State and non-state agents of persecution and the failure of state protection

Magdalena Aguilar Pulido, ASSOCIATE PROTECTION OFFICER

UNHCR
The UN Refugee Agency

WHAT IS STATE PROTECTION?

Protection within the territory is provided through measures and mechanisms designed to establish the rights of the person and at setting up mechanisms to ensure that these can effectively be claimed and exercised, prevent the violation of the person's rights, and provide remedies where such violations occur.

ACTORS OF PROTECTION

Article 7: Actors of protection

- The ***State***

- ***Parties or organizations*** , including international organizations, controlling the State or a substantial part of the territory of the State

The 2004 EU Qualification Directive

AGENTS OF PERSECUTION

Article 6: Sources of persecution or serious harm

- The **State**
- **Parties or organizations** controlling the State
- **Non-State actors** where the State or parties or organizations, including international organizations, controlling the State are unable or unwilling to provide protection

The 2004 EU Qualification Directive

IS THE AGENT OF PERSECUTION A NON STATE ACTOR?

Where the claimant fears persecution by a non-State agent of persecution, the main inquiries should include:

- an assessment of the motivation of the persecutor
- the ability of the persecutor to pursue the claimant in the proposed area, and
- the protection available to the claimant in that area from State authorities.

STATE'S INABILITY OR UNWILLINGNESS TO PROTECT THE CLAIMANT

Evidence of the State's inability or unwillingness to protect the claimant in the original persecution area will be relevant. It can be presumed that if the State is unable or unwilling to protect the individual in one part of the country, it may also not be able or willing to extend protection in other areas.

This may apply in particular to cases of gender-related persecution.

"Internal Flight or Relocation Alternative" UNHCR Guidelines

LACK OF STATE PROTECTION

If the State, as a matter of policy or practice, does not provide protection from serious abuse, then the discrimination in not extending protection, resulting in serious harm could amount to persecution.

It is a question of fact as to whether there remains a well founded fear despite any efforts by the state to protect.

Even if the crime is not motivated by a Convention ground, **the lack of state protection may be motivated by a Convention ground.**

The state may also be unwilling to protect because of political motivations or religious motivations (**endangering re-election, protections not seen as "sellable" to the population.** For example: a specific honor crime may be motivated for financial reasons alone. The state, however may be unwilling to protect the woman because it believes the woman violated a religious code.

Even though a State may have prohibited a persecutory practice (e.g. FGM/C), the State may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively.

STATE PROTECTION ANALYSIS

1) Is there a link to the Convention?
Note the link needs to be a relevant factor, not necessarily the dominant factor.

2) Reason for Persecution = **Convention ground & No State protection** e.g. due to lack of resources = Convention Refugee

Or

2) Reason for persecution = NOT Convention Ground. Then proceed to ask:

3) Is there State Protection? No, then

4) Why no state protection? If lack of State protection motivated (in part) by a Convention ground, then = Convention refugee.

GENDER AND STATE PROTECTION

- Not all abused women will be able to benefit from the Convention as they need to demonstrate that they have a well founded fear. **Many countries will have enough protections in place.**

- If the state has made effective efforts to reduce the risk to below the well founded fear test, then she will not be in need of international protection.

One can look at:

- Are there laws in place?
- Are they enforced?
- Are there legal processes & legislation available to the individual – such as no-contact orders?
- Are there safe houses/shelters? Are there enough and would they be accessible?
- Are there organizations to help protect?
- Is the country a signatory to relevant international instruments—e.g. CEDAW.

USE OF COI

Where the risk of persecution emanates from non-state actors, asylum seekers will be required to show that the State is unwilling or unable to provide protection.

Government has shared responsibility through the proper research of COI.

Thank you!