue of whether there was a link to future persecution.[119]

The expectation of a malignant intent is clearly visible in a 1989 Raad van State decision regarding a female Tamil applicant from Sri Lanka.[120] It is not clear from the case, whether she was politically active herself, though she insisted, had sympathized with the Tamil cause. It was, however her boyfriend who had been the target of the military authorities. Each time they came to arrest him, they were unsuccessful but, each time, they arrested the applicant, who was subsequently raped and beaten, only to be released later, with no charges being filed. This happened on a number of occasions, and the applicant finally fled to India, and then to the Netherlands. The Secretary of State denied her application for asylum, based mainly on the principle of singling out that had been discussed earlier. This decision was affirmed by the Raad van State, but, for the purpose of the meaning of persecution, it is interesting to observe that the court did not address the issue of rape as a form of persecution, but held, consistent with the singling out criterion, that since the she had not been targeted personally, there was no persecution. Thus, the lack of malignant intent towards her personally was imperative for dismissing the claim.[121] It would be interesting here to speculate whether the decision would have been different, if the authorities had decided to rape her boyfriend. The tentative answer to that would have to be "yes". Had the authorities aimed for her boyfriend, with the intention of harming him, and had done so by raping him, then, perhaps the Raad van State would have found persecution, on grounds of the intent to harm. This is a progeny of the singling-out criterion, but the principle is the same. While, in the case of singling out, it is a requirement that the person "be targeted", here follows the second part of the doctrine "for persecution". Thus, any asylum claim that does not provide evidence for both, the targeting (singling-out) and "for persecution", will fail according to the Duch case-law.

In this reading of the case, we are strengthened by the Rasiah case, as argued before the Supreme Court and the Raad van State. Rasiah was been a Tamil female from the North of Sri Lanka. She was young and unmarried and as such, was easy victim to the Indian Pace Keeping Forces (IPKF) which were known to have committed wide-spread human rights violations against the Tamil population there. She arrived in the Netherlands and applied for refugee status, claiming to have a well-founded fear of being persecuted on account of her membership in of group of "young Tamil women from Sri Lanka" who faced rape and sexual assaults from the IPKF. The Secretary of State denied her application for refugee status, which decision she appealed to the Raad van State. Also, in lieu of her removal proceedings, she applied to the President of the court sitting in Haarlem for a preliminary injunction for her removal order, pending the outcome of her appeal to the Raad van State. The President

[118] R. Fernhout, *Erkenning en toelating*…, p.80.
[119] Spijkerboer & Vermeulen 1995, p. 111-112. The discussion there is conducted about the question of arbitrary detention, and if it constitutes persecution. However, the same facts put forward by the authors, apply to the issue of the intent of the persecutor.
[120] ARRvS 8 december 1989, RV 1989 no. 8 with note by Fernhout, p.22-24.
[121] Ibid., p. 23.

denied her application and, though she filed an appeal to the appellate court in Amsterdam from that decision, she was in the meantime removed from the Netherlands. The Raad van State heard the merits of her claim a year later in 1991.[122] In all the decisions taken in her case and decided by the courts, the issue had been: can rape of Tamil women in Sri Lanka be construed as persecution? The President of the Court in Haarlem, found, that there was no evidence of motive behind the rape, being means of intimidation by the I.P.K.F. Thus, with the absence of that, he denied her application. His remark that "*many women are being raped by the soldiers*" which led to the conclusion that her position in Sri Lanka was nothing unusual and thus cannot constitute persecution, is fundamental here.[123] The same line of reasoning was applied by the Raad van State in its decision a year later. The court found that the applicant had failed to show that the I.P.K.F. was using systematic rape as a tactic to intimidate the Tamil population. Indeed, the court found that there was no such aim at all. Therefore, it found that Rasiah had failed to produce convincing evidence that she has a well-founded fear of being persecuted by rape on account of her Tamil ethnicity.[124] Again, the influence of the singling-out criterion is clearly visible: there needs to be the intent to single out for persecution the individual. If the intent to persecute is missing, then there is no persecution.

Finally, the implicit requirement for a malignant intent behind the persecutor's actions is clearly visible in the case-law on homosexuals in the Netherlands. In 1993 the Raad van State heard the appeal from a denial of refugee status to a homosexual from Russia.[125] The applicant, was Jewish and a member of a political – happening democracy group called the "Muchomory", claimed that he had a well-founded fear of being persecuted on account of his sexual orientation. He put forward the fact that homosexuality was a punishable offence in Russian law and carried the threat of five years in prison, and the fact that he had been detained in a psychiatric hospital for three months to "cure him" of his homosexuality. The Raad van State upheld the denial of refugee status. It found that the applicant did not provide enough evidence that his stay in the hospital was because of his sexual orientation, and furthermore, the fact that Russian criminal law proscribes homosexuality is according to the court not enough to find the intent to persecute the applicant, especially since, he was never arrested nor charged criminally for his sexuality.[126] This decision is important for two reasons: on the one hand, the applicant has not proven that the authorities want to punish him for being a homosexual - thus there is no intent. On the other hand, using an argument *a contrario*, it may be inferred that, had he proven that his hospitalization "to cure" was because of his orientation, the court would have found persecution. Commenting on the case, Spijkerboer relates a non-published decision of the Secretary of State in similar circumstances where a homosexual incarcerated in a psychiatric ward of a hospital for being a homosexual was found to be a refugee.[127]

This brings us to the other issue: if in certain circumstances, persecution may be exonerated by the greater good pursued by the persecutor? That can take two forms: when the persecutor acts for benevolent reasons, such as the "healing of a homosexual, or conversion to the "true

[122] ARRvS 28 october 1991, RV 1991, nr. 11 with note by Vermeulen, p. 29-38. The case and the note were also published in RV 100, nr. 1, p. 1-9. I will refer to the publication in RV 100.
[123] Ibid., p.30.
[124] Ibid., p.5.
[125] ARRvS 26 mei 1993, RV 1993 no.4 with note by Spijkerboer, p. 9-12.
[126] Ibid., p.10.
[127] Ibid., p. 12 pnt.6.

religion" and "the saving of souls"; or, when the persecutor performs unpleasant duties, for a greater good, such as the maintenance of the unity of the state.

What happens if the intention of the State is benevolent? That is, what if the state acts with good intentions that result in persecution? The answer provided by the homosexual cases would lead to the answer that, in those cases, there could be talk of persecution.[128] In the two gay cases described above, the position had been that, even if the state acted to "cure them" of their homosexuality (benevolence no.1), and did not prosecute them, though it could (benevolence no.2), that was nonetheless enough to find persecution. It was the end result that counted and not the intent of the state. The reason why one applicant failed and the other succeeded, was as suggested by Spijkerboer, the fact that one had been persecuted (or treated) recently, and the other a few years back.

Finally, there is the question, of whether persecution may be exonerated by the greater good pursued, such as the unity of the state. On Febraury 24 1988, the Raad van State gave its decision on a case put forward by a young male applicant form Sri Lanka.[129] He had belonged to certain Tamil organizations and student unions and had claimed to have been persecuted by the government forces as a young Tamil man, which meant that, in their eyes, he had been a sympathizer of the Tamil United Liberation Front. In an interesting passage, the court found that actions taken by the government of Sri Lanka to suppress rebellion:

> "are not indiscriminately applied to every member of the Tamil ethnic group. Only those who participate in terrorist activities or with such people, may have a anxiety of persecution. There is thus no talk of group persecution."[130]

But what of those who do support the Tamil cause in their actions?

> "It is the opinion of the court, that the starting point should be, that general measures taken to ensure the unity of the state against those who wish to challenge that unity, cannot be regarded as acts of persecution in the meaning of the aforementioned sentence. (…) The court is not of the final conclusion that under such circumstances there can be talk of persecution."[131]

This ruling has been the subject of an extensive analysis by Fernhout who criticized it completely and fiercely,[132] while another legal scholar called it "ugly" (*lelijk*).[133] Under such criticism from the legal scholars, the Raad van State departed from this doctrine in the same year and did not return to it.[134]

Concluding: the issue of the definition of persecution, or its components, has not been clearly worked out in Dutch case-law. The case-law since the late 1970s does show that the courts

[128] Ibid.
[129] ARRvS 24 februari 1988, RV 1988 nr. 4, p.13-23.
[130] Ibid., p.16.
[131] Ibid., p. 22.
[132] R. Fernhout, *Erkenning en toelating*…, 100-102; Nieusbreif Asiel- en Vluchtelingenrecht 1988, nr. 2, p. 153-158; See also Spijkerboer & Vermeulen 1995, p. 146-151 and the case-law there cited.
[133] RV 1988, p.31.
[134] ARRvS 14 september 1988, RV 1988 nr. 6 with note by Bolten, p. 26-33.

do have a strong preference for the intent of persecution on behalf of the persecutor. Though the issue is blurred with that of singling-out and with nexus, it can be inferred from the case-law, that such an intent should not be generally but specifically linked to the refugee. Thus, as it was shown, the rape and detention of the girlfriend of a dissident when the authorities came to arrest him, was not considered to be persecution since it happened "on the side" of the persecution, and she was not their primary target. Arbitrary detention that was not followed up by prosecution was not persecution, as it lacked the intent to persecute. Thus, the intent of the persecutor follows strictly the intent to single out for such action. Without the singling-out there is no persecution.

When it comes to the benevolent intent of the persecutor, the situation is a bit more complicated since the case-law is scarce. There would be persecution, even if the persecutor had a benevolent intent, if his actions were directed at the individual, and that they resulted in persecution. This was strengthened by the rejection by the Raad van State in late 1988 of the theory that the state could not be persecuting if it had a legitimate goal in mind. Thus, persecution may be found to exist, even if the objective of the state is legitimate, if the end result is harm. The effectiveness of this line of case-law in Dutch case-law is however offset by the fact that the applicants need to prove, according to the singled-out criterion, that the actions of the persecutor, either malicious or benevolent, were directed at him or her personally. The relative scarcity of legal cases relating to the definition of persecution is thus explained by the fact that most of the legal analysis is done on the level of the "well-founded fear" of being persecuted.

The Dutch courts have always insisted that not all violations of human rights will be regarded as persecution in their interpretation of the Refugee Convention. In 1983 the Raad van State heard an appeal of a Hungarian national who had escaped his country and sought asylum in the Netherlands.[135] The Secretary of State denied his application for asylum, arguing that what he fears was just prosecution for illegal departure from his home country. The Raad van State disagreed and, taking into account his family situation (his two cousins were refugees, and his wife had also escaped from Hungary), and the legal punishment for illegal departure, found it be "*particularly severe, because his illegal border violation was probably to be viewed as taken for political reasons*."[136] In a comment on this case, Swart pointed out that the Raad van State seemed to accept that only "serious violations" would be acknowledged as persecution. This was explicitly affirmed in a 1984 decision by the Raad van State in the case of a Cambodian citizen.[137] The applicant had belonged to the Chinese minority in that country, and his father had owned a restaurant in the country's capital Phnom Penh, where the applicant had worked. His family had been supporters of the Lon Nol regime and, when the communist Khmer Rouge advanced towards the capital, the applicant fled towards the Thai border with his wife. During the flight, he was forced to leave his wife "to her fate" when they were ambushed by the Khmer Rouge. After spending a few years working illegally in Thailand, and when threatened with forced repatriation back to Cambodia, he fled via Hong Kong to Italy and later the Netherlands.[138] The Secretary of State denied his refugee status application, claiming that since 1979 things have improved in Cambodia, and that the applicant did not have

[135] ARRvS 21 februari 1983, RV 1983 nr. 2 with note by Swart, p.5-12.
[136] Ibid., p. 9.
[137] ARRvS 31 januari 1984, AB 1985 nr. 185 with note by Fernhout, p. 465-470.
[138] Ibid., p.466-467.

a well-founded fear of being persecuted either on account of his political opinion, ethnicity or membership of a particular social group (middle class people). The Raad van State disagreed and quashed the decision of the Secretary of State, remanding the case back for consideration. It held that the applicant might have a well-founded fear of "*terror activities and human rights violations*" from the former Khmer Rouge.[139]

The requirement that the violations of human rights have to be of particular severity was maintained throughout the case-law of the 1980s and 1990s. In 2002 the Afdeling affirmed it again, in the claim of a Somali citizen.[140] His application was denied by the Secretary of State based on the fact that the applicant had not sufficiently proven that the discrimination against him was so severe as to make his life untenable. The applicant appealed to the district court, which overturned the decision of the Secretary of State. The Secretary of State then appealed to the Raad van State which reversed the judge's decision and affirmed the initial Secretary of State decision.[141] The Council of State ruled that what the applicant faced "*was not grave enough, that his life had not become unbearable*."[142] Finally in 2003 the Afdeling in one of the rare instances were it affirmatively spoke on the substance of the refugee definition held:

> "otherwise than the applicant contends, the [district – K.B.] court correctly held that the Convention's term "persecution" implies a fear of a particularly severe treatment. Not all violations of human rights, in particular not those of light nature, will constitute without other things persecution in the meaning of the Refugee Convention."[143]

Thus, from the 1980s till now, the Dutch courts have insisted that persecution be a particularly heinous or grave violation of human rights, and that not all human rights breaches would pass the threshold.

Though the case-law is scarce, the Dutch courts seemed to have also come to accept that an accumulation of different violations of human rights may amount to persecution. In 1988 the Raad van State heard an appeal from a denial of refugee status by the Secretary of State, filed by an Iranian Bahai believer.[144] He claimed that, due to religious persecution by the state, constant harassment, confiscation of property and discrimination, the Bahai believers in Iran faced the choice of either converting to Islam or fleeing the country. The Secretary of State disagreed with the applicant in that the Bahai were persecuted as a group. The Raad van State, though not necessarily doubting the findings of the Secretary of State in regard to group persecution, nonetheless reversed and remanded his decision, based on the fact that it was not specific enough in regards as to how this affected the individual case of the applicant.

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[139] Ibid., p.469.
[140] ABRvS 30 juli 2002, JV 2002 nr. 315, p. 971-974.
[141] Ibid., p. 971-72.
[142] Ibid., p. 972 pnt. 2.3.1. For a similar decision see ABRvS 20 augustus 2002, JV 2002 nr. 280, p. 1131-1132.
[143] ABRvS 6 october 2003, JV 2003 no. 532, p. 1713-1715.
[144] ARRvS 8 juli 1988 (R02.97.0737).

In 1998 the district court in 's- Gravennhage sitting in Zwolle dealt with a claim filed by a man from the Nuba people in South Sudan.[145] One day the Sudanese army descended on the village, killing a number of men, raping the women and kidnapping children for slavery. The applicant, who was found to be in possession of a gun, was sentenced to flogging and a prison term. Later, his village was again raided by the army and burned as it was suspected to be supporting the SPLA. It was accumulation of all these circumstances that led the court to reverse the Secretary of State, and remand the decision for reconsideration.

Later, in the 1990s, some district courts found that the treatment some of the minority clans have endured in lawless Somalia, such as slavery, psychological abuse, deprivation of life and property, may in particular cases amount to persecution.[146] However, the usefulness seems to be limited by the 2003 ruling by the Raad van State, where it effectively overturned all the previous regional courts' jurisprudence, which found the situation in Somalia to amount to persecution.[147]

3.3.2 Agents of persecution

The issue of the agent of persecution has been one of the most contested problems of refugee law, not only in the Netherlands but also in other countries in Europe in the 1990s. Two important countries, namely Germany and France, held a different view on the subject than the majority of the Member States of the European Union and their attitude has affected the EU context of the asylum and immigration harmonization efforts.

The problem is a simple one when one speaks of the state as the persecuting agent. If persecution can be attributed either to the State or to its organs, one can speak without a doubt of persecution. The problem gets slightly more complicated when it is not the state which is the persecutor. This situation can take two shapes: first, when a state tolerates persecutory behavior or even condones it and, second, when the state is unable to offer protection from persecution, even if though it is willing to do so. In the first situation the state is tolerating persecution, and in the second it is powerless to stop it. In response to these questions, legal doctrine has developed two positions: one, called generally the "accountability" or "complicity view", and the other, the "protection view."[148]

According to the accountability theory, there can be no persecution in the meaning of the Geneva Convention if the state cannot be held accountable for the persecution. It is only when the state is directly responsible for the persecution and violation of human rights that

[145] Rb. 's – Gravenhage zp. Zwolle, 9 Juni 1998, RV 1998 no. 8 with note by Vermeulen, p. 25-28.

[146] Rb. 's – Gravenhage zp. Zwolle 31 maart 1999, JUB 1999, 15-4; Rb. 's – Gravenhage zp. Haarlem 16 september 1999, RV 1999 no. 9 with note by Spijkerboer, p. 45-49, also published in NAV 1999, no. 131 and JV 1999 no. 258; Rb 's – Gravenhage zp. Amsterdam 27 oktober 1999, JuB 200 nr. 2-33; Rb 's – Gravenhage zp. 's Hertogenbosch 16 November 1999, JuB 2000 nr. 3; Rb 's – Gravenhage zp. Zwolle 17 November 1999, NAV 2000 no. 32, p. 121-123; Rb 's – Gravenhage (Rechtseenheidskamer) 14 juli 2000, RV 1974/2003, no.11 with note by Bruin, p. 85-91.

[147] ABRvS 22 augustus 2003, JV 2003 nr. 526, p. 1694-1697. Also published in NAV 2003 nr. 313.

[148] Ben Vermeulen, Thomas Spijkerboer, Karin Zwaan, Roel Fernhout, *Persecution by Third Parties, Center for Migration Law*, Nijmegen, 1998, passim.

a refugee may seek protection under the Convention regime. In general, this view was adopted by the German and French judiciary. The German courts would have someone fall outside the protection afforded by the Convention if there is no *de facto* or *de jure* authority that may give protection. Somalia was a classical example. There was no authority at all, so Germany denied protection to Somali refugees because there was no authority there at all. The approach of France is slightly different. The French authorities and courts would deny protection where there was a functioning state authority in the country, even though it was unable to afford effective protection. Here the classical situation was Algeria, where the government was willing but unable to offer effective protection from Islamic fundamentalist militias. Refugee petitions from that country were systematically denied by authorities and courts.

According to the protection theory, it is not important who is the agent of persecution. The only substantive issue is "*whether the persons involved are not effectively protected against human rights violations, regardless of the source of these violations*."[149] This view has been maintained by the UNHCR,[150] and is shared by the vast majority of States Party to the Convention, such as the United Kingdom, Canada, the United States etc. The arguments for this approach are the following. First of all, it is of little difference to the refugee who is the persecutor. One is allowed international protection simply because of being persecuted. Secondly, the Geneva Convention is not an international document on state responsibility but rather a treaty on human rights. Its object is not to establish guilt or liability of a state party concerned but, rather, to give protection to those who seek it. Thirdly, if one was to follow the consequence of the "accountability" principle, one comes to the conclusion that in order for a refugee to exist, one has to have a State or de facto authority. If there is no state or authority then there is no persecution. As Goodwin-Gill has pointed out:

> "qualifying as a refugee would be conditional on the rules of attribution, and protection would be denied in cases where for any reason, the actions of the persecutors were not such as to involve responsibility."[151]

Fourthly, it follows that if a state is not a party to a human rights treaty, then it is not legally bound to observe it and has the right to violate it and to persecute. Fifthly, the "accountability" view is self-conflicting if it allows for *de facto* authorities to be held responsible, even if according to principles of state responsibility in international law there is no one be held accountable.[152]

The issue of the agent of persecution had been present in Dutch case-law from at least the early 1980s. In the beginnings it was of little importance to the cases. In one case, the applicant was of Syrian Orthodox religion and ethnicity and had been harassed by his Muslim neighbors, and Kurdish insurgents, with the apparent silent approval of the police, who did nothing to protect him or his fellow believers. He applied for refugee status but his application was denied by the Dutch Secretary of State. In the decision, the Secretary of State stated that "*the*

[149] Ibidem.
[150] UNHCR, Handbook, p.17, UNHCR position with regard to persecution by non-state agents, 8th August 1996.
[151] G. Goodwin-Gill, *The Refugee in international Law*…, p. 73.
[152] Ben Vermeulen, Thomas Spijkerboer, Karin Zwaan, Roel Fernhout, *Persecution by Third Parties, Center for Migration Law*, Nijmegen, 1998, passim.

authorities were not guilty of persecution."[153] The applicant appealed to the Raad van State. In its decision the court did not address that issue specifically, but did say that:

> "The Court is of the opinion that refugee status is a special status and is reserved for those who due to a well-founded fear of persecution find themselves outside their country of nationality and whose protection they cannot or will not invoke, because of that fear."[154]

The formulation of the court is vague but it may be reasonably inferred that the court allowed, in principle, the idea that persecution may stem from non-state agents, as happened in this particular case. It is interesting to observe, that one of the issues raised by the representative of the UNHCR, was the fact that, according to the UNHCR, persecution may indeed come from both state and non state agents.[155]

A more clear statement came in a decision on 1 June 1984 when the Raad van State reviewed the application of an Ethiopian Eritrean. The Secretary of State argued that state complicity was necessary for persecution and denied the application, upon which the applicant appealed to the court. The Raad van State rejected that argument out flat saying "[the notion – K.B.] '*there must be talk of personal experience of persecution by the authorities of the said country' is wrong, and we would like to add, that this is badly phrased.*"[156] Here, the court rejected the requirement of state complicity and accepted that persecution may stem from other sources.

Finally, on 15 January 1993, the Dutch Supreme Court dealt with the same issue in a case involving a Lebanese national.[157] The court, quashing the decision of the court of the first instance in 's - Gravenhage, said:

> "One can speak of well-founded fear of being persecuted in the meaning of that sentence not only when an alien in his land of origin fears persecution by the authorities of that land, but also (…) when his well-founded fear of being persecuted comes from others other than the authorities, and they are unable or unwilling to offer him protection."[158]

This was no doubt the clearest utterance on that issue so far, with the Dutch Supreme Court accepting persecution from both state and non-state agents.

In all these cases the courts upheld the possibility of persecution by non-state agents, when the state was either unwilling or unable to offer protection. However, this did not address the question of what happens in a situation where the state had completely fallen apart to the extent that no government authority, of even the most nominal sort, exists. The issue, no doubt a highly theoretical one before the early 1990s, soon became a practical problem with Somali refugees coming to the Netherlands and applying for asylum here.

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[153] ARRvS 7 februari 1980, RV 1980 no 3., s. 24-34.
[154] Ibid., p.30.
[155] Ibid., p.30.
[156] ARRvS 1 juni 1984, RV 1984, nr. 3 with note by Swart, p. 12-15.
[157] HR 15 januari 1993, RV 1993 no.16, p. 41-42.
[158] Ibid., p. 41.

That question was addressed by the Raad van State in its decision of 6th November 1995.[159] The applicant was a Somali fleeing civil war in that country, which had evolved to such a unparallel level of chaos and destruction, that the country as such had fallen apart and the were virtually no authorities. It is decision, the Raad van State said:

> "The court took the following into consideration. The term 'persecution' (…) as had been consistently construed by the court, that it should be understood: persecution by the authorities or by third parties, whereby the authorities can or will offer insufficient protection. Having said the above, the court is of the opinion that there cannot be talk of persecution in the meaning of the Geneva Convention and Aliens Act, where the land of origin of the applicant has no authorities."[160]

In this decision the Raad van State has made it clear that while persecution by third parties can be invoked in Dutch courts, it was only in the context of inefficient protection or unwillingness to protect offered by the state authorities. So, in fact, the court has tied the existence of persecution to the existence of state authorities. The court did not consider the fact of existence of *de facto* authorities in Somalia, which drew sharp criticism from the commentators.[161]

In a decision rendered a year later, it seemed that the Raad van State might have considered a change of its interpretation of that question. Hearing the appeal of another Somali citizen, whose application was denied, also because of the lack of authorities in Somalia, the Raad van State said that

> "The court is right now not convinced that there can be no persecution in the meaning of the Convention and the Aliens Act, when in the country of origin of the alien no authority exists, but shall leave this question open for now."[162]

Based on other circumstances of the case, the Raad van State quashed the decision of the court of the first instance, leaving the question of the agent of persecution open. This was quite a radical change of the line of reasoning, but it seems that throughout the year 1996 the Raad van State would go back and forth on that issue.[163]

In 1997 the Raad van State seems to have reverted to its decision of 1995, having first nuanced it considerably.[164] While affirming that, in general, there needs to be state authority for persecution to occur, nonetheless, the court found that the existence of *de facto* authorities which perform the most essential state functions such as "*administrative tasks, tax collection, education or medical facilities*", as were in the case of this particular applicant who had fled from the north of Somalia (Somaliland), one can speak of persecution in the meaning of the convention. The nuancing of the court's line was recognized by the author of the note. Thus in 1997 the court seemed to have allowed persecution the cases where *de facto* authority

[159] ABRvS 6 november 1995, RV 1995 no.4 with note by Spijkerboer, p. 11-13.
[160] Ibid., p. 12.
[161] R. Fernhout, T. Spijkerboer, B. Vermeulen, *Vervolging zonder overheid: vluchtelingschap of niet?*, NJB 1995 no. 10 (8 march 1996), see also note in RV 1995 p. 12-13 by T. Spijkerboer.
[162] Rb. 's – Gravenhage (Rechtseenheidskamer) 11 juli 1996, RV 1996 no.9, p. 31-34 with note by Spijkerboer.
[163] Ibid., p.34.
[164] ABRvS 19 maart 1997, RV 1997 no.2, p. 2-4 with note by Spijkerboer.

existed. However, given the 1996 decisions of the Raad van State, there was still some ambiguity in cases where refugees came from that part of Somalia, where there was no authority at all.

Jurisprudence after 1997 showed a tendency to step away from the requirement that there needs to be an authority of some kind in order to find persecution. On the 27th of May 1998 the district court in Zwolle heard an appeal form a clanless Somali woman.[165] She had been kidnapped from an orphanage and forcibly married to her abductor, with whom she had two children. Her husband not only abused her physically, but also kept her a prisoner in the house. She managed to escape, and claimed refugee status. The Secretary of State denied her refugee application, taking the position that the case was purely, about domestic violence problems. Interestingly, he did not even broach the subject of agent of persecution. The court rejected the argument of domestic violence, and found that the woman had a well-founded fear of being persecuted. The court too did not tackle the issue of agents of persecution and one might presume that the court took for granted the opinion that a clanless Somali woman could not invoke the protection of clans which in Somalia were the *de facto* authorities.[166]

The question of the agents of persecution received full attention in another court decision in the same year, this time given by the Rechtseenheidskamer court on 27 August 1998.[167] The case involved an applicant who was a member of the Darod clan. The court, before deciding on the merits of the case, which was ultimately dismissed, first dealt extensively with the issue of diverging interpretation of the Geneva Convention about the issue of persecution agents. Citing not only the relevant Raad van State case-law dating from 1995, but also the UNHCR position paper on the issue of agents of persecution, it concluded:

> "The court is of the opinion that neither the wording of Article 1A (…) leads to the conclusion that there can be no persecution in the meaning of the aforementioned sentence, when persecution comes from third [parties – K.B] and furthermore one cannot invoke protection from the authorities because any form of authority has broken down. The wording history of the Geneva Convention also does not lead to this conclusion."[168]

Concluding, the problem of the agents of persecution had quite a chequered history in Dutch law. From the beginning in the 1980s, the Raad van State accepted that persecution could come from non-state agents, provided that the state was not willing or able to offer protection. Though through its decisions the Secretary of State tried to get that line overturned, it was nonetheless unsuccessful, and the 1993 Dutch Supreme Court ruling once again underlined, that where the state is unwilling or unable to offer protection from persecution from non-state agents, the Geneva Convention applies.

However, within two years the courts were faced with a different dilemma: what if there is no state to offer or to be unable to offer protection? Here the Raad van State took a decidedly different approach. In 1995, it held that state existence is a requirement for finding persecution.

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[165] Rechtbank 's – Gravenhage, zp. Zwolle 27 mei 1998, RV 1998 no. 7, p. 23-25 with note by Spijkerboer.
[166] Ibid., p.24.
[167] Rechtbank 's – Gravenhage (Rechtseenheidskamer) 27 augustus 1998, RV 1974-2003, no.10, p. 76-84.
[168] Ibid., point 10.

A year later, it left the question open and its non-consistent case-law on that issue left the legal doctrine very much irritated. In 1997, it again changed course, now accepting de facto authority as a possible protection provider or persecutor. Finally, in 1998, the district courts no doubt confused by the case-law, saw a clear ruling by the Rechtseenheidskamer in the Hague, close all possible gaps. The court held that persecution may come from non-state agents, even in cases where there is no *de facto* or *de jure* authorities. It is worth observing that despite considerable case-law, and doctrinal criticism, the legal reasoning in this question was never addressed in particular detail, until the 1998 decision. It should also be pointed out that the two most important decisions in the 1990s on these issues, stating clearly, why persecution by non-state agents may be allowed, with the most detailed legal reasoning came from the Dutch Supreme Court (1993) and the Rechtseenheidskamer in the Hague (1998), and not from the Raad van State. It is also worth pointing out here that, post 2001, when the Afdeling again was competent in refugee cases, it never returned to its pre-1995 case-law.

3.3.3 Specific issues
3.3.3.1 Physical harm and threat thereof

It has been generally accepted in Dutch case-law that the threat of life would constitute persecution in the meaning of the Geneva Convention. In 1982 the court heard the case of a citizen of Argentina, who had worked as a coastal guard.[169] During work he had come across bodies of political dissidents that had been dropped from airplanes to the ocean, and which had washed up on the beach. He reported these findings to the police, which told him not to tell anyone about it. After that he was interrogated a number of times by the Secret police about what he knew, and if he had told anyone about his findings. The applicant fled to the Netherlands but was denied refugee status by the Secretary of State. The Raad van State quashed his decision and remanded it for consideration. According to the court, the applicant's fear of "disappearing" (which was apparently the fate of political opponents in Argentina) was in fact a threat of life, and that amounted to persecution.[170]

In 1989 two presidents of the local courts granted an interim measure forbidding the Secretary of State to deport the applicants to their country until their appeal from a denial of refugee status was decided upon. In the first case, the applicant had been a citizen of Bangladesh, belonging to a forbidden political party.[171] Because of his political activities, he was blacklisted and fled to "*escape the death punishment*" which meant extra-judicial killing. In the second case, the applicant, a national of Ghana, was an informer of the country's secret police, but withheld some information, which led to the accusation that he plotted to overthrow the government. His family had freed him from his prison but, following his escape, his mother and sister had been interrogated and the mother taken into the army barracks, where she died in her prison cell. The judge forbade his removal pending his appeal from a denial of refuge status by the Secretary of State, finding that the applicant "*could fear for*

[169] ARRvS 29 juni 1982, RV 1982 nr.3, with note by Swart, p.6-10.
[170] Ibid., p. 9.
[171] Pres. Rb. Amsterdam 18 mei 1989, NAV 1989, 441.

his life or other forms of heavy persecution."[172] Finally, the Raad van State in 1994 quashed the decision of the Secretary of State denying refugee status to an Afghani army deserter, based on the fact that, for his desertion he would face the death penalty.

Torture, or threat of, is also considered to amount to persecution. Thus, in its decision in 1984, the Raad van State held that the applicant, who had been an Ethiopian citizen of Eritrean ethnicity and who had been detained by the Ethiopian military and tortured for five months had a well-founded fear of being persecuted.[174] In 1988 the Raad van State amidst a very unfavorable line of decisions in Tamil cases, nevertheless, held that the applicant, who had been detained, beaten, and tortured while in detention, could have a well-founded fear of persecution, and quashed the negative decision by the Secretary of State and sent it back for reconsideration.[175]

In this context it is interesting to point to the jurisprudence that the Dutch courts have created with regards to rape. In the two previously described cases of Rasiah the courts, though dismissing her claims of persecution based on the threat of rape, found that it was not specific enough to warrant a well-founded fear of persecution.[176] However, if one reads the Raad van State's decision *a contrario*, it would be reasonable to conclude that if Rasiah had proven to the courts, that the Indian Peace Keeping Forces in Sri Lanka had indeed used rape of women, as a measure to humiliate the Tamil population, and to keep them under control, the courts might have found persecution.[177] But in another decision of 1989, the Raad van State refused to rule on the issue of rape. The case involved a female Tamil from Sri Lanka whose fiancé was an active Tamil fighter.[178] Each time the authorities came to arrest him he was away, but each time the applicant had been raped by the military, taken into detention and released sometime afterwards. The Secretary of State denied her application based on the fact that what had happened to her, was not because she was singled-out for persecution. She appealed to the Raad van State but the court denied her appeal and affirmed the decision of the Secretary of State. It held that, since she was not the target of the military in the first place, she could not have been persecuted. Thus, the repeated rapes were just rapes, and not persecution. The interpretation of that decision is problematic for several reasons. Even assuming *a contrario* it is difficult to know whether it would have amounted to persecution if it had been the applicant's fiancé that had been raped.

The unwillingness of finding rape to be persecution is well illustrated by two decisions of the district court in 's- Gravenhage sitting in Zwolle. In 1996 the court heard the case of an Aramaic Christian from Syria.[179] Though she had not been politically active herself, her parents and her husband were, and as such they became known to the authorities. Her parents fled to the Netherlands and, following her visit to them, she and her husband were

[172] Pres. Rb. Arnhem 31 mei 1989, NAV 1989 no. 441.
[173] ARRvS 20 maart 1994, RV 1994 nr.3 with note by Vermeulen, p. 8-10.
[174] ARRvS 7 juni 1984, RV 1984 nr. 5 with note by Swart, p. 19-23; See also ARRvS 21 januari 1986, RV 1986 nr.1, with note by Bolten, p. 1-3.
[175] ARRvS 14 september 1988, RV 1988 no. 6, with note by Bolten, p.26-33.
[176] ARRvS 28 october 1991, RV 1991, nr. 11 with note by Vermeulen, p. 29-38. The case and the note were also published in RV 100, nr. 1, p. 1-9. I will refer to the publication in RV 100.
[177] Ibid. pnt.4, p.9.
[178] ARRvS 8 december 1989, RV 1989 no. 8 with note by Fernhout, p.22-24.
[179] Rb 's- Gravenhage zp. Zwolle 29 november 1996, NAV 1997. nr 13 with note by Heijnennman, p. 18-20.

arrested and interrogated by the secret police. She was released on condition that she did not engage in any anti-government activities, and her husband on condition that he would spy for the Syrians in Lebanon. However, soon after the husband went into hiding and the applicant was re-arrested and interrogated about the whereabouts of her spouse. During the interrogation, she was threatened with rape if she did not disclose what she knew. The court refused to quash the decision of the Secretary of State denying refugee status. It held that:

> "the applicant had been arrested on a number of occasions, and subsequently mistreated, but she was not tortured, and these detention periods had been of short duration. Also the discrimination was not of such a grave matter, that would support the admittance of the applicant into this country as a refugee."[180]

The same district court in Zwolle rendered a similar decision in 1998.[181] The applicant had been a Turkish national of Kurdish origin, and a supporter of the Kurdish independence movement. She was arrested by the military and, during her detention, raped repeatedly by the soldiers. The court found that rape had not been an example of persecution.

> "The court is of the opinion that the rape of the applicant cannot be treated as a directed towards her as an act of persecution. Based on the fact that she was not the only woman in her village that had been raped, it cannot be assumed that the rape (…) is linked with her support for the PKK."[182]

Thus, the Dutch courts have been very reluctant to accept rape as a form of persecution.

In contrast to the case-law surrounding rape, the Dutch courts have been much more willing to acknowledge refugee status when it comes to forced abortions and sterilizations connected with the one-child policy in communist China. In 1996 the Raad van State heard an appeal from a denial of refugee status by the Secretary of State from a citizen of China.[183] The applicant and his wife had already two daughters but wished to have a son. When the third pregnancy became visible, the authorities insisted that the applicant underwent sterilization, and his wife an abortion. The applicant and his wife refused and fled from Shanghai, where they were living, to relatives in the countryside. However, during the flight, his wife miscarried and returned to their house. The applicant, fearing sterilization, refused to return and fled to the Netherlands. The Raad van State upheld the denial of refugee status, however, in an important par of its decision it held that while the concept of

> "controlling population growth is not persecution in the meaning of the Convention. The **method** in which this principle is applied to the part of the population that does not support this aim, may amount to persecution in the meaning of the Convention."[184]

The first positive decision came in 1997 when the Raad van State heard the appeal from a

[180] Ibid., p.19. For a comment on this case see Spijkerboer 2000, passim.
[181] Rb 's- Gravenhage zp. Zwolle 9 februari 1998, NAV 1998 no. 45, RN 1998, 973.
[182] Ibid., . For more on this see Spijkerboer/Vermeulen 2005, p. 60-61 and Spijkerboer 2000, p. 125-128.
[183] ABRvS 7 november 1996, RV 1996 nr.6, with note by Spijkerboer, p. 16-21.
[184] Ibid., p. 18 (emphasis mine).

denial of refugee status by the Secretary of State to an applicant from China.[185] The applicant and her husband already had one child when she became pregnant again. After refusing to abort her baby in the eighth month of the pregnancy, they fled to family in the countryside where she had given birth to the second, and illegal, child. Following their return to their hometown, both were required to pay a penalty for an "illegal pregnancy" and pressured to sterilize themselves. Since they both refused, her husband was taken away to the clinic but fled on his way there. The applicant was later taken to a "contraception center" where, without narcosis or painkillers, she was forcibly sterilized. The applicant had found herself in a situation where her oldest son, born before her marriage, was not registered and her younger, "illegal" child was not registered as he was born without permission. The Raad van State finding the Secretary of State's reason's for denying the applicant and her children refugee status to be inadequate, quashed the decision and sent it back for reconsideration.[186] It is reasonable to infer, as the court did not say so explicitly, that when it came to the applicant, *the method* of forced sterilization was considered to be persecution. That caution is strengthened by the fact that, in three earlier decisions on the same issues, the Raad van State affirmed the denial of refugee status by the Secretary of State, and based its reasoning on the fact that the breaking of a "one-child policy" is breaking the law, and as such does not enjoy the protection of the Geneva Convention.[187] Also in 1995, the district court in Zwolle denied the appeal of a woman who had claimed that the one-child policy, as well as the punishments imposed on those breaking it, amounted to persecution. The court found that since the law was of a general application, and penalties applied to both men and women, this was not persecution according to the court.[188]

Arbitrary detention has been generally accepted by the courts as enough to constitute persecution. In 1982 the Raad van State heard an appeal from a denial of refugee status to a citizen of Chile.[189] The applicant, who had been working at the University, had been a member of the Chilean communist party and known to be an ardent supporter of the left wing president Salvador Allende. Following, the military coup, he was first interrogated by the military, then placed under house arrest, and eventually released, but still regularly detained and interrogated by the secret police about his political activities, which had ended in 1977, and the underground communist party. During those interrogations he was physically abused and tortured.[190] The Secretary of State denied his application for refugee status because it argued that, since the applicant was not politically active, there was no reason to assume that the state authorities would be interested in him still.[191] The Raad van State quashed the decision and remanded it back for consideration, holding that (amongst others) the numerous arbitrary detentions he was subjected to show that the authorities still consider him to be a political opponent, and thus he has a well-founded fear of being persecuted.[192]

[185] ABRvS 22 september 1997, RV 1997 nr. 3, with note by Spijkerboer, p. 4-6.
[186] Ibid., p. 6.
[187] ABRvS 15 januari 1997, R02.92.2670, ABRvS 15 januari 1997, R02.93.5461, ABRvS 20 mei 1997, R.2.93.6262. See also other negative decisions by the courts from 1994-95, as quoted in RV 1996, p.19.
[188] Rb. 's – Gravenhage zp. Zwolle 4 januari 1996, NAV 1996 no.7, p. 226-231.
[189] ARRvS 12 juli 1982, RV 1982 nr. 7, p.22-26.
[190] Ibid., p.22-23.
[191] Ibid., p. 25.
[192] Ibid., p. 25-26.

This decision was affirmed when in 1984 the Raad van State heard the appeal of a denial of refugee status by the Secretary of State to a citizen of Argentina.[193] Though the court did affirm the denial of refugee status, it did hold however, that the Secretary of State's motivation was wrong. The Secretary of State held that the fact that, after his arbitrary detentions the applicant was released "*stood in the way of finding refugee status*". The Raad van State held that this motivation was "wrong".[194] However, later in the year, it reversed the Secretary of State when he had denied refugee status to a Chilean left wing activist, who, together with his wife, had been busy in underground opposition, and because of that detained, and tortured. The Secretary of State had found that because he was not harassed by the authorities for a two year interval he was not a refugee.[195] In this case, the court called the reasoning of the Secretary of State "unbelievable".[196] In a similar case in 1986 the Raad van State held that a citizen of Uruguay, who came from a politically active family, and though not political himself, had been detained on a number of occasions, was considered to be persecution.[197]

Arbitrary detention was considered to be persecution in a case rendered by the Raad van State in 1988, when it heard an appeal from the denial of refugee status to a Tamil from Sri Lanka.[198] The applicant, a young male, and a sympathizer of the Tamil United Liberation Front, had been arrested by the Sri Lankan military, taken to the Elephant Army camp where he was detained for months, during which time he was interrogated and tortured. Though eventually released, he suffered the same fate on a number of subsequent occasions and during each detention he was abused physically. The Raad van State quashed the denial of refugee status, and sent it back for reconsideration to the Secretary of State. It based its decision on the facts that that the numerous detentions of the applicant, taken together with his abuse and torture, were persecution in the meaning of the Convention.[199] Also in 1993 the Raad van State held that, in a case where the applicant had been detained over 40 times for various periods, it had a: "*deep impact on the personal life and the professional occupation of the applicant*" and held that to be persecution.[200]

The issue of detention in facilities other than prisons, dungeons, or military barracks is slightly more complicated. That is clearly seen in the cases of homosexual applicants who are often confined to hospitals or psychological institutes to "cure them" of their sexuality. In 1992 a homosexual applicant from former Czechoslovakia had been denied refugee status by the Secretary of State and he appealed to the Raad van State.[201] He had been fired from his military job because of his sexual orientation, taken to the hospital to undergo "treatment" for it and, following his release, was unable to find a job, since his record showed clearly that he was both a homosexual, and had been treated in a mental institution for it. The Raad van State affirmed the decision of the Secretary of State and did not find (amongst other things) that confinement to a mental hospital because of one's sexuality was persecution.

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[193] ARRvS 19 october 1984, RV 1984 nr.7 with note by Swart, p. 26-28.
[194] Ibid., p. 27. See also ARRvS 27 januari 1983, AB 1984, nr. 363, p. 1061-1065.
[195] ARRvS 28 juli 1983, AB 1984, nr. 364, p. 1065-1068.
[196] Ibid., p. 1068.
[197] ARRvS 21 januari 1986, RV 1986 nr 1 with note by Bolten, p. 1-3.
[198] ARRvS 14 september 1988, RV 1988 nr. 6 with note by Bolten, p. 26-33.
[199] Ibid., p.29-30.
[200] ARRvS 26 october 1993, no. R. 02.90.3502.
[201] ARRvS 17 juni 1992, RV 1992 nr. 9 with note by Spijkerboer, p.21-24.

Similarly, in 1993 the Raad van State affirmed the denial of refugee status by the Secretary of State to a homosexual from Russia.[202] It held that the confinement of the applicant in a mental institution where he was to be cured of his sexuality was not persecution. The same conclusion was also reached by the President of the court in 's – Gravehage sitting in Zwolle.[203] The applicant was a Russian homosexual who, because of his orientation, had to leave his parent's house and received two "notices to appear" in the local psychiatric hospital for treatment. The Secretary of State denied his application and the applicant applied to the President of the court for a court injunction barring his deportation. The President granted his petition, and forbade his deportation based on humanitarian grounds. However, the judge had no doubts that the applicant was not a refugee.

Interestingly enough, the Dutch courts were granting refugee status from the early 1990s to homosexuals from countries where homosexuality had been proscribed by law, the law enforced with more or less severity, and if the applicants had been detained *in prison* for their sexual orientation.[204]

3.3.3.2 Mental, emotional, and psychological harm and threat thereof

There are very few cases in Dutch case-law where psychological harm, or mental harm, is discussed or mentioned as grounds to finding the existence of persecution. In the rape cases of the Tamil women, there is no mention of the psychological trauma associated with rape and no indication if that may be construed as persecution. While this might be because the courts have found rape, or thereat thereof, not to be well-founded in the Convention meaning. Nevertheless, this silence is instructive. Also, the psychological trauma is not addressed in most of the homosexual cases heard by the courts. Again, given the fact that the applicants claimed that locking them up in a mental institution was persecution, this is puzzling. Perhaps this might be explained, albeit only partially, by the fact that the Dutch courts often hide the lack of persecution under the phrase that "*the applicant has insufficiently proven, a well-founded fear of being persecuted*."

There are, however, cases where the psychological trauma has been addressed by the court, and where it seemed to have been a factor for finding persecution. The extent of which it was decisive is not clear though.

In 1982, the Raad van State dealt with the appeal from a denial of refugee status to a Chilean.[205] The applicant had been a member of the Chilean communist party and known to be an ardent supporter of the left wing president Allende. Following the military coup in his country, he was detained by the military, placed under house arrest and eventually released, but still regularly detained and interrogated by the secret police. During those interrogations he was physically abused and tortured.[206] The Secretary of State denied his application for

[202] ARRvS 26 mei 1993, RV 1993 nr. 4 with note by Spijkerboer, p. 9-12.
[203] Pres. Rb. Zwolle 11 maart 1993, NAV 1993 nr.23 with note by van Mansveld, p.124.
[204] See cases by courts in Haarlem and Den Hague, as quoted in the note of Spijkerboer, p. 23. Also Pres. Zwolle 28 augustus 1995, RV 1995 nr. 13 with note by Fernhout, p.43-46. See also section 4.4.2 of this book.
[205] ARRvS 12 juli 1982, RV 1982 nr. 7, p.22-26.
[206] Ibid., p.22-23.

refugee status because it argued that, since the applicant was not politically active anymore, there was no fear of future persecution. The Raad van State quashed the decision, and remanded it back for consideration, holding that, amongst others, the numerous arbitrary detentions and torture he was subjected to "*had caused him real physical **and psychological consequences**, which he had experienced, and is still experiencing*."

But in most other cases, the psychological consequences and trauma were dismissed. In 1992 the Raad van State affirmed a denial of refugee status to a Czechoslovakian homosexual, fired from his job, hospitalized to "cure him" of his sexuality and unable to find works since.[208] The court found all this to be insufficient to reverse the Secretary of State's decision. In this, and other homosexual cases, the mental sufferings were not addressed.[209]

In 1996 the President of the court in Zwolle affirmed the decision of the Secretary of State denying refugee status to an Aramaic Christian woman with a Syrian Passport who had been detained and threatened with rape in order to reveal information about her husband, a political dissident.[210] He ruled that what she had suffered was not "grave enough" to constitute persecution, and did not address the issue of the psychological trauma she had endured, concentrating rather on the fact that she had not been tortured nor raped and was, thus, not a refugee.

A year later the same district court in Zwolle, *en passant*, discussing a case of a homosexual from Armenia, remarked that, due to numerous factors, his life became "unbearable" and quashed the decision of the Secretary of State denying refugee status and sent it back for reconsideration, but did not divulge on the mental trauma the applicant had undergone.[211]

3.3.3.3 Forced conscription, draft evaders, and conscientious objectors

The issues of forced conscription, draft evaders and conscientious objectors have been long-standing in Dutch case-law, and have been developed relatively clearly by the courts.

The first case dealing with that problem took place in 1971 when a American marine Ralph Waver, whose ship had been on its way to the Vietnam area, deserted his ship and applied for refugee status. His application threw the Dutch authorities into much confusion, as it was one of the first asylum applications to be lodged by a member of a fellow NATO country. The Dutch Secretary of State on 30 Augustus 1971 denied the petition. Waver appealed to the Crown and, following the advice of the Council of State, the Crown quashed the initial decision, and sent it back for review on 30 November 1971. What followed was an exchange of letters between the Secretary of State and the Dutch Council of State. The Raad van State then advised the Crown that prosecution for a refusal of military service, or desertion, may be considered persecution if it is attributed to a political opinion that the applicant has. Thus, the Raad van State argued that, if desertion or a refusal to perform military service is based

[207] Ibid., p. 25-26. (emphasis mine).
[208] ARRvS 17 juni 1992, RV 1992 nr. 9 with note by Spijkerboer, p. 21-24.
[209] See section 3.4.3 in this book.
[210] Rb 's- Gravenhage zp. Zwolle 29 november 1996, NAV 1997. nr 13 with note by Heijnennman, p. 18-20.
[211] Rb 's- Gravenhage zp. Zwolle 30 juni 1997, RV 1997. nr 7 with note by Spijkerboer p. 21-23.

on reasons of conscience, then there is persecution. However, the Crown was not convinced by the advice of the Raad van State and its decision and denied Waver's application for asylum. It held that indeed prosecution for refusal to bear arms may be persecution, with the important addition that, if the punishment imposed for such a refusal would be disproportionably severe, there would be discriminatory persecution.[212]

That reasoning was later upheld by the Raad van State in a decision in 1980.[213] The applicant had been a citizen of Columbia, who had been active in the opposition movement, organized mass rallies, distributed opposition propaganda etc. He was especially hostile to the army which, he claimed, had always aligned itself with the ruling elite, and intervened in politics to "*restore order and social calm*." In 1977, while active in organizing a general strike, he was arrested on four occasions. The general strike ended in bloodshed with hundreds shot by the army and thousands more wounded. Following his release and anticipating being drafted, which, as the applicant contented, was to intimidate the opposition leaders as well as himself, he fled to the Netherlands, where he applied for refugee status.[214] The Secretary of State refused his application, claiming that neither the draft to the army nor the punishment for evading such a conscription could be viewed as persecution. Interestingly, the UNHCR representative also advised the court that there were no grounds to grant the applicant refugee status. In the end the Court affirmed the decision of the Secretary of State and denied the appeal. It found that the applicant did not show, that he would be disproportionately punished for his refusal to be drafted to the army. It held that the applicant did not show sufficiently that his escape from the country would be viewed as political, and punished as such.[215]

The court slightly altered its case-law four years later.[216] The court heard an appeal from a citizen of Morocco, of South Saharan origin. He had been conscripted to the Moroccan army but escaped since, as he claimed, he would have been forced to fight the South Saharan separatist movement Polisario, which he supported. He also claimed, based on the UNHCR Handbook, paragraphs 170-171, that this would have meant participating in a war condemned by the international community. Therefore, his refusal to bear arms, and the punishment for that, would, in fact be persecution.[217]

The Raad van State again affirmed the denial of refugee status by the Secretary of State. It held, that there were no reasons to believe that the applicant would be punished more severely for his refusal to serve in the army than any other person refusing to serve. Thus, in principle it restated its position of 1980. What was new this time was that the court added an important new premise. Based on the UNHCR Handbook, it agreed that in principle, if the applicant was forced to take part in military conduct, that would be "*contrary to basic human conduct*" but refused and was punished for refusing, that punishment would constitute persecution. However, in this particular case, the court did not find the presence of such circumstances

[212] KB 9 augustus 1972, Stb. 1972 nr. 427, RV 1972 nr.3 The advice given by the Raad van State was published in AB 1973, 19. See also *Aspecten van Vluctelingenrecht*, Deventer 1972, p.247-258.
[213] ARRvS 17 april 1980, RV 1980 nr. 4, p. 35-39.
[214] Ibid., p. 36-37.
[215] Ibid., p. 39.
[216] ARRvS 23 augustus 1984, AB 1985 no. 585 with note by Fernhout, p. 1516-1520; also published in RV 1984 nr. 4 with note by Swart, p. 15-19.
[217] Ibid., p.15-16.

and denied the appeal.[218] The note under this decision was cautiously supportive of the decision of the court, especially of the new premise introduced by the court.[219]

The case-law in this field was further developed in 1988.[220] The court then heard the appeal of a citizen of Iran, who had been conscripted by the Islamic Iranian government, which he opposed, to fight in the Iran – Iraq war. He claimed that, while he had in principle no objections to military service *in abstracto*, he did have them in this particular case, as this was a war condemned by the international community, and moreover, by waged by a government he was fundamentally opposed to. The Secretary of State maintained that the conflict was indeed not condemned by the international community, and therefore he could not invoke the UNHCR handbook to back his claim.

The Raad van State seemed to have mixed feelings on the issue. It therefore nuanced its decision from that of 1984. It first held that, in order to invoke punishment for a refusal to fight, several conditions must be met. First of all, there must be a war being fought. Secondly, the war must be condemned by the international community. Only after these two conditions were met, can the courts move to the two requirements as set by the 1984 decision, that is participation in actions contrary to human conduct, and "discriminatory persecution". In this particular case, the Raad van State found that although there was a war between Iran and Iraq, nonetheless it was not one condemned by the international community, and therefore refused to entertain the rest of the application. It also remarked that, since the applicant was not political or religious, and did not invoke objection to all military service, he could have not succeeded in proving the other points, as, as the court held, his actions did not stem from conscientious reasons. Thus, on the one hand the court agreed that in some cases, the simple refusal to bear arms would be considered grounds for asylum, but on the other hand, the conditions it attached to such a situation were so strict that it undermined the ground it gave in the 1984 decision.

The author of the comment under the decision fiercely attacked the ruling. She argued that the court completely ignores the motives of the individual asylum seeker in such cases, and looks only at the big picture, making successful invocation of objections of conscience nearly impossible. She quotes a decision of the President of the court in Leeuwarden granting the motion to stay a removal order to a draft evader from Surinam.[221] Remarking on the motives behind the action of one of the applicants, the court said: "*The applicant states, that he refuses to do military service, as he does not want to shoot any of his fellow countrymen. The applicant has thus not political or ethical motive behind this decision.*"[222] Not without some irony, Bolten calls this statement "a parody" of the Raad van State decision in the Iranian case.

Perhaps because of this criticism, a year later, the Raad van State seemed to have become more tolerant of conscientious objectors and to their motives. In 1989 it quashed the decision of the Secretary of State denying refugee status to an Ethiopian of Eritrean ethnicity.[223] He

[218] Ibid., p. 18-19.
[219] Ibid., p.19.
[220] ARRvS 23 augustus 1988, RV 1988 nr. 8 with note by Bolten, p. 41-48.
[221] Pres. Rb. Leeuwarden 21 december 1988, RV 1988 nr. 11 with note from Bolten, p. 54-58.
[222] Ibid., p. 48.
[223] ARRvS 16 februari 1989, RV 1989 nr. 1 with note by Fernhout, p. 1-3.

was conscripted to the Ethiopian army but had deserted, unwilling to fight against his own people. The Secretary of State denied his application, but the Raad van State quashed his decision, and ruled that the Secretary of State had not addressed properly the issue of the applicant not wanting to fight his own people. Thus the court in this decision again put some stress on the motives of the asylum seeker.[224] The note under the decision was cautiously positive and compared it to that of 1984, rather than of 1988.[225]

Another development came in 1991 when the Raad van State heard the appeal of a citizen of Afghanistan.[226] The applicant had first done military service in the years 1966-68. In 1986 he was detained by the governmental forces and forcibly conscripted to the military. He fled soon afterwards, but was caught. During his interrogation, he promised to serve in the military if no charges were brought against him. That was granted and again joined the military. Again he fled, this time successfully, to the Netherlands where he applied for asylum. The Secretary of State denied his application, based on the fact that the applicant had never taken any part in the opposition to the Afghani regime, and there were no grounds for believing that his second desertion would be considered to be politically motivated, and that he would thus be punished disproportionately. The Raad van State did not agree and reversed the Secretary of State's decision and remanded the case for reconsideration. It found that the Secretary of State did not sufficiently argue the question as to why he thought that the Afghani authorities would not consider the second desertion as one based on political motives. The reasoning of the court is very succinct, but it was a clear turn from the 1988 decision. This time the court seemed to accept that, sometimes, the authorities may attribute a political motive to the draft evader and thus punish him for it. The removal of the burden of proof from the applicant (he has to prove that the authorities will impute him a political opinion) to the Secretary of State (that the authorities will not impute a political opinion) was of fundamental importance.

One of the major breakthroughs came in the 1995 decision of Antikian.[227] The applicant had been a Christian from Armenia, whose brother had been conscripted earlier into the Armenian army to fight with Azerbaijan for the Nagorno-Karabah region, where he had been killed. The applicant did not want to fight in that war, based on his Christian convictions, his brother's early death, and on the fact that he did not support the war. Fearing the death penalty, which could have been imposed on him because of his refusal to fight, he fled to the Netherlands where he applied for refugee status. He was refused by the Secretary of State and he appealed to the district court in Zwolle. That court in 1994 referred the matter to the Rechtseenheidskamer for a clarification, and that court heard Antikian's appeal in 1995.[228]

The court gave a very detailed legal theory as to when draft evaders, conscientious objectors and deserters may successfully invoke refugee status. First, it held that refugee status would

[224] Ibid., p. 2.
[225] Ibid., p. 2-3.
[226] ARRvS 12 maart 1991, RV 1991 nr. 3 with note by Spijkerboer, p. 4-8.
[227] Rb. 's – Gravenhage (Rechtseenheidskamer) 12 april 1995, RV 1995 nr. 7, p. 18-21, also published in AB 1995, nr. 592 with note by Spijkerboer, p. 646-654, and also in NAV 1995, p. 1017-1024 with note by Bruin. Finally, it was also published in RV 1973-2003, nr. 8 with note by Spijkerboer, p. 65-70.
[228] Ibid., 65-66.

be applicable, when for their refusal to serve because of their race, religion, political opinion, ethnicity or membership of a particular social group; they may be punished disproportionately severely for their refusal to bear arms.[229] Secondly, if due to their

> "Earnest religious or conscientious convictions, they took the decision to desert or refuse to bear arms, and, in their country of origin, there are no possibilities to substitute military duty for other non-military service."[230]

Finally, the court also found that such people may also be granted refugee status in cases where the military conflict is being condemned by the international community, or the applicant would be forced to commit acts contrary to the laws of war, or where he or she would be forced "*to participate in a conflict against members of his own nation or family*."[231] Having said that, the court found that none of these situations applied in the case of Antikian and denied his appeal, affirming the decision of the Secretary of State.

This decision was commented by on Spijkerboer as a culmination, over a decade, of case-law development.[232] It stated, for the first time affirmatively, in which situations conscientious objectors, deserters, and draft evaders may claim refugee status, in clear, unequivocal language, taking into account explicitly the UNCHR handbook, and putting an end to some of the confusion, especially regarding the C category, based on previous case-law. What is also important is that this decision was continued by other courts[233] and later the Raad van State in the 21st century, when it again began hearing appeals from the Secretary of State's decisions. Thus applicants could invoke disproportionately severe punishment for such actions or when connected with one of the persecution grounds,[234] refusal to serve based on religious or other convictions,[235] refusal to serve based on the international condemnation of the conflict or the fact that one would have to fight against one's family or people,[236] and the general division in general.[237]

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[229] Ibid., pt. 6.A., p. 65.
[230] Ibid., pt. 6.B., p. 65.
[231] Ibid., pt. 6.C., p. 65.
[232] Ibid., p. 70.
[233] Rb. 's – Gravenhage zp. Zwolle 25 mei 2000, JV 2000 nr. 179, p. 693-698, also published in NAV 2000 no. 128 with note by Ijsseldijk, p. 428-433; Rb. 's – Gravenhage zp. Haarlem, 29 juni 2000, JV 2000 nr. 184, p. 713-718. For comments on these cases see T. Spijkerboer, *Asiel voor dienstweigeraars*, NJB 2000, p. 312; Rb. 's – Gravenhage zp. Zwolle 26 april 2000, NAV 2000 nr. 142, p. 459-460; Rb. 's – Gravenhage zp. Zwolle 26 april 2000, NAV 2000 nr. 143, p. 460; Pres. Rb. Zwolle, 6 september 2000, JV 2000 nr. 279, p. 1061-1065; ABRvS 11 september 2001, JV 2001 nr. 306, p. 1064-1066 , NAV 2001 nr. 336 with note by Bruin, p. 725-729, RV 2001, nr. 18 with note by Vermeulen, p. 97-100; Rb. 's – Gravenhage zp. Assen 23 augustus 2002, JV 2002 nr. 399, p. 1173-1178. For an overview of how the Dutch legal doctrine saw this development see F. Lankers, *Diepgewortelde band met eigen volk. Dienstweigeraars met gewetensbezwaren door mogelijke inzet tegen de eigen bevolkingsgroep*, NAV 1999, p. 91-99.
[234] ABRvS 5 juni 2003, JV 2003 nr. 327, p. 1051-1053.
[235] ABRvS 21 november 2002, JV 2003 nr. 16, p.34-35.
[236] ABRvS 27 november 2002, JV 2003 nr. 23, p. 56-58; ABRvS 17 maart 2003, JV 2003 nr. 184, p. 578-579; Rb. 's Gravenhage 29 maart 2005, NAV 2005 no. 145, p. 348-349 (this decision was appealed by the Secretary of State to the Afdeling).
[237] ABRvS 11 september 2001, RV 2001 nr.18 with note by BP Vermeulen, p. 97-100.

3.3.3.4 Economic sanctions and persecution

The issue of whether economic deprivation may constitute persecution is a complicated one. The Dutch legal doctrine gives a tentative "yes" to that question. If economic deprivation is in fact, so severe as to result in the loss of possibility of earning a living, or is of such a nature that it constitutes a threat to life and freedom, it may in fact be persecution in the meaning of the Convention.[238]

One of the first cases where the Raad van State dealt with this issue as early as 1978, when it heard the denial of refugee status by the Secretary of State.[239] The applicant Y.T. was a Syrian Orthodox Christian from the region of the central eastern town of Midyat, where there was a considerable number of this group. He came to the Netherlands and applied for refugee status in 1976. In his application, he claimed that, as being distinct from the rest of the Turkish population on account of his ethnicity, language (Aramaic) and most importantly, religion (Syrian Orthodox) he was subject to persecution by the Muslim majority, as well as the government. His position had got even worse with the general situation in the Middle East deteriorating to such a point that "*he could not live anymore as a Christian in his place of birth*".

The UNHCR filed *an amicus* curiae brief in which it stated that, first of all, a state does not have to be guilty of persecution itself in order to bring refugee status into being, but can also be guilty of negligence to protect the applicant in question from persecution by his fellow citizens. According to the UNHCR, the main points supporting the granting of refugee status to the applicant were the following: the hardship he experienced did in fact make it impossible for him to earn his living in a normal way, due to constant harassment by fellow citizens and lack of any meaningful protection by the Turkish state. Secondly, he could not practice his religion freely, and was constantly mistreated, to the point where he feared for his life and health. Again no protection from the Turkish authorities was forthcoming. Finally, in the case of his return to Turkey, he could not expect to return to his place of residence and there would be no guarantee that, in the case of him settling in another part of Turkey, the authorities would protect him from persecution by his fellow citizens.

The Raad van State admitted that Turkish Orthodox Christians do face hardships in Turkey. It stated that had it been the case, that the Turkish government could not afford him protection, then what he had experienced could have been "a situation of persecution". However, the Raad van State was unaware of any persecution by the state of Turkey, even if it failed to provide the necessary protection." But even having said that, the Raad van State based its decision on arguments not presented by any of the parties. It affirmed the denial of refugee status by the Secretary of State on the argument of internal flight alternative.

> "In the opinion of the Court, based on evidence presented and pleaded before it, the resettlement of the plaintiff can take place in another part of Turkey without

[238] Spijkerboer & Vermeulen 2005, p. 34-35; Spijkerboer & Vermeulen 1995 p. 113-115; R. Fernhout, *Erkenning and toelating*…, p. 79-81.
[239] ARRvS 18 augustus 1978, RV 1978, nr. 30 with an anonymous note, p. 90-94.

> the risk of being subjected to violence, while the authorities prove to be unwilling to offer protection. If such a removal would cause for the plaintiff a deterioration of his economic and social position, that cannot lead in the opinion of the court to a conclusion that the plaintiff should be accepted as a refugee (..)".[240]

The court found the need to relocate, based on the fact of the impossibility of earning a living, taken together with insults, harassment and discrimination to be, in principle, persecution. The reason the applicant failed in his appeal was not that he had not shown persecution but, rather, that he could have, according to the Raad van State, obtained effective protection in other parts of the country. The anonymous comment under the decision agrees that "the Court sees the applicant as a refugee", even if he disagrees with the final outcome of the case.[241]

On 7 February 1980, the Raad van State gave another decision concerning Turkish Christians in which it elaborated more extensively on the subject.[242] The applicant S.D., like the applicant from 1978, had come from the central east part of Turkey - the Midyat city region. The circumstances of his case where roughly the same, maybe even more aggravated given the ongoing upheavals in Cyprus and Lebanon which all had repercussions for the few Christians living in Turkey. The applicant claimed that daily harassment by his Muslim neighbors had got even worse, with the situation for the Syrian Orthodox making it impossible to live, least of all to develop their culture and practice their religion freely. Any complaints to the police were useless and, in fact, dangerous themselves, as the police were involved in the persecution of Christians. Finally, the applicant contended that his return to Turkey was impossible, as the land and houses abandoned by the Christians were immediately seized by local Muslims. In the case of his return to his place of origin, he would face certain death. The applicant also pointed out that in no other countries where the Syrian Orthodox fled (namely Belgium, Sweden, Austria and West Germany) and where they were recognized as refugees, was the possibility of an 'internal flight alternative' deemed possible.[243]

The Secretary of State argued that, since the applicant was not persecuted by the Turkish authorities, there could be no persecution in the meaning of the Geneva Convention, though it did state for the record that by the term 'persecution' it did understand not only persecution by a government but also "*systematic, unrelenting discriminatory treatment from fellow citizens, from which the authorities are unable to offer effective protection*".

The UNHCR representative Hoeksma, had a different view on the matter this time. He began by pointing out that persecution can come not only from state agents but also from other sources and can in fact be a cumulation of severe repressive and discriminatory actions, which seemed to be the case of the Syrian Orthodox in Turkey. Having said that, the UHCR went on:

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[240] Ibid., p.93.
[241] Ibid., p. 94.
[242] ARRvS 7 februari 1980, RV 1980 nr. 3 with anonymous note, p. 24-34.
[243] Ibid., p.25-27.
[244] Ibid., p. 28.

> "refugee status cannot be invoked (…) by a member of this group, who has a well-founded fear of being persecuted based on his religious convictions, who can move to some other place in Turkey to avoid such persecution and such a move would only amount to a deterioration of his economic and social status"[245]

Thus, effectively endorsing the internal flight alternative.

The Raad van State decided the following:

> "The argument that someone can see no future in the country for himself or for his children, while can be a motivation for emigration is not enough for asylum and refugee claims. The asylum procedure is not a poor man's alternative for emigration."[246]

It went on to establish that the applicant could move to Istanbul, where he would be anonymous, and thus safe from persecution, despite some misgivings as to the political situation and stability of Turkey. The Raad van State, furthermore, also rejected the appeal from the denial of the Secretary of State to grant him leave to remain on compassionate (humanitarian) grounds and affirmed that decision also.[247]

The appraisal of these decisions is problematic. On the one hand, all the parties concerned admitted that the Syrian Orthodox were persecuted in Turkey by their fellow citizens and, in the central east region, the Turkish authorities were evidently unwilling to offer protection. All parties agreed that the harassment and the impossibility to earn a living was persecution. The Secretary of State also went so far as to admit, that systematic discrimination and economic deprivation was persecution. However, the applicant failed. This was because the Raad van State required that there be no means of internal relocation within the host country available. In putting forward such a requirement, it was strengthened by the UNHCR representative, Hoeksma, who drew sharp criticism in the note to the decision.[248] Thus, while accepting in principle the fact that economic deprivation and discrimination may amount to persecution, the Raad van State nonetheless dismissed this and appeals of other Turkish Christians.[249]

The group that was more successful in pursuing a claim of discrimination and the deprivation of the means of earning a living were claimants from China. In 1984 the Raad van State heard the appeal of a denial of refugee status from an applicant from China.[250] The applicant had been born of a Chinese father, who had studied in Cambridge, and a Dutch mother. In 1950 both moved to China where they began working for the new Communist regime. In 1966, due to the Cultural Revolution, his parents were first shunned, and later dismissed from their university posts as "bourgeois" and "counterrevolutionary". The repressions were

[245] Ibid., p. 28.
[246] Ibid., p. 29.
[247] Ibid., p. 29-32.
[248] Ibid., p. 34.
[249] See also ARRvS 21 juni 1979, RV 1979, nr.8 with an anonymous note, p. 37–42; ARRvS 4 december 1981 (not published); ARRvS 28 december 1981, RV 1981 nr. 7 with anonymous note, p. 37-39; ARRvS 5 october 1981 (A-2.0182 A en B).
[250] ARRvS 31 januari 1984, RV 1984 nr.1 with note by Swart, p. 1-7. The same case was also published in AB 1984, nr. 504 with note by Fernhout, p. 1477-1482.

so severe that the applicant's mother had tried committing suicide and his father died from the stress in hospital. Ever since then the applicant and his sister had experienced a great deal of discrimination, lost many friends who were afraid to be seen with them and were only allowed back to Peking in the late 1970s. Though his father had been rehabilitated in 1978 as "a good communist", the applicant stated that this had little or no bearing on his everyday life. He and his sister were still viewed with suspicion by the police, as belonging to the class of "intellectuals" (as opposed to the "proper" class of workers and peasants). They still had to report to the police regularly and had little prospects for a better economic or social position.[251]

The Secretary of State argued that the Chinese authorities do not persecute or discriminate intellectuals anymore and that the applicant should not be allowed in as refugee. The Raad van State disagreed, quashed the Secretary of State's decision and remanded it back for reconsideration. The court held that the applicant had clearly shown that he had experienced persecution in the past in connection to his father and mother, and that, ever since, he has been a victim of constant discrimination. The fact that the rehabilitation of his father did not change anything for the better in his life, or in the life of his sister, underlines that point.[252]

In 1997, the Raad van State heard an appeal from another Chinese applicant, who had been denied refugee status by the Secretary of State.[253] She had had her first child before being married, and it was therefore not registered. After she married, she and her husband wanted to have another one, but the party authorities did not grant the necessary permission and told the couple that they should get sterilized. During the pregnancy, they fled to the countryside, where she delivered safely the second, unregistered baby. After their return to Shanghai, the couple was forced to pay the fine for an illegal birth, and her husband was taken away to be sterilized. He fled on the way to the clinic. The applicant herself was less lucky, being taken to the family planning clinic, where she was sterilized without narcosis or any anesthetics. She claimed that, despite all this, neither of her two children may be registered, and thus will be deprived of any means of education, health care etc. The Secretary of State refused refugee status but the Raad van State quashed it, and remanded the case for reconsideration. It held that the Secretary of State should specifically address the problem of the children's futures, their lack of educational, health, and work possibilities in terms of a persecution ground.

There was a slight alteration to the case-law in 2004. The Afdeling heard the appeal of the Secretary of State against the decision of the district court in Roermond, quashing his denial of refugee status to a single female applicant from China who had become pregnant, and given birth to child, while abroad.[254] The applicant claimed that, upon her return to China she would be forced to pay a fine for an "illegal pregnancy" in order to register her child. The court in Roermond found that to be persecution, but the Raad van State reversed and remanded that decision, claiming that, since it was possible for her to register her child, then the Secretary of State was right in not finding persecution. Arguing *a contrario*, it would

[251] Ibid., p. 1-5.
[252] Ibid., p. 6.
[253] ABRvS 22 September 1997, RV 1997 nr. 3 with note by Spijkerboer, p. 4-6.
[254] ABRvS 12 juli 2004, NAV 2004 no. 262 with note by Bruin, p. 631-633; also published in JV 2004 nr. 373, p. 1246-1248.

seem that had the registration of the child not been possible at all, the court would have found otherwise.[255]

Concluding, it may be said that, in those cases where the court did concentrate on the issue of persecution, the Raad van State and other courts were prepared, in principle, to acknowledge that economic deprivation in certain, severe circumstances may amount to persecution.[256]

3.4 Persecution grounds
3.4.1 The nexus requirement

Unlike the American case-law, the Dutch court jurisprudence has shown relatively little interest in the nexus requirement between the persecution and the persecution grounds. There are very few cases in which this problem is addressed fully, and exhaustingly, and it would seem that the majority of the analysis has been done by the legal doctrine, rather than the courts themselves.[257]

In 1985 the Raad van State heard an appeal from the Secretary of State's decision denying refugee status to an applicant from Ethiopia.[258] He had been of Eritrean ethnicity and had supported the Eritrean Liberation Front from 1975 till 1980 by providing them with information about the Ethiopian military in Asmara. Following the crack down on E.L.F. sympathizers in Asmara, the applicant had fled to the countryside, where he had joined the guerrillas, with whom he fought for the next two years. During one engagement with the governmental forces, he had been wounded and left for Sudan to be treated. Given the fact, that he had left the country without permission, and taking regard of his political opinions and actions, the applicant applied for refugee status.[259] The Secretary of State refused his application on grounds that he had not shown that the authorities knew of his actions and political opinions or that they would punish him for these. It held that any sanction imposed by the government for illegal country departure, would be merely prosecution and not persecution.

The Raad van State disagreed, quashed the decision and remanded it back for review. It held that the applicant had been active in the Eritrean national struggle and had taken up arms against the government. It held that, while, in principle, punishment for illegal country departure would not be normally considered persecution, nonetheless:

[255] Ibid.,pnt. 2.5, p. 1247.
[256] See also ABRvS 25 maart 2002, JV 2002 nr. 151, p. 468-470 where the Raad van State reversed the court in 's – Gravenhage sitting in Zwolle of 13 Februari 2002, where it quashed the Secretary of State denial of refugee status based on incidents of individual discrimination. Since the Raad van State reversed the Zwolle court on procedural grounds (deference to the executive by courts, when assessing their facts), it is not clear if it did acknowledge that individual discrimination may amount in particular circumstances to persecution. Spijkerboer and Vermeulen seem to think so, see Spijkerboer & Vermeulen 2005, p. 35.
[257] Vermeulen & Spijkerboer 1995, p. 146-151; Spijkerboer & Vermeulen 2005 p. 52-56.
[258] ARRvS 7 juni 1985, RV 1985 nr. 1, p. 1-3.
[259] Ibid., p.1.

> "One can talk of persecution, if it may be feared that punishment for such an act shall be unduly heavy, by considering such a country departure to be taken because of political reasons."[260]

Thus it found, that in particular circumstances, prosecution may in fact be persecution on account of someone's political opinion. Here the applicant feared persecution by the state, on account of his political opinion, and it was the nexus that the Secretary of State had overlooked.

This line of reasoning was confirmed in 1986 when the Raad van State heard the appeal of a Kurdish citizen of Turkey, whose application for asylum had been denied by the Secretary of State.[261] He had been active in a Kurdish communist party and had distributed materials supportive of that cause. The Turkish authorities had arrested him, charged and sentenced him to a prison term for spreading communist and Kurdish propaganda, and that sentence had been later affirmed by the higher court in Ankara. The Secretary of State denied his application for asylum, based on the fact that the prison term he had received, was not too hard at all, and bordered on the lowest sanction possible, and therefore there could be no talk of excessive punishment, and thus no persecution.

The Raad van State quashed the decision and remanded it back for consideration. It held that the applicant had been sentenced for his political opinions and for exercising his freedom of speech. While it acknowledged that this freedom is not absolute, and that sometimes punishment for it will not be considered persecution, and that the applicant indeed had not been punished too severely, it found nonetheless that the applicant had been sentenced because of his political opinions. Furthermore, the Turkish state attached great importance to fighting communist and Kurdish propaganda, and, thus, the applicant may be persecuted for reasons of his political opinion.[262]

The nexus link can be also visible in the decision of the Raad van State from 2002.[263] Here the Raad van State heard an appeal from a decision of the district court in 's – Gravenhage sitting in Assen, affirming the denial of the Secretary of State of refugee status to an applicant of Albanian citizenship. The applicant had contented that, as a witness to the assassination of the opposition leader Hazem Hajari, he was detained by the police for some time. The Secretary of State and the court in Assen, found that the applicant had not shown a sufficient link between his witnessing of the assassination, his detention and his fear of being persecuted. The Raad van State agreed with the court is Assen and denied the appeal.[264]

There is one instance in Dutch case-law, where the nexus requirement is being stressed, though, it should be underlined, in a different way than in the American case-law in the same area. In the cases of singling out, the Dutch courts require that the applicant shows that he or she was singled out for persecution for a particular persecution ground. That is, when embarking on persecuting the applicant, the persecutor not only has persecution in mind, but also for a conventional ground. Though this concept is mingled in the complexity of the

[260] Ibid., p.2-3.
[261] ARRvS 19 augustus 1986, RV 1986 nr.8, with note by Bolten, p. 25-30.
[262] Ibid., p.27-28.
[263] ABRvS 24 januari 2002, NAV 2002 nr. 92, p. 238-239.
[264] Ibid., p. 239.

singling out theory, it is nonetheless an example where the nexus, is being used as a further premise of the singling-out criteria. Several cases illustrate this point very well.

Such an example would be in the reasoning adopted by the Raad van State in the Rasiah case, described above.[265] Rasiah was a Tamil female from the North of Sri Lanka. She was young and unmarried and, as such, was easy victim to the Indian Pace Keeping Forces (IPKF) which had been deployed in the North of Sri Lanka for peacekeeping, yet were known to have committed wide-spread human rights violations against the Tamil population there and were notorious for raping Tamil women. Rasiah's appeal from a denial of refugee status by the Secretary of State went up to the Raad van State.[266] She claimed that, as a young, unmarried woman, she had a well-founded fear of being persecuted, the persecution being rape. The Secretary of State restated that there was no talk of group persecution of Tamils, the I.P.K.F. did not systematically target Tamil women for rape.[267]

The Raad van State dismissed Rasiah's application. It did admit that the fighting in Sri Lanka was far from over and that there were cases of sexual assaults against women. However, the court found that the applicant had failed to show that the I.P.K.F. was using systematic rape as a tactic, to intimidate the Tamil population. Indeed, the court found that there was no such aim at all. Therefore it found that Rasiah had failed to produce convincing evidence that she had a well-founded fear of being persecuted by rape, on account of her Tamil ethnicity.[268] What the court said, in effect, was that, unless the I.P.K.F. embarked on raping Rasiah to intimidate the Tamil population, and tried to rape Rasiah because she was Rasiah, she cannot be recognized as refugee.[269]

The nexus requirement in the context of the singling-out criteria is very visible in the cases of Reer Hamar applicants from Somalia in the late 1990s and early 21st century. They were associated with the old dictatorship of Somalia and relatively well off. Thus, after the brake up of the Somali state, they became easy targets for the warring clans there. Members of the Reer Hamar clan tried to invoke the group persecution principle.[270] The Dutch district courts were divided on the issue, most finding that there was a case of "nearly group persecution" and others finding otherwise.[271] In 2000 the issue was resolved by the Rechtseenheidskamer.[272] That court settled the matter in a form of compromise where the requirement of a nexus is very visible. On one hand it ruled that there could be no talk of group persecution of the Reer Hamar on account of clan membership. On the other hand, however, the court found

[265] See Chapter 3.2.3.
[266] ARRvS 28 october 1991, RV 1991, nr. 11 with note by Vermeulen, p. 29-38. The case and the note were also published in RV 100, nr. 1, p. 1-9. I will refer to the publication in RV 100.
[267] Ibid., p.1-4.
[268] Ibid., p.5.
[269] Ibid. pnt.4, p.9.
[270] See Chapter 3.2.1.
[271] Rb 's – Gravenhage zp. Amsterdam 27 Oktober 1999, JuB 200 nr. 2-33; Rb 's – Gravenhage zp. Zwolle 31 maart 1999, JuB 1999, 15-4; Rb 's – Gravenhage zp. Zwolle 17 November 1999, NAV 2000 no.32, p. 121-123; Rb 's – Gravenhage zp. 's Hertogenbosch 16 November 1999, JuB 2000 nr. 3.
[272] Rb 's – Gravenhage (Rechtseenheidskamer) 14 juli 2000, RV 1974/2003, no.11 with note by Burin, points 12-13: Also published in JV 2000, nr. 190, p. 748-753.

> "The position of the Reer Hamar is of such a condition that an individual member of this group may be recognized as a refugee, if it is apparent that personal acts of persecution directed against him, may be linked to his ethnic background."[273]

It is interesting to note that when a few years later the Raad van State began hearing the appeals of the Secretary of State again, it used the nexus requirement as developed by the Rechtseenheidskamer. Thus, in a decision of 2003, the Afdeling heard an appeal by the Secretary of State from a decision by the court in Amsterdam.[274] The applicant, a member of the Reer Hamar clan again, was denied refugee status and appealed to the district court in Amsterdam, which then quashed the Secretary of State's decision and sent it back for reconsideration. The Secretary of State then appealed to the Raad van State but it affirmed the decision of the Amsterdam court. It held that the applicant did not invoke group persecution but showed cases of individual acts of persecution, stemming from his clan ethnicity, and thus showed persecution for reasons of a persecution ground.[275]

However, in most cases the Raad van State would quash and remand the decisions of the regional courts, finding that the Secretary of State had been right, when he decided that the applicants had not proven sufficiently the nexus between their clan ethnicity (persecution ground) and the persecution. Thus, in 2004, the Raad van State reversed a decision of the district court in Zwolle, where it had quashed the decision of the Secretary of State denying refugee status.[276] The Raad van State held that the applicant had not shown sufficiently that what he experienced was persecution because of his ethnicity, and not "individual actions" of criminal activity "*which had not been inspired by the authorities*".[277]

In the same year, the Raad van State again restated this position.[278] The applicant had been a member of the Reer Hamar clan who had an argument with a member of another clan. Following the growing tensions, he fled and applied for refugee status. The Secretary of State refused his application, finding that his problems had nothing to do with his ethnic background but rather with the general situation of "*random violence, banditism, abuse of power by clans and factions*."[279] The applicant appealed to the regional court in Rotterdam, which quashed and remanded that decision to the Secretary of State. He then appealed against that judgment to the Raad van State which in turn overturned the decision of the court in Rotterdam. It held that the Secretary of State was within his right to conclude that the applicant had not shown that what he had experienced was for reasons of his clan ethnicity.[280]

Concluding, the nexus requirement has been present in Dutch case-law, but on a different scale than in its American counterpart. Here it has been used primarily to strengthen the concept of singling out. The courts require the nexus, as an additional premise, when assessing the well foundedness of fear of persecution. It is only in this context that the courts ask for a link between persecution and a persecution ground.

[273] Ibid., pt. 14, p. 752. Followed by other courts: see Rb 's – Gravenhage zp. Assen 15 april 2002, JV 2002 nr. S259, p. 806-807; ABRvS 28 juni 2002, JV 2002 nr. 293 with note by Spijkerboer, p. 924-927.
[274] ABRvS 28 november 2003, JV 2004 nr. 47, p. 164-165.
[275] Ibid., p. 48.
[276] ABRvS 20 januari 2004, JV 2004 nr. 98 with note by Spijkerboer, p. 323-326.
[277] Ibid., pt. 2.2.2, p. 325.
[278] ABRvS 9 februari 2004, JV 2004 nr. 228 with note by Spijkerboer, p. 752-756.
[279] Ibid., pt. 2.1.3, p. 753.
[280] The same decision is also published in NAV 2004 nr. 171 with note by Anderbhan, p. 388-390.

3.4.2 Persecution based on religion

As a commentator in 2001 put it, there are few cases in Dutch case-law, when refugee status had been acknowledged by courts based on persecution for reasons of someone's religion.[281]

One of the first examples of such cases, discussed above, were those of Syrian Christians fleeing persecution in South East Turkey in the late 1970s and 1980s. The Secretary of State denied their applications, claiming that they could move to another part of Turkey and thus avoid persecution. The Courts agreed with the Secretary of State and dismissed the appeals. Though in these cases the applicants lost, the Raad van State seemed to accept in principle that the Syrian Christians were indeed persecuted in Turkey.[282]

There was a positive decision in 1982.[283] The applicant was a citizen of Argentina, who was also a member of the Divine Light House Mission. This religious group had been delegalized in Argentina in 1976 (confirmed in 1978 by the Supreme Court of Argentina). The applicant, who had been an active member of the movement, had been arrested on a number of occasions because of his religious membership and, during the detention, he had been abused. The Secretary of State denied his asylum application because the religion had been delegalized according to procedure, the applicant's arrests were incidental and he was always released without any charges being brought, and, finally, he was issued a passport by the Argentinean authorities. The applicant put forward the interesting argument that his human rights were being violated (freedom of conscience and religion) and that the lack of possibility to practice his religion amounted to persecution. The UNHCR representative sided with the administration and remarked that, according to the UNCHR knowledge, the D.L.M. members had not been granted refugee status anywhere.[284]

The Raad van State disagreed with both the UNHCR and the Secretary of State. It held that according to the evidence put forward, the arrests of the applicants followed directly the delegalization of the D.L.M. in Argentina; that during those detentions the applicant had always been abused, mistreated, and tortured; that other members of the sect were also detained and harassed. Remarking on the international law norms put forward by the applicant, the court said shortly but tartly:

> "The Court would like to point out in this context, that it has not been shown or proven that the D.L.M. was banned in Argentina on grounds of, as the international legal norms would also allow, reasons of public order and national security, or for the protection of fundamental norms of others. Besides this, the D.L.M. is a movement which operates unhindered in the Netherlands."[285]

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[281] S. Mazaheri, *Geloof en vervolging. Religieuze vervolging en vluchtelingrechtelijke bescherming: internationaal kader, Nederlands beleid en rechtspraak*, NAV 2001, p.692-702.

[282] ARRvS 18 augustus 1978, RV 1978, nr. 30 with an anonymous note, p. 90-94; ARRvS 21 juni 1979, RV 1979, nr.8 with an anonymous note, p. 37–42; ARRvS 7 februari 1980, RV 1980 nr. 3 with anonymous note, p. 24-34; ARRvS 4 december 1981 (not published); ARRvS 28 december 1981, RV 1981 nr. 7 with anonymous note, p. 37-39; ARRvS 5 october 1981 (A-2.0182 A en B).

[283] ARRvS 30 september 1982, RV 1982 no. 8 with note by Swart, p. 26-29.

[284] Ibid., p. 28.

[285] Ibid., p.29.

The court held that, based on all these considerations, the decisions of the Secretary of State should be quashed and remanded back for reconsideration.

There were no more cases till 1990 when the Afdeling quashed the decision of the Secretary of State denying refugee status to a member of the royal family of the Ashanti clan in Ghana.[286] The applicant was a Christian and had refused to commit a ritual murder which was customary in the ceremony of ascending the throne. His refusal caused him to be threatened with death, and the court ordered the Secretary of State to explain more clearly what motivated his decision that the applicant could safely relocate to another part of the country and seek the protection of the state authorities. In another decision the court in 's – Hertogenbosch ruled that the mere proscription of Jehovah's Witness activity by law in Zaire, does not amount to persecution.[287]

It was the early 1990s that saw the district courts ruling on a number of cases related to persecution based on religion.

In 2000, the court in Haarlem heard the appeal from a denial of refugee status by the Secretary of State.[288] The applicant was a national of Pakistan who belonged to the Ahmadi community, a religious group considered non-Muslim by the Sunni Muslims, who form the vast majority of the citizens of Pakistan. Because of his religion, he had experienced a series of discrimination, and incidents of violence that made his life unbearable. The Pakistani state, while not engaging in the persecution of the Ahmadi, still refused to provide protection. The Secretary of State claimed that the applicant could move to another place in Pakistan, where he would be safe from persecution. The court disagreed, quashed the decision and remanded it back for reconsideration. It held that the Ahmadi are being persecuted by fellow citizens because of their religion, with the state unwilling to grant protection. It also dismissed the internal flight alterative, by quoting the "UNHCR Position on Relocating as a Reasonable Alternative to Seeking or Receiving Asylum".[289]

In other cases of Ahmadi, the courts held that they had been persecuted on account of their religion.[290] The courts also found persecution based on the religion in the cases of Chaldeans and other Christians,[291] Mandeians from Iraq,[292] and others.[293]

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[286] ARRvS 2 november 1990, RV 1990 no. 5 with note by Fernhout, p. 13-14.

[287] Pres. Rb. Den Bosch 14 november 1990, NAV 1991, p.66. See also Vermeulen & Spijkerboer 1995, p. 155.

[288] Rb. 's – Gravenhage zp. Haarlem 13 juni 2000, JV 2000 no. 196, p. 371-372, also published in NAV 2000 no. 164 with note by Pastoors, p. 512-517.

[289] Ibid., 514.

[290] Rb. 's – Gravenhage zp. Amsterdam, 29 october 1999, NAV 2000 no. 5 with note by Bruin, p. 39-45; but see Rb. 's – Gravenhage zp. Zwolle 7 juli 2000, JV 2000 no. 227, p. 879-884 (no persecution but discrimination).

[291] Rb. 's – Gravenhage zp. Zwolle, 27 juli 2000, NAV 2000 no. 222, p. 612 (Assyrian Christian from Iraq); Rb. 's – Gravenhage zp. Zwolle, 7 september 2000, NAV 2000 no. 230, p. 634-639 (Armenian Christian from Iraq); Rb. 's – Gravenhage zp. Zwolle, 8 maart 2001, NAV 2001 no. 156 with note by Hoogenberk, p. 361 (Assyrian Christian from Iraq).

[292] Rb. 's – Gravenhage 25 september 2000, NAV 2000 no. 276, p. 768-769 (Chaldean Christians and Mandeians from Iraq) but see Rb. 's – Gravenhage zp. Assen, 19 december 2003, JV 2004 no. 116, p. 366-371.

[293] Rb. 's – Gravenhage zp. Arnhem, 1 maart 2001, NAV 2001 no. 157, p. 362 (Hindu from Afghanistan); Rb. 's Gravenhage, 29 maart 2001, NAV 2001 no. 150, p. 358 (Hindu woman from Afghanistan forcibly converted to Islam); ABRvS 16 maart 2005, NAV 2005 no. 218, p. 563-564 (Hindu from Afghanistan).

In another decision, the district court in Amsterdam heard the appeal of a female Sikh from Taliban controlled Afghanistan.[294] The Secretary of State denied her asylum application based on the fact that what she had experienced was a result of the civil war and unrest in that country. The court disagreed, quashed the decision and remanded it for further reconsideration. The court drew attention to the fact that not all that the applicant had experienced could be attributed solely to the circumstances of civil unrest and war. The court indicated that the discrimination of Sikhs in that country had become so fierce and unbearable that most of them chose to leave the country. In other cases serious religious discrimination was also found by courts to be persecution.[295]

One of the most interesting features of the district court's case-law, was the rise of the decisions made in cases of persecution based on conversion from Islam to Christianity. The issue was already signaled by Bruin in 1998.[296] In the same year the district court in Haarlem heard the case of a Iranian convert to Christianity and his wife.[297] The applicant had converted to Christianity while in Japan but after his return to Iran he encountered some problems because of his new religion. He also feared death at the hands of Islamic judges who proscribe the death penalty for apostasy from Islam. His wife who refused to divorce him, feared stoning to death as a Muslim married to an apostate. The Secretary of State rejected their asylum applications, but the court quashed his decision and remanded it back for reconsideration. It ruled that apostasy from Islam is not only proscribed by Iranian law, but also enforced, and thus the applicant has a well-founded fear of being persecuted in the future. The court also pointed out that the Secretary of State did not draw sufficient attention to the circumstances of the wife and what would befall her. In the note under the decision, Ijselsdijk drew a parallel between the court's rejection of the argument that he stayed "discreet about his religion", as outlined by the Secretary of State and the same requirement accepted by another court in a case of a gay man from Syria.[298]

However, the conversion cases were not always successful. In 1999 the district court in Den Bosch heard one of those cases.[299] The applicant had been born and raised a Coptic Christian in Egypt. In 1989 she was abducted, forced to convert to Islam and married to a Muslim man. Despite her forced conversion, she remained secretly a Christian, refusing to say Muslim prayers, baptizing her children as Christians and finally converting her husband. After some years the applicant formally re-converted to Christianity. The husband died, probably poisoned by his family because of his apostasy. Following his death, the family of the deceased husband (all Muslim) began exerting pressure on the applicant and her children wanting them to be raised as Muslims. The applicant and her children moved to a Christian part of Cairo, but insecure there, left for the Netherlands. The Secretary of State denied her application, claiming her problems were of "*private nature*" and that she did not show that the Egyptian authorities did not and could not offer her protection. The same applied to her children.

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[294] Rb. 's – Gravenhage zp. Amsterdam, 21 augustus 2000, NAV 2001 no. 32, p. 71-72.
[295] Rb. 's – Gravenhage zp. Haarlem 16 juli 1999, NAV 1999 no. 135 with note by Pastoors, p. 583-586 (Jewish from Russia); Pres. Rb. Arnhem, 24 october 2000, NAV 2001 no. 77, p. 140 (Jewish from Russia).
[296] R. Bruin, *Met een voet tussen de deur. Over in Nederland tot het christendom bekeerde Iraanse asielzoekers*, NAV 1998, p. 243-247.
[297] Rb. 's – Gravenhage zp. Haarlem, 26 november 1998, NAV 1999 no. 75 with note by Ijsseldijk, p. 323-327.
[298] Ibid., p.327.
[299] Rb. 's – Gravenhage zp. 's Hertogenbosch, 22 november 1999, JV 2000 no. 25 with note by Spijkerboer, p. 97-103.

The court reached double conclusion. As to the applicant's claim it held that "just being a Coptic Christian" is not enough to qualify as a refugee. It held that she had the possibility of relocating to other parts of Egypt and thus avoid persecution. It did not address the fact that, by reverting to Christianity, she had too become a Muslim apostate. Her claim was thus denied. However, when it came to the children the court ruled otherwise. It held that they might be seen by the authorities as Muslim apostates, despite being baptized Christian since they were born of a Muslim father. The court remarked that it is impossible to receive a new ID card if one converts to Christianity, and as the social attitudes toward Muslims-turned-Christian are hostile, the children of the applicant have a well-founded fear of persecution based on their religion.[300]

Finally, in the case of a homosexual man from Morocco who had also been interested in Christianity, but was afraid to speak of his belief for fear of persecution, the court in Haarlem ruled that the Secretary of State was wrong in denying his application.[301] The court held that the Secretary of State should address the core of the asylum claim, that the applicant cannot be forced to hide his sexuality or new religion any longer but that if he does, he will be persecuted for both in his country of origin.

The case-law post 2001 continues to recognize in principle that converts from Islam to Christianity may face persecution in their countries of origin.[302]

Concluding, there has been relatively little case-law concerning religious based persecution in Dutch law, with the late 1990s having most of it. The Dutch courts have accepted serious discrimination and forced conversions to be persecution. The Afdeling post the year 2001 had not made any decisions to the contrary.

3.4.3 Homosexuals and other particular social groups

As it has been mentioned earlier before, the Dutch case-law shows remarkable ambiguity about the exact persecution ground. Once the refugee passes the hurdle of showing a well-founded fear of being persecuted, as understood by the Dutch courts, the persecution ground on which he or she is granted refugee status becomes a secondary problem. Therefore, there are just a few cases where the courts have explicitly stated that there is a persecution ground. This has been done most often in the particular social group category.

In the late 1970s and early 1980s, the Dutch Raad van State seemed to have accepted, that the Christians from Turkey, were persecuted not only because of their religion but also because they belong to an ethnic group, and also because of the fact that they were considerably better off than their Muslim neighbors. However, since the court refused the appeals on other grounds, the exact identification of their persecution ground was somewhat unclear.[303]

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[300] Ibid., p.100-101.

[301] Pres. Rb. Haarlem 11 augustus 2000, JV 2000 no. 251, p. 971-975, NAV 2000 no. 234 with note by Bruin, p. 659-664.

[302] Rb. 's – Gravenhage zp. Zwolle 2 mei 2005, NAV 2005 no. 205 with note by Mazaheri, p. 535-536 (Convert to Christianity from Iran); Vz. Rb. Leeuwarden, 14 juli 2005, NAV 2005 no.235 with note by Mazaheri (Convert to Christianity from Iran).

In 1984, the Raad van State quashed and remanded the Secretary of State's decision denying refugee status to an applicant from Cambodia.[304] He had been of Chinese ancestry, his father had owned a restaurant in the country's capital, and the family belonged to the middle class. They were considered supporters of the Lan Nol government. With the advance of the fanatic communists, the Khmer Rouge, the applicant fearing for his life fled Cambodia to Thailand. His refugee status had been rejected by the Secretary of State based on changed country conditions but also on the premise that the new communist government of Cambodia was not as hostile to the bourgeois, as the Khmer Rouge had been. The Raad van State disagreed, and said that because of his minority ethnicity, because of his former bourgeois background, and because of his support for the Lan Nol government, the applicant may have a well-founded fear of being persecuted:

> "Family, political and social class, as well as the ethnic background of the applicant make the removal back to Cambodia more precarious for him."[305]

However, even in this decision, the Raad van State chose to merge the persecution grounds and while it is relatively clear that the applicant had been accepted, based on a particular social group, there could be more uncertainty if the Raad van State found him to be persecuted in other grounds like race, political opinion etc.

In 2002, the President of the Court in Amsterdam denied the motion for an interim measure from a female applicant from Ghana, who feared domestic violence.[306] Though her claim was dismissed, the President stated that the Secretary of State "*has incorrectly stated that fear of violence against women cannot lead to a* [persecution – K.B.] *ground of the Convention.*"[307] This was later affirmed by the Raad van State which, in a 2005 decision, held that domestic violence against women might lead to refugee status if it is of sufficiently serious nature and if the victim cannot invoke effective protection.[308]

Also in 2005 a district court in Almelo recognized that a single, non-practicing Islam and westernized Afghani woman with a child born out of wedlock from a non-Afghani father, who did not speak Dari, had a well-founded fear of persecution on account of her membership of a particular social group of single women in Afghanistan.[309] However, in 2003, the district court in Assen rejected the argument that women in Taliban ruled Afghanistan are persecuted

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[303] ARRvS 18 augustus 1978, RV 1978, nr. 30 with an anonymous note, p. 90-94; ARRvS 21 juni 1979, RV 1979, nr.8 with an anonymous note, p. 37–42; ARRvS 7 februari 1980, RV 1980 nr. 3 with anonymous note, p. 24-34; ARRvS 4 december 1981 (not published); ARRvS 28 december 1981, RV 1981 nr. 7 with anonymous note, p. 37-39; ARRvS 5 october 1981 (A-2.0182 A en B).

[304] ARRvS 31 januari 1984, AB 1984 nr. 185 with note by Fernhout, p. 465-470.

[305] Ibid., p. 469.

[306] Pres. Rb. Amsterdam 27 november 2001, NAV 2002 no. 33 with note by Mazaheri, p. 106-111.

[307] Ibid., p. 109. See also Rb. 's – Gravenhage zp. Alkmaar 22 maart 2004, NAV 2004 no. 135 with note by Mazaheri, p. 321-325.

[308] ABRvS 23 november 2005, RV 2005 no. 6, with note by Bem, p. 68-71; See also ABRvS 30 juni 2005, NAV 2005 no. 190, p. 514-515, also published in JV 2005 no. 320. Rb. 's - Gravenhage zp. Alkmaar 22 maart 2004, NAV 2004 no. 135 with note by Mazaheri, p. 321-325; Vz. Rb. Almelo 12 november 2004, NAV 2005 no. 59 with note by Mazaheri, p. 118-119; For an overview of Dutch case-law see S. Jansen, *Conflicten achter de voor deur. Over huiselijk geweld als grond voor asiel*, NAV 2004, p. 603-617 as well as R. Oostland, *Klachten over schending van vrouwenrechten*, NAV 2003, p. 164-175 .

[309] Rb. 's – Gravenhage zp. Almelo 12 januari 2005, NAV 2005 no. 117, p. 282-284.

as women (and thus as a particular social group). The court did admit that their situation was indeed "*very bad*" but then added "*but in general not so bad as to say that all women, without taking into consideration the living circumstances, should be recognized as refugees*."[310]

Some of the cases where the Dutch courts ruled explicitly that the "particular social group" was the persecution ground, were the cases brought forward by homosexuals. The first claim of refugee status based on sexual orientation came from Poland.[311] The claimant W.R. had studied economy and took up employment in a hostel for construction workers where, after several years of living "in the closet", he had his first relationship. After some time, the affair was discovered by a chauffeur who happened also to be a secret police agent. W.R. broke up the relationship and tried to find a woman to marry. This resulted in a nervous breakdown and hospitalization. In the meantime his supervisors, previously full of praise for his work, accused him of fraud. Although W.R. was acquitted by the court, in the course of the proceedings his sexual orientation became known and he became unemployed for a period of few months. He took up a job in a restaurant for party leaders and police agents where the chauffeur tracked him down and blackmailed him into paying money in order to keep quiet about the plaintiff's sexual orientation. Finally, finding himself unable to pay more blackmail money, he applied for a visa to come to the Netherlands to visit his sick aunt and, immediately upon his arrival, applied for refugee status.[312]

What is significant is that the Secretary of State did not question the fact that sexual orientation might constitute valid persecution ground. However, he refused the application nonetheless. The main arguments were that W.R. is not, and never was, politically active, and that homosexuality is not punished by law in Poland, and, while admitting that gays in Poland suffer discrimination, this does not amount to persecution in the meaning of the Geneva Convention. The Raad van State agreed with both findings of the Secretary of State:

> "[t]he Court is led to agree that a reasonable interpretation of the term persecution because of belonging to a particular social group, one can speak of persecution because of sexual orientation (…) The Court considers that it was clearly shown that the applicant, because of his sexual orientation, is liable to discrimination by the authorities in his country of origin. The Court would like to underline that the plaintiff, because of his ties with the police as well as secret police members, is marked down in their files as a homosexual. The discriminatory acts, as experienced from the side of Polish authorities, however, do not accumulate according to the Court to form a severe limitation of the means of economic hardship of such a nature that one can invoke persecution in the meaning of the aforementioned Convention."[313]

The Dutch courts were thus some of the first, if not in fact the first at all, to recognize sexual orientation as a valid persecution ground. What is striking here, however, is the scant legal

[310] Rb. 's – Gravenhage zp. Assen 17 december 2002, JV 2003 no. 116, p. 370-377; See also Rb. 's – Gravenhage zp. Almelo 20 december 2002, JV 2003 no. 53, p. 127-136; Rb. 's – Gravenhage zp. Arnhem 26 november 2002, JV 2003 no. 51, p. 115-118.
[311] ARRvS 13 augustus 1981, RV 1981 nr. 5 with an anonymous note, p. 30-34.
[312] Ibid., p. 30-31.
[313] Ibid., 34.

reasoning as to why that was so, and as to how Dutch courts construed the "particular social group". One cannot escape the feeling that this acknowledgment was done *en passant*, since the court in fact went on to dismiss the claim on other grounds.

It was another decade before the Raad van State heard another asylum case based on sexual orientation. In 1992 the court heard the appeal of a gay man from Czechoslovakia.[314] J.T. had been fired from his military job, put in hospital for his "sickness" and because of that was unable to find employment and earn the means of living. The Secretary of State denied his asylum application based on the fact that homosexuality was not punished by law in Czechoslovakia, and that what the applicant had encountered was not persecution, but merely discrimination. The Raad van State conceded that he was indeed discriminated against, but yet that only meant economic hardship, and that was not enough to reach the burden of persecution. Again, in principle however, no one questioned the finding that homosexuals are a particular social group in the meaning of the Geneva Convention.[315]

One year later, in 1993, the Council of State dealt with the case of a homosexual from Russia, of Jewish origin and with some political activity, who had spent some time in a psychiatric ward due to his orientation.[316] In this case the Raad re-issued the statement recognizing gays a "particular social group":

> "As the Court had found earlier, a reasonable interpretation [of the Convention –K.B.] (…) would allow for an interpretation, whereas, under persecution of a membership of a particular social group, would include persecution based on sexual orientation."[317]

However, the court in this case found;

> "Not enough evidence that, in the period of making the decision, there was talk of overall persecution of homosexuals in Russia. The fact that being of homosexual orientation is being proscribed by Russian law and that (…) the Russian authorities have a negative attitude towards homosexuals is not enough [to constitute persecution – K.B.]."[317]

Thus, in 1993, the Raad van State restated its finings that homosexual men and women may constitute a particular social group, but did not go into theoretical details as to why it found so. It also, again, denied the appeal based on insufficiently proven persecution in the country of origin.

A different decision came in 1995, and was rendered by the district court in ‘s – Gravenhage sitting in Zwolle, which dealt with a gay applicant from Romania.[319] Unlike in the decisions

[314] ARRvS 17 juni 1992, RV 1992 nr. 9 with note by Spijkerboer, p. 21-24.
[315] See however, a critical note to the decision by Spijkerboer, where he question’s the outcome of the case, and cites to other unpublished decisions in similar cases, ibid., p.22-24.
[316] ARRvS 26 mei 1993, RV 1993 nr. 4 with note by Spijkerboer, p. 9-12.
[317] Ibid., p.10.
[318] Ibid., p.10.
[319] Rb. ‘s – Gravenhage zp. Zwolle 28 augustus 1995, RV 1995 nr. 13 with note by Fernhout.

described above, the court quashed the denial of refugee status. It based its decision on the facts that:

1) homosexuality was proscribed by criminal law in Romania;
2) homosexuality was in fact punished and prosecuted in Romania;
3) gays and lesbians in that country were constantly discriminated against in social and economic life.

It was an accumulation of all these three factors that led the Court to such a decision. The requirement of personal severity is visibly seen in a decision rendered by the Raad van State in 1996.[320] The Court dealt with another application from a Romanian homosexual. In this case, while acknowledging that sexual orientation can be a persecution ground in the meaning of the Convention, and while stating that "*the fact that life for homosexuals in Romania is difficult in combination with the fact that homosexuality is regarded as a taboo by that society can lead to refugee status*", it found, nevertheless, that that was seen as not enough by the court for refugee status: "*Therefore, basis for* [refugee status – K.B.] *should be found in personal circumstances of the plaintiff, taking into account the general situation*".[321] The Raad van State again refused to reverse the ruling of the Secretary of State and affirmed his decision.

A case where there were enough "personal circumstances" came in 1997, when it was heard by the district court in Zwolle.[322] The applicant was a homosexual from Armenia. He had been repeatedly beaten on the street, threatened at home and at work, and could find no help at the police, as homosexuality was proscribed by Armenian law. The Secretary of State denied his application, but upon appeal to the court this was reversed and remanded back to the Secretary of State for consideration. The court held that:

> "The court is of the opinion that the applicant was a victim of discrimination on grounds of his sexual orientation, and that this discrimination was so fierce that his life had become unbearable."[323]

Here the court in Zwolle followed its decision from 1995. It found that discrimination because of sexual orientation may, in some cases, amount to persecution. The question was not if sexual orientation may be a persecution ground, but rather in which circumstances. Around the same time, a number of Iranian gays and lesbians were accepted as refugees based on the same principles.[324]

That is not to say, that homosexual cases always succeeded upon their appeal to the district courts. In 1999 the court in Haarlem dismissed the appeal of a homosexual from Nigeria.[325] He had been caught having sex with his partner, was dragged out of his house, lynched with his partner by an angry mob. His partner was killed. He escaped with his life, though he was

[320] ABRvS 28 mei 1996, RV 1996 nr. 4 with note by Spijkerboer, p. 11-14.
[321] Ibid., p. 12.
[322] Rb. 's –Gravenhage zp. Zwolle 30 juni 1997, RV 1997 nr. 7 with note by Spijkerboer, p. 21-23.
[323] Ibid., p. 22.
[324] Ibid., note point 1 and the relevant case-law listed there. Also ABRvS 10 september 2004, NAV 2004 nr. 289, p. 703-704, also published in JV 2004 nr. 414, p. 1388-1389.
[325] Rb. 's –Gravenhage zp. Haarlem 9 juli 1999, NAV 1999 no. 136 with note by Heijnnenman, p. 587-591.

severely beaten. When he went to the police to ask for protection, the police instead imprisoned him for causing public unrest. The court dismissed his application using the standard singling – out criterion, and that was analyzed in more detail above in this chapter. For the purpose of a particular social group, the court (referring to the Afdeling's case-law) stated that the mere fact that homosexuality is proscribed by Nigerian law is not enough to find persecution. The fact that he was mistreated by the police because of his sexuality is of little importance. According to the court, it happened only once and, thus, this was a once only incident and not systematic. The gravity of the incidence was found by the court to be of little significance. As to persecution by his fellow villagers, the Court suggested moving to another part of Nigeria.[326] The commentator writing the note to this decision, was utterly unimpressed by any of the arguments invoked by the judge, and this decision is without doubt one of the worst cases dealing with sexual orientation claims in Dutch case-law.[327] In a similar way the district court in 's – Hertogenbosch accepted in principle that homosexuality may be a valid persecution ground, but claimed that the applicant, a Palestinian from Syria, could avoid persecution from both his in-law family and the Syrian state by living a discreet life.[328]

The case-law post 1999, regarding claims made by applicants based on sexual orientation, has been mixed. In 1999 the court in Haarlem heard the case of a gay man from Morocco, who had also converted to Christianity, both of which are punishable by Moroccan law.[329] The Secretary of State denied his asylum application on both grounds, but the court quashed the decision and sent it back for review. The court agreed with the Secretary of State that the applicant had no well-founded fear of being persecuted on account of his homosexuality, as the applicant had engaged in one clandestine homosexual relationship and his sexual preferences were not known to the police. However, the court identified the "essence" of the claim with the question of whether it is valid to require the applicant to suppress both his sexuality and his newly embraced religion (Christianity) to avoid potential persecution. Thus the court shifted the focus of the inquiry to the possible future persecution, once the applicant admits in Morocco that he is a Christian gay man. That was important to assess according to the court, as the Moroccan authorities not only proscribe homosexuality, but also actively persecute such individuals.[330] A similar decision was rendered by the court in 's Hertogenbosch regarding a gay man from Somalia.[331]

Throughout the year 2001 the courts grappled with the cases of homosexual asylum seekers. In general the courts would find similarly to the court in Zwolle in its ruling in the case of a homosexual from Sudan.[332] The applicant had been detained, because of his homosexuality, for two years without a court trial. Though eventually released, the court found that the Islamic law in Sudan proscribes homosexuality, that that law is being enforced, and that, given the applicants notoriety to the police because of his sexual orientation, one cannot rule out possible persecution if he were to be returned to Sudan. A similar decision was reached in

[326] Ibid., p. 589.
[327] For other examples of similarly strict case-law see S. Jansen, *Op de vlucht voor homohaat*, NAV 2006, p. 131.
[328] Rb. 's –Gravenhage zp. 's – Hertogenbosch 13 november 1998, NAV 1999 no. 4 with note by Burin, p. 39-45.
[329] Pres. Rb. Haarlem 11 augustus 2000, JV 2000 no. 250, p. 968-971, it was also published in NAV 2000 no. 234 with note by Nruin, p. 659-664.
[330] Ibid., p. 660-661.
[331] Rb. 's –Gravenhage zp. 's - Hertogenbosch 22 september 1999, NAV 1999 no. 155, p. 637-640.
[332] Rb. 's – Gravenhage zp. Zwolle 29 december 2000, NAV 2001 no. 45, p. 94-96.

the cases of asylum seekers from Iran,[333] Nigeria,[334] Turkey,[335] and Syria.[336] In the interesting case of a lesbian applicant from Mongolia, where homosexuality is not proscribed by law as such (other articles of the penal code are used), the applicant was raped because of her orientation and was too scared to report to the police. The court quashed the denial of refugee status and ruled that in this case it was the lack of effective protection that made her life unbearable.[337]

That point was strongly made by the court in Arnhem which heard an appeal from a denial of refugee status to a citizen of Georgia.[338] The applicant had been an orphan and was raised without any family in an orphanage. Because of being homosexual, he was assaulted, beaten, and raped over ten times. The applicant never complained to the police, as he was afraid that the police would not only not help him, but rather subject him to further persecution. This all happened, even though homosexuality had been officially decriminalized in Georgia. The Secretary of State claimed that the applicant was ineligible for refugee status, since he had never tried to invoke protection from the state authorities. The court disagreed, quashed the decision and sent it back for reconsideration. The court found that the constant persecution from fellow citizens, with the state turning a blind eye to it, was indeed persecution in the meaning of the Convention. Secondly, the court found that the general situation in the country (macho culture, strong position of the Orthodox Church), makes it impossible for the applicant to invoke protection from the authorities, if he has reasonable grounds to believe this would be futile, and could, in fact, lead to further persecution.[339]

The case-law of the Afdeling, post 2000, seemed to sway in a liberal direction. In a decision from 2003, the court overturned a decision by the court in Den Bosch, and ruled that homosexuality was a new circumstance in an asylum application procedure that mandated a reopening of the case.[340] The case involved a minor asylum applicant from Somalia, whose first application was denied by the IND. He then filed a new claim based on his homosexuality. In another decision by the Afdeling a year later, the Afdeling again overturned the district court on other procedural grounds but agreed with it in saying that it is not enough just to show a proscription of homosexuality in the country of origin. The applicant had to show also that such a proscription is enforced and that he will be personally in danger by the enforcement of such a law.[341] This goes against a 2001 decision of the district court in Utrecht. There, the court ruled that the lack of effective prosecution in a country that penalizes homosexuality (Iran), does not mean "*that the applicant is safe from persecution.*"[342]

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[333] Rb. 's – Gravenhage zp. Utrecht 30 maart 2001, NAV 2001 no. 149, p. 358.
[334] Pres. Rb. Haarlem 12 april 2001, NAV 2001 no. 190, p. 437-439, also published in JV 2001 no. 223, p. 798-802.
[335] Pres. Rb. Arnhem 19 october 2001, NAV 2002 no. 9 with note by Spijkerboer, p. 52-55.
[336] Pres. Rb. 's –Gravenhage 9 april 2001, NAV 2001 no. 208, p. 457. This was significantly different to Rb. 's –Gravenhage zp. 's - Hertogenbosch 13 november 1998, NAV 1999 no. 4 with note by Bruin, p. 39-45.
[337] Pres. Rb. Zwolle 3 janurai 2001, NAV 2001 no. 178, p. 372, also published in RV 2001 no. 22 with note by Terlouw, p. 110-114.
[338] Rb. 's –Gravenhage zp. Arnhem 1 mei 2001, JV 2001 no. 216 with note by Spijkerboer, p. 783-787.
[339] Ibid., p. 788-787.
[340] ABRvS 3 october 2003, NAV 2004no. 130 with note by Andebrhan, p. 785-787, also published in JV 2004 no. 3, p. 37-39.
[341] ABRvS 27 augustus 2004, NAV 2004 no. 269 with note by Andebrhan, p. 646-647, also published in JV 2004 no. 407, p. 1373-1374.
[342] Rb. 's –Gravenhage zp. Utrecht 30 maart 2001, NAV 2001 no. 149, p. 358.

Concluding, although the Dutch Courts have found as far back as 1981 that homosexual men and women may constitute a particular social group, it took over fifteen years before a successful case based on this claim was accepted by the court. The grounds for finding a particular social groups were never elucidated by the courts – it was rather done, as "we know one, when we see one" rationale. Thus, some groups succeeded in being recognized as a particular social group, while other groups did not. However, even if a group was recognized, the courts still demanded "personal severity of persecution" to overturn the decisions of the Secretary of State. The homosexual group is instructive in this: though they were recognized as refugees, they had to show particular circumstances why they were also persecuted. The requirement of "particular personal circumstances" resonates clearly with the notion of singling out criterion, as developed by the Raad van State. Indeed, the homosexuals, just like the Reer Hamar, could not succeed by merely pointing to their group as grounds for persecution. They had to also provide either evidence of personal persecution incidents (the homosexuals) or of persecution grounds for the Reer Hamar (wealth, clan, political opinion). To give an example: in the case of Reer Hamar, the Raad van State required additional attribution to find persecution. It is not enough to be Reer Hamar as they are not persecuted as a group. You have to show any additional reasons why, you personally would be targeted. In the case of homosexuals: it is not enough to belong to that minority, even in a country where homosexuality is proscribed by law. You have to show that what has happened to you, personally, was persecution on account of your homosexuality.

Thus, even when the persecution ground has been developed more clearly than in most cases, the applicants still have to struggle with the case of singling–out.

3.5 Conclusions

Over a quarter of the century from ca. 1980 Dutch law has changed considerably on the one hand, yet on the other it has changed little.

First of all, the procedure has changed. In the beginning, denials of refugee status could only be challenged by an appeal to the Crown. The Crown could listen to the advice of the Raad van State, but, as the case of Ralph Waver shows, was not bound by it. In the late 1970s, the procedure was changed so as to allow the appeals to be heard by the Raad van State. There were relatively few cases back then, and the case-law of the late 1970s and the early 1980s of the Raad van State is considerably more clear, and elaborate than in the later years. However, by the mid 1980s the number of cases being appealed to the Raad van State began to soar. In the late 1980s and the early 1990s, there were so many, it was considered necessary to change the legal regulations which coincided with the changes to general Dutch Administrative law. Now, appeals from the Secretary of State decisions could only be filed with the district courts, and there would be no formal higher appeal. If the issue was grave, or the regional courts disagreed on the problem in question, the case would be referred, by the courts themselves to the Rechtseenheidskamer (REK) sitting in The Hague. Though not a formal higher appeal, the decisions rendered by this court carried considerable weight with the regional courts who tended to follow them. The Ministry of Justice was not pleased with this outcome, and with the changing of the Aliens Law in 2000, higher appeal to the Raad van State was reintroduced.

Now, the decisions rendered by the regional courts could be appealed to the Raad van State. The results of this introduction have been significant.

The second feature of the Dutch law is the persistence of some features and problems with the refugee definition over the years. Thus, the issue of draft evaders and conscientious objectors has been a constant theme of the Dutch case-law ever since the 1971 decision with the Ralph Waver case, right till the 2001 decision of the Raad van State.[343] The development of the doctrine by the Dutch courts here went very slowly. It was not until the 1984 decision when the Dutch Raad van State accepted, that if in a conflict the applicant would be forced to engage in activities, that were contrary to basic human conduct, such a refusal to bear arms and was subsequently punished, that this would amount to persecution. In 1988 the Raad van State went back on its earlier decision, adding additional clauses, that the conflict must be condemned by the international community, and that it must happen within the context of a war. A year later, the court again reversed itself, when it seemed to have accepted the 1984 position. It wasn't until the 1995 decision of the *Anitkian*, when all the exact circumstances one has to meet to be granted refugee status were put together and discussed, that the doctrine became clear. It is poignant to note, that the *Antikian* decision was not rendered by the Raad van State, but by the Rechtseenheidskamer in The Hague.

Another issue that had been present in the Dutch courts, but which has not to this date been clearly elaborated upon by the Dutch courts in any consistent manner, was that of group persecution and the singling-out criterion. It has become a tautology to say that the Dutch courts adhere to the singling-out concept in refugee case determination. It is not clear at all what kind of singling out criterion the courts have in mind. To give two examples: in the early 1980s the Raad van State accepted the concept of group persecution in the cases of Eritreans fleeing from Ethiopia. The definition of "group persecution" was never given clearly by the court, but was worked out on the basis of "come –as-you go basis". It was acknowledged that Eritreans were being persecuted as a group, unless proven otherwise. This line of decisions was reversed suddenly in 1986, when group persecution was denied. Again, little legal argument was given and, from then on, there would just be no group persecution at all. The courts then shifted to the singling out criterion. In all honesty, there were signs, that this time the Raad van State would produce a substantive decision that would map out the reasons for assuming that particular position. However, the legal doctrine criticized the reasoning completely, and the Raad van State abandoned this principle quietly by the end of that year. What also happened though, was that it gave up the idea of defining clearly the concept of singling out. Throughout the late 1980s and early 1990s the Court went on, defining through the negative, that the "*applicant has not sufficiently shown that he/she has a well-founded fear of persecution*". It was not clear to the doctrine or practitioners, what the applicants should show, in order to succeed. The most tense situation came in the early 1990s, when in the case of Somalis the Raad van State would sometimes grant refugee status, sometimes refuse, all based on singling out options, keep the family exception to the singling-out theory. Group persecution was allowed by the district courts in the cases of the Nubas and southern Sudanese refugees. The doctrine was exasperated by this outcome, as is evidently clear from one of the commentators, who sardonically remarked on the case-law involving the Issaq Somalis, that it is hard to tell

[343] ABRvS 11 september 2001, JV 2001 nr. 306, p. 1064-1066 , NAV 2001 nr. 336 with note by Bruin, p. 725-729, RV 2001, nr. 18 with note by Vermeulen, p. 97-100.

what the Raad van State would do and compared the chances of appeal to the law on gambling.[344] It was only in the late 1990s that the regional courts brought some clarity to the matter of singling out and group persecution, and some of the concerns were addressed. The reversal of the Raad van State jurisdiction in 2001 has again brought back some ambiguity and, in one of the few decisions on the substance of the definition, in 2003 it ruled out the possibility of group persecution for the Reer Hamar cases.

The same comments that had been made for the problems described above, can also be said about the two other issues: the agent of persecution decided finally in the late 1990s effectively by the Rechtseenheidskamer.

The third feature of Dutch law, is its stress on the well-foundedness of the fear. In fact, most of Dutch legal doctrine is concerned with that part, and shows an interesting ambivalence towards the rest of the definition. One Dutch legal scholar remarked that, once the applicant has established that he has a well-founded fear of being persecuted, there is little concern about which persecution ground is the appropriate one. The case-law with the homosexual applicants serves as a clear example. The Dutch Raad van State was one of the first jurisdictions to recognize that homosexuals may constitute a particular social group in the meaning of the Geneva Convention. This was done as far back as 1981, and thus a good decade earlier than the American decision of the BIA in *Re Toboso-Alphonso*. However, a closer look at this decision is indeed as interesting as disappointing. The recognition of gays as a particular social group is done *en passant*, treating it as something obvious. There is no extended or even shorthand attempt to define a particular social group, as in the relevant American, or British, or Australian case-law. They are a particular social group and that's that. Even in the later years, the courts stopped short of even trying to attempt to define the particular social group in general, or in particular, regarding the homosexuals. In fact, the 1981 decision pre-dated for well over fifteen years the first positive decision on a gay asylum seeker case.

Thus, a sort of abnegation of the persecution ground is closely tied with the meticulous pre-occupation of the requirement that the fear be a well-founded one. The whole debate around the singling out criterion is in fact a debate around the well-foundedness of the claim. However, by neglecting the persecution ground, the legal doctrine is in fact murky to say the least. Also, by not laying down clearly the principle of when one is singled-out for persecution, but rather by constantly saying, that in this case she is not singled out, the case-law in this area has become muddy waters even for the Dutch legal scholars. In the early 1990s Fernhout wrote his groundbreaking "*Erkenning and toelating als vluchteling in Nederland*" where he expressed his reservation about the direction in which the singling out criterion was heading. By the mid 1990s came the Somali Issaq case-law of the Raad van State which can be seen as a monumental effort in confusing jurisprudence. In 1995 Spijkerboer and Vermeulen wrote a book which shows their growing frustration with the approach of the Raad van State on the issue, and which has not abated since then. Though, as we will see, the discussion is somewhat moot after 2003, there is still a growing discomfort behind the Raad van State decisions in this area. It would seem that the enormous stress placed by the courts on the first part of the definition, while not elaborating a clear and unambiguous understanding of either the singling out criterion or group persecution, or preferably both, has tangled the law in this area considerably.

[344] RV 1996, p. 34.

The developments in the Dutch case-law in the past 30 years have been numerous. On the one hand we see those of the singling –out concept and that of group persecution, where the courts have been for years striving (or not) to come up with a doctrinal statement on these issues, but were more or less unsuccessful. On the other hand, the jurisprudence on draft evaders, and the agents of persecution, show clearly, that if so desired, the courts are capable of producing coherent legal theory, in which the reasoning is clear, and easy to follow, and the court's *ratio decidendi* well argued. Why it seems that the district courts or the Rechtseenheidskamer are more willing to do so, than the Raad van State will be elaborated upon in the next chapter. Suffice it to say here however, that these possibilities do exist, but are not taken.

Chapter 4

Reconstructing the refugee definition

This chapter consists of two parts. In the first part, I will give a general overview of American and Dutch jurisprudence. I will show case-law developments and how the language of the decisions has shaped or has helped shape asylum law. In the second part of this chapter, I will draw potential conclusions from all this and put forward some theses that are open to discussion.

4.1 Case-law appraisal

4.1.1 An appraisal of American case-law

It would be tempting to define the American case law from the 1980s by the US Supreme Court decisions in the cases of *Stevic* (1984),[1] *Cardoza-Fonseca* (1987),[2] and *Elias-Zacarias* (1997)[3] in order to make it fit with the Dutch equivalent time periods. However, this would be, in my opinion, incorrect because the *Cardoza – Fonseca* decision was rendered to clarify the ambiguities caused by *Stevic*, and the fact that the American INS had more or less deliberately ignored the *Stevic* decision in its application of the Refugee Act of 1980. Thus, it would seem that there are three distinct periods in the American case law: before 1987 and *Cardoza-Fonseca*, between the latter and the *Elias-Zacarias* decision, and finally, the post *Elias-Zacarias* decisions.

4.1.1.1 The years from 1980 until 1987

It is now a cliché to say that the U.S. Refugee Act of 1980 was a major overhaul and turning point for the asylum law in the United States.[4] At least in theory, from that time on, the refugee definition was free of any ideological bias, and closely mirrored that of the 1951 Geneva Convention relating to the Status of Refugees. The United States authorities, namely, the Immigration and Naturalization Service, were to apply it equally to refugees fleeing left wing dictatorships and to those fleeing right wing dictatorships.

The problem was that, as quite often happens, legal theory and legal practice diverged a great deal. The INS continued to discriminate against refugees fleeing right wing juntas supported by the US in Latin America. By the mid 1980s, responses to this discrimination had escalated into the well known Sanctuary Movement,[5] and culminated in the *American Baptist Churches et al. (ABC) v. Thornburgh* case, which the INS feared losing, and so agreed to reassess most of the cases of Salvadorians and Guatemalans it had previously denied.[6]

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1 *INS v. Stevic* 467, 413 U.S. 404 (1984).
2 *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct.1207 (1987).
3 *INS v. Elias-Zacarias*, 502 U.S. S.C. 478, (1992).
4 G. Loescher & J.A. Scanlan, *Calculated kindness*…, passim.
5 I. Bau, *This Ground is Holy. Church Sanctuary and Central American Refugees*, New York - Mahwah 1985, Paulist Press; S. Bibler Coutin, *The Culture of Protest. Religious Activism and the U.S. Sanctuary Movement*, Boulder – San Francisco – Oxford, Westview Press; H. Cunningham, *God and Caesar at the Rio Grande. Sanctuary and the Politics of Religion*, Minneapolis – London 1995, University of Minnesota Press.
6 *American Baptist Churches et al. (ABC) v. Thornburgh*, 760 F. Supp 796 (N. D. Cal. 1991).

Regardless of this reassessment, the courts took issue with which standard the INS should apply to asylum, and which to the withholding of deportation.

Thus, in *INS v. Stevic*, the Supreme Court agreed with the Second Circuit in holding that there were two distinct standards, which should be applied differently in different situations. The legacy of *Stevic* was mixed, however, since the INS had found a way to circumvent what the court said. In *Re Acosta*, the BIA found that, while these standards seem different, for "*practical reasons they converge*" and since the BIA would apply just one standard of proof, it was naturally the more stringent one, while the INS applied the pre-1980 one of withholding removal. It is here that we see the signs that different courts came to different conclusions on asylum matters. The Third Circuit agreed with the INS, while the Ninth, Fifth and Fourth disagreed. The Seventh and Sixth tried to steer a middle course, saying, that the "*standards were very similar, though not identical*".[7] This claim did little to clarify the situation, and finally, the INS challenged a case decided against the agency by the Ninth Circuit to the Supreme Court. However, in *INS v. Cardoza – Fonseca*, the American Supreme Court again ruled against the INS. It reaffirmed its *Stevic* decision, where it held that the standards are meaningfully different. Moreover, the Supreme Court held that the more lenient refugee standard should be applied to asylum cases while the stricter standard should apply only in withholding of removal cases.

The issue of the proper application of the right standards of proof is important not only for procedural law, but, more importantly, it shows that both the federal courts and the INS took the matter seriously, though the latter in an admittedly peculiar way. The INS in defense of its position and the circuit courts in defense of theirs rendered decisions in which considerable space was dedicated to the theoretical analysis of why they took their respective positions, and not the other. The standard of proof was also important in another way. The conflicting opinions of the circuit courts and the INS created tension within the legal system of conflicting decisions not only vis-à-vis INS and the Federal courts, but also among themselves. Thus, the Supreme Court heard and resolved two cases related to asylum within seven years. While deciding both cases, the United States Supreme Court heavily invoked domestic constitutional and procedural law in its *ratio decidendi*.

In *Stevic*, the Supreme Court drew heavily on the legislative history of the withholding of removal standard, as well as the asylum standard.[8] The Court, based on legislative history, which it quoted profusely, found that the US Congress wished to bring the US asylum law into conformity with the 1967 Protocol when it enacted the 1980 Refugee Act. Thus, the sections regarding asylum were changed substantively, and a new, well founded fear standard was introduced there.[9] Since Stevic was seeking relief in the form of the "withholding of removal", the court then turned to the provisions of §243(h) which dealt with that provision. Again, taking into account the intent of Congress, and the legislative history, the Supreme Court held that it was the intent of Congress to keep this provision separate, i.e. not governed by the asylum criterion. Therefore, its interpretation should be consistent with the intent of Congress and the practice before 1980.[10]

[7] *Carvajal-Munoz v. INS*, 743 F. 2d 562, 574-76 (7th Cir. 1984) and Youkhanna v. INS, 749 F. 2d 360, 362 (6th Cir. 1984).
[8] *INS v. Stevic* 467 U.S. 414-426 (1984).
[9] Ibid., p. 421.
[10] Ibid., p. 425-427.

The influence of national law is even more visible in the *Cardoza-Fonseca* decision of 1987.[11] As the Court said in its decision, it stepped in to resolve a conflict between circuits.[12] Again, in order to explain its decision the court relied heavily on the doctrine of the intent of Congress and the legislative history.[13] Justice Blackmunn wrote a concurring opinion, in which he too referred to the intent of Congress. Blackmunn called the INS line of decisions "*purposeful blindness*" and said that it was only now that the INS would "*develop properly the task entrusted to its care*."[14] What is even more interesting is the concurring opinion by the Justice Scalia.[15] While he agreed with the Court's findings as to the well founded fear standard and with the fact that it differed from that of withholding of deportation, he markedly differed from the majority in the way in which he arrived to his conclusion. His opinion is an impassioned polemic with the Court on its way of reasoning and its implications for American administrative law. The plain language of the statute is clear, according to Scalia, so he asks why the court is engaging in "*superfluous discussion as the occasion to express controversial, and I believe erroneous, views on the meaning of this Court's decision in Chevron*."[16] In his next passage, Justice Scalia engages in a debate about the principles when administrative agencies' interpretations of a statute are to be shown deference by the courts, and when they are not. The discussion turns from that of asylum law to manners and standards of administrative review. The discussion is easily turned away from questions of asylum law to those of domestic, administrative law and statutory interpretation.

The interplay between international and national law was addressed in this decision, not only in the majority opinion, but also in the dissent. The majority found the roots of the 1980 Refugee Act in international law, namely, in the 1967 New York Protocol Relating to the Status of Refugees. They compared the withholding standard, along with the asylum one, to remarks made in the UNCHR Handbook, as well as quoting the international legal scholar Grahl Madsen.[17] This did not impress the dissenting judges, who insisted that the INS approach was not at face inconsistent with the New York Protocol, but were uncomfortable by the significance the court attached to instruments, such as the Handbook, that "*have no binding force*."[18] The legal doctrine was quick to pick up on this one, and Anker in her "Law of Asylum in the United States" said that:

> "One of the most important legacies of the Cardoza-Fonseca decision was the Court's recognition of the roots of the domestic asylum statute in the international law."[19]

This is true. Yet one might argue that the *Cardoza-Fonseca* is as much a recognition of international law roots of asylum, as recognition that it had become a fully integrated part of the domestic legal order of the United States law, and consequently should be interpreted as domestic law.

[11] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct.1207 (1987).
[12] Ibid.., 426.
[13] Ibid., 432-433.
[14] Ibid., 451-452.
[15] Ibid., 452-455.
[16] Ibid., 454. Chevron was a decision which dealt with, amongst others, the balance between the court's deference to the administration, in the absence of the clear intent of Congress in passing the law.
[17] Ibid., 439-440.
[18] Ibid., 463-464.
[19] D. Anker, *Law of asylum*…, p. 18.

Thus, the *Cardoza – Fonseca* and Stevic decisions were important cases, where asylum issues were dealt with, but also where the international roots of American asylum law were being recognized. It is interesting to observe that, in the same period, the American courts were already laying grounds for the big doctrinal issues they would face in the years to come. They were also increasingly domesticating asylum law – that is drawing parallels from domestic law, to solve some of the questions they were facing.

The time of these two decisions is important not only because they ultimately reached the United States Supreme Court. Around the time of the *Cardoza-Fonseca* ruling, the Ninth Circuit gave two important decisions in *Hernandez - Ortiz v. INS*[20] and *Arteaga v. INS*,[21] while the BIA rendered its decision in *Re Acosta*.[22] The first case, given in 1985, involved a female applicant from El Salvador, whose family had suffered numerous instances of physical violence and harassment on part of the government troops. The INS denied her claim for asylum based on the fact that she had never voiced her criticism of the government publicly and there was thus insufficient grounds to presume that she was persecuted on account of her political opinion. The Ninth Circuit, however, reversed and remanded the case back to the INS for reconsideration. The court found that perhaps Adela Hernandez–Ortiz may not have been persecuted for her political opinion, but for a political opinion rightly or wrongly attributed to her by the government in her home country.[23] Thus, the doctrine of imputed political opinion was born.

It was paralleled, and for a while overshadowed, by the progeny of the *Arteaga v. INS* decision.[24] There the Ninth Circuit seemed to have adopted a blank assumption (though, rebuttable) that if the organization persecuting an individual had a political aim, then it persecutes because of political opinion and disagreement. Thus, the doctrine of political neutrality had been developed and refined from earlier case law. As has been shown already, that development met with restrained enthusiasm and reception from the different circuits, some refusing to adopt it altogether,[25] while some endorsing it with considerable modifications.[26] This conflict between circuit courts would be solved by the *Elias-Zacarias* decision of the Supreme Court.

At the same time, the courts were developing the neutrality or imputed political opinion case-law. First the INS and later the courts dealt with the question of the nexus between the persecution and the persecution ground. In *Re Acosta*, the Board of Immigration Appeals ruled that there must be a clear link between the inflicted persecution and the persecution ground. The Ninth Circuit agreed, though in subsequent decisions of *Henerndez-Ortiz* and *Bolanos–Hernandez* it considerably lessened the strict requirements the BIA had laid down in its *Acosta* decision.[27]

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[20] *Hernandez - Ortiz v. INS* 777 F.2 509 (9th Cir. 1985).
[21] *Arteaga v. INS* 9836 F.2d 1227, (9th Cir. 1988).
[22] *Re Acosta* 19 I. & N. Dec. 211 (BIA 1985) reversed on other grounds by *Re Mogharrabi*, I. & N. Dec. 439 (BIA 1987).
[23] *Hernandez - Ortiz v. INS* 777 F.2 509, 517 (9th Cir. 1985).
[24] *Arteaga v. INS* 9836 F.2d 1227, (9th Cir. 1988).
[25] *Perlera – Escobar v. INS*, 894 F.2d 1292, (11th Cir. 1990); *Cruz – Lopez v. INS*, 802 F.2d 1518 (4th Cir. 1986).
[26] *Lopez – Zeron v INS*, 8 F.3d 636 (8th Cir. 1993); *Novoa – Umania v. INS*, 896 F.2d 1, (1st Cir. 1990).
[27] See Chapter 2.4.1 for more details.

From the early 1980s, the American administration and the courts have shown their willingness to break the refugee definition into pieces and to tackle the apparent problems on their own. Thus, the early 1980s saw the resolution of such questions as the agent of persecution, the nexus between the persecution and the persecution ground, and particular instances of a persecution ground, such as neutrality and imputed political opinion. Finally, it was the BIA that in its extensive *Chen* decision, gave the construction, of when one qualifies for refugee status even if there is little probability of future persecution.[28]

4.1.1.2 The importance of the Elias-Zacarias decision

The *Elias-Zacarias* decision was a result of numerous case developments by the courts (primarily, but not exclusively, by the Ninth Circuit) and their growing dissatisfaction with the decisions rendered by the INS. It should be also remembered that even after the *ABC v. Thornburgh* case was settled, the government made a specific clause to exclude from the settlement the *Elias-Zacarias* and the *Canas-Sergovia (I)* decisions of the Ninth Circuit, which the INS was challenging in the Supreme Court at that time. It is therefore instructive to look at both of these decisions.

Elias-Zacarias was a native of Guatemala, where there had been fighting between the right-wing government (backed by the United States) and left-wing guerillas, supported by the Soviet Union. Elias-Zacarias was neutral in the conflict and stayed aloof of any political activity until on one night the guerillas arrived at the home of his parents and asked Zacarias to join them. He refused. Naturally, the guerillas were not pleased and, while they left him unharmed for the time being, they told him to reconsider his decision as they would be back. Elias-Zacarias did not wish to join them lest the government should retaliate against his family. The INS denied his claim, holding that the fear of conscription, even if by the guerillas, was not enough to warrant a grant of asylum, as Elias-Zacarias did not fear persecution on any of the persecution grounds. The Ninth Circuit heard the appeal, and it reversed and remanded the case back to the BIA.[29] It held that since the motives of the guerillas had been political, they were in fact persecuting Elias-Zacarias for political reasons. Furthermore, drawing on its case law post *Arteaga* decision, the Court held, that the refusal to join the guerillas is thus a manifestation of political opinions, and thus, conscription to the contrary would be persecution.[30] The INS appealed to the Supreme Court, which heard the appeal.[31]

The case of *Canas-Sergovia v. INS (I)* was somewhat similar.[32] The two brothers Jose Roberto and Oskar Iban were citizens of El Salavdor, and professed to be Jehovah's Witnesses. El Salvador law had no provisions for exempting men from military service under any circumstances and the brothers claimed that forced conscription to the army would amount to persecution on account of religion. They also alleged that, given the civil war in their home country, their refusal to serve in the army would be perceived as a sign of

[28] *Re Chen*, 20 I. & N. Dec. 16, (BIA 1989).
[29] *Elias-Zacarias v. INS*, 921 F.2d. 844, (9th Cir. 1990)
[30] *Arteaga v. INS* 9836 F.2d 1227, (9th Cir. 1988) and chapter … of this book
[31] *Elias-Zacarias v. INS*, 921 F.2d. 844, 851-852 (9th Cir. 1990)
[32] *Canas - Sergovia v. INS*, 902 F.2d 717, (9th Cir. 1990) (*Canas I*)

disapproval of the government. Thus, they would have an imputed political opinion attributed to them. The INS denied their application, but the Ninth Circuit reversed and remanded. Similar to the case of Elias-Zacarais, it held that a country's government is a political entity, and when it chooses to prosecute for a refusal to bear arms, this may in fact amount to persecution on account of religion. The Court also held that the bothers would indeed have had a political opinion attributed to them for refusing to be drafted to the armed forces.[33]

The Supreme Court heard the appeal of the INS from both cases, but gave the substantive decision in the case of Elias-Zacarias.[34] Justice Scalia delivered the majority decision this time, from which three Justices (Stevens, Blackmun and O'Connor) dissented. The majority of the Supreme Court rejected the argument that Elias-Zacarias held a neutral political opinion for which he was persecuted by a threat of forced conscription. The Supreme Court underlined the nexus requirement and stated that the "*plain meaning of the statute*" meant that it should be the political opinion of the victim, and not the persecutor, that is taken into account. Thus, the victim, should give "some evidence", either circumstantial or direct, of the intent of the persecutor. While the Supreme Court threw out the doctrine of political neutrality as practiced by the Ninth Circuit after the *Arteaga* decision, it remained ambiguous on other accounts. What is interesting to remember, is that unlike the *Stevic* and the *Cardoza-Fonseca* decisions, *Elias-Zacarias* was almost devoid of any other legal analysis, like international law (e.g. The UNCHR handbook) or constitutional questions (eg. intent of congress). What was at stake was the question of interpreting the question of "persecution on account of political opinion" and that is exactly what the court did, both in the majority decision, and in the dissent too.[35]

As described earlier, the *Elias-Zacarias* decision had an ambiguous effect. The legal doctrine was at first unanimously critical of it,[36] while the INS commentators, could hardly hold back their jubilation.[37] However, a slightly less bi-polar picture emerged over time. While that decision did deal a serious blow to the neutrality as a political opinion theory, the Ninth Circuit managed nonetheless to salvage some of it in the modified theory of "hazardous neutrality".[38] Also, more importantly, it did little damage to the concept of imputed political opinion. In fact, it was the post *Elias-Zacarias* time, which saw the full development of that theory. The classical example of imputed political opinion theory would be the decision given by the Ninth Circuit in the second *Canas-Sergovia* case, after the first one was reversed by the Supreme Court.[39] Hearing the case again, the Ninth Circuit could not presume that the prosecution of conscientious objectors was a persecution on account of the victim's religion, as the Canas-Sergovia brothers did not provide any evidence to that effect.[40] However, the

[33] Ibid., 723-729.
[34] *INS v. Elias-Zacarias*, 502 U.S. S.C. 478, (1992).
[35] Ibid., passim.
[36] See (amongst others): D. Anker et al, *The Supreme Court's Decision in INS v. Elias Zacarias: Is there Any "There" There?*, 69 Interpreters Releases 285 (1992); C. Fielden, *Persecution on Account of Political Opinion: "Refugee" Status after INS v. Elias – Zacarias*, 112 S. Ct. 812 (1992), 67 Washington Law Review 959, 977-78.; A. C. Helton, *Resistance to Military Conscription or Forced Recruitment by Insurgents as a Basis for Refugee Protection: a Comparative Perspective*, 29 San Diego Law Review 581, 594 (1992).
[37] B.J. Einhorn, *Political Asylum in the Ninth Circuit and the Case of Elias – Zacarias*, 29 San Diego Law Review 597, 610 (1992).
[38] See Chapter 4.2.
[39] *Canas - Sergovia v. INS*, 970 F.2d 599, (9th Cir. 1992) (*Canas II*).
[40] Ibid., 601.

Ninth Circuit held, that by refusing to serve in the army, the Canas brothers may have been imputed a false political opinion, and been persecuted for that opinion. The court again reversed and remanded the original decision of the BIA for reconsideration.[41] Thus, despite the wishes of one of the INS members that:

> "The Supreme Court majority dealt a firm, if not fatal, blow to the doctrine of imputed political opinion applied by the Ninth Circuit from the time of Bolanos-Hernandez and Hernandez-Ortiz"[42]

what had happened, had been the exact opposite.

One more thing should also be borne in mind when discussing the *Elias-Zacarias* decision. Unlike the *Stevic* and *Cardoza-Fonseca* decision, this ruling has very little references to other legal issues. The Supreme Court discussed the question of a political opinion and nothing more. There are no references to literature or legal scholarship, either in the majority, or in the dissent. If the *Cardoza-Fonseca* decision was indeed an acknowledgement of the international law roots of asylum, than perhaps the *Elias-Zacarias* decision may be viewed as a sign that the refugee definition had been thoroughly integrated into the American legal system and doctrine by 1992. Both the majority and dissent chose to rely on domestic asylum case law to make their points, rather than on legal scholars or public international law. In this respect too, the *Elias – Zacarais* has indeed a mixed legacy.

4.1.1.3 Case-law post Elias-Zacarias

Case law since the *Elias–Zacraias* decisions shows that the American courts have a way of skillfully applying Supreme Court decisions in their own way. As we have seen, the Ninth Circuit managed to salvage some of the concept of political neutrality and develop it further into the "hazardous neutrality" concept. The *Canas- Sergovia (II)* decision showed, and the subsequent case-law confirmed, that the courts were adamant about retaining the imputed political opinion theory, and managed to do so.

At the same time, the disparities between the different circuits continued. This variation is visible in the court's approach to the singling out criterion. The Ninth Circuit, and to some extent the Seventh as well, were alert to the BIA attempts of trying to shift the "singling-out" criterion into a requirement of the refugee definition. In the decision of *Kotasz v. INS*, the Ninth Circuit reversed and remanded a denial of asylum by the BIA, after the latter ruled, that *Kotasz* was not singled out for persecution since other participants in a demonstration were also beaten and detained by the police.[43] By comparison, the Fifth Circuit in a decision of *Abdel-Masieh v. INS*, held that a Copt from Southern Sudan could not claim persecution since he had not been singled out for persecution. It based the rejection on the fact that other

[41] Ibid., 602.
[42] B.J. Einhorn, *Political Asylum in the Ninth Circuit and the Case of Elias – Zacarias*, 29 San Diego Law Review 597, 610 (1992).
[43] *Kotasz v. INS*, 31 F.3d 847 (9th Cir.1997).

participants of an anti government demonstrations were arrested too.[44] The divergence in circuit practice is visible in the fact that the Ninth Circuit and a few other circuits prefer to use the term "people similarly situated",[45] while other courts use the term "singled out for persecution" for similar cases.[46] Finally, to add to the confusion in terminology, the Eight Circuit seems to accept that people in similar circumstances may be singled out for persecutions.[47]

Another, and perhaps a more important dissent between the Circuits Courts has evolved around the question of the definition of a particular social group. Though the precise and detailed study of this question in American case-law would exceed the scope of this book,[48] it is nonetheless instructive to give an overview of that question.

The issue of defining a particular social group emerged quite early, in 1985 in the decision of *Re Acosta*.[49] Based on this ruling, the BIA has applied the test to claims based on particular social groups more or less consistently since. The concept was used to acknowledge claims based on sexual orientation[50] and fear of female genital mutilation (FGM),[51] among others. The courts seemed to follow the BIA definition[52] although some diverged on minor points.[53] One of the most poignant questions was whether membership in a particular family may constitute membership in a particular social group. Here the federal courts split. The First,[54]

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[44] *Abdel-Masieh v. INS*, 73 F.3d 579 (5th Cir. 1996).

[45] *Lolong v. Gonzales*, 400 F.3d 1215, 1222-23 (9th Cir. 2005); *Poradisova v. Gonzales* 420 F.3d 70, 80 (2nd Cir. 2005); Interestingly, in some cases the Fifth Circuit also finds that singling –out for persecution is not required: *Eduard v. Ashcroft*, 379 F.3d 182, 192 (5th Cir. 2004).

[46] *Abdel-Masieh v. INS*, 73 F.3d 579 (5th Cir. 1996); *Ontunez – Tursios v. Ashcroft*, 303 F.3d 341 (5th Cir. 2002); *Sayaxing v. INS*, 179 F.3d 515 (7th Cir. 1999), *Portillo v. INS*, 182 F.3d 932, (10th Cir. 1999, unpublished decision); *Germain v. U.S. Atty. Gen*, 140 Fed.Appx. 232, (11th Cir. 2005, unpublished).

[47] *Makkonen v. INS*, 44 F.3d 1378, (8th Cir. 1995), *Agada v. Ashcroft*, 368 F.3d 867 (8th Cir. 2004), *De Brenner v. Ashcroft*, 388 F.3d 629, 637 (8th Cir. 2004).

[48] For an extensive analysis of this problem see; M. Graves, *From Definition to exploration: Social Groups and Political Asylum Eligibility*, 26 San Diego Law Review 739 (1989); T.D. Parish, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and The Legal Concept of the Refugee*, 92 Columbia Law Review 923; Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 Cornell international Law Journal 505 (1993).

[49] *Re Acotsa*, 19 I. & N. Dec. 211 (BIA 1985) *overruled on other grounds in Re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

[50] *Re Toboso-Alphonso*, 20 I. & N. Dec. 819, (BIA 1990); *Re Tenorio* NO. A72 093 558 (EOIR Immigration Court, July 26, 1993); *Pitcherskaia v. INS* 118 F. 3d 641 (9th Cir. 1997); *Hernadez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

[51] *Re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996); *Abankwah v. INS*, 185 F.3d. 18 (2nd Cir. 1999); *Mohammed v. Gonzales*, 400 F.3d 785, 796 (9th Cir. 2005), *but see Rreshpja v. Gonzlaes*, 420 F.3d 551, 555 (6th Cir. 2005) where the court disagrees with the Ninth Circuit's decision.

[52] *Silva v. Ashcroft*, 394 F.3d 1, 5 (1st Cir.2005); *Fatin v. INS*,12 F.3d 1233, 1238- 40 (3rd Cir.1993); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir.2002); *Castellano-Chacon v. INS*, 341 F.3d 533, 546-48 (6th Cir.2003); *Lwin v. INS*, 144 F.3d 505, 511-12 (7th Cir.1998); *Thomas v. Gonzales*, 409 F.3d 1177, 1184-87 (9th Cir.2005) (en banc) *reversed on other grounds by Gonzales v. Thomas*, 126 S.Ct. 1613 (U.S. Supreme Court 2006); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir.2005); *Castillo-Arias v. U.S. Attorney General*, 446 F.3d 1190, 1195 (11th Cir. 2006).

[53] *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir.1991); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) *superceded by statute on other grounds recognized by Rife v. Ashcroft*, 374 F.3d 606, 614 (8th Cir.2004).

[54] *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir.1993); *Aguilar-Solis v. INS*, 168 F.3d 565, 571 (1st Cir.1999).

Third,[55] Fourth,[56] Seventh,[57] Eighth Circuits[58] held, that it does. The Ninth Circuit however, produced two lines of case law. First in *Estrada-Posadas v. INS*,[59] and later in *Hernandez–Montiel v. INS*,[60] the Ninth Circuit held that one cannot claim to be persecuted on account of membership in a particular social group, if that group is a family. At the same time a different panel of the Ninth Circuit held exactly the opposite, calling the family a "prototypical example" of a particular social group.[61] The conflicting jurisprudence of this Circuit led to a growing concern by the doctrine, and was finally addressed by the Ninth Circuit in the case of *Thomas v. Gonzales*. The applicants, a white family from South Africa, had fled from persecution by the black population, which was hostile to the father-in-law of Mrs. Thomas, a well known racist. The IJ and then the BIA rejected their claims, finding that the Thomas family did not constitute a "particular social group". The applicants appealed to the court which handed a divided, three-panel decision reversing the BIA, but then heard the case again en banc. The Ninth Circuit held, that a family may constitute a particular social group in the meaning of the Refugee Act, and overruled all its prior decisions that held to the contrary.[62] Thus, by the dawn of the new century, the Ninth Circuit joined other courts in holding that a family may constitute a particular social group.

Finally, though it remains to be seen, one of the effects of the *Elias-Zacarias* decision may be the growing pressure on the Circuit Courts by the administration and the Supreme Court to show a greater deference to the decisions rendered by the administration, and only vacate and remand if they feel compelled to do so. The scope of the changes this might introduce remains to be seen, but the Fourth Circuit may be showing the direction in its decision in *Lopez–Soto v. INS*:

> "Our review of a BIA asylum eligibility determination is most narrow. (…) indeed, we will uphold the BIA determination unless a petitioner can "show that the evidence he presented was *so compelling that no reasonable factfinder could fail to find the requisite fear of persecution*" *Elias-Zacarias, 502 U.S. at 483-84* (emphasis added)"[63]

Perhaps the conflict between the different circuits on the scope of how much they feel "compelled to overturn" might be the future big issue in the case-law post *Elias-Zacarias*.

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[54] *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir.1993); *Aguilar-Solis v. INS*, 168 F.3d 565, 571 (1st Cir.1999).

[55] *Fatin v. INS*, 12 F.3d 1233, 1239, 1240 (3rd Cir.1993); *Kanchaveli v. Gonzales*, 133 Fed.Appx.852, (3rd Cir. 2005) (not published); *Singh v. Gonzales*, 406 F.3d 191, 196 (3rd Cir. 2005).

[56] *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004).

[57] *Najafi v. INS*, 104 F.3d 943, 947 (7th Cir.1997); S*harif v. INS*, 87 F.3d 932, 936 (7th Cir.1996); *Lwin v. INS*, 144 F.3d 505, 511 (7th Cir.1998).

[58] *Hamzehi v. INS*, 64 F.3d 1240, 1243 (8th Cir.1995).

[59] E*strada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991).

[60] *Hernandez – Montiel v. INS*, 225 F.3d 1084, 1092 (9th Cir. 2000).

[61] *Sanchez – Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir.1999); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir.2000); *Molina-Estrada v. INS*, 293 F.3d 1089, 1095 (9th Cir.2002).

[62] *Thomas v. Gonzales*, 409 F.3d 1177, 1184-87 (9th Cir.2005) (en banc) *reversed on other grounds by Gonzales v. Thomas*, 126 S.Ct. 1613 (U.S. Supreme Court 2006).

[63] *Lopez – Soto v. Ashcroft*, 383 F.3d 228, 233-34 (4th Cir. 2004) (emphasis in the original).

4.1.2 An appraisal of Dutch case-law

It is interesting to observe how the refugee definition was construed in the Dutch case-law over the period from the 1970s till 2006. After analyzing the relevant period, one comes to the conclusion that there were certain distinguishable periods or segments.

4.1.2.1 The years between the 1975 and1986

The first time segment would be from roughly the 1970s till 1986. We can see particular aspects of the case law from this period which included both the form (language) in which the decisions were written, as well as the substance of the decision themselves.

Dutch asylum decisions in this period were written in a particular way.. The courts were willing to use positive language, that is construct its decisions, so it was clear who was eligible for refugee status. Thus, the court in principle held that sexual orientation may be a valid persecution ground;[64] that the fate of family members is relevant to the asylum determination;[65] that severe discrimination might constitute persecution;[66] or that refusal to engage in degrading military conduct and punishment thereof will constitute persecution.[67] Though one might at times argue with some of these decisions, they nonetheless state clearly what the premises are and when a refugee applicant could get his denial of refugee status by the Secretary of State overturned by the court. However, there are times when even then the courts would prefer a negative definition - that is, who is not a refugee? Thus, the first decision in a draft evasion case stated that the applicant was not a refugee, as he did not show that he would be punished more severely for his refusal to be drafted. This kind of decision carries a special hurdle: as legal reasoning about it is reductive, and thus open to error when one tries to establish who is a refugee based on it. It does not suggest that, had he shown that he would be more severely punished than other conscientious objectors, he would have been termed a refugee. He could have been one, but he also might not have been. By writing the decisions negatively, the courts leave themselves open the possibility to of future maneuvers in any direction – more restrictive or more liberal. This manner of writing was visible, but not predominant, in this first period.

We can see the preoccupation of the Dutch Raad van State with the concept of the well founded fear of persecution from the beginning. The reasons for this are not altogether clear. The lack of any prior case law where the definition had been broken down and analyzed in parts might have played a role, but the reason may be a bit simpler: the court intuitively dealt first with the first element of the definition. Although other elements of the definition would also be acknowledged in this period, it would never be done to the degree that the well founded fear requirement was.

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[64] ARRvS 13 augustus 1981, RV 1981 no. 5, p. 30-34.
[65] ARRvS 24 november 1983, AB 1984 no. 408 with note by Fernhout, p. 1203-1209; also published in RV 1983 no. 5 with note by Swart, p. 19-30.
[66] ARRvS 13 juni 1980, RV 1980 no.6, p. 48.
[67] ARRvS 23 augustus 1984, AB 1985 no. 585 with note by Fernhout, p. 1516-1520; also published in RV 1984 no. 4, p. 35-39.

This points to another feature of Dutch asylum case law, which moves us to the substance of it, namely its distaste for dissecting the refugee definition into pieces e.g. well founded fear, of persecution, on account of, a persecution ground. Thus, the Dutch phrase began in the late 1970s that "*the applicant has in the opinion of the court not sufficiently shown that she has a well founded fear of being persecuted*" originated here. While the court might later ponder the definition of persecution or just the well founded fear, it is immaterial: the same line will be used in all these cases. This underlines the statement of one of the scholars of Dutch refugee law, that, once an applicant passes the hurdle of the well foundedness of fear, the exact persecution ground in Dutch case law is largely irrelevant.[68] The examples of Christians from Turkey and of homosexual asylum seekers are here to back this point. In the first group, the court concentrated in fact on the issue of persecution and defining it, and avoided the question based on what ground they were persecuted. In the case of the homosexuals, the court swiftly accepted a persecution ground, but dismissed the case on the lack of well foundedness of fear.

The Raad van State dealt with a number of cases and did not shy away from inserting some legal theory into its case law. Although the legal interpretation was not elaborate, the court addressed the question of a group persecution,[69] persecution based on sexual orientation,[70] and the issue of draft evaders and conscientious objectors in a more or less detailed way.[71] In most of these cases, the Courts would use affirmative language: a language that would make clear that the applicant either did have a well founded fear of being persecuted, or that she did fear persecution based on a persecution ground, or that the applicant did fear group persecution. In some of the cases, the Raad van State would have quashed and remanded it back to the Secretary of State based on the fact that his interpretation of the refugee definition was not clear or that the court found it too strict. Even when the Raad van State refused to reverse and remand the case back to the Secretary of State for reconsideration, in some cases it would find that there had been persecution, and would say so explicitly.[72] To give another example: in 1983 the Raad van State reversed and remanded the Secretary of State's decision to deny refugee status to an Argentinean applicant whose family members had been imprisoned and tortured by the military junta. The court held that the Secretary of State should pay attention to the situation of family members in refugee determination proceedings.[73]

On one hand, the courts in this period were much more willing to develop the legal understanding of the refugee based on their case-law. Thus, after a denial of refugee status in 1980 by Raad van State to a conscientious objector from Colombia, because he could not prove that he would be disproportionably punished for his refusal to bear arms, another decision in 1984 brought about a change. In that year the Raad van State dismissed an appeal from a draft evader from Southern Sahara/Morocco. Although it essentially affirmed the Secretary of State's decision, it added nonetheless that if the applicant in the course of warfare were forced to commit acts contrary to human conduct, and be punished for a refusal to commit

[68] R. Fernhout, *Erkenning en toelating*…, p. 98-103.
[69] ARRvS 10 april 1979, RV 1979 no. 3, p. 16-22. (Eritreans from Ethiopia).
[70] ARRvS 13 augustus 1981, RV 1981 no. 5, p. 30-34 (Homosexual man from Poland).
[71] ARRvS 17 april 1980, RV 1980 no. 4, p. 35-39. (Draft evader from Columbia).
[72] ARRvS 13 juni 1980, RV 1980 no.6, p. 48. (Syrian Orthodox from Turkey).
[73] ARRvS 24 november 1983, AB 1984 no. 408 with note by Fernhout, p. 1203-1209; also published in RV 1983 no. 5 with note by Swart, p. 19-30.

these acts, then he would be considered a refugee. It is worth noting, that this change in case law was brought about when the Raad van State invoked the UNCHR handbook.[74] Another change happened with the group persecution concept. A year after recognizing group persecution in the case of Eritreans from Ethiopia, the court slightly altered its position when it held that the group persecution of Eritreans from Ethiopia still applied unless, in particular circumstances, there were insufficient grounds to find "*uncontrolled repressive treatment [by] Ethiopian authorities*."[75] Thus we find in that period not only relatively clear doctrinal statements of questions such as draft evasion, but also a slight modification of these, both for the applicants advantage, and disadvantage.

On the other hand, this by no means implies that the Dutch Raad van State always had clear reasoning of its decisions, where all the issues were meticulously explained and analyzed. The case law dealing with the Christians from Turkey shows an ambiguous picture. While on one hand, the Court was willing at least implicitly to find group persecution, or that the situations of the applicants was untenable, other issues must also be considered. The Court did not choose to elaborate on the question of when discrimination amounts to persecution. Also, it was the Court, and not the Secretary of State that found that the applicants could move to other parts of Turkey, and it did this despite the initial objection to that by the UNCHR representative.[76] It insisted in this interpretation of the facts, even in later cases, when the applicants pointed out that the "internal flight alternative" had not been accepted in other jurisdictions.[77] It was also in that case that the court uttered the words that "*asylum is not a poor man's alternative to emigration*".[78] It should again be stressed here, that while the Raad van State accepted the possiblity of group persecution of Eritreans in principle, it did not provide for a clear theoretical (doctrinal) list of premises regarding when to find such group persecution.

The ambiguous side of the early 1980s case law is also reflected in the famous 1981 first homosexual asylum claim. While the court accepted that sexual orientation may be a valid persecution ground, it none the less did so *en passant*, without any elaboration on the subject: why that is so, what the premises are, what the relation of law proscribing homosexual behavior is to asylum, etc. Thus, despite a decision acknowledging homosexuality as grounds for asylum, it left most of the questions unanswered. It would be well over a decade before the courts would once again grant asylum based on sexual orientation.

4.1.2.2 The years between 1986 and1995

The second period in Dutch case law would span from 1986 till the mid-1990s. After 1986, the Afdeling moved more in the direction of defining the refugee negatively. As I explained earlier, this was not new, and already happened now and again before 1986, but in this second period, this line of writing judgments gained strength. It became very clear in the

[74] ARRvS 23 augustus 1984, AB 1985 no. 585 with note by Fernhout, p. 1516-1520; also published in RV 1984 no. 4, p. 35-39.
[75] ARRvS 13 juni 1980. RV 1980 no. 6, p. 46-49.
[76] ARRvS 18 augustus 1978, RV 1978 no. 30, p. 94-98.
[77] ARRvS 7 februari 1980, RV 1980 no. 3, p. 24-34.
[78] Ibid., p. 29.

cases of Issaqs. The same case-law is the clearest example of how confusing the Afdeling's case law could be when it employed negative definitions. The story is as follows. Since the year 1986, the Raad van State had been consistently denying claims of groups based on group persecution. This was done by both denying the notion of group persecution, and by demanding singling out. The Issaqs were one of the many clans and subclans in Somalia that were caught in the midst of an all-out clan war, when their government collapsed in the early 1990s. Since the Issaqs were not very numerous and could not afford a proper militia to defend themselves, they soon became easy prey to more numerous and armed clans. In the space of a few months in the early 1990s, the other clans combined their efforts to wipe out the Issaqs. Over 30,000 of them died, and thousands fled for safety to other countries. Yet the Afdeling consistently denied their claims of both group persecution and their having been singled out.[79] They had not shown that they were being persecuted as a group – bearing in mind that there were no clear doctrinal criteria of what constitutes group persecution. But then, the same court went on to insist that what had happened to the applicants had nothing to do with their personal circumstances, or was not directed personally toward them, but rather it had happened because of their clan background or what had happened was a result of actions taken against members of their clan. Therefore, the applicants had not been singled out for persecution. It would seem that the Afdeling would be denying the thing it had just said earlier in its reasoning concerning group persecution.

It is of little surprise that the legal doctrine expressed growing exasperation with the Afdeling's case-law. It should also be remembered that the Afdeling was also dealing with the question of the agent of persecution in the Somali cases. So, the singling out criterion, the agent of persecution, and the group persecution concepts all combined to create a complicated and confusing case-law. Describing the case law in 1995 and 1996 in one of his case-law annotations, Spijkerboer did not mince his words:

> "The conclusions so far are as such: 1. Invoke any legal argument against the case-law of the Court, even if the current line is crystal clear. Maybe today they will think about it something completely different. Conclusion 2: the Afdeling maybe changed its earlier position (…) or maybe gone back to its earlier position (…), but maybe none of the above. The Minister of Justice should ponder the question if appealing to the Afdeling is not governed by the Law on Gambling."[80]

The "objective leer" is a rare example of where the court did state the doctrine affirmatively for once.[81] It is also one of the cases that triggered an immediate reaction from the legal doctrine, which called it "ugly".[82] It would seem that this reaction of the legal scholars, who lamented it as further stratification of the theory of singling out, caused the Afdeling to drop it quietly. Interestingly, the court never explicitly rejected its early findings. In a typical manner, it simply moved swiftly along with the case-law in another direction.[83]

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[79] ARRvS 21 mei 1991, RV 1991, no.6 with note by Fernhout, p.14-17; ARRvS 25 mei 1992, RV 1992, no. 8 with note by Fernhout, p. 18-21.
[80] RV 1996, p. 34.
[81] ARRvS 24 februari 1988, RV 1988 nr. 4, p.13-23.
[82] RV 1988, p.31.
[83] ARRvS 14 september 1988, RV 1988 nr. 6 with note by Bolten, p. 26-33.
[84] ARRvS 12 juli 1982, RV 1982, no. 7, p. 25. (emphasis mine)
[85] ARRvS 21 januari 1986, RV 1986, no. 1 with note by Bolten, p.1-3, (family members); ARRvS 22 juli 1987,

When it came to the substance of the refugee definition, the mid-1980s were very important too. The Raad van State continued in its preoccupation with the well foundedness of fear of persecution. Again, it concentrated on this issue, but had now moved away from the possibility of group persecution to that of singling out. As I tried to show earlier in Chapter 3, this was not only a new development of the Raad van State, but it can also be seen as the court embracing the position of the Secretary of State from the early 1980s. Back then, the Secretary of State would argue in a number of cases that the refugee must show "individual" or "personal" targeting by the persecutor, to show persecution. In the case of a Chilean communist party activist, the Secretary of State argued that: "*it was not shown that the authorities of Chile because of the specific activities (…) of the applicant have in their mind, and wish to persecute him because of these activities*."[84] In this and other cases, the Raad van State held that such a strict interpretation of the well founded fear of being persecution is incorrect. It would reverse and remand the case back to the Secretary of State and order him to take into account the human rights situation in the country of origin or the circumstances of family members of the applicant.[85] However, from the mid 1980s, the court began to adopt the exact reasoning of Secretary of State, which it had previously rejected. Thus, it moved from the concept of group persecution to that of singling out.

The first cases where the singling out theory was clearly applied were the Tamils fleeing the civil war in Sri Lanka. In those cases the court not only rejected the claim of group persecution, but it went also to demand that the applicants show "personal" persecution directed toward them. In most cases, it also dismissed the general situation in the country of origin as irrelevant. This stress on the individual circumstances of the applicants caused most of the Tamil cases before the Raad van State to fail. The line of the Afdeling is most clearly visible in the two cases of Tamil women. In the case of Rasiah, a female Tamil applicant who fled from the Nothern Sri Lanka out of fear of rape by the Indian Peace Keeping Forces, the Raad van State rejected her claim to refugee status.[86] It held that there was no proof that the I.P.K.F. were using rape of Tamil women as an instrument of intimidation of the Tamil population. In the removal (summary) proceedings, the local judge, and later the Supreme Court also claimed, that since her fate was not unusual to that of other Tamil women in Sri Lanka, there was therefore no persecution.[87]

How much the language of the decisions was instrumental in shaping the complicated singling out theory, we clearly see from another Tamil decision from 1989.[88] The applicant, another female from Sri Lanka had a boyfriend who had been politically active and had supported the Tamil guerrillas. The authorities were aware of his sympathies, and went to their home a number of times to arrest him. On each occasion, the boyfriend was out of the house, but the applicant was not. So, each time the soldiers came, she was taken into detention, raped, and beaten. First the State Secretary, and later the Raad van State held that she had was not a refugee. Why? She had not been targeted **personally** for persecution. Had the authorities come and raped her boyfriend perhaps then it would have been persecution. But since they came for someone else (her boyfriend), thus, what had happened to her was not enough to

RV 1987, no. 4 with note by Bolten, p. 12-14, (human rights conditions in country of origin).

[86] ARRvS 28 october 1991, RV 100, no. 11 with note by Vermeulen, p. 29-38.

[87] HR 14 december 1990, no. 14.329, RV 1990 no. 9 with note by Fernhout, p. 26-34.

[88] ARRvS 8 december 1989, RV 1989, no. 8 with note by Fernhout, p. 22-24.

be considered persecution by the State Secretary or by the court. The singling out criteria were also phrased negatively, that is that the applicant had failed to show, that he or she had been targeted by the persecutor personally, or that the persecution of the applicant was embarked upon by the persecutor in order to target that particular applicant.

Another part of the singling out theory was the area of its interplay with group persecution. In 1986, the Raad van State completely reversed itself on the question of group persecution. Whereas it was accepted for the Eritreans from Ethiopia before, now the court held that this group cannot invoke this concept anymore. The Afdeling did not rule out group persecution as such: it just held that the applicants from Ethiopia have insufficiently proven that they are persecuted as a group. The lack of any court definition of the concept of "group persecution" from before 1986 proved convenient. It was not clear why the court changed its mind, but it did. Also, future groups who tried to invoke group persecution would fail, as they too did not sufficiently prove that they were persecuted as a group. The fact that it was not altogether clear what they had to show exactly was another matter. So, the cases of Kurds, Lebanese, Somalis, Tamils and others would ultimately fail if they tried to invoke group persecution.[89] With the lack of any affirmative definition of the concept, and just a negative one (group X has not sufficiently proven that they face group persecution), the Raad van State had the full discretion and room for maneuver regarding whether to find group persecution. It also meant that the regional courts in the mid 1990s had little substantive case law to build on when it came to that issue.

One of the things that had happened to Dutch case law in the decade between the 1986 and the mid-1990s, was a nearly complete reversal of the Afdeling's approach from the concept of group persecution to the singling out criterion. This happened by abandoning one concept (group persecution) in exchange for another (singling out), without ever properly defining either of them. So, the earlier lack of precise definitions of theoretical concepts came in handy to the Court, which could now reverse itself without actually having to admit as much.

The group persecution and its transformation to the concept of singling out was not the only case where the Raad van State developed legal theory. As was shown in Chapter 3, the court also put forward some legal theories and concepts. That of the agent of persecution is the clearest example, but also those of the "objective leer" is another one. However, here again we see that even the Raad van State was cautious not to state its understanding of the agent of persecution clearly and generally. In fact, the relevant case law shows that the Raad van State was influenced by the decisions of the Hoge Raad. Later, the lower courts would only concede on case-to-case basis. Indeed, the whole legal controversy was not solved by the Raad van State at all, despite its decade-long preoccupation with the question, but only by the Rechtseenheidskamer.[90]

The Afdeling's case law development in this period is also seen in the cases concerning draft evaders and conscientious objectors. In 1988, the Raad van State rendered a decision in

[89] Spijkerboer & Vermeulen 1995, p. 85-86.
[90] See Chapter 3.3.2 and RV 1974-2003, no. 10 with note by Bruin, p. 76-84.

which it effectively undermined its previous case law, especially the 1984 judgment.[91] That ruling had been criticized by the legal doctrine, and the court seemed to heed its voice, as in its 1989 decision it reversed back to that of 1984.[92] That was taken even further in 1991, when the court for the first time seemed to have agreed that desertion from an army may be viewed as a political act.[93] Yet all these decisions were done on a case-by-case basis, and for a clear restatement of where the Dutch courts were on this issue, one had to wait until 1995, and again, for the Rechtseenheidskamer to rule.[94]

In conclusion, we can see that the decade from the mid-1980s to mid-1990s were complicated. The Afdeling managed to turn its case-law around by 180 degrees regarding the issue of group persecution and singling-out. This was done despite, or perhaps precisely **because** it failed to develop either of these issues doctrinally or theoretically. The court continued to use negative language in assessing whether the applicants fell into the refugee definition. Now, while undoubtedly that approach gave the court more room for manoeuvre, in the end it backfired against the Court itself. Combining the case-law of singling out and agents of persecution led to chaos in the Court's decisions. The growing frustration of people like Vermeulen, Fernhout and Spijkerboer over the court's inconsistencies, show that it had managed to antagonize the legal doctrine. By the mid-1990s, the case law was confusing and difficult for the reader from outside, while the legal scholars became highly critical of where the Dutch case-law was heading.[95]

4.1.2.3 The years between 1995 and 2000

Following the new Aliens Law from 1994,[96] the district courts began to hear appeals from the decisions of the Secretary of State denying refugee status. As we will see, the change was not just in form but also in substance.

The first change, and quite a dramatic one, was that these courts did not shy away from using affirmative language, so instead of declaring who does not fall within the Refugee definition, they actually started ruling on the issue of who does. The obvious example is the decision of the draft evaders and conscientious objectors. The pre-1995 case-law of the Afdeling had been scattered and at times inconsistent, so the issue was referred to the Rechtseenheidskamer sitting in the Hague. The court in *Antikian*, in a new style, summed up all the instances where applicants who were draft evaders could successfully invoke refugee status.[97] The courts did not stop there. In 2000, the court in Zwolle reaffirmed clearly another

[91] ARRvS 23 augustus 1988, RV 1988 nr. 8 with note by Bolten, p. 41-48.
[92] ARRvS 16 februari 1989, RV 1989 nr. 1 with note by Fernhout, p. 1-3.
[93] ARRvS 12 maart 1991, RV 1991 nr. 3 with note by Spijkerboer, p. 4-8.
[94] Rb. 's – Gravenhage (Rechtseenheidskamer) 12 april 1995, RV 1995 nr. 7, p. 18-21, also published in AB 1995, nr. 592 with note by Spijkerboer, p. 646-654, and also in NAV 1995 nr. 11, p. 1017-1024 with note by Bruin. Finally, it was also published in RV 1973-2003, nr. 8 with note by Spijkerboer, p. 65-70.
[95] Spijkerboer/Vermeulen 1995.
[96] See Chapter 1.6.
[97] Rb. 's – Gravenhage (Rechtseenheidskamer) 12 april 1995, RV 1995 nr. 7, p. 18-21, also published in AB 1995, nr. 592 with note by Spijkerboer, p. 646-654, and also in NAV 1995 nr.11, p. 1017-1024 with note by Bruin. Finally, it was also published in RV 1973-2003, nr. 8 with note by Spijkerboer, p. 65-70.

instance where conscientious objectors could successfully claim refugee status: that is, when they are forced to fight against their own people.[98] Another instance was introduced by the court in Groningen in 2003 when it held that those soldiers who desert the army because of their religion may invoke refugee status.[99]

What is interesting, that unlike the Raad van State, the regional courts were much less shy in invoking other sources such as legal doctrine for their decisions. The UNHCR "Handbook" had been invoked on a number of times, especially in cases where the courts felt that they were developing or changing the doctrine. Thus, in 2000, the court in Zwolle relied on the UNCHR handbook when it held that a refusal to serve in the army (and punishment thereof) may be a valid grounds for refugee status if such a refusal was based on the fact that the applicant would have been fighting members of his own ethnic group.[100] Although the court in Haarlem had already addressed the same issue,[101] the court in Zwolle used this opportunity to analyze the wording of the "Handbook" carefully, especially paragraphs 169 and 170 which were pertinent to the case. The court found that the Secretary of State's interpretation of them had been wrong and, based on that new understanding, reversed his decision and remanded it for reconsideration.[102] Based on the decision of the court in Zwolle other courts followed suit.[103]

Also in other cases the courts relied on sources other than just the Aliens Law. In a 2000 case involving a member of the Ahmadi minority in Pakistan, the court in Haarlem relied on the "*UNHCR Position on Relocating as a Reasonable Alternative to Seeking or Receiving Asylum*" when it held that the Secretary of State should address all the relevant human rights violations as put forward by the applicant and may not dismiss them summarily by claiming that the applicant has an internal flight alternative in Pakistan.[104] The UHCR sources have been invoked and relied upon by the courts in cases of the agent of persecution,[105] as well as the difficult question of group persecution.[106] In fact, as late as 2004, the court in Alkmaar quoted the "*UNHCR Guidelines on International Protection: Membership in a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967*

[98] Rb. 's – Gravenhage zp. Zwolle, 25 mei 2000, NAV 2000 no. 128, p. 428-433 with note by Ijsseldijk. For an overview of how the Dutch legal doctrine saw this development see F. Lankers, *Diepgewortelde band met eigen volk. Dienstweigeraars met gewetensbezwaren door mogelijke inzet tegen de eigen bevolkingsgroep*, NAV 1999, p. 91-99.

[99] Vz. Rb. Groningen, 8 januari 2003, NAV 2003 no. 85, p. 239.

[100] Rb. 's – Gravenhage zp. Zwolle 25 mei 2000, NAV 2000 no. 128 with note by IJsseldijk, p. 428-433.

[101] Rb. 's – Gravenhage 9 juli 1998, NAV 1998 no. 141 and the article by F. Lankers, *Diepgewortelde band met eigen volk. Dienstweigeraars met gewetensbezwaren door mogelijke inzet tegen de eigen bevolkingsgroep*, NAV 1999, p. 91-99.

[102] Rb. 's – Gravenhage zp. Zwolle 25 mei 2000, NAV 2000 no. 128, p. 431-432.

[103] Rb. 's – Gravenhage zp. Haarlem 28 juni 2000, NAV 2000 no. 170, p. 531 also published in JV 2000 no. 184, p. 713-718; Rb. 's – Gravenhage zp. 's – Hertogenbosch 12 mei 2000, NAV 2000 no. 215, p. 609; Rb. 's – Gravenhage 3 november 2000, NAV 2001 no. 222.

[104] Rb. 's – Gravenhage zp. Haarlem 13 juni 2000, JV 2000 no. 196, p. 371-372, also published in NAV 2000 no. 164 with note by Pastoors, p. 512-517.

[105] Rb. 's – Gravenhage (Rechtseenheidskamer) 27 augustus 1998, RV 1974/2003 no. 10 with note by Bruin, p. 76-84, also published in JV 1998 no. 157.

[106] Rb. 's – Gravenhage (Rechtseenheidskamer) 14 juli 2000, RV 1974/2003, no.11 with note by Bruin, points 12-13. It was also published in JV 2000, nr. 190, p. 748-753 and in 14 juli 2000, NAV 2000 no. 160 with note by van Bergen and den Haan, p. 498-503, as well as in AWB 2000 no. 1790.

Protocol Relating the Status of Refugees 2002" when deciding the case of a woman from Guinea who fled domestic violence in a country which offered no protection from such incidents.[107]

In its case-law, the regional courts ran afoul of the Afdeling case law on a number of occasions. The two examples would be the agents of persecution case-law and that of the group persecution.

The issue and complicated case law regarding the question of the agent of persecution has been described above in detail.[108] Suffice it here to say that, by 1995, the Raad van State had construed the Refugee Definition such that there could be no persecution if there was no state authority or no de facto state in the land of origin.[109] This hit at the Somali applicants since there had been no government there since the 1990s, and the country had been overrun by clan war-lords. However, in 1996 the Rechtseenheidskamer strongly hinted at its disapproval of this stance. Hearing an appeal of a Somali applicant, it said:

> "The court is right now not convinced that there can be no persecution in the meaning of the Convention and the Aliens Act, when in the country of origin of the alien no authority exists, but shall leave this question open for now."[110]

Although that particular case was decided on other grounds, this was a clear indication that the lower courts were willing to depart from the position the Raad van State had developed. In 1997, perhaps under some criticism by the doctrine, and the abovementioned case, the Raad van State relented a bit: although it maintained that a state is required in order to find persecution, it held nonetheless, that in some cases, a de facto authority was sufficient to establish persecution.[111] The ball was back in the field of the lower courts who seemed to have leaned toward the Rechtseenheidskamer's position rather than that of the Raad van State.[112] Finally, in 1998, the Rechtseenheidskamer again inflicted the final blow to the doctrine of the agent of persecution. In a detailed decision, quoting earlier case law, as well as UNCHR documents, the court held that:

> "The court is of the opinion that the wording of Article 1A (…) does not lead to the conclusion that there can be no persecution in the meaning of the aforementioned sentence, when persecution comes from third [parties – K.B] and furthermore one cannot invoke protection from the authorities because any forms of authorities have broken down. The drafting history of the Geneva Convention also does not lead to this conclusion."[113]

Thus, under the consistent pressure of the lower courts, especially the Rechtseenheidskamer, the doctrine of the agent of persecution has been set aside and overturned.

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[107] Rb. 's – Gravenhage zp. Alkmaar 22 maart 2004, NAV 2004 no. 135 with note by Mazaheri, p. 321-325.
[108] See Chapter 3.3.2.
[109] ABRvS 6 november 1995, RV 1995 no. 4 with note by Spijkerboer, p. 11-13.
[110] Rb. 's – Gravenhage (Rechtseenheidskamer) 11 juli 1996, RV 1996 no.9 with note by Spijkerboer, p. 31-34.
[111] ABRvS 19 maart 1997, RV 1997 no.2 with note by Spijkerboer, p. 2-4.
[112] Rb. 's – Gravenhage zp. Zwolle 27 mei 1998, RV 1998 no. 7 with note by Spijkerboer, p. 23-25.
[113] Rb. 's – Gravenhage (Rechtseenheidskamer) 27 augustus 1998, RV 1974-2003, no.10 with note by Bruin, p. 76-84, also published in JV 1998 no. 157.

A similar case, though much less successful in its outcome in terms of clarifying the Afdeling's case law, is that of group persecution of the Reer Hamar clans from Somalia. As we have already discussed, the Raad van State had successfully done away with the possibility of group persecution by the 1990s. Under the case law of the lower courts, it accepted the concept for the Nubas and Christians from Southern Sudan.[114] However, in the Reer Hamar cases, the lower courts were less successful in turning the case-law around. In 1999, the court in Haarlem seemed to have agreed that the Reer Hamar were being persecuted as a group and the court in Zwolle shared its position.[115] The approach of the courts in Amsterdam and Den Bosch was somewhat different. While they rejected the claim of group persecution in the cases before them, they nonetheless accepted a construction where, in a country experiencing civil war, where a particular clan is targeted for human rights violations, the applicant's burden of proof in showing the possibility of future persecution is somewhat lighter than in other circumstances.[116] The case finally went to the Rechtseenheidskamer again.[117] This time the court tried to steer a middle ground between the particular courts. It held that there can be talk of group persecution if "***all*** *who belong to a group of people, are in fear of persecution*."[118] The court found that not to be the case when it came to the Reer Hamar, but nonetheless held that they were in a "*a precarious position and have a higher probability of becoming victims of human rights violations*." The legal scholars called this "almost group persecution." However, it would seem that the fact that the lower courts failed to develop a clear line of cases on the Reer Hamar and similar instances of group persecution, made it easier for the Raad van State to reverse them in later years.

The contrast between the case law of the Afdeling and the district courts is also clearly visible in the case law regarding homosexuals. The Afdeling has been reluctant to acknowledge any claims based on sexual orientation since 1981, and its legal justification for not doing so has been confusing.[119] The first substantively positive decision in cases regarding homosexuals was that of the court in Zwolle in 1995, which had quashed a denial of refugee status by the Secretary of State. It based its decision on the fact that homosexuality was penalized in the country of origin of the applicant, and that these laws were being enforced, and that on top of this, homosexual men and women were being discriminated against.[120] This decision clarified the question of whether the criminalization of homosexual activity was pertinent to such claims. In an interesting "dialogue between the courts" the Afdeling conceded to the Zwolle court on these points when it heard another case a year later, but it still insisted that it was the "*personal circumstances of the plaintiff*" that mattered most.[121] A year later the court in

[114] See Chapter 3.2.1.

[115] Rb. 's – Gravenhage zp. Haarlem 16 september 1999, RV 1999 no. 9 with note by Spijkerboer, p. 45-49. It was also published in NAV 1999, no. 131, p. 570-573; Rb. 's – Gravenhage zp. Zwolle 31 maart 1999, JUB 1999, 15-4; Rb. 's – Gravenhage zp. Zwolle 17 November 1999, NAV 2000 no. 32, p. 121-123.

[116] Rb. 's – Gravenhage zp. Amsterdam 27 oktober 1999, JuB 200 nr. 2-33; Rb. 's – Gravenhage zp. 's Hertogenbosch 16 November 1999, JuB 2000 nr. 3.

[117] Rb. 's – Gravenhage (Rechtseenheidskamer) 14 juli 2000, RV 1974/2003, no.11 with note by Bruin, points 12-13. It was also published in JV 2000, nr. 190, p. 748-753 and in 14 juli 2000, NAV 2000 no. 160 with note by van Bergen and den Haan, p. 498-503, as well as in AWB 2000 no. 1790.

[118] Ibid. (emphasis mine)

[119] See ARRvS 17 juni 1992, RV 1992 nr. 9 with note by Spijkerboer, p. 21-24, ARRvS 26 mei 1993, RV 1993 nr. 4 with note by Spijkerboer, p. 9-12 all described in the Chapter 4.4.2 above.

[120] Rb. 's – Gravenhage zp. Zwolle 28 augustus 1995, RV 1995 nr. 13 with note by Fernhout.

[121] ABRvS 28 mei 1996, RV 1996 nr. 4 with note by Spijkerboer, p. 11-14.

Zwolle again quashed the Secretary of State's decision denying refugee status to a homosexual from Armenia, based exactly on his particular circumstances, and taking into account the general situation in that country.[122] Furthermore, the courts later expanded the legal theory in this sort of cases. Thus the court in 's – Hertogenbosch found in 1999 that the Secretary of State cannot expect a homosexual from Somalia to lead a "discreet" life, if his partner were a white Australian, and when his sexual orientation became well known.[123] The court in Arnhem ruled in 2001 that a refugee applicant may come from a country where homosexuality is not proscribed by law, but where the authorities are unwilling or unable to offer effective protection from persecution by fellow citizens.[124] Although, as the case decided by the court in Haarlem illustrates,[125] the regional courts were also capable of issuing very questionable decisions, within a period of five years, these courts had done much to clarify the case-law theory behind refugee claims based on sexual orientation.

The district courts were also making their decisions on a clear persecution ground for the first time in a long time. It should be remembered that for most of the 1980s and early 1990s, with just a handful of exceptions, the Raad van State was weary and reluctant to name a persecution ground, and preferred to decide the issue on the merits of a well founded fear or lack of it. In contrast to the Raad van State, the courts started to look for a persecution ground. Thus, in the case law of the 1990s, the district courts were ready to accept that people were being persecuted because of their religion (Ahmadi,[126] Chaldeian Christians and Mandeians from Iraq,[127] others[128]), their change of religion (converts from Islam to Christianity in Islamic countries[129]) and their race (Hutus,[130] Armenians from Azerbijdjan or people of mixed Azeri/Armenian descent,[131] Roma,[132] Jewish[133]) as well as sexuality.[134]

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[122] Rb. 's – Gravenhage zp. Zwolle 30 juni 1997, RV 1997 nr. 7 with note by Spijkerboer, p. 21-23.

[123] Rb. 's – Gravenhage zp. 's – Hertogenbosch, 22 september 1999, NAV 1999 no. 155, p. 637-640.

[124] Rb. 's – Gravenhage zp. Arnhem, 1 mei 2001, JV 2001 no. 216 with note by Spijkerboer, p. 783-787.

[125] Rb. 's – Gravenhage zp. Haarlem, 9 juli 1999, NAV 1999 no. 136 with note by Heijnneman, p. 587-591.

[126] Rb. 's – Gravenhage zp. Amsterdam, 29 october 1999, NAV 2000 no. 5 with note by Bruin, p. 39-45; Rb. 's Gravenhage zp. Haarlem 13 juni 2000, JV 2000 no. 196, p. 371-372, also published in NAV 2000 no. 164 with note by Pastoors, p. 512-517, but see Rb. 's – Gravenhage zp. Zwolle 7 juli 2000, JV 2000 no.227, p. 879-884 (no persecution but discrimination).

[127] Rb. 's – Gravenhage zp. Zwolle, 27 juli 2000, NAV 2000 no. 222, p. 612 (Assyrian Christian from Iraq); Rb. 's – Gravenhage zp. Zwolle, 7 september 2000, NAV 2000 no. 230, p. 634-639 (Armenian Christian from Iraq); Rb. 's – Gravenhage 25 september 2000, NAV 2000 no. 276, p. 768-769 (Chaldeian Christians and Mandeinas from Iraq); See also the relevant case law pertaining to the conflict between the circuits in this section below.

[128] Rb. 's – Gravenhage zp. Amsterdam, 21 augustus 2000, NAV 2000 no. 32, p. 71-72 (Sikh from Afghanistan ruled by the Taliban); Rb. 's – Gravenhage 29 maart 2001, NAV 2001 no. 150, p. 358; Rb. 's – Gravenhage zp. Arnhem, 1 maart 2001, NAV 2001 no. 157, p. 362 (Hindus from Afghanistan).

[129] Rb. 's – Gravenhage zp. Haarlem, 26 november 1998, NAV 1999 no. 75, p. 323-327 (conversion to Christianity in Iran); Rb. 's – Gravenhage zp. 's – Hertogenbosch, 22 november 1999, JV 2000 no. 25, p. 97-103 (forced conversion to Islam, and a later reversal to Christianity of the woman, conversion of her Muslim husband); Pres. Rb. Haarlem 11 augustus 2000, JV 2000 no. 251, p. 971-975, NAV 2000 no. 234 with note by Bruin, p. 659-664 (Homosexual convert to Christianity from Morocco).

[130] Rb. 's – Gravenhage zp. Haarlem, 25 januari 2000, JV 2000 no. 70, p. 266-269, NAV 2000 no. 95, p. 302-303 (Hutu from Ruanda).

[131] Rb. 's – Gravenhage 13 augustus 1999, NAV 2000 no. 21, s.66; Rb. 's – Gravenhage 6 augustus 1999, NAV 2000 no. 22, s. 67 (Amernians from Azerbaijan);

[132] Rb. 's – Gravenhage zp. Haarlem 23 februari 2000, NAV 2000 no. 122, p. 377 (Roma from Slovakia).

[133] Rb. 's – Gravenhage zp. Haarlem 16 juli 1999, NAV 1999 no. 135 with note by Pastoors, p. 583-586.

[134] See relevant case law in Chapter 3.4.3.

It is interesting to observe, that nearly all of these groups could have invoked group persecution in their asylum applications. The courts could have dismissed based on either lack of group persecution or lack of the singling out criterion. What the courts chose to do, in all these instances, was to sever its analysis strictly from the well-founded fear requirement and search for a potential persecution ground. By doing so, the courts have managed to avoid the difficult issues of first defining group persecution (or singling out) and instead concentrated on the definition as a whole: is there a persecution ground? If so, is the applicant persecuted because of it? If so, does she have a well founded fear of being persecuted for such a ground?

The district courts soon proved apt at reviving old concepts. In 1998, for the first time in over a decade, a Dutch court held that the concept of group persecution applied in the case of Nuba people from the South of Sudan.[135] The precise premises of group persecution were not clearly articulated, nonetheless, in the following years the courts accepted group persecution for the Nubas and Christians from the Southern Sudan region.[136] At least on one occasion, even the Afdeling seemed to have agreed that group persecution may be invoked here.[137]

The case of the Reer Hamar jurisprudence points out to the less successful aspect of the district court's decisions. The Rechtseenheidskamer was sometimes of assistance in bringing the case-law of the courts into one consistent line, yet it was not always particularly successful. The Reer Hamar cases are one example where the decisions in similar cases on one important question varied from court to court. Another, and perhaps even better example, was that of internal flight or relocation alternative within Iraq. Suffering persecution under Saddam Hussein's regime or from their fellow citizens (especially the religious minorities), different groups such as Kurds,[138] Turkomans,[139] the Armenians[140] or Assyrians,[141] Chaledeans,[142] other

[135] Rb. 's – Gravenhage zp. Zwolle 9 juni 1998, RV 1998 no. 8 with note by Vermeulen, p. 25-28.

[136] Rb. 's – Gravenhage zp. Zwolle 25 mei 1998, JV 1998 no. 113, NAV 1998 no. 114 with note by Bruin, p. 519-526 (Nuba); Rb. 's – Gravenhage zp. Zwolle 9 juni 1998, NAV 1998 no. 175, p. 759 (Nuba); Rb. 's - Gravenhage zp. Haarlem 1999, JV 2000 no. 32, p. 184-188 (Southern Sudan); Pres. Rb. Zwolle 18 october 2000, NAV 2001 no. 39, p. 74-75 (Nuba); Rb. 's – Gravenhage 19 januari 2001, JV 2001 no. 97, p. 345-347 (Nuba).

[137] ABRvS 21november 1996, NAV 1997 no. 2, with note by Heijnneman, p. 5-7 (Christian women from South Sudan).

[138] **POSITIVE:** Rb. 's – Gravenhage zp. Haarlem 4 januari 2000, NAV 2000 no. 101, p. 306 (Kurd); Rb. 's – Gravenhage 13 april 2000, NAV 2000 no. 145, p. 461 (Kurd); Rb. 's – Gravenhage zp. 's – Hertogenbosch p. 464 (Kurd); Rb. 's – Gravenhage zp. Zwolle, 18 december 2000, NAV 2001 no. 123, p. 291 (Faily-Kurds); Pres. Rb. Assen, 6 april 2001, NAV 2001 no. 209, p. 457-58 (Faily Kurd); **NEGATIVE:** Rb. 's – Gravenhage 20 october 1999, NAV 2000 no. 108, p. 310 (Kurd);); Rb. 's – Gravenhage zp. Haarlem 27 juni 2000, NAV 2000 no. 225, p. 613-614 (Kurds); Rb. 's – Gravenhage zp. 's Hertogenbosch 4 mei 2000, NAV 2000 no. 227, p. 614-615 (Kurds); Rb. 's Gravenhage, 23 november 2000, JUB 2001, no. 1-22 (Faily Kurds); Rb. 's – Gravenhage zp. Arnhem, 15 januari 2001, NAV 2001 no. 201 with note by Schaafsma, p. 453 (Kurd).

[139] **POSITIVE:** Rb. 's – Gravenhage zp. Haarlem 4 augustus 2000, NAV 2000 no. 221, p. 612 (Turkomans and Mandeinas); **NEGATIVE:** Rb. 's Gravenhage zp. Zwolle, 20 october 2000, NAV 2001 no. 17, p. 63-64 (Turkomans).

[140] **POSITIVE:** Rb. 's – Gravenhage zp. Zwolle, 7 september 2000, NAV 2000 no. 230, p. 634-639 (Armenian Christian); Rb. 's – Gravenhage zp. Arnhem, 18 december 2000, NAV 2001 no. 83 with note by Kroerse, p. 187-196 (Armenian Christians); **NEGATIVE:** none published.

[141] **POSITIVE:** Rb. 's – Gravenhage zp. Zwolle, 27 juli 2000, NAV 2000 no. 222, p. 612 (Assyrian Christian); Rb. 's – Gravenhage, 19 juli 2000, NAV 2000 no. 223, p. 613 (Assyrian Christian); Rb. 's – Gravenhage zp. Assen, 15 maart 2001, NAV 2001 no. 155 with note by Hoogenberk, p. 361 (Assyrian Christian); Rb. 's – Gravenhage zp. Assen, 15 februari 2001, NAV 2001 no. 163, p. 365 (Assyrian Christian); Rb. 's – Gravenhage zp. Groningen, 31 mei 2001, NAV 2001 no. 237, p. 530 (Assyrian Christian); **NEGATIVE**: none published.

Christians,[143] the Mandeians,[144] or other minorities[145] fled the country. The Dutch Secretary of State claimed that these minorities may have a viable internal flight alternative in the North of Iraq controlled by the Kurdish guerrillas hostile to Hussein, and are thus ineligible for persecution. The courts seemed to have been completely divided on this issue. Some would agree with the Secretary and affirm his denial of refugee status, while others would disagree, reversing and remanding such decisions. It is ironic, that this divided case-law, was a progeny of a REK decision from 2000, which tried to clarify the issue and lay down the requirements of when the State Secretary may invoke the internal flight alternative if denying a refugee case.[146]

In conclusion, the years between 1995 and 2000 saw a substantial change in the Dutch court's approach to the refugee definition. Unlike the Afdeling, the district courts did not hesitate to tackle the refugee definition by trying to construct theoretical concepts of who is a refugee. They tried, with some success, to divorce the Dutch preoccupation with well-founded fear to that of the persecution ground and the nexus. For the first time in a long time, specific persecution grounds were named and decisions were made based on such determinations. In doing so, the courts were visibly more inclined than before to invoke works by legal scholars and to rely on the UNCHR position. These years showed that it was the case law of the courts that had overturned the Afdeling's previous line of decisions in cases such as the agent of persecution or the lack of group persecution. Other doctrinal questions such as the cases based on sexual orientation or draft evaders and conscientious objectors were developed and refined.

The positive effect of these changes is somewhat overshadowed by the fact that there were instances where the courts were unable to come up with a coherent or clear case law line. The profuse and conflicted case law in the area of internal flight alternative in Iraq is a good example. Another where the courts shied away from finding or formulating clear line was that of the group persecution in the cases of the Reer Hamar. It is interesting to note, that in the next period, the Afdeling will strike at exactly these two issues.

4.1.2.4 The years since 2001

The last period of Dutch case law regarding asylum matters is mainly described by the come-back of the Council of State. It was again competent to hear appeals from the decisions

[142] **POSITIVE:** Rb. 's – Gravenhage, 25 september 2000, NAV 2000 no. 276, p. 768-769 (Chaldeian Christians and Mandeinas); Rb. 's – Gravenhage zp. Zwolle, 20 october 2000, JV 2000 no. S297, p. 1131 (Chaldeian Christians); Rb. 's – Gravenhage zp. Arnhem, 21 december 2000, NAV 2001 no. 55, p. 128 (Chaldeian Christians); **NEGATIVE:** Rb. 's – Gravenhage zp. 's – Hertogenbosch 27 october 2000, NAV 2001 no. 16, p. 63 (Chaldeian Christians).

[143] **POSITIVE:** Rb. 's – Gravenhage zp. Zwolle, 22 december 2000, NAV 2001 no. 119, p. 288-289 (Syrian Orthodox Christians); Rb. 's – Gravenhage zp. Zwolle, 21 december 2000, NAV 2001 no. 120, p. 289 (Syrian Orthodox Roman Catholics); Pres. Haarlem, NAV 2001 no. 330, p. 680 (Syrian Orthodox Christian); **NEGATIVE:** none published.

[144] **POSITIVE:** Rb. 's – Gravenhage zp. Haarlem 4 augustus 2000, NAV 2000 no. 221, p. 612 (Turkomans and Mandeinas); Rb. 's – Gravenhage zp. Zwolle, 13 november 2000, NAV 2001 no. 15, p. 62-63 (Mandeinas); Pres. Rb. Groningen, 17 augustus 2001, NAV 2001 no. 331, p. 680 (Mandeian); **NEGATIVE:** none published.

[145] **POSITIVE:** Rb. 's – Gravenhage zp. Arnhem, 27 februari 2001, NAV 2001 no. 160, p. 363-364 (Arab Communist); Rb. 's – Gravenhage zp. Groningen, 16 mei 2001, NAV 2001 no. 239, p. 532 (Arab Communist); **NEGATIVE:** none published.

[146] Rb. 's – Gravenhage (Rechtseenheidskamer) 20 maart 2000, JV 2000, no. 83 with note by Spijkerboer, p. 313-320, also published in RV 2000 no. 7, p. 41-46.

of the lower courts, as the instance of "higher appeal", and was quick to show its influence. However, there was a marked difference to its case-law from before 1995.

First of all, the court radically changed its manner of dealing with cases before it. Whereas before it would have tried to map out some doctrine by stating who is not a refugee (the negative language), the court is now extremely cautious and says as little as possible substantially about the refugee law. Writing in 2002 about the case law of the Afdeling post 2001, Spijkerboer wrote that:

> "there is little substantive jurisprudence available, because the Afdeling has concentrated on the procedural aspect of the asylum law."[147]

Even in cases where the court does choose to formulate a statement about the legal theory, the Afdeling chooses to do it, using a double negative ("no ground to find, that the State Secretary could not have found"). While this negative language is not as prevalent as it had been before 1995, the scarcity of substantive case-law, as well as the high deference given to administrative discretion compensate for it.

Indeed, that conclusion rings true for the whole period after 2000. By concentrating on the procedural aspect of the definition, the Court manages to avoid some substantive asylum law questions, and rather re-clothes them as issues of marginal scope of review and the discretion of the administration. To give an example: as it was discussed in the section above, the district courts were divided on the question of the possibility of an internal flight alternative for refugees. The question was what the precise requirements were that an alternative flight alternative must meet in order to be successfully invoked by the Secretary of State when denying asylum. Although the most profuse case-law has come from applicants from Iraq, the question was also true regarding Armenians from Azerbeijan[148] or the Ahamdis from Pakistan.[149] This question reached the Afdeling relatively quickly and it gave its decision in 2001.[150] The Raad van State completely shifted the question from material grounds (the feasibility of an internal flight alternative) to that of procedural question: could the State Secretary in his discretion ("*in redelijkheid*") decide the way he did? The court found that he could and overturned the decision of the court of the lower instance. The commentator to this decision was not quite certain, if this meant an end to the conflict between the courts and the Secretary of State.[151] However, later case-law demonstrates that by giving deference to the Secretary of State and allowing courts only marginal judicial review of such decisions, the Raad van State effectively overturned most of the lower courts' case-law, without saying anything substantive on the matter.[152]

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[147] T.P. Spijkerboer, *Het hoger beroep…*, p. 131.

[148] See eg. Rb. 's – Gravenhage 5 october 1999, NAV 2000 no. 49, p. 145-146; Pres. Rb. Arnhem 30 november 2000, NAV 2001 no. 139, p. 299-300; Rb. 's – Gravenhage zp. Utrecht 2 augustus 2002, NAV 2002 no. 243, p. 569-579; Rb. 's – Gravenhage zp. Assen 24 juni 2002, NAV 2002 no. 258, p. 612-619; also published in JV 2003 no. 359, p. 1082-1086.

[149] See eg. Rb. 's – Gravenhage zp. Amsterdam 29 october 1999, NAV 2000 no. 5 with note by Bruin, p. 39-45; Rb. 's – Gravenhage zp. Haarlem 13 juni 2000, NAV 2000 no. 164 with note by Pastoors, p. 512-517, also published in JV 2000 no 196.

[150] ABRvS 8 november 2001, NAV 2002 no. 1 with note by van Mansfeld, p. 22-27.

[151] Ibid., p. 26-27.

[152] Rb. 's – Gravenhage 29 januari 2002, NAV 2002 no. 71, p. 194-195 also published in JV 2002 no. 82, p. 255-

The expression "in redelijkheid" (reasonable) was used in numerous cases when the Raad van State preferred to either reverse the lower courts on procedural grounds, or claimed that because the court's scope of review was marginal ("*marginale toetsing*"), they should give deference to the decisions made by the administration when they decide the refugee applications.[153] In early 2003, perhaps as a result of mounting criticism from the legal doctrine,[154] the court issued a decision in which in defended its marginal review on constitutional grounds.[155] This case will be discussed in detail below. The Raad van State continued with its position that judges must show deference to the administration and may only reverse and remand their decisions if the administration has abused its discretion in deciding the cases. Thus, there are cases where the Raad van State would agree in principle with the applicant, yet affirm the denial of refugee status by the Secretary of State because the administration was within its discretion to do so.[156] In one decision, though affirming the denial of refugee status, the Court actually gave a rare doctrinal statement, defining the term persecution.[157] The Raad van State disagreed with the definition of the term "persecution". Pointedly, it was put forward by the applicants, and not the Secretary of State.

Deference to the Secretary of State meant, of course, that the Raad van State had little reason to quote and refer to its earlier decisions. Although this may also be explained by the new Aliens Law, there is a striking silence in the court's post-2000 jurisprudence, when it comes to earlier decisions. Another explanation would simply be that since the court was giving so much deference to the Secretary of State, and was reluctant to issue any doctrinal statements, there was simply no reason why it should have quoted its earlier decisions. The scant utterances of the Afdeling since 2000, coupled with almost no quotes from earlier decisions, meant that in fact, the deference given to the State Secretary was very considerable indeed. The court insisted that courts may review if the State Secretary applied the Convention properly, nonetheless, given the fact that they were only allowed marginal review of his appraisal of the facts before him, it is not clear what material review of the State Secretary was possible.

259; Rb. 's – Gravenhage zp. Haarlem 12 maart 2002, NAV 2002 no. 183 with note by Schaafsma, p. 413-415 (Cheldeian Christian); Rb. 's – Gravenhage zp. Dordrecht 1 mei 2002, NAV 2002 no. 174 with note by Hubel, p. 407-408 (Chaledian Christians). But see Rb. 's – Gravenhage zp. Groningen 17 april 2002, NAV 2002 no. 175 with note by Andebrhan, p. 408, where the court did not follow the Raad van State and reviewed the material in toto (Mandeians) also Rb. 's – Gravenhage zp. Alkmaar 28 augustus 2002, NAV 2002 no. 266 with note by Schaafsma, p. 634-636.

[153] See amongst many others ABRvS 11 september 2001, NAV 2001 no. 336 with note by Bruin, p. 725-729, also published in JV 2001 nr. 306 and RV 2001, nr. 18; ABRvS 14 januari 2002, JV 2002 no. 76, p. 224-229; ABRvS 25 maart 2002, JV 2002 no. 151, p. 468-470; ABRvS 30 augustus 2002, JV 2002 no. 382, p. 1131-1132; ABRvS 22 november 2002, JV 2003 no. 139 with note by Olivier, p. 36-47.

[154] S. Essakkili, *Marginal Judicial Review in the Dutch Asylum Procedure*, Vrije Universiteit Amsterdam, Amsterdam 2005, p. 5-42.; J. van Rooij, *Asylum Procedure versus Human Rights*, Vrije Universiteit Amsterdam, Amsterdam 2004, p. 1-15; L. Slingenberg, *Dutch Accelerated Asylum Procedure in Light of the European Convention on Human Rights*, Vrije Universiteit Amsterdam, Amsterdam 2006, p. 1-10 (all of these are available online at www.rechten.vu.nl/documenten); T.P. Spijkerboer, *Het hoger beroep*…, passim.

[155] ABRvS 27 januari 2003, RV 2003 no. 5 with note by Battjes, p. 66-68. That case was also published in JV 2003 no. 103 with note by Olivier, p. 325-331, as well as in the NAV 2003 no. 100 with note by Olivier, p. 285-291. It has also been published in AB 2003 no. 286 with the note by Vermeulen, as well as in the RV 1974-2003 no. 57 with note by Spijkerboer p. 371-375. For another case on marginal judicial review see ABRvS 15 november 2002, NAV 2003 no. 1 with note by Groenenwegen, p. 24-26.

[156] ABRvS 5 juli 2003, JV 2003 no. 327, p. 1051-1053.

[157] ABRvS 6 october 2003, JV 2003 no. 532, p. 1713-1715.

Of course, the court did grapple with the refugee definition on some occasions. Given the intensive history debate in the case law regarding conscientious objectors, it is not surprising that one of these was regarding a claimant from Bosnia.[158] In it, the Afdeling demanded that the applicants show that they have "*genuine objections for reasons of conscience*" against military service, and overturned the lower court's decision. What is interesting is that the court gave deference to the Secretary of State in this decision too, and reversed the court on the point of the assessment of evidence. In a 2002 decision, it also re-affirmed its acceptance of persecution by third parties, where the authorities were unwilling or unable to grant protection, as in the case of two Armenian applicants from Azerbaijan, and overturned both the Secretary of State and the court in The Hague.[159] A year later the court also restated its understanding of the term persecution and what it signifies.[160]

Probably the most important decisions came in 2003 and 2004, and they concerned the cases of group persecution and claims based on sexual orientation. In 2003, the court heard the appeal from a decision of the court in Assen, which had reversed and remanded the Secretary of State's decision denying refugee status to an applicant from the Reer Hamar clan in Somalia.[161] In that decision, the Raad van State closed off the possibility of recognizing group persecution in Dutch law. This decision did not only overturn a substantial case-law of the lower courts and the Rechtseenheidskamer, but also seemed to have brought closure to the debate about this doctrinal point, a debate that has been going on for over two decades.[162] In 2003, the Afdeling overturned a decision of the lower court in Den Bosch, finding that the homosexuality of the applicant was potential new evidence and it should be addressed accordingly by the courts and administration.[163] A year later, hearing again the appeal of a homosexual applicant from Somalia, the court stated that in countries where homosexuality is punishable by law, the applicants are nonetheless required to produce evidence that these rules are being enforced and that he or she will be personally targeted for persecution.[164]

In conclusion, since the year 2000, the Dutch Council of State has effectively managed to halt the developments of the district court's refugee case law. This has been achieved by stressing the procedural aspect in cases, giving high deference to administrative discretion of the executive, and finally by making sure that there are as few substantial decisions as possible. Within five years, the court has managed to end substantive review of the asylum decisions by the courts to a great degree and vested the interpretation in the hands of the administration. Learning from its mistakes and battles with the legal doctrine, the Afdeling has carefully avoided any legal inconsistencies when interpreting the Refugee definition by hardly interpreting it at all. It had retained the concept of singling out, as we remember was first put forward by the Secretary of State, and which practically, though not theoretically,

[158] ABRvS 11 september 2001, JV no. 306, p. 1064-1066; also published in NAV 2001 no. 336 with note by Bruin. p. 725-729; also published in RV 2001 no. 18 with note by Vermeulen, p. 97-100.
[159] ABRvS 19 juli 2002, JV 2002 no. 306, p. 953-956, also published in NAV 2002 no. 256 with note by Kok, p. 606-612.
[160] ABRvS 6 october 2003, JV 2003 no. 532, p. 1713-1715.
[161] ABRvS 22 augustus 2002, JV 2003 no. 526, p. 1694-1697.
[162] See Chapter 3.
[163] ABRvS 3 october 2003, NAV 2003 no. 310 with note by Anderbhan, p. 785-787; also published in JV 2004 no. 3.
[164] ABRvS 27 augustus 2004, NAV 2004 no. 269 with note by Anderbhan, p. 646-647; also published in JV 2004 no. 407.

closed the avenue for group persecution, but their interpretation and development now lay squarely within the bound of the Secretary of State. Unless he oversteps the principles of good administration, the courts have little capacity to overturn him, as the Afdeling clearly demonstrated in the cases concerning the internal flight alterative.

4.2 Defining of the refugee

In this part of this Chapter, having drawn a short overview of the case-law developments in both jurisdictions, I will now focus on some of the patterns I have found, and try to give explanations for them.

4.2.1 Approach to the refugee definition

In this section I will argue that:

- Dutch and American courts have shown particular areas of interest in the refugee definition (Point 1).
- Dutch and American courts have shown that the same concept may be interpreted in both a liberal and a restrictive way (Point 2).
- Dutch and American courts have, notwithstanding the two points made above, a special interest in particular sorts of cases which don't necessarily fit into those two trends described above (Point 3).

Point 1.

At first glance the Dutch and the American approach to the Refugee definitions are substantively different. Indeed, in a sense they are: the Dutch courts seem to concentrate on the aspect of proving a "well founded fear of persecution". The American courts are on the other hand a bit more meticulous looking not only for a well founded fear, but also for a persecution, a persecution ground, and finally, but perhaps most importantly, for a nexus that arches all the ingredients of the definition. Yet, despite this *prima facie* difference, there is a considerable similarity between the two jurisdictions. In fact, both jurisdictions show that they tend to engage more with one part of the definition than with the others.

As I just said, the Dutch courts have centered their deliberations around the question of the well founded fear of persecution. As I tried to show in the chapter concerning the Dutch case-law, my opinion is that this has led to the emergence of the doctrine of group persecution, singling out, and the agents of persecution. The thrust of the legal deliberation focuses on that part of the definition. As early as the 1990s, Fernhout claimed that once the applicant established that he or she has a well founded fear of persecution, the precise persecution ground is of little importance. Indeed, the manner in which the Raad van State seemed to write its decision before 2000 was exactly that: "*The applicant has not sufficiently proven that he has a well founded fear of being persecuted.*" As I tried to show in the Chapter 3, that was sometimes true, but sometimes the courts were somewhat confused as what the

applicants had failed to prove: a well founded fear, or a lack of persecution ground. The fact that the singling out concept and that of group persecution appeared in Dutch case law so relatively early is another indicator of that approach. By concentrating on the probability of persecution (group persecution, singling out) the courts have to a large degree ignored the question *why* did the persecution happen.

There have been exceptions to the rule, the most obvious being those of draft evaders, conscientious objectors and homosexual asylum seekers. Let us look carefully at the last group for a moment. The first case of homosexual-based asylum, decided in 1981 was revolutionary for two reasons. First, for its relative progressiveness at that time (America followed suit only a decade later) – there were hardly any other jurisdictions that accepted homosexuality to be a valid persecution ground in the early 1980s. Second, and more importantly, it was revolutionary due to the fact that it accepted homosexuality as ground for asylum without any legal or theoretical deliberation on why that was exactly possible. In the 1981 decision, there are hardly any other legal points future asylum seekers could base their cases on, besides the *en passent* sentence:

> "[t]he Court is led to agree that a reasonable interpretation, of the term persecution because of belonging to a particular social group, one can speak of persecution because of sexual orientation (…)"[165]

However, even this case was decided on the basis of whether the applicant had a well founded fear of persecution.

The American courts share the Dutch preoccupation with parts of the refugee definition. Here my point might be obscured by the fact that American courts tended to develop almost all of the parts of the refugee definition. But even conceding that, it is evident from the case law discussed in Chapter 3 that the American courts had a particular tendency to concentrate on the nexus between the persecution and the persecution ground.

From the early 1980s, the American courts, and especially the Ninth Circuit, developed first the theory of neutrality as a political opinion, and then that of imputed political opinion. The courts held that the applicants were persecuted "on account of" that political opinion. The administration disagreed, and tried to get both of these lines overturned by the Supreme Court. It succeeded only partially in *Elias-Zacarias* case. The Supreme Court struck down most of the neutrality theory,[166] as it was lacking (amongst other things) a strong link between the persecution and the applicants political opinion.

> "The ordinary meaning of the phrase "persecution on account of ... political opinion" (…) is persecution on account of the *victim's* political opinion, not the persecutor's. (…) The mere existence of a generalized 'political' motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that Elias-Zacarias fears persecution *on account of* political opinion."[167]

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[165] ARRvS 13 augustus 1981, RV 1981 nr. 5 with an anonymous note, p. 30-34.

[166] The Ninth Circuit insists that its judgments of "hazardous neutrality" have withheld the test imposed by the Supreme Court. Rivera - Moreno v. INS, 213 F.3d 481 (9th Cir. 1999).

[167] *U.S v. Elias Zacarias*, 502 U.S. 478, 482 112 S.Ct. 812 (S.Ct.) (emphasis in original).

However, *Elias-Zacarias* did little damage to the doctrine of imputed political opinion, which had been maintained and developed further by the Ninth Circuit.

As I said before, the preoccupation with the nexus requirement is not the sole point of interest of the American courts, just like the well founded fear is not the sole area of interest for the Dutch courts. One example of that would be the attention the American courts (and the administration) had placed on the clear demarcation between the different standards of proof the applicants had to meet to be granted asylum or withholding of removal. The issue was far from a technical matter; right from the start the courts stressed the difference between those two standards, while the INS insisted on their practical convergence. This dispute caused the intervention of the Supreme Court, which, first in *Stevic v. INS*, and later more clearly in *Cardoza-Fonseca*, ruled for the interpretation of the courts: that these two standards do indeed differ. We can see that it was no academic dispute, by finding the courts some years later reversing and remanding the cases back to the BIA for reconsideration if they had used the wrong standard of proof in reaching their decision.[168]

Point 2.

Having said that both the Dutch and the American court have shown an interest in parts of the refugee definition, we also see a second common trait. Both jurisdictions have shown a similar capacity to use the same doctrinal issue in a liberal and a restrictive way.

The Dutch courts have shown that flexibility clearly in the area dealing with the well-founded fear progeny, namely the group persecution and the singling out. In the 1980s, the Dutch courts accepted group persecution in the case of Eritreans fleeing Ethiopia. In the mid-1980s, the courts reversed themselves by denying not only group persecution claims of Tamils from Sri Lanka, but also of Eritreans from Ethiopia. This restrictive line championed by the Raad van State continued for over a decade, and all invocation of this concept before the courts failed, as was evident in the case of the Issaqs from Somalia. Only when the district courts began hearing the appeals did the concept of group persecution remerge in the case of the Nuba peoples and refugees from Southern Sudan. Even then, the concept was not applied to the Reer Hamar clan members from Somalia, though the district courts did considerably lower the burden of proof imposed by previous Raad van State decisions. The reversal from the moderately liberal concept came in after 2000, when the Raad van State began rehearing appeals from the lower courts and its 2003 decision seems to have closed that concept for the time being.[169] At the same time the courts were dealing with the concept of singling out, and again, as was shown in Chapter 3, the Dutch courts showed an unrelenting interest in that doctrine. It will suffice to say here however, that during the period from 1980s till 2003 the courts showed considerable flexibility in switching from a liberal to a restrictive one and vice versa.

The American case-law provides similar examples of the trend to interpret the same issue in both a restrictive and a liberal way, though perhaps the difference here is somewhat less

[168] See *Abankwah v. INS*, 185 F.3d 18, 22-23 (2nd Cir. 1999).
[169] ABRvS 22 augustus 2003, JV 2003 no. 526, p. 1694-1697, also published in NAV 2003, no. 313.

visible than in the Dutch case-law. American courts look carefully for the nexus between the persecution and the persecution ground. However, they may differ when it comes to their idea what is there to find nexus. The difference is visible in the case-law of the Ninth and the Fifth Circuit, and interestingly it borders too on the issue of singling out. In *Kotasz v. INS*,[170] the Ninth Circuit held that the applicant had been arrested because of his participation in an anti-government rally. The fact that there were numerous other people arrested was, the court held, of importance only as it supported his claim for asylum. Since the rally was political, and the demonstrators were arrested for participating in it, they were arrested *on account* of their actual or imputed political opinion. On the other hand of the spectrum is the case of *Abdel-Masieh v. INS* decided by the Fifth Circuit.[171] There the court held that since Abdel Masieh was arrested with others participating in an anti-government rally, he did not show sufficient nexus between his political opinion and what had happened to him. In fact, when rejecting his claim that there had been a link between his religion and political opinion and his detention, the court claimed that "*Abdel fails to establish that he was singled out for persecution*." What has happened to Abdel was not unique enough, as other Copts were arrested too, and therefore he fails to show a nexus. Interestingly, in a decision prior to both of these two cases, the Supreme Court in *Elias-Zacarias* in an obiter, expressed a willingness towards a middle ground attitude, where the applicant had to show some evidence, direct or circumstantial, that the persecution happened for at least one of the convention grounds.[172] As has been pointed out in Chapter 2, that debate continues.

It should be pointed out here that in their extreme interpretation of singling out and the nexus requirement show remarkable similarities. Let us look at two cases to illustrate that point. In *Lopez-Soto v. Aschcroft* the Fourth Circuit heard an appeal from a denial of refugee status to a citizen of Guatemala Rutilio Lopez-Soto. He came from a family who had trouble with one of the gangs (Mara 18), which had tried to recruit his brothers into joining them, as is standard gang policy. When one refused and was stabbed to death, another brother fled to the United States. A couple of years later the gang called on Lopez-Soto and his cousin and offered them a choice of either joining the gang or getting killed. Both refused, were threatened with death, and decided to flee to the United States. Lopez-Soto was lucky, but his cousin Elmer was apprehended, sent back to Guatemala, where he was subsequently killed by the gang a week later. His younger bother was shot too, but survived and fled to the United States.[173] The question in this case was this: was the applicant persecuted *on account* of his membership in a particular social group, namely his family?

The Dutch case involved a homosexual claimant from Nigeria. He had been caught with his partner and dragged to the village elders. His partner was first lynched and tortured before being killed. The applicant was also severely beaten, and barely escaped with his life. When he requested the help of the police, they arrested him for disturbing the peace in the village.[174] The question in this case was this: was the applicant been singled out for persecution because of his homosexuality?

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[170] *Kotasz v. INS*, 31 F.3d 847 (9th Cir. 1997).
[171] *Abdel – Masieh v. INS*, 73 F.3d 579 (5th Cir. 1996).
[172] *U.S v. Elias Zacarias*, 502 U.S. 478, 482 112 S.Ct. 812 (S.Ct.).
[173] *Lopez-Soto v. Aschcroft* 383 F. 3d 228 (4th Cir. 2004).
[174] Rb. 's – Gravenhage zp. Haarlem 9 juli 1999, NAV 1999 no. 136 with note by Heijnnenman, p. 587-591.

In the American case, the court began by looking first at the *general situation* of in the country of origin. The court said:

> "undisputed record evidence indicates that gang violence in Guatemala has reached pandemic proportions and that over 10,000 children are in gangs in Guatemala and that 'young males' are a target of gang violence. Indeed, Petitioner's expert witnesses gave affidavit testimony stating that Guatemalan gang violence is an 'epidemic' and that boys and young men 'often face torture or murder if they do not join.'"[175]

However, the court went to say, that because of such a situation, there is no nexus between the persecution of Lopez-Soto and a persecution ground. While the court admits that what happened to the applicant was terrible, it was not extraordinary because many boys in Guatemala get offers from such gangs and get shot when they refuse. There might well have been five men in Lopez-Soto's family who were targeted, but they were not (according to the IJ, BIA, and the majority of the court) targeted because they were from the same family.[176] The court saw some flaws in its judgment, when it admitted that its reluctance to reverse the BIA is that while *some reasonable factfinders* could have found otherwise, yet it could only reverse if *no reasonable factfinder* would have found like the IJ and BIA did.[177] Thus, the court used the general situation in the country first to make the point that there is no exceptionality in the case, and secondly to undermine the nexus.[178]

The Dutch case-law started out differently. The judge first analyzed the *individual* story of the applicant, and found that he had never before been attacked because of his homosexuality. He therefore concluded that the lynching of his partner was a one time episode ("incident"),[179] and therefore the applicant could not show that, if returned to Nigeria, he would be attacked again. He then looked at the general situation in Nigeria and remarked that, since the applicant could not point out to any specific actions taken because he was homosexual, the general antipathy towards homosexuals in Nigeria was not enough to constitute a well founded fear of being persecuted. He has not shown systematic harassment, but mere incidents, and therefore he lacks a well founded fear of being persecuted.[180]

In both of these cases, it is either the general situation in the country of origin that is belittled to weaken the nexus claim, or the individual situation is used to strenghten the singling out requirement. Ultimately, both cases were dismissed.

It should be mentioned again, that the *Lopez-Soto* case is the most restrictive reading of the nexus requirement. The sole dissenting opinion by Judge Michael fiercely criticized the

[174] Rb. 's – Gravenhage zp. Haarlem 9 juli 1999, NAV 1999 no. 136 with note by Heijnnenman, p. 587-591.
[175] *Lopez-Soto v. Aschcroft* 383 F. 3d 228, 237 (4th Cir. 2004).
[176] Ibid., 238-240.
[177] "In this respect, our hands are tied by the great deference owed to the Attorney General's determination." Ibid., 236.
[178] Ibid, p. 244.
[179] Rb. 's – Gravenhage zp. Haarlem 9 juli 1999, NAV 1999 no. 136, p. 589.
[180] Ibid., 589.

majority and held to a view of the nexus requirement shared by the other circuits, which he quoted in his opinion.[181]

The question of nexus is surely not the only one when courts differ on the subject of doctrine: one interpreting it narrowly and the others, restrictively. Other examples would be the cases of neutrality as a political opinion, accepted by the Ninth Circuit and rejected by most others, and which have all been discussed in greater detail in Chapter 2.

Truth be told, the possibility of a liberal and restrictive interpretation of the same issue by the American courts is less visible than the same question by the Dutch courts. I will try to explain why that might be in the following section.

Point 3.

When it comes to the refugee definition, both the Dutch and the American courts have a special category of cases they seem to treat with particular interest and for which they maintain either a consistent line of case law, or change it over time, quite independently of other developments happening in the "mainline" refugee definition.

In Dutch jurisprudence, an example of that special category would undoubtedly be the question of persecution on account of family membership. In the late 1970s and early 1980s, the Raad van State insisted that the existence of persecution of asylum applicant's family members is relevant to his own asylum claim. It was not of major significance when the courts were willing to accept group persecution. However, when the Dutch courts moved from the group persecution concept to that of singling out after 1986, the courts maintained the exception of family membership. Thus from about 1986 until 1998 when group persecution remerged for a while, this was the only avenue in which the restrictive interpretation of the singling out doctrine was somewhat weakened. Again, after 2000, when the Raad van State remerged as the court of higher appeal and reversed most of the regional court's case law in the area of group persecution, it nonetheless retained the position on persecution of members of family and its relevance to the asylum claim.

Another doctrinal development when it comes to the Dutch courts would be the case law concerning the conscientious objectors. Cases based on such claims have been making their way to the appropriate Dutch courts since the 1972 Ralph Waver case.[182] There has not been one consistent approach, however; rather, a slow development of case law. What makes this case law stand out is that, even compared to homosexual asylum claims, the doctrine had been developed quite explicitly by the courts. The REK decision in *Anitkian* is one of the few decisions where there is extensive analysis of the doctrinal point in *abstracto*, which is then used and applied to the case *in concreto*. In draft evasion and conscientious objectors cases, the Dutch courts have shown not only consistent interest in that question, but also a consistent willingness to use clear language in defining who is and who is not a refugee in those cases.

[181] *Lopez-Soto v. Ashcroft* 383 F. 3d 228, 244 (4th Cir. 2004). The applicant applied for a re-hearing of the case *en banc* by the whole pane of judges of the Fourth Circuit which was granted, by the government decided to settle the case with the applicant before the court reheard it en banc.

[182] W.J. van Bennekom (ed.), *Aspecten van Vluchtelingenrecht*, Deventer 1972, s. 247-258.

In American case law, the equivalent to the point of interest given above would be the case of past persecution as independent grounds for asylum. Though added into the Refugee Act, it has created a separate asylum ground for applicants. They can be granted asylum even if they lack a well-founded fear of persecution in the future if the past persecution suffered had been particularly heinous or atrocious. The administration and the courts have interpreted and applied it consistently and restrictively and ruled that it applies to survival of genocide or particularly heinous persecution (e.g. Cultural Revolution in China).[183]

4.2.2 The influence of domestic law on the refugee definition

In this section I will argue that the American and Dutch courts differ in their application of domestic law to asylum law.

- The American courts tend to use domestic constitutional law norms to develop certain concepts of asylum law (religion, neutrality etc) (Point 1)
- The Dutch courts on the other hand tend to avoid domestic law norms, when in comes to asylum theory although the Raad van State has indeed used domestic administrative law since 2000 as an excuse to steer clear of the refugee definition (Point 2)
- The American courts may be heading towards the same direction due to the unwanted and late legacy of the *Elias-Zacarias* decision (Point 3).

In the previous section, I tried to show, that while on one hand both the Dutch and the American courts seem to ponder on different parts of the refugee definition closely, both court systems have proven capable of developing doctrinal points both liberally and restrictively. Emerging from the different involvement of the courts in the refugee definition is a different scale of domestic-law influence on the application and interpretation of the refugee-law definition of these two legal systems.

Point 1.

While one might reasonably assume that the American courts, which analyzed the definition meticulously, would tend to invoke the UNCHR Handbook and international legal scholars when writing their decision, analysis of the relevant case law has proven that assumption seems to be wrong. Ever since the *Stevic* decision, the American courts have relied much more confidently on domestic law than on international scholarship. The *Cardoza-Fonseca* decision of the Supreme Court did rely on the UNHCR Handbook and other scholarly sources, but it drew equally heavily upon American constitutional law principles. Thus, the *Cardoza-Fonseca* decision may be regarded both as one recognizing the international law roots of American asylum law and also its domestic ones.

Consider the case where the Ninth Circuit used these two sources to reach a decision of why neutrality may be a valid political opinion. In situations of armed conflicts, some parties align with each side, yet there is always a group who wish to disassociate themselves from both – the neutrals. This wish to "stay out of it" was quite often the case in the situations of civil wars in the Central American states. The administration would back one side in the

[183] *Gonahasa v. U.S. INS*, 181 F.3d 538, 544 (4th Cir. 1999).

conflict, and tended to reject the claims of applicants based on their sympathy for the others or by those wishing to remain neutral. It is here that the Ninth Circuit stepped in. In one of the first cases dealing with neutrality, the court rejected the argument that neutrality is not a valid political opinion. It said that upholding such a view of the administration would effectively force people to declare their allegiance to one of the warring factions. Such a demand would defeat the purpose of the Geneva Convention and the Refugee Act, which was to provide protections to all victims no matter what their ideology may be.[184] So, international law arguments have been brought in. The notion, that one has the right to hold his own opinion(even the valid choice of neutrality) received a boost when the government agency decided to undermine that line of reasoning by asking the question: based on what facts was the decision to remain neutral taken? If one came to prefer neutrality for a-political reasons, then his neutrality is non-political. The courts would have none of it, though. In an interesting passage, citing domestic constitutional law,[185] and calling it "instructive" the court dryly remarked that:

> "it is improper for governments to inquire into the political motivation of the individual."[186]

One's political opinion is what it is, and must be accepted by the government as such. The referral to domestic constitutional law is poignant in that it seems to underline the fact that American courts consider that some values (such as freedom of speech and religion) to be universal and apply both to US citizens and asylum seekers.

Although the doctrine of neutrality was trimmed by the Supreme Court in its *Elias-Zacarias* decision, it nonetheless survived in two later forms: that of hazardous neutrality and the imputed political opinion. As I tried to show in Chapter 2, the second one is an elaboration of the neutrality principle. It is constructed along similar lines: if the government persecutes the asylum seeker based on his imputed political opinion, this is persecution in the meaning of the Refugee Act because the government has no right to persecute anyone because of his or her political opinion. In another decision of *Canas-Sergovia v. INS (I)*, the Ninth Circuit pointed the BIA to the fact that a neutral law may be enacted simply to discriminate and persecute a particular group, and pointed to an American law that held the same.[187]

Similar arguments have been made in the cases of persecution based on religious opinion, when the Ninth Circuits (and others as well) decided to draw upon domestic constitutional case law, to define what religious opinions might be.[188]

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[184] *Bolanos – Hernandez v. INS*, 767 F.2d 1277, 1280 (9th Cir. 1984).

[185] "Our constitution requires that an individual be able to "maintain his own beliefs without public disclosure," *see Pruneyard Shopping Center v. Robins, 447 U.S. 74, 100, 100 S.Ct. 2035, 2050, 64 L.Ed.2d 741 (1980)*, because the freedom to speak and the freedom to refrain from speaking are "complementary components of the broader concept of 'individual freedom of mind.' " *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 1435, 51 L.Ed.2d 752 (1977) (quoting *Board of Education v. Barnette*, 319 U.S. 624, 637, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943)). While this principle may not be directly applicable here, the reasons underlying the right of citizens to be free from similar governmental inquiries are certainly instructive." Ibid, 1287.

[186] Ibid., 1287.

[187] *Canas - Sergovia v. INS*, 902 F.2d 717 (1990) (*Canas I*).

[188] See Chapter 2.4.4.

In a recent case, the Ninth Circuit relied on the Supreme Court decision of *Lawrence v. Texas*, which declared the so-called "sodomy laws" unconstitutional, when it overturned a BIA denial of refugee status to a homosexual. The government argued that he was not persecuted as a homosexual, but rather prosecuted for homosexual acts. The Ninth Circuit was very unimpressed with this sort of reasoning:

> "By arguing that Karuni could avoid persecution by abstaining from future homosexual acts, the Attorney General is essentially arguing that the INA [Immigration and Naturalization Act – K.B.] requires Karuni to change a fundamental aspect of his human identity, id., and forsake the intimate contact and enduring personal bond that the Due Process Clause of the Fourteenth Amendment protects from impingement in this country and that 'have been accepted as an integral part of human freedom in many other countries,' *Lawrence, 539 U.S. at 577; cf: United States v. Marcum, 60 M.J.198, 208 (2004)* (recognizing that United States military "service members clearly retain a liberty interest to engage in certain intimate sexual conduct").[190]

The reverse interplay between asylum law and constitutional law is also possible. Consider the claims of gay and lesbian asylum seekers. This issue received considerable attention from various legal journals, yet one of the issues that was overlooked was that recognition that gays and lesbians may constitute a particular social group came a *decade earlier* than the "sodomy laws" were thrown out by the United States Supreme Court in *Lawrence v. Texas* in 2005.[191] The decision of *Re Toboso–Alfonso* in 1990 was in its time quite revolutionary, which one of the dissenting BIA members was quick to point out. He found it odd that the BIA would be granting refugee status based on persecution defined as prohibition of homosexuality, while the United States had laws simultaneously proscribing homosexual activity, albeit only in some of the states. A couple of years later an Immigration Judge accepted that sexual orientation was basis for asylum, and it wasn't till the *Hernendez–Montiel v. INS* however, that sexuality was explicitly recognized as an asylum ground by a Circuit Court. The court held that violence against gay and lesbian people was not a question of fashion, cited domestic criminal law rules (again!), and rejected the "you asked for it- you got it" excuse for rape. Thus, in the case of homosexual asylum seekers, asylum law had to a degree predated some of the constitutional law developments.

In conclusion, in American law the development of asylum law had been to a large degree aided by the courts invoking domestic legal principles and constructions and applying them to the relevant case-law.

Point 2.

The situation is different in the Netherlands. The case law concerning substantive asylum shows scant, if any, references to constitutional law and norms of Dutch law. When discussing the rights of draft evaders or conscientious objectors, there is no quotation, link, or reference to Dutch domestic law on that matter, even if it were to be helpful in deciding the case or not.

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[189] *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005).
[190] Ibid., 1173.
[191] *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472.

The same applies to cases bases on sexual orientation. As one of the most liberal countries in the world, one would expect that the Dutch courts would at least remark on the Dutch understanding of the matter and on the domestic legislation in their decisions regarding sexual orientation. They don't. There seems to be a neat divide, "a wall of separation", to use an American expression, between that of asylum law and constitutional law. The only reference is to the principle of good administration, but that will be discussed below.

Until 2000, quite the opposite was true. When Dutch courts tried to define a new concept clearly, they were much more willing to invoke international legal arguments, such as the UNHCR Handbook, a particular favorite of the Dutch courts, than any other source. The Handbook influence is very clear in the *Antikian* decision of the REK, when it sought to codify the circumstances under which draft evaders and conscientious objectors might be granted asylum in the Netherlands. The UNHCR and international legal scholars were both quoted in the decision by the REK when, after years of going back and forth over the issue of agent of persecution, it decided clearly to allow persecution by non state agents. Thus, until 2000, it was not the domestic law, but rather international law that proved most useful for the Dutch courts when trying to construct the refugee definition.[192]

In this context it is interesting to note, that the Afdeling does not always acknowledge that it is quoting verbatim from the Handbook.[193] The fact that the courts were willing to quote the Handbook also didn't always mean that they agreed completely with its content, despite the pleas of the legal doctrine to do so. The courts can have a very flexible interpretation of how to apply a international law and scholars' suggestions in practice.

The situation markedly changed in the years after 2001 when the Raad van State was competent again to hear highest appeals from the decisions of the district courts. The court started to invoke domestic administrative law and constitutional provisions, mainly the discretion of the decisions of the Secretary of State and the principal of marginal judicial review. This was done, however, not to develop asylum law, but rather to curb the lower courts from overturning too many administrative decisions. Thus, domestic law had been invoked not to develop asylum law but rather to side step the issue. Though the Raad van State has insisted that it retains the power to fully review the findings of the Secretary of State when it comes to the refugee definition, it hardly ever happens. By overturning the lower court decisions, the Raad van State not only abstained from any meaningful pronouncements on the definition itself (with very few exceptions), it also forced the lower courts to do the same.

Not surprisingly, writing in 2002, Spijkerboer based on his analysis of the Raad van State claimed, that it had limited its scope of judicial review for political reasons. It was perhaps in response to his book that in January 2003 the Raad gave constitutional reasons for its doctrine of marginal judicial review in one of its decisions.[194] It held that the State Secretary as the administrative organ is able to rely on better sources and support material in deciding the

[192] See Rb. 's – Gravenhage zp. Zwolle 25 mei 2000, JV 2000 nr. 179, p. 693-698, also published in NAV 2000 no. 128 with note by Isseldijk, p. 428-433 for the influence of the UNHCR Handbook in the court's decision making process.

[193] R. Fernhout, *Ekenning en toelating*…, p. 27 fnt. 77 for a list before 1990. For a list of case-law post 1990 see Spijkerboer & Vermeulen 1995, p. 498 fnt. 23.

asylum application, and the courts should therefore give high deference to his findings. The administrative judge may only review if based on the materials the State Secretary could have reached the decision he did. The administrative judge may therefore not substitute his findings for that of the State Secretary, unless the latter's conclusion are not supported by the material and evidence gathered in the material.

> "This does not mean that there is no legal review of the Minister's assessment. The standard however, is not the judge's own opinion on the credibility but whether there is a reasonable basis for the Minister's opinion (…). This is in addition to the requirement that the decision must meet the standards of carefulness and must give a reason and that the judge must assess the decision on these aspects".[195]

Though the doctrine was only partially convinced with the Raad van State's reasoning,[196] it nonetheless shows how the Dutch Council of State had used the domestic law to disengage from reviewing the Refugee definition by Dutch courts.

In conclusion, the Dutch courts unlike their American counterparts had kept away from using domestic law constructions and principles to develop their meaning of the refugee convention until 2000, preferring to invoke international law instruments – the UNHCR Handbook especially. Although the situation changed after 2001, it has only been the degree to which domestic law has been invoked to sidestep the Refugee definition and to prevent, or at least curtail, the local courts from developing the definition themselves, which they have been doing with more or less success from 1995 to 2000.

Point 3.

There is one note I should make concerning that last constatation and the American courts. In 1992 in *Elias-Zacarias*, the United States Supreme Court overturned the Ninth Circuit findings and stated, literally, in a footnote to the main body of the decision:

> "Quite beside the point, therefore, is the [minority – K.B.] dissent's assertion that 'the record in this case is more than adequate to *support the conclusion* that this respondent's refusal [to join the guerrillas] was a form of expressive conduct that constituted the statement of a 'political opinion,'' *post*, at 819 (emphasis added). To reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it--and also compels the further conclusion that Elias-Zacarias had a well-founded fear that the guerrillas would persecute him *because of* that political opinion."[197]

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[194] ABRvS 27 januari 2003, RV 2003 no. 5 with note by Battjes, p. 66-68. That case was also published in JV 2003 no. 103 with note by Olivier, p. 325-331, as well as in the NAV 2003 no. 100 with note by Olivier, p. 285-291. It has also been published in AB 2003 no. 286 with the note by Vermeulen, as well as in the RV 1974-2003 no. 57 with note by Spijkerboer p. 371-375.

[195] Ibid.

[196] See P. Boeles, note to ABRvS 22 augustus 2003, JV 2003 no. 451; R.J.L. Bokhoven, *De omvangvan de rechterlijke toetsing van asielaanvragen – Een praktish overzicht van de Afdelingjurisprudentie*, Journaal Vreemdelingenrecht jg. 2 (2003), p. 52; S. Essakkili, *Marginal Judicial Review in the Dutch Asylum Procedure*, Vrije Universiteit Amsterdam 2005, passim; Spijkerboer's note to the decision in RV 1974-2003 no. 57; Vermeulen's note to this decision in AB 2003 no. 286.

[197] *U.S v. Elias Zacarias*, 502 U.S. 478, 481 112 S.Ct. 812 (S.Ct.).

That footnote might have gone unnoticed at the time when the doctrine was despairing over the overturning of the doctrine of political neutrality, yet it has produced some interesting case law in recent years. In 2002, the Supreme Court granted *certiorari* and reversed the Ninth Circuit holding that it should not have substituted its own findings for that of the BIA.[198] The court quoted domestic constitutional law, as well as *Elias-Zacarias*, and held that the Court may not substitute its own findings for that of the administrative agency but rather:

"A court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.' " *Ventura, supra*, at 16, 123 S.Ct. 353 (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985)). "Rather, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'[199]

At least some circuits seem to be following suit and have begun to apply a narrower judicial review of the decisions rendered by the BIA and the INS. Thus, in *Lopez – Soto v. INS* the Fourth Circuit stated that:

Our review of a BIA asylum eligibility determination is most narrow. (…) This standard is extremely deferential to the BIA's determinations; indeed, we will uphold the BIA determination unless a petitioner can "show that the evidence he presented was *so compelling that no reasonable factfinder could fail to find the requisite fear of persecution*" *Elias-Zacarias, 502 U.S. at 483-84* (emphasis added).[200]

Given that some other Circuit courts have already been applying this rule,[201] while in others that requirement is read broadly,[202] it remains to be seen whether the longer living legacy of the *Elias-Zacarias* decision will not have been the limited review by the circuit courts, which may only reverse and remand back to the BIA if the files "compel" them to do so. It would also make it similar to the Dutch case-law after 2001, where deference to the administration and judicial restraint are the reasons for a similar outcome. The quip by the Fourth Circuit where the court said:

> "In this respect, our hands are tied by the great deference owed to the Attorney General's determination"[203]

shows a remarkable similarity in approach and substance on part of the Fourth Circuit to its Dutch counterpart, the Raad van State.

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[198] *INS v. Orlando Ventura*, 537 U.S. 12, 123 S.Ct. 353 (Supreme Court 2002).

[199] Ibid., 16. See also *Gonzales v. Thomas*, 126 S.Ct. 1613 (Supreme Court 2006). For a discussion on some of the points see J. W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of INS v. Ventura*, 18 Georgetown Immigration Law Journal (2005) p. 605-649.

[200] *Lopez – Soto v. Ashcroft*, 383 F.3d 228, 233-34 (4th Cir. 2004) (emphasis in the original).

[201] See amongst others: *Ontunez –Tursios v. Ashcroft*, 303 F.3d 341, 355 (5th Cir. 2002); *Eduard v. Ashcroft*, 379 F.3d 182, 197 (5th Cir. 2004) (dissenting opinion); *Tesfu v. Ashcroft*, 322 F.3d 477, 480 (7th Cir. 2003); *Castillo-Arias v. U.S. Attorney General*, 446 F.3d 1190, 1195 (11th Cir. 2006).

[202] *Poradisova v. U.S. Attorney General*, 420 F.3d 70, 82 (2nd Cir. 2005); *Singh v. U.S. Attorney General*, 406 F.3d. 191, 199 (3rd Cir. 2005); S*alazar-Paucar v. INS*, 281 F.3d 1069, 1075 (9th Cir. 2002).

[203] *Lopez – Soto v. Ashcroft*, 383 F.3d 228, 236 (4th Cir. 2004).

4.2.3 The position of the courts

Having argued the points above it is now necessary to look at the courts themselves, and their relationship to the administration of their respective jurisdictions. Here, I will argue that:

- American and Dutch courts can be developers of asylum law (Point 1).
- American and Dutch courts have also shown to be restrainers of asylum law (Point 2).
- Both jurisdictions show, that the more removed the courts are from the administration, the more "independent" they seem to be (Point 3).

Point 1.

In the previous sections of this Chapter I have tried to show that that courts in both jurisdictions chose to center on a particular element of the refugee definition, and they are more or less willing to use domestic or international law to that aim. By doing so, they place themselves more or less in the position of developers or restrainers of asylum law theory.

Let us first look at the Dutch courts. From the periods I have outlined, from the earliest one till the year 2000, it may be assumed that the Courts were modest developers of asylum law. In that period, explicit or implicit quotations of the UNHCR Handbook had been made to back up the point the court was trying to make. Thus, group persecution was accepted and homosexuality was recognized as a valid persecution ground even if neither was ever properly defined. As was said earlier, sometimes the Raad van State would cite the "Handbook" explicitly and at other times the court would quote it without referencing it.

The attitude of the court did not change considerably after 1986 even though the case law outcome did turn fundamentally. The courts now were denying certain points of legal doctrine rather than developing another. Thus the courts rejected the notion of group persecution. Its affirmation of the doctrine of singling out was also interesting: it continued to use the negative language described above, claiming that the applicants "had not sufficiently shown that they had been singled out." Even if they failed to fully define the concept of singling out, they nonetheless insisted on maintaining that doctrinal point, and were thus developing it, if in a somewhat cryptic way. Another example would be the doctrine of the agent of persecution, which had been developed in the mid-1990s in a typical way, by statements that one cannot qualify.

As was shown in the Dutch Chapter, the developments did not always go smoothly. The Raad van State showed a considerable inconsistency in the cases of Somalis, among others, which the legal doctrine was quick to point out. The doctrine of singling out had run into serious troubles and contradictions. The Raad van State must have been relieved, both legally and figuratively, when it stopped hearing the appeals from denials of refugee status in 1995.

The period of 1995 till 2000 is arguably, one of the most fruitful when it comes to asylum case-law in the Netherlands. The district courts inherited an impressive but not always coherent body of decisions left to them by the Raad van State. The fact that there was no formal higher appeal, in a strange way worked to their advantage. Unable to get higher courts to settle disputes for them, the decisions were sometimes made by the REK. As it was said earlier in Chapter

1, despite the official court composition of three judges – from the district courts –there were more judges present for oral arguments, and all retired to deliberate *in camera*. Although, as before, no dissents or concurrences were allowed, Terlow has demonstrated in her book that the decisions were quite often well thought through compromises between the judges.[204] Thus, perhaps the REK decisions were the ones that were most clear, elaborate, and explicit in formulating the doctrinal stance of the Dutch courts. In the seven years the regional courts were responsible for hearing the appeals from the decisions of the Secretary of State, they managed to sort out the issue of agents of persecution, the question of draft evaders and conscientious objectors codifying previous decisions in *Antikian*, introduce a limited concept of group persecution. True, they did not sort out the somewhat complicated case law regarding singling out, but they only had five years.

The irony of the years 1995-2000 is that in 2000 there was no book that would have tried to define the past half decade of district courts deciding in asylum cases. The main books by Vermeulen and Spijkerboer were written in 1995 and 2005 respectively. The first book is a sign of the complicated legacy the Raad van State jurisprudence till that date. The second one deals mainly with the Afdeling's jurisprudence after 2001, and that proved to be something fundamentally different to what the Dutch courts were doing before that. It will also be discussed in detail below. But because neither book dealt with the years 1995-2000, the work of the district courts has been neglected to a degree. Thus, the difference in substance and form of the Dutch case law has gone unnoticed.

The American courts were also developers of asylum law doctrine. That can be both said for the circuit courts, as well as the Supreme Court. First, all of them struggled with the question of the proper burden of proof as required from an asylum applicant. The courts disagreed with the administration and insisted first on the differentiation of the standards in question, and then on the fact that the asylum law was more generous than the withholding of removal one. Second, and most visibly perhaps, the Ninth Circuit developed the case law of neutrality as a political opinion and that of the imputed political opinion throughout the 1990s. These developments have been shown in Chapter 2. The Seventh Circuit also added considerably to the cases of persecution based on religious conversion.

The Supreme Court had also considerable influence in developing certain legal constructions. It first lent its support to the majority of circuit courts when it held that asylum and withholding of removal substantively differ and therefore may not be confused by the INS. One of the most interesting contributions of the Supreme Court to the asylum law theory is its decision in the case of *Elias-Zacarias*. Although widely criticized immediately after it was rendered, a decade later the American doctrine had by then revised its appraisal, calling it "ambiguous".[205] In that judgment, the court held that neutrality may not be applied in the way it was construed by the Ninth Circuit, and thus threw that piece of doctrine out. This decision also cast some doubt on cases of conscientious objectors, who were prosecuted for their refusal to bear arms. At the same time, the court left the door for the doctrine of imputed political opinion open, which the Ninth Circuit clearly recognized and moved on to develop.[206]

[204] A. Terlouw, *Uitspraak en afspraak*…, passim.
[205] D. Anker, *Law of Asylum*…, p. 274.
[206] *Canas-Sergovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992) (Canas II) . But see *Ozdemir v. INS*, 46 F.3d 6, 7 (5th Cir. 1994).

Also, in *Elias-Zacarias* the court stressed the causal link between the persecutor and the victim, agreeing that the motive does not have to be necessarily punitive – this in turn has allowed the circuit courts to develop the theory of "mixed motives" of the persecutor.

Thus, as we have seen, both the Dutch and American courts have shown to be capable of developing asylum case law. In the American system, the task has fallen to the circuit courts, with the Ninth and the Seventh playing a dominant role. In the Dutch jurisdiction, it was true for the whole of period till 2000, though the most visible period was that of 1995-2000. During that time it was the district courts and the REK who had managed to resolve some of the questions left behind by the more restrained case-law of the Afdeling.

Point 2.

While the courts may serve as catalysts in developing asylum law theory and doctrine, the same courts have also the potential to restrain such developments if they choose to. In my analysis, I have found this to be the case for both the American and the Dutch jurisdictions, yet this is clearest in the Dutch system.

As I said earlier, the Dutch Raad van State had been instrumental at developing some asylum law concepts till the year 1995. However, one cannot overlook the fact that it often did so reluctantly. I have already discussed how the Court used the language to avoid articulating the points of doctrine clearly. Thus, it was more common for the court to use the phrase "The applicant has not sufficiently shown that..." than to explain what the applicant had succeeded in doing in positive language. The careful restraint of the Raad in stating the doctrinal requirements allowed it to switch from group persecution to that of singling out, without ever defining either.

However, the clearest example of the Raad van State restraining the development of substantive refugee law, may be traced in the Afdeling's case-law after 2000. One of the first things a reader notices, is the almost complete lack of any reference to its pre-1995 case-law. While one might explain this phenomenon, at least partially, by the fact that a new Aliens law had been enacted in the meantime, that argument only goes so far. While indeed the law had changed, the Afdeling was dealing with the same refugee definition and sometimes with the same doctrinal problems as before. Therefore, the lack of any reference to any previous decisions cannot be viewed as coincidence. Furthermore, as I tried to show earlier, the Afdeling has shown to be very careful to utter as few judgments on the substance of refugee definition as possible. Although in theory it insists on the full judicial review of the refugee definition, the court made sure that this kind of review happens as rarely as possible. In fact, the Afdeling's case law has achieved two goals: first, the court has managed (with a few marginal exceptions) to refrain from making any case-law on the substance of the refugee definition, and second, it has also seriously crippled any attempts of the district courts to do so, reversing the trend we have seen in the years 1995-2000. By invoking the principles of domestic administrative law and of administrative judicial review, the court has voluntarily surrendered its role in developing refugee theory.

Even the few exceptions I have mentioned serve rather to underline this theory than to strengthen it. By articulating a few doctrinal points in some cases, the Afdeling has provided

itself with evidence that full judicial review is theoretically possible. The scarcity of these instances, as well as the language used in those cases,[208] guarantees that, even then, the Afdeling has sufficient room to interpret it in any way it chooses to in the future. When Spijkerboer published his 2002 book on higher appeal in the post-2000 Dutch law in which he argued that the Afdeling had restricted itself in reviewing the Aliens Law, he had little case law to prove his point as regarded the refugee definition.[209] Writing three years later, he again re-stated his criticism of the Afdeling's case-law, this time again concentrating on procedural questions, as there were hardly any other cases on the substance of the definition. He did nonetheless express cautious optimism, arguing that the present case-law of the Afdeling was untenable in the long run.[210] His view is on the increasing proceduralization of Dutch asylum law is also shared by others.[211]

The American courts have shown to have potential for this tendency too. The case law of the Fourth and Fifth Circuits has shown high reverence to the INS determination, so much that it has caused the INS to do some forum shopping – that is move some asylum applicants from the jurisdiction of the "hostile" Ninth Circuit to that of a more friendly Fourth or Fifth.[212]

The Supreme Court has also shown a similar record on this question. As I have said before, the legacy of *Elias–Zacarias* is mixed. While the court seemed to have allowed the theory of imputed political opinion, it has thrown out that of neutrality as a political opinion. Also, its decision requiring a clear causation (with some evidence, direct or circumstantial) between the persecution and the persecution ground, have cast doubt on cases of draft evaders and conscientious objectors prosecuted for their refusal to bear arms. As I have also indicated, perhaps the most damaging effect of *Elias-Zacarias* might be its progeny, involving the scope of deference the circuit courts must give to the findings of the INS.[213] Whether that feature of American case law will become more visible and dominant, is a question for the future.

Point 3.

The engagement in reconstructing the refugee definition, the invoking of domestic and international law has an effect on how the courts are seen by the administration and how the administration is seen by the courts.

In the United States, the INS and now Homeland Security, has an unmistakably dislike of the Circuit courts, in particular the Ninth, and to a lesser degree of the Seventh, Circuit. That

[207] D. Anker, *Law of Asylum in the United States*, p. 274-281; *Harpinder Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995).
[208] ABRvS 23 november 2005, RV 2005 no. 6, with note by Bem; ABRvS 30 juni 2005, NAV 2005 no. 190, p. 514-515, also published in JV 2005 no. 320. Both cases dealing with domestic violence as grounds for asylum. For an overview of Dutch case law see S. Jansen, *Conflicten achter de voordeur. Over huiselijk geweld als grond voor asiel*, NAV 2004, p. 603-617.
[209] T. Spijkerboer, *Het hoger beroep …*, p. 21-22, 131-133139-143.
[210] T. Spijkerboer, *Hoe consistent is de Afdeling?*, NAV 2005, p. 464-471.
[211] M. Reneman, *Hoe beperkt is het hoger beroep? Over de formele eisen, het grievenstelsel, en de rechtsbescherming, rechtsontwikkeling en rechtseenheid*, NAV 2002, p. 212-219; R. Bruin & A. Terlouw, *Geen twijfel meer mogelijk*, NAV 2004, p. 660-690. But see W.J. van Bennekom, *Ontaarde rechters?*, NAV 2005, p. 64-67 for a polemic.
[212] *Guevara Flores v. INS*, 786 F. 2d 1242, (5th Cir. 1986).
[213] *Gonzales v. Thomas*, 126 S.Ct. 1613 (Supreme Court 2006).

is clearly visible in the fact that it refuses to apply case-law of one circuit in others, thereby creating diverging legal regimes. The courts are well aware of that approach and try to prevent the BIA from forum shopping. Sometimes, the disputes between the BIA and the courts get out of hand. In one of the decisions the Ninth Circuit remarked sardonically that the BIA seems to consider itself bound by not only court precedent but also by *Madison v. Marbury*, the most fundamental court decision in the U.S. constitutional case-law. The courts rarely minces its words:

The BIA's decision turns logic onto its head[214]

or, for two more recent quips:

> "The proceedings of the Immigration and Naturalization Service are notorious for delay, and the opinions rendered by its judicial officers, including the members of the Board of Immigration Appeals, often flunk minimum standards of adjudicative rationality.[215]
>
> The tension between judicial and administrative adjudicators is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."[216]

Little wonder, that the INS officers view the courts as their enemies. The article written by an INS adjudicator Einhorn immediately after the *Elias-Zacarias* decision shows the level of frustration felt in the INS toward a judicial system, the Ninth Circuit especially, that seems to be engaged solely in overturning the BIA decision.[217] It is worth bearing in mind, that all the asylum decisions brought before the Supreme Court were those rendered by the Ninth Circuit. There are of course "the good boys", the Fourth and Fifth Circuits, where overturning the BIA is difficult, and rarely happens. However, on the whole, the analysis of American case-law shows that the courts seem to be generally viewed as an entity which the government must convince that an asylum seeker is not a refugee.

The image is decidedly different in Dutch case law, though the scale of the difference varies. In the early 1980s and 1990s, the Dutch courts were more eager to overturn the Secretary of State. While never as tart in their appraisal of the Secretary of State's decisions, they nonetheless sometimes engaged in innuendo polemics with the administration. The situation changed markedly when the local courts took over in the mid-1990s. These courts started behaving in a fashion surprisingly similar to the American circuit courts, demanding from the Secretary of State more information, better reasoned decisions, and some clarity, as to why he reached a particular decision.

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[214] *Bolanos – Henrnadez v. INS*, 767 F.2d 1277, 1284 (9th Cir.1984).
[215] *Salameda v. I.N.S.*, 70 F.3d 447, 449 (7th Cir. 1995).
[216] *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) with a long list of similar quips by the same court.
[217] B.J. Einhorn, *Political Asylum in the Ninth Circuit and the Case of Elias – Zacarias*, 29 San Diego Law Review 597, 610 (1992).

Although crude polemic with the Secretary of State never prevailed, the government without a doubt got the hint. When the 2000 Aliens Law was being discussed, it was the government that did not mince its words. When proposing higher appeal, it said that the district courts have too often taken the place of the administration, and according to the debate in Parliament, the REK was too asylum-seeker friendly. They wanted something else and they were hoping to get it from the Raad van State of whose case-law they had good reminiscences. As one of the MPs put it bluntly:

> "We know what we have and that does not suit us. [That is the district courts and the REK case-law – K.B.] we don't know what we will be having, but we are hopeful that it will not disappoint us. The Raad van State had before the passing of the 1994 Aliens Law (…) handled this issue in a completely other way, and for us a more convenient way, than the REK in the previous years"[218]

The hopes of MP Kamp were indeed fulfilled. In his book Spijkerboer (2002) argued that the Raad van State has since 2000, in fact, rescinded for political, or less controversially: non-judicial, reasons its standard of review. He made his point based on procedural aspects, but pointed out that the scarcity of substantive case law on the refugee definition till then did not allow him to make that argument there as persuasively as in other sections of his book.[219] However, writing four years later, the amount of substantive case law has not significantly increased, and maybe that is again proving his point. By refusing, or severely limiting any utterances on the refugee definition itself, and turning most of the cases into the margin of the administration's discretion, the Raad van State is in fact ruling on the merits of the definition: it relegates its interpretation almost solely to that of the administration. In fact, one of the longest of its decisions was a sort of polemic with Spijkerboer's thesis (naturally, without mentioning names), where it laid down the reasons why it cannot do more with the refugee definitions and has, interestingly, invoked here constitutional law principles. In its post-2000 years, the Raad van State's judicial restraint has probably met the highest of expectations at least. It has not been the opponent of the administration, like the district courts. It has not been even a reluctant reviewer of the administration's decision as in the pre-1995 years. By skillful legal decisions it has voluntarily absolved itself of scrutinizing administration decisions and has left it to the discretion of the state.

If indeed the proximity of the court to the administration reflects on its case law to some degree, it would be interesting to look at the case law of the Dutch Supreme Court (*Hoge Raad*) in this context. Here, the picture is mixed when it comes to the relationship between the government and the court. On one hand, at least in some of the cases, the Dutch Hoge Raad seemed to have accepted the government's understanding of the concept of singling-out. In the case of *Rasiah* discussed above, the court accepted the argument that Raisah had not been singled out for persecution, as what had happened to her was not unusual for Tamil women in Sri Lanka. Also, the court seemed to have agreed with the government that Raisah had not sufficiently shown, that rape has been used as a weapon of persecution and intimidation by the I.P.K.F. in Sri Lanka, and therefore for all these reasons she was unable to show a well founded fear of persecution.[220]

[218] TK 83-5336, quoted in K. Geujien, *De Asielcontroverse*…, p. 200.
[219] T.P. Spijkerboer, *Hoger beroep*…, p. 131-139.
[220] HR 14 december 1990, no. 14.329, RV 1990 nr. 9 with note by Fernhout, p.26-34.

However, in other cases, the Hoge Raad was not always so easily convinced by the arguments of the government. In its famous 1988 Mosa criterion decision, the Hoge Raad imposed a new requirement in removal proceedings, that the applicant had the right to await a final outcome of his asylum proceedings without being removed, even if his initial application had been denied, unless it was clear that "*amongst reasonalble people there would be no doubt that the applicant does not fall within refugee status.*"[221] Thus as, the commentators put it, the Dutch Supreme Court imposed a high threshold for the government to overcome.[222]

Similarly, in the case of agents of persecution the situation was markedly different. In 1993, the Dutch Supreme Court quashed the decisions of the lower courts when it ruled that persecution may emanate not only from the state authorities, but also from non state agents in those cases where the state is unwilling or unable to offer protection.[223] This was done in a time when the Raad van State was still unclear about the issue, and the Hoge Raad's point was later developed by the REK decision in 1998.[224]

The relatively few cases of the Hoge Raad in asylum matters, especially on substantive issues, make it very difficult to draw definite conclusions. However, the fact that the Hoge Raad was not viewed by the administration with much fondness can be observed in the facts that it never tried to appeal a district court decision in cassation to the Supreme Court in the years 1995-2000, and more persuasively, that it was the Raad van State that was chosen for hearing appeals from the district court decisions, and not the Hoge Raad after 2000.

4.2.4 The position of legal doctrine

Having discussed the approach of the courts to the refugee definitions and their role in developing or restraining its development, it is instructive to look now at the position of the legal doctrine in both countries on the subject.

- American asylum law doctrine is somewhat descriptive with the case law of the court. The authors engage in polemic around certain themes of the asylum case law, yet do not seem to have a problem with the case-law on the whole (Point 1).
- The Dutch legal doctrine is markedly different. Since the mid-1980s, it has been increasingly conflicted with the courts, with the Raad van State decisions being the classic example. Whereas the American courts and legal doctrine support each other to a degree, the Dutch legal doctrine has been at odds with the courts for well over a decade now. Its role has been, therefore, more as a criticism/polemic of the case law, rather than supplementary (Point 2)
- The courts and their approach ultimately push the legal doctrine in one direction or another. In other words: the role of the legal doctrine is derived from and defined by the approach of the courts (Point 3).

[221] HR 13 mei 1988, JV 1974-2003 no. 5 with note by Vermeulen, p. 47-50. See also Spijkerboer & Vermeulen 1995, p. 72-76.
[222] Spijkerboer & Vermeulen 1995, p. 72-76.
[223] HR 15 januari 1993, RV 1993 no.16, p. 41-42.
[224] Chapter 3.3.2.

Point 1.

The American legal doctrine is in this respect mostly descriptive, but not exclusively so. That is, the authors describe the case law of the circuits and analyze it in context. The book by Anker is a superb academic handbook where the author analyses the American asylum law bit by bit, and quotes the numerous case-law of different circuits. She engages in polemic with the court on only a few occasions, leaving the remainer of the book to serve as a guide to American Refugee Law, rather than a polemic with it.

That is not to say that the American writers do not engage in polemics. The obvious example when they did is the vast literature regarding the *Elias-Zacarias* decision by the Supreme Court. Before it was rendered, a growing number of scholars were voicing their unease with the BIA approach to the cases of neutrality as a political opinion, and almost to a man sided with the Ninth Circuit and its case law. When the Supreme Court reversed the Ninth Circuit, the scholars reacted more than critically. Some even called for legislative intervention in order to curb, what they perceived, the excesses of *Elias-Zacarias*. A few years later, the same doctrine more calmly remarked that the courts have managed to salvage from the wrecks of *Elias-Zacarias* much more than was first anticipated. What is more interesting is that, while the scholars heatedly debated theoretical implications for the refugee definition of the *Elias-Zacarias* decisions, there was little concern with the Supreme Courts finding that circuit courts may only overturn the BIA if they are compelled to do so, that is: if no reasonable fact finder could have decided otherwise. The importance of this utterance is at least growing, as the Fourth and Fifth Circuits apply it strictly, the Ninth Circuit very loosely, and the other circuits fall somewhere between these two extremes. Recently, the doctrine has been increasingly critical of the practice of the BIA to affirm or deny the decisions of the IJ summarily, without itself rendering an opinion.[225]

The American doctrine may engage in subtle, albeit lengthy, polemics with the case-law as well. One such subject would be trying to clearly distill the court's approach to the subject of the particular social group. I have given in my book a short example of two of the issues (family and homosexuals as examples of a particular social group) yet the issue reaches much further. One of the authors has devoted a significant study to this question, dealing very carefully with all the case law then available.[226] That is by no means extraordinary. The Ninth Circuit's case law first on neutrality and then imputed political opinion had attracted considerable, and exhaustive, studies of great value, both before and after the *Elias – Zacarias* decision.[227]

[225] Chapter 1.5.

[226] M. Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 San Diego Law Review (1999), 739-843.

[227] See amongst others: M. von Sternberg, *Emerging bases of "persecution"…*, p. 1-74; G. Porter, *Persecution Based On…*, p. 231-276; K. Musalo, *Irreconcilable Differences?*, p. 1179-1240; C.P. Blum, License to Kill…, p. 719-750.

A look at the American asylum literature reveals also another interesting phenomenon. It has clearly some topics it feels at ease discussing (e.g. sexual orientation claims case-law),[228] while other topics seem to receive less attention in analysis (e.g. claims based on religious persecution).[229] Even when we note that some of the articles have been written by law students, the close correlation between the attitude of the courts and that of literature is worth noting here.

Point 2.

The case is markedly different when it comes to the Dutch legal scholars, although here there are again variations within different periods of time. In the 1980s, the legal doctrine was somewhat similar to the American one. Hoeksma in his book on asylum status is more descriptive and systematic. He voices few, merely subtle, criticisms of the case law. Writing a decade later, Fernhout shifts the emphasis. Although he is also systematizing the case law which by then had grown to be more substantial, he begins to voice strong concern about some of the decisions in which the courts seem to be going. But that was just the prelude. The "Rechtspraak Vreemdelingenrecht", a yearbook of Dutch case-law reveals that in the 1990s concern and frustrations with the court's decisions were growing, especially on the Somali case line. If the Dutch courts were never markedly tart about the administration, the

[228] Alan G. Bennett, *The "Cure" that Harms: sexual Orientation-Based Asylum and the Changing Definition of Persecution*, Golden Gate U. L. Rev. vol. 29 (1999), p. 279-309; Kristie Bowerman, *Pitcherskaia v. I.N.S.: The Ninth Circuit Attempts to Cure the Definition of Persecution*, Law & Sexuality, vol. 7 (1997), p.101; Daniel Compton, *Asylum for Persecuted Social Groups: A Closed Door Left Slightly Adjar – Sanchez –Trujillo v. INS, 801 F.2d 1571 (9th Cir.1986)*, Wash. L. Rev., vol.62 (1987), p. 913-939; Suzanne B. Goldberg, *Give me Liberty or…*, p. 605; Ryan Goodman *The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary "Medical" Intervention*, Yale L.J., vol. 105 (1995), p. 225-289; Stuart Grider, *Sexual Orientation as Grounds For Asylum in the United States -- IN RE TENORIO, NO. A72 093 558 (EOIR IMMIGRATION COURT, JULY 26, 1993)*, Harv. Int'l L.J., vol. 35 (1994), p. 213-224; Lucy H. Halatyn, *Political Asylum And Equal Protection: Hypocrisy of United States Protection of Gay Men and Lesbians*, Suffolk Transnat'l L. Rev., vol.22 (1998), p. 133-161; Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, Harv. Hum. Rts. J., vol. 9 (1996), p. 61-103; Brian F. Henes, *The origin and Consequences of Recognizing Homosexuals as a "Particular Social Group" for refugee purposes*, Temp. Int"l & Comp. L.J., vol. 8 (1994), p. 377-401; Robert C. Leitner, *A Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, U. Miami L. Rev., vol. 58 (2004), p. 679-699; Brian J. McGoldrick, *United States Immigration Policy and Sexual Minorities: Is Asylum for Homosexuals a Possibility*, Georgetown Imm. L. J., vol. 8 (1994), p. 201-226; David K. McGraw *Toboso-Alfonso Case to be Treated as Precedent for Gays Seeking Asylum*, Geo. Immigr. L.J., vol. 8 (1994), p. 635-636; Shannon Minter, *Sodomy and Public Morality Offences Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, Cornell Int. L. J., vol. 26 (1994), p. 771-818; Christopher Nugent & Lavi Soloway, *Racing the Asylum Deadline: Keeping Gays and Lesbians from Falling in the Cracks*, 219 N.Y.L.J. 2 (1998); Jin S. Park, *Pink Asylum…*, p. 1115; Erik D. Ramanathan, *Queer Cases: a Comparative Analyisis of Global Sexual Orientation-Based Asylum Jurisprudence*, Geo. Immigr. L.J., vol. 11 (1996), p. 1-44; John A. Russ IV, *The Gap Between Asylum Ideals and Domestic Reality: Evaluating Human Rights Conditions for Gay Americans by the United States' Own Progressive Asylum Standards*, U.C. Davis J. Int'l L. & Pol'y , vol. 4 (1998), p. 29; *Symposium Shifting Grounds for Asylum: Female Genital Mutilation and Sexual Orientation*, Colum. Hum. Rts. L. Rev., vol.29 (1998), p.467-531; Ellen Vagelos, *The Social Group that Dare not Speak its name: Should Homosexuals Constitute a Particular Social Group for the Purposes of Obtaining Refugee Status? Comment on RE: INAUDI*, Fordham Int'l L.J., vol.17 (1993), p.229-276.

[229] T. Samahon, *The Religion Clauses …*, p. 2211-2238 (dealing only with the question of religious conversion and the relation to constitutional law requirements); Lance Hapton, *Step away from …*, p. 453; C. Mousin, *Standing with the Persecuted…*, p. 541-592.

legal doctrine was about the Dutch courts in that period. The book by Spijkerboer and Vermeulen in 1995 is only at first glance similar to the book by Anker of four years later. It too is exhausting and descriptive, but in fact, the section devoted to asylum is with a few exceptions an impassioned polemic with the Afdeling's case law from A to Z. For example, in the section devoted to the singling out criterion, the authors do try to give a coherent overview of the case law, yet at the same time they mutinously point out to the inconsistencies and mistakes made by the Raad in its case law. The section of the agents of persecution, is simply one big polemic between the authors and the court.[230]

In the years between 1995 and 2000, the doctrine cooled down somewhat, but this was also due to the fact, that the Afdeling no longer heard asylum appeal cases. But as soon as the cases returned to the Afdeling, the criticism resumed. Not only was the Spijkerboer 2002 book an example of that, but also the new textbook by Vermeulen and Spijkerboer from 2005. Drawing mainly on the case law since 2000, it was considerably more succinct in the definition section. Since the case law on agents of persecution had been settled since 1995, this book is somewhat more restrained, and in this section, descriptive. But the old criticism of the Afdeling resumed in the section devoted to the singling out criterion and the "intenteleer" sections. What is even more instructive is that the majority of the polemic is now shifted from the once substantive definition sections (and now considerably reduced) to the procedural sections. Thus, probably against its own wishes, the legal doctrine has followed the Afdeling to the procedural law, where the debate is now being waged.[231]

The Dutch legal doctrine is markedly different from its American counterparts. Its main stress is being a critical reviewer and suggesting changes and corrections, rather than just trying to go along with the courts. In the Dutch system with some years of relative calm, the doctrine had been primarily busy with trying to shift the courts (Afdeling) from their current position.

In conclusion, the difference between the American and Dutch positions is subtle but important. While in the United States, legal scholars and the courts cooperate and sustain each other for most part, with occasional outbursts of criticism by scholars, almost the opposite is true in the Netherlands. The doctrine is with exceptions, critical of the case law, especially with that of the Raad van State.

Point 3.

Whereas the American courts and legal doctrine support each other to a degree, the Dutch legal doctrine has been at odds with the courts for well over a decade now. Its role is therefore more as a criticism/polemic with the case law, rather than supplementary.

It is here that we see that the position of the legal doctrine is somewhat defined by the attitude taken by the courts. Since the courts seem to have particular inclinations for some parts of the refugee definitions, the doctrine will naturally follow them in that interest. However, the position of doctrine vis-à-vis courts is, in my opinion, defined to a large degree by the courts. Take two examples.

[230] Spijkerboer & Vermeulen 1995, p. 135-142. Compare with Spijkerboer & Vermeulen 2005, p. 35-40.
[231] Spijkerboer & Vermeulen 2005, p. 203-313.

The interest of the American doctrine on the issue of neutrality stemmed from the fact that the courts, namely the Ninth Circuit, have defined this doctrine and were developing it over the 1980s and early 1990s. The legal scholars were supportive of it and tried to keep a healthy dialogue with the court and with the opposite position set out by the INS. The most critical piece about both the doctrine of neutrality and imputed political opinion came only after the *Elias-Zacarias* decision, and was written by a member of the INS who sat on the BIA which had rejected these two theories all along.

In the Netherlands in the same period, the legal scholars were engaged with the courts in a heated polemic about the issue of singling out. The Issaq jurisprudence of the Afdeling, and the scholarly review of it, were far beyond the courtesy normally encountered in academic debate. In one of the notes under a decision, the commentator went so far as to remark that the court's case law is governed by the law on gambling rather than on any consistency and clear line. Another commentator called another decision of the Afdeling "ugly" and then proceeded to critique it top to bottom. Following 1995, the tone of the legal scholars calmed down, possibly due to the fact that the district courts and the REK now heard asylum appeals from the Secretary of State. As it was said earlier, their case law was visibly different from that of the Afdeling before 1995.

The interplay between the asylum law doctrine and courts is even more visible in the Dutch law after 2001. Once the Afdeling had moved away from the substantive issues to that of administrative judicial review and constitutional law, the doctrine had little choice but to follow. There were some doctrinal law articles in the years after 2001, but they could only happen in those areas where the Afdeling had chosen to say something substantive about the convention.[232] Since 2001, most of the doctrine has shifted to the same grounds the Afdeling was now walking – indeed, the Dutch doctrine remained as critical as before, but the discussion has now shifted to new grounds. The difference is visible if one compares the two books written by Vermeulen and Spijkerboer in 1995 and 2005. The first one was a exhaustive description of the Raad van State's case law as of 1995 with all its contradictions and inconsistencies. The stress on the substantive part is quite evident, as well as the careful and sometimes impassioned polemic with the court on singling out. The book that came a decade later is very different. It is no less exhaustive, but the accent shift is dramatic in the assessment. Although the book does show the substantive elements of the refugee definition, the polemic has moved to the sections on the scope of the judicial review.

[232] S. Jansen, *Op vlucht voor homohaat*, NAV 2006, p. 124-146 (talking about homosexual asylum seeker case-law); idem, *Conflicten achter de voordeur*, NAV 2004, p. 603-617 (talking about cases of domestic violence as grounds for asylum); F. Lankers, *Diepgeortelde band…*, p. 91-97 (over the draft evasion question).

[233] The Book of Daniel, Chapter 4 v. 25.

Conclusions

In the Book of Daniel there is the story of an extravagant feast in Babylon being suddenly rudely interrupted by an mysterious hand that wrote on the wall the famous words: "*mene, mene, tekel, upharsin*".[233]

With refugee case-law the situation is somehow similar. Any comparative look that spans a period of over 20 years will be subject to different interpretations, some of which will be more plausible than others. What refugee case-law shares with the words from the Daniel narrative is that its meaning is, politely speaking, difficult to discern at times.

First of all, let us remember that the cases that end up in the courts are the ones that were *rejected* by the administration in the first place. They came, they presented their claim, but were refused by the authorities. This important fact cannot be overlooked, as we talk of case-law on refugee status. While other groups were admitted straight away, these individuals had to reargue their cases. Before the 1980 Refugee Act in the United States, as Loescher and Scanlan presented in their book, to the U.S. administration certain groups were prima facie refugees and thus received preferential treatment from the immigration authorities. With the passage of the Refugee Act things were supposed to change. Yet, it should be remembered that still the same principle applied. Some cases made it the first time, while the others had to go through the process of adjudicating by the IJ, BIA, circuit courts etc. The absence of certain groups in the higher instances can be as much demonstrative of the concept of the refugee, as the presence of others. Thus, it is instructive, that for the whole period of 1980s, there were few cases from Eastern Europe before American courts – most were accepted in the first stage and did not need to appeal to the courts for legal recourse. At the same time, most cases before the bench, were filed by applicants from Central America and other continents. The same was true in the 1990s with the absence of any Yugoslavian cases in the 1990s in the Netherlands. Most of these applicants were accepted either as refugees or under the humanitarian status category.

Let us look closely at the refugee claims that were so dominant in the American case-law in the past quarter of the century. Which ones were popular and dealt with readily by the courts? Which ones failed in the beginning, or were moved to other categories where the courts were most comfortable with them?

Looking at the American asylum case-law it seems that there was a particular group of rights that were clearly protected by the courts: the freedom of speech, and the freedom to refuse to participate in acts contrary to conscience, or to put it more broadly, the freedom *from* government interference. The freedoms connected with reproductive choice, though officially endorsed by the Congress (within certain numerical limits), were advanced with less conviction, as if to avoid politicizing them. However, since 1990, there was a steady stream of jurisprudence affirming them more and more strongly. Interestingly enough, for those who would expect the rise of the religious right parallel the rise of religious orientated asylum case-law, this has not been the case. The courts seem to be uneasy with religious cases and if possible, prefer to classify them or merge them with other persecution grounds where they feel more comfortable. The only field where there has been more jurisprudence, were the conversion cases, where the courts insisted that it was improper for governments to inquire into the sincerity of the

convictions of the asylum claimants.

Dutch case-law offers a slightly different picture. In 1980 the Council of State stated that, in principle, homosexuals constituted a particular social group in the meaning of the Refugee Convention. Though in that particular case, it dismissed the appeal by the applicant. It was indeed revolutionary in 1980 to say boldly that homosexuals might fall under the protection of the Geneva Convention. What is interesting is that the Court did not divulge any more on the subject but just mentioned it *en passant* in one sentence and then proceeded to dismiss that particular claim. The value of such a statement was considerably decreased by the fact that until the mid 1990s, few homosexual cases succeeded before the Court, yet nonetheless, in 1980 a signal was sent: homosexuals qualify for refugee status in The Netherlands. The second group that found protection was that of Eritrean refugees fleeing from the war in Ethiopia. So, Dutch courts were ready to accept group persecution of an ethic minority in a country. Finally, in the 1990s the Dutch Courts reversed their previous case-law and allowed conscientious objectors claims to succeed.

Perhaps, when speaking about Dutch asylum case-law, it would be more instructive to say which groups did not succeed in the courts, as, it has been shown, the theories developed by the jurisprudence tended to be more exclusive, than inclusive. Thus, from the end of the 1970s till the 1980s groups who were not awarded refugee status were Christians from Turkey, fleeing violence and serious economic deprivation. The courts, without addressing the issue of persecution grounds in greater detail, found that economic disadvantage did not constitute persecution. In the mid 1980s, group persecution was not allowed and most of the Tamil cases from that period were dismissed based on the principle of singling out. The applicants had not been singled out for especial discriminatory treatment, thus they were not persecuted. The singling out criteria had been maintained more or less consistently later in the Somali cases, where again the court ruled that their fate was not exceptional enough to constitute persecution. The 1990s also saw the development of the theory of agents of persecution which successfully excluded Tamils, Somalis, and Algerians. At the same time, the court again reversed its line of decisions, now allowing in some instance group persecution (Nuba from Sudan) as well as that, in some circumstances, economic deprivation may constitute persecution (Assyrians from Turkey).

When reading both case-law and literature on the question of asylum in the United States and the Netherlands, two things strike the reader. First of all, legal theory behind asylum in the United States is constructed affirmatively, while in the Netherlands negatively, and this has bearing on the second feature: its domestication. Let us have a closer look.

When the American courts were constructing the theory of (for example) neutrality as a political opinion, they did so in clear and understandable language. The issue of well-founded fear was analyzed, as was that of political opinion and whether neutrality constituted such,. Also the question of the nexus between the political opinion and persecution was looked at. It is interesting to note that some court decisions were clearly divided into sections and subsections with titles where a particular issue is discussed. The language, and arguments, as well as premises how to qualify or not, were clearly stated, so that they could have been invoked in future case-law. Quite often, courts referred to other similar decisions by sister circuits, before making their own pronouncement in the cases before them. Thus, the neutrality theory was

slowly being developed, transformed and changed into the imputed political opinion theory, as well as that of hazardous neutrality. The same applied for the notion of the nexus requirement or a particular social group. When case-law conflicted, even within one circuit, this was stated, and at times the court would intervene to clarify things by sitting *en banc*. The courts had no difficulty in articulating new doctrine, and they quite often employed the norms of domestic, constitutional, criminal or civil law. Thus by inserting these provisions to the matter of before them in asylum cases, the American courts seemed to feel more at ease with refugee law.

Legal theory was shaped, and very often invented, by the courts themselves and legal doctrine in most cases was secondary to the courts. That is, it had more of a descriptive role. Only in some circumstances, did the legal authors (Anker, Blum, von Sternberg etc.) warn the courts of possible problems with their line of interpretation, and possible inconsistencies with previous case-law.

Dutch asylum case-law was somewhat the opposite. First of all, it avoided, as much as possible, stating a clear legal doctrine. It preferred to state who *does not* qualify, rather than who does. It is interesting that in the draft evasion cases, it took several years before the courts articulated detailed and clear premises on whether draft qualified or not for refugee status. Most of the cases were styled in the manner "in the case before us, the applicant has not sufficiently proven that he has a well founded fear of being persecuted." The Dutch Council of State was much happier to say: "this interpretation is too extreme" or "harsh" than to state *what* the proper interpretation would be. Thus, the case of draft evaders returned to it all through the 1970s and a clearer interpretation of admissibility of draft evaders was not made until the 1980 decision in the case of a Columbian, but its precedent value in terms of future cases would be limited. Even after that, the courts would rather grant humanitarian status, and thereby avoid ruling on the merits, than to define the refugee status.

So, do the Dutch courts offer legal doctrine from time to time? Yes and no. The example of the homosexuals and agents of persecution are pertinent. The Council of State ruled in 1981 that gays qualify for refugee status "as a reasonable interpretation" but without giving any more indication on why exactly they thought so. For the next 15 years after that decision, nearly all asylum cases based on sexual orientation that came before it were denied, based on "insufficient evidence in that particular case". It wasn't, in fact, until the late 1990s and the times of district courts, when the Dutch courts did grant asylum to a group of homosexuals from Iran and Armenia. There is also an example when the Dutch courts refused to issue a clear pronouncement: that of the agents of persecution. At first the courts found that the state must be "willing and knowing" in the persecution (in another case, they even used the word "guilty"). The Dutch legal commentators were very unimpressed with that decision, and following a critical note in one of the legal periodicals, the courts from then on avoided elaborating on the issue, and simply applied it at will. This avoidance led to a chaotic line of decisions in the late 1990s especially in the Somali case, and in one of the notes Spijkerboer compared the coherence of the decisions to lotto. The issue was finally resolved by a long and detailed decision by the district courts, which left no place for ambiguity.

It is interesting to observe that the Dutch courts seem to view the Aliens law as, indeed, an alien law in terms of interpretation, and hardly insert any other legal theory into it. I have

found no case where the Dutch courts would cite domestic constitutional, criminal or civil law to elucidate on the asylum case before them.

It is because of this that legal theory in The Netherlands has a different role to play that in the United States. Here it is based on what I would call a "negative" case-law. It tries to reconstruct a theory of the asylum seeker who does qualify, based on decisions, where the courts say who does not qualify. This is not only frustrating at times but also difficult, and the Dutch authors are much bolder at times in criticizing the Council of State and the courts in their manner of dealing with the case-law before them.

In one of the cases, the Dutch Council of State remarked that "asylum is not a poor man's alternative for immigration." Perhaps not, but the same court was very cautious about saying what is was. The reluctance to state exacty that, the caution in which it formulates legal theory and finally, the preference for a selection through the negative is a feature of the case-law. Apart from some brief decisions that state the principles ("gays are in", or "draft evaders are in, in extreme circumstances"), there is a visible avoidance of more explicit legal theory. I would venture the thought that the Dutch courts prefer to leave the issue open. By phrasing their decisions in such terms, the courts leave the administration a large margin of appreciation in dealing with refugee cases. By doing that Dutch courts reserve for themselves more flexibility to change their case-law if the deem it necessary. Thus, the prophet Daniel is given great leeway in interpreting the sign on the wall: it can be good news, it can be bad news, and sometimes it's neither.

The American refugee law is, on the other hand, much more "parochial". Immigration has always been a feature of the United States history, and so were the refugees. The question is are they seeking the same values that the Americans are? To discern that, the courts heavily and willingly borrow from other fields of American law. Why not? Asylum law is a part of the American law system. While the deference towards the administration is shown, it has its limits – the case-law of the courts and constitutional principles: for example the freedom from governmental inquiry into the motivation behind a political opinion or the conversion to a particular religion.

The American dream, ethos of freedom to hold an opinion, is clearly visible in the *Bolanos-Hernandez* case, where the court stated that one has the right to hold an opinion, not a particular opinion (pro or con) but any opinion desired. In *Re Kasinga*, the BIA said that judging other cultures was not an issue: if the individual thinks of something that is being done to her is abhorrent, she should be free from it. Kasinga, if living in the United States would not be forced to undergo FGM, and thus she should not be forced to undergo it wherever she comes from. The amendments that gave special consideration to evangelical Christians and people fleeing from birth control were another example of American legal thought influencing the refugee convention. Everybody has the right to hold a religion, to have as many children as they please and should be free *from* governmental interference in those matters. The quote from the Declaration of Independence: "*We hold these truths to be self-evident…*" is true: the American justice system (as it understands it) does consider them to evident and thus effecting all – "we hold these truths to be universal". Even if they are not applied universally, they will be applied here in this forum. It is not the United States forcing their values on others. It is, in fact, quite the opposite. If we are not allowed to judge the refugee cases through the

prism of our own values, we will be importing foreign notions to our legal system and thus compromising it in its coherency.

If I were to distil the concept of the refugee as it emerges from American case-law I would risk to say that it seems to be understood as: a valid case made by an individual in which he seeks to call his persecutor an oppressor and a tyrant. And if he makes his case, he should be allowed to stay, in a land that once rebelled against its own oppressor. By making his case persuasively he becomes one of us. The prophecy is a piece of cake and Daniel knows it.

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Samenvatting

In het Boek Daniël staat een verhaal over een extravagant feest in Babylonië. Het werd plots en ruw wordt verstoord door een mysterieuze hand. Op de muur schrijft deze de beroemde woorden '*mene, mene, tekel, upharsin*'.

Op zijn eigen manier is de situatie bij vluchtelingenrechtelijke jurisprudentie vergelijkbaar met deze gebeurtenis. Elke vergelijkende studie die twintig jaar omspant kent zijn eigen beoordeling en interpretatie; de ene meer plausibel dan de ander. Wat vluchtelingenrechtelijke jurisprudentie deelt met de woorden uit het boek Daniël is dat de betekenis te alle tijde moeilijk te achterhalen is, en dat is een understatement.

Allereerst, besef dat aan de zaken die door een rechtbank behandeld werden een verzoek ten grondslag lag dat in eerste instantie is *geweigerd* door de overheid. De vluchtelingen kwamen, ze presenteerden hun verzoek en dit werd afgewezen door de autoriteiten. Aan dit feit kan niet voorbij gegaan worden als het gaat over jurisprudentie omtrent de status van vluchtelingen. Waar andere groepen direct werden toegelaten als vluchteling, moesten deze mensen opnieuw hun zaak bepleiten. Voordat de 1980 Refugee Act in de Verenigde Staten in werking trad, werden, zoals aangetoond door Loescher en Scanlan, door de Amerikaanse overheid bepaalde groepen beschouwd als *prima facie* vluchtelingen. Dit had een voorkeursbehandeling van hen bij de immigratiediensten tot gevolg. Met het aannemen van de Refugee Act werd verondersteld dat dit zou veranderen. Het is belangrijk om voor ogen te houden dat ook daarna nog steeds hetzelfde principe van toepassing is: sommige zaken haalden het in één keer, voor andere moest in beroep worden gegaan bij de IJ, BIA, and circuit courts. De waarde van de aanwezigheid van bepaalde groepen vluchtelingen in de rechtspraak is van even groot belang voor duiding van het concept "vluchteling" als de afwezigheid van andere groepen in deze zaken. Zo is het leerzaam om te bemerken dat er in jaren '80 slechts enkele zaken uit Oost-Europa voor de Amerikaanse rechtbanken kwamen – de meeste verzoeken werden in eerste instantie reeds geaccepteerd waarmee de noodzaak om door te procederen verdween. Tevens is opmerkelijk dat de meeste zaken die aan de rechter werden voorgelegd, belanghebbenden kende uit midden Amerika. Een vergelijkbaar verschijnsel was in Nederland in de jaren negentig waarneembaar: er zijn geen zaken over personen uit het voormalig Joegoslavië. De meeste van deze aanvragers kregen ofwel als vluchteling ofwel om humanitaire redenen een verblijfsvergunning.

Laten we de asielverzoeken onder de loep nemen die prominent aanwezig waren in de Amerikaanse jurisprudentie van de afgelopen vijfentwintig jaar. Welke verzoeken kwamen het meest voor en werden door de rechtbanken afgehandeld? Welke verzoeken faalden in het begin of werden vanwege het aanvoeren van ongewenst gronden geherinterpreteerd?

Amerikaanse jurisprudentie geeft het beeld dat er een specifieke groep van rechten door de rechtbanken werd beschermd: de vrijheid van meningsuiting en de vrijheid om te weigeren mee te werken aan handelingen die strijdig zijn met het geweten. Om het meer algemeen te stellen: de vrijheid van overheidsingrijpen. De vrijheid voortplantingskeuzes te maken neemt – wellicht om de verzoeken niet te politiseren – een minder belangrijke plaats in. Dit ondanks dat deze vrijheiden door het Amerikaans Congres tot op zekere hoogte zijn bekrachtigd. Sinds 1990 is er evenwel een gestage stroom jurisprudentie die het bestaan van deze vrijheid in toenemende mate bevestigd. Interessant genoeg heeft de ontwikkeling van de Religious Right Movement niet geleid tot een met deze ontwikkeling gelijk lopende stijging

van het aantal religieus georiënteerde asielzaken. De rechtbanken bleken zich ongemakkelijk te voelen bij argumenten gestoeld op religieuze gronden en verkozen, waar mogelijk, de gronden te herinterpreteren of samen te voegen met andere vervolgingsgronden. Dit lijkt geen gelding te hebben ten aanzien van zaken die het veranderen van levensovertuiging betroffen. De rechtbanken bleven daar vasthouden aan het uitgangspunt dat het onbehoorlijk was om de geloofwaardigheid van de overtuigingen van de asielzoekers te onderzoeken.

Nederlandse jurisprudentie geeft een beeld dat van het Amerikaanse verschild. In 1980 bepaalde de Raad van State dat in beginsel homoseksuelen een bepaalde sociale groep vormden binnen het kader van het Vluchtelingenverdrag. In de betreffende zaak werd echter wel het beroep van verzoeker afgewezen. Het was in 1980 revolutionair om te stellen dat homoseksuelen wellicht onder de bescherming van de overeenkomst van Genève zouden kunnen vallen. Interessant is dat de Raad van State verder hieromtrent niets nader overweegt; het blijft bij een opmerking *en passent* om vervolgens het verzoek af te wijzen. De waarde van de uitlating nam af omdat tot het midden van de jaren negentig slechts enkele zaken betreffende homoseksuelen door de Raad behandeld werden. Desalniettemin was er in 1980 een signaal afgegeven: homoseksuelen komen in aanmerking voor de vluchtelingenstatus in Nederland. Een tweede groep die bescherming vond in Nederland, betrof vluchtelingen uit Eritrea gevlucht voor de oorlog in Ethiopië. Nederlandse rechters waren, zo blijkt, bereid om groepsvervolging van een ethische minderheid in een land te accepteren als grond voor bescherming binnen het vluchtelingen verdrag. Tot slot, in de jaren negentig veranderde de Nederlandse rechters in haar jurisprudentie van koers en werden verzoeken op basis van gewetensbezwaren toegestaan.

Wellicht zou het, als het gaat om Nederlandse vluchtelingenrechtelijke jurisprudentie, meer verhelderend zijn om te kijken naar de groepen die wisten te slagen bij in hun verzoek. De theorieën ontwikkeld in de jurisprudentie, het is hiervoor getoond, neigen er naar categorieën van personen eerder niet dan wel te betreffen. Zo bestonden, vanaf het eind van de jaren zeventig tot het begin van de jaren tachtig, groepen die geen vluchtelingenstatus kregen voornamelijk uit Christenen uit Turkije gevlucht voor geweld en ernstige economische ontberingen. De rechters oordeelden, zonder al te veel in te gaan op de vervolgingsgrond in kwestie, dat economische benadeling geen vervolging is. In het midden van de jaren tachtig was collectieve behandeling niet toegestaan en werden de meeste zaken van Tamils uit die periode afgedaan op basis van het 'singling-out' principe. De verzoekers hadden als individu geen discriminerende behandeling ondergaan, dus werden zij niet aangemerkt als zijnde vervolgd. Het 'singling-out' principe is min of meer ongewijzigd, in een latere periode, toegepast op zaken van Somaliërs. Ook hier werd geoordeeld dat het lot van ieder van hen afzonderlijk niet uitzonderlijk genoeg was om te oordelen dat ze vervolgd werden. In de jaren negentig ontstond ook een theorie omtrent de daders van vervolging; Tamils, Somaliërs en Algerijnen vielen hier niet onder. Tezelfdertijd veranderde opnieuw de lijn van oordelen van de Raad van State door in sommige gevallen groepsvervolging wel toe te staan als grond voor bescherming binnen het vluchtelingen verdrag.(Nuba uit Sudan) en in sommige gevallen economische misère voldoende te laten zijn om vervolging aan te nemen (Assyriërs uit Turkije).

Wanneer men de jurisprudentie en de literatuur omtrent asiel in zowel de Verenigde Staten als Nederland leest, dan vallen er twee dingen op. Ten eerste is dit dat de rechtstheorie met betrekking tot asiel in the Verenigde Staten positief is geformuleerd, in Nederland luidt deze negatief. Dit brengt ons op het tweede punt: de domesticatie of acclimatisering.

Toen de Amerikaanse rechtbanken de theorie voor (bijvoorbeeld) neutraliteit als een politieke standpunt creëerden, deden zij dit in duidelijke en begrijpelijke taal. De kwestie van "gegronde vrees" en "politieke opvatting" werd geanalyseerd en er is beoordeeld in hoeverre neutraliteit daaraan bijdroeg. Ook is de samenhang tussen politieke opvattingen en vervolging beoordeeld. Het is interessant om op te merken dat sommige gerechtelijke beslissingen ingedeeld zijn in secties en subsecties met specifieke titels voor de verschillende besproken onderwerpen. De taal is helder en argumenten evenals kwalificatiecriteria werden duidelijk benoemd zodat deze in toekomstige zaken konden worden ingeroepen. Met enige regelmaat is door gerechten verwezen naar vergelijkbare oordelen van gerechten in andere/aanverwante "circuits", alvorens uitspraak te doen. Er ontwikkelde zich langzaam een neutraliteitstheorie die vervolgens werd omgevormd en veranderd in een "imputed political opinion theory" en in het concept "hazardous neutrality". Dezelfde ontwikkeling geld voor "the nexus requirement" en het concept "a particular social group". Indien jurisprudentie onderling tegenstrijdig was, zelfs binnen een "circuit", dan werd dit vermeld. Soms intervenieerde een gerecht om opheldering over het een en ander te geven, dit werd gedaan bij een zitting *en banc* (met alle raadsheren aanwezig). Een gerecht had er geen probleem mee een nieuwe doctrine uit te spreken, waarbij met regelmaat gebruik werd gemaakt van normen uit het constitutioneel-, straf- of privaatrecht. Door gebruik te maken van deze normen voelde een Amerikaanse rechters zich op zijn gemak om te oordelen over vluchtelingenrechtelijke vragen.

Juridische theorie werd gevormd en ontworpen door de gerechten zelf; juridische doctrine bleek van secundair belang. Doctrine speelde een meer beschrijvende rol. Slechts in enkele gevallen werden de gerechten door juristen gewaarschuwd (Anker, Blum, von Sternberg, etc.) over mogelijke problemen van de door hen gevolgde interpretatielijn alsmede mogelijke inconsequenties met eerdere jurisprudentie.

In de Nederlandse jurisprudentie ging het er anders aan toe. Allereerst werd, zo lijk het, zo veel als mogelijk voorkomen een heldere juridische doctrine te construeren. Er werd de voorkeur aan gegeven om te duiden wie *niet* – in plaats van wie wel – in aanmerking komt voor een vluchtelingenstatus. Het is interessant om te zien dat in de gevallen waar het dienstweigeraars betrof, het enkele jaren duurde voordat de rechtbanken duidelijke en heldere voorwaarden gaf om te beoordelen of dienstweigering kon leiden tot een vluchtelingenstatus. In veel van de gevallen werd de beoordeling als volgt opgeschreven: "De Appellant heeft niet aannemelijk gemaakt dat hij gegronde reden heeft te vrezen voor vervolging." Deze wijze van oordelen ging de Nederlandse Raad van State beter af dan te duiden wat *wel* gegronden redenen zouden kunnen zijn. Dit had tot gevolg dat de vraag omtrent dienstweigeraars in de jaren ’70 bleef terugkeren en dat het tot 1980 duurde voordat er een meer definitief oordeel kwam. De precedentwerking was evenwel beperkt. Nadien verleende de rechtbanken liever een verblijfsvergunning op clemente gronden, waarmee een beoordeling van de feiten meestal achterwege bleef, dan dat de vluchtelingenstatus werd geduid.

Dus, de Nederlandse rechtbanken droegen zo af en toe wel bij aan de juridische doctrine? Ja en nee. In dit verband zijn de zaken betreffende homoseksuelen en daders van vervolging relevant. De Raad van State oordeelde in 1981 dat het oordeel dat homoseksuelen kwalificeerden voor de status van vluchteling "een redelijke interpretatie" is, evenwel zonder precies aan te geven waarom. In de vijftien jaar die op dit oordeel volgde werden bijna alle asielverzoeken gebaseerd op seksuele oriëntatie afgewezen vanwege "onvoldoende bewijs in de specifieke zaak". Het was pas in de late jaren '90 – reeds in de tijd van Arrondissementsrechtbanken – dat Nederlandse rechters een asielverzoek van een groep homo's toewees. Het betrof Iraniërs en Armeniërs. Een voorbeeld waarin de Nederlandse rechter weigerde om een duidelijke verklaring te geven, betrof daders van vervolging. In eerste instantie vonden rechtbanken dat een staat "willing and knowing" in de vervolging moest zijn (in een ander geval werd zelfs gesproken over "schuldig zijn aan"). Nederlandse commentaren waren ontstemt over dit oordeel. En, met het oog op een kritische noot hierover in een van de juridische tijdschriften, vermeden Arrondissementsrechtbanken uit te weiden over het onderwerp. De norm werd simpelweg naar eigen goeddunken toegepast. Deze ontwijkingstrategie leidde tot een chaotische lijn in de beslissing in de late jaren '90. In een van zijn noten vergeleek Spijkerboer de coherentie van de uitspraken met een loterij. Het onderwerp werd uiteindelijk afgedaan met een lange en gedetailleerde beslissing van een van de Arrondissementsrechtbanken. Er werd daarin geen ruimte voor ambiguïteit gelaten.

Het is interessant om te bemerken dat Nederlandse rechters het vreemdelingenrecht lijken te zien als vreemd of ander recht. Er wordt bij de interpretatie haast geen gebruik gemaakt van elders ontwikkelde juridische theorie. Ik heb geen enkele uitspraak kunnen vinden waarin een Nederlands gerecht verwees naar, of citeerde uit constitutioneel-, straf- of privaatrecht om zo mogelijk verhelderend licht te werpen op de te beoordelen asielzaak.

Het is hierom dat juridische theorie in Nederland een andere rol speelt dan in de Verenigde staten. In Nederland zijn oordelen gebaseerd op wat ik zou willen noemen "negatieve" jurisprudentie. Er wordt geprobeerd een theorie te reconstrueren van degene die als asielzoeker kwalificeert, gebaseerd op oordelen waarin de Raad van State bepalen wie juist niet tot deze groep behoort. Dit is frustrerend en maakt de uitspraken lastig te ontcijferen. Vergeleken andere Nederlandse commentatoren ban ik dan overigens nog mild in mijn kritiek over de manier van oordelen van de Raad van Staten.

In een van de zaken merkte de Raad van State het volgende op: "*De asielprocedure is niet het arme-mans alternatief voor emigratie*." Wellicht niet, maar het is wel het zelfde gerecht dat zeer terughoudend was bij het formuleren wat het dan wel is. De aarzeling om dit te bepalen, de voorzichtigheid in de manier waarop juridische theorie en doctrine gebruikt werd en de voorkeur voor een negatieve formulering is een eigenschap van de jurisprudentie. Afgezien van sporadische en korte overwegingen waarin principes genoemd worden (" homoseksuelen vallen erbinnen" of "dienstweigeraars vallen eronder, maar slechts in extreme omstandigheden"), wordt een duidelijk meer expliciete juridische theorie ontweken. Ik zou het aandurven te stellen dat de Nederlandse rechtbanken de vraag van wie wel en wie niet een vluchteling is, liever open laten. Door op deze wijze beslissingen te verwoorden, laat de Afdeling aan de staat een beoordelingsruimte bij de omgang met asielverzoeken. Door dit te doen hebben de Nederlandse rechtbanken zichzelf de mogelijkheid van flexibiliteit gegund, als het nodig is kan anders beslist worden. De profeet Daniel wordt veel speelruimte

gegund in het interpreteren van het teken op de muur: het zou goed nieuws kunnen zijn, maar ook slecht en soms geen van twee.

Het Amerikaanse vluchtelingenrecht is vergeleken het Nederlandse meer "parochiaal". Immigratie, evenals vluchtelingen, zijn altijd onderdeel geweest van de Amerikaanse geschiedenis. De vraag is of zij op zoek zijn naar de zelfde waarde als Amerikanen. Om dat te bepalen leunen de rechtbanken zwaar op andere rechtsgebieden en wordt met graagte leentjebuur gespeeld. En waarom niet? Vluchtelingenrecht is deel van het Amerikaans rechtssysteem. Terwijl de taken van de overheid eerbiedigt worden, worden er beperking aan gesteld door de jurisprudentie en constitutionele principes. Ik noem bijvoorbeeld "the freedom from governmental inquiry into the motivation behind a political opnion " of de bekering tot een bepaalde religie.

Illustratief voor de Amerikaanse droom en de mogelijkheid tot vrije meningsuiting is de *Bolanos Hernandez* zaak. Het rechtbank bepaalde dat men het recht heeft zijn eigen opvatting te hebben, niet een specifieke opvatting (voor of tegen) maar elke gewenste opvatting. In *Re Kasinga*, het BIA stelde dat het beoordelen van andere culturen niet ter zake doend was: indien een individu van mening is dat haar iets aangedaan wordt dat weerzinwekkend is, ze er vrij van zou moeten zijn. Kasinga zou dus, indien ze leefde in de Verenigde Staten, niet gedwongen worden om een FGM te ondergaan ongeacht waar ze vandaan komt. Het amendement dat speciale aandacht gaf aan conservatieve Christenen en mensen vluchtende van het "één kind beleid" in China, is een ander voorbeeld van een Amerikaans juridische theorie die inwerkt op het Vluchtelingen Verdrag. Een ieder heeft het recht een geloof of zoveel kinderen hebben als men wil, een ieder zou op deze vlakken vrij moeten zijn van overheidsbemoeienis. Het citaat uit de Declaration of Indepence "*We Hold These Truths to be Self-Evident*", is waar: het Amerikaans rechtssysteem beschouwd deze waarheden als zichtbaar en dus een ieder betreffend. Zelfs als ze niet universeel toegepast worden, dan worden ze toegepast in dit forum/deze rechtszaal. Het zijn niet de Verenigde Staten die waarden aan een ander opdringen. Neen, het is eigenlijk precies omgekeerd. Als ons niet toegestaan wordt vluchtelingen zaken te boordelen door het prisma van onze waarden, dan importeren we concepten uit den vreemde in ons juridisch systeem en doen we daarmee af aan de coherentie.

Als ik het begrip van vluchteling zou moeten destilleren uit de Amerikaanse jurisprudentie dan zou ik het aandurven te stellen dat het begrepen kan worden als: een geldige oproep gedaan door een individu waarin deze verzoekt zijn vervolger te benoemen als een onderdrukker of een tiran. Als de vluchteling daarin slaagt, dan mag hij blijven in een land dat ooit gestreden heeft tegen zijn eigen onderdrukker. Door zijn zaak aannemelijk te maken wordt hij een van ons. De voorspelling aan Daniel is eenvoudig, en hij weet het.