Part 1 Refugees, 3 Determination of Refugee Status: Analysis and Application

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The legal consequences[1] that flow from the formal definition of refugee status are necessarily predicated upon determination by some or other authority that the individual or group in question satisfies the relevant legal criteria.[2] In principle, a person becomes a refugee at the moment when he or she satisfies the definition, so that determination of status is declaratory, rather than constitutive.[3] However, while the question whether an individual is a refugee may be a matter of fact, whether or not he or she is a refugee within the Convention, and benefits from refugee status, is a matter of law. Problems arise where States decline to determine refugee status, or where States and UNHCR reach different determinations.[4]

(p. 55) 1. Respective competence of UNHCR and of States parties to the Convention and Protocol

The UNHCR Statute and the 1951 Convention contain very similar definitions of the term ‘refugee’. It is for UNHCR to determine status under the Statute and any relevant General Assembly resolutions, and for States parties to the Convention and the Protocol to determine status under those instruments.[5] Given the differences in definition, an individual may be recognized as both a mandate,[6] and a Convention[7] refugee; or as a mandate refugee but not as a Convention refugee.[8] The latter can arise, for example, where the individual is in a non-Contracting State or a State which still adheres to the temporal or geographical limitations permitted under the Convention.[9] Divergence between mandate and Convention status can also result from differences of opinion between States and UNHCR, although a number of factors ought in principle to reduce that possibility. UNHCR, for example, has the statutory function of supervising the application of international conventions for the protection of refugees,[10] and States parties to the Convention and Protocol formally undertake to facilitate this duty.[11] Moreover, many States accept direct or indirect participation by UNHCR in procedures for the determination of refugee status, so that the potential for harmonization of decisions is increased.[12] The problem of divergent positions is more likely, however, where States decline to determine refugee status for any reason; or where refugees whose claims are well-founded under a regional regime move elsewhere.

2. Determination of refugee status by UNHCR

The basic elements of the refugee definition are common to States and to UNHCR and are examined more fully in Section 3. UNHCR itself will be concerned to determine status (1) as a condition precedent to providing international protection (for example, intervention with a government to prevent expulsion); or (2) as a prerequisite to providing assistance to a (p. 56) government which requests it in respect of certain groups within its territory. Except in individual cases, formal determination of refugee status may not be necessary. Intervention to secure refuge or protection as a matter of urgency, for example, can be based on prima facie elements in the particular case—the fact of flight across an international frontier, evidence of valid reasons for flight from the country of origin, and the material needs of the group in question. Where assistance is expressly requested by a receiving country, that invitation alone would justify UNHCR’s involvement in the absence of hard evidence that those to be helped were not refugees or displaced persons, or of any coherent, persuasive opposition by the country of origin or other members of the international community.[13]

Formal determination of mandate status, however, is often necessary in individual cases.[14] In States that are not party to the 1951 Convention, or which have not yet instituted procedures for assessing refugee claims, intervention by UNHCR on the basis of a positive determination of refugee status may be required to protect the individual. Occasionally, access to national refugee resettlement programmes may be conditional upon certification by the UNHCR office in the country of first admission that the individuals in question fall within the mandate of the High Commissioner.[15] In each scenario, UNHCR's approach to the determination of status has attracted considerable criticism, particularly in matters of due process and appeal or review,[16] and its preparation and circulation of a detailed handbook on procedural standards did not fully quell concerns; it remains to be seen whether the latest version will do so.[17]

3. Determination of refugee status by States

The 1951 Convention defines refugees and provides for certain standards of treatment to be accorded to refugees. It says nothing about procedures for determining refugee status, and leaves to States the choice of means as to implementation at the national level.[18] Given the nature of the definition, the assessment of claims to refugee status thus involves a complex of subjective and objective factors, while the context of such assessment—interpretation of an international instrument with fundamentally humanitarian objectives—implies certain ground rules.[19]

(p. 57) Clearly, the onus is on the applicant to establish his or her case, but practical considerations and the trauma which can face a person in flight, impose a corresponding duty upon whomever must ascertain and evaluate the relevant facts and the credibility of the applicant.[20] Given 'protection' of refugees as one of the Convention's objectives, a liberal interpretation of the criteria and a strict application of the limited exceptions are called for. Moreover, a decision on the well-foundedness or not of a fear of persecution is essentially an essay in hypothesis, an attempt to prophesy what might happen to the applicant in the future, if returned to his or her country of origin. Particular care needs to be exercised, therefore, in applying the correct standard of proof.

In civil and criminal cases, two 'standards of proof' are commonly advanced: 'proof on a balance of probability' for the former, and 'proof beyond a reasonable doubt' for the latter. In practice, there can be no absolute standard in either case, and it will vary with the subject-matter. In the United Kingdom, for example, in habeas corpus proceedings, the applicant must cast some doubt on the validity of his or her detention. But in matters of fact, it is enough that the applicant presents such evidence as raises the possibility of a favourable inference. It then falls to the respondent, the detaining authority, to rebut that inference.[21] It might be argued that, in a refugee status case, the 'likelihood of persecution' must be established on a balance of probabilities. In civil cases, the typical issue is whether a close, legally relevant relation exists between past causes and past effects.[22] The applicant for refugee status, however, is adducing a future speculative risk as the basis for a claim to protection. Analogous issues were considered as long ago as 1971 in the United Kingdom by the House of Lords in an extradition case, *Fernandez v Government of Singapore*.[23] Here, Lord Diplock noted that the phrase 'balance of probability' was 'inappropriate when applied not to ascertaining what has happened, but to prophesying what, if it happens at all, can only happen in the future'.[24] He went on to note that the relevant provision of the Fugitive Offenders Act:

> [c]alls upon the court to prophesy what will happen to the fugitive in the future if he is returned … The degree of confidence that the events specified will occur which the court should have to justify refusal to return the fugitive … should, as a matter of common sense (p. 58) and common humanity, depend upon the gravity of the consequences contemplated on the one hand of permitting and on the other hand of refusing, the return of the fugitive if the court's expectation should be wrong. The

> general policy of the Act, viz. that persons against whom a prima facie case is established that they have committed a crime … should be returned to stand their trial … , is departed from if the return of a person who will not be detained or restricted for any of the reasons specified in paragraph (c) is refused. But it is departed from only in one case. On the other hand, detention or restriction in his personal liberty, the consequence which the relevant words are intended to avert, is grave indeed to the individual fugitive concerned.[25]

One significant difference between the principle of non-extradition and that of protection of refugees lies in the risk to society if return is refused when, in fact, persecution would not have occurred.[26] On the one hand, a suspected or actual criminal is allowed to remain, while on the other hand, someone who is innocent and against whom no allegations are made is not allowed to remain. The attitude to the asylum seeker should be at least as benevolent as that accorded to the fugitive from justice.[27] Lord Diplock took account of the relative gravity of the consequences of the Court's expectations proving wrong either one way or the other, and concluded that the appellant need not show that it was more likely than not that he or she would be detained or restricted if returned. A lesser degree of likelihood sufficed such as 'a reasonable chance', 'substantial grounds for thinking', or 'a serious possibility'.[28] Considered in isolation, these terms lack precision. In practice, however, they are appropriate, beyond the context of municipal law, for the unique task of assessing a claim to refugee status. While the facts on which the claimant relies may be established on a balance of probability, the decision-maker must then make a reasoned guess as to the future, taking account also of the element of relativity between the degree of persecution feared (whether death, torture, imprisonment, discrimination, or prejudice, for example), and the degree of likelihood of its eventuating.[29]

In 1984, UNHCR submitted an *amicus curiae* brief to the US Supreme Court in the *Stevic* case, arguing against the balance of probability, or clear probability, test as the criterion for the grant of asylum. The Court concluded that the well-founded fear standard, which was incorporated into the Refugee Act 1980 as the criterion for the grant of asylum, did not apply to applications for relief from deportation under section 243(h) of the Immigration and Nationality Act (INA);[30] in such cases, relief was conditional on the applicant showing (p. 59) 'a clear probability' of persecution. However, the Court also emphasized that eligibility for asylum under section 208 of the Act remained an entirely separate issue.[31]

Following this ruling, courts and administrative authorities were divided. Officials insisted that well-founded fear requires applicants to show that it is more likely than not that they will be singled out for persecution, a view also followed by the Board of Immigration Appeals (BIA).[32] In *Acosta*, for example, the applicant appealed against denial both of his application for asylum and for withholding of deportation to El Salvador.[33] His claim was based on active participation in a co-operative organization of taxi drivers, threatened by anti-government forces seeking to disrupt transportation; a number of taxis were burnt and drivers killed, and the applicant testified to having received a beating and various threats. The BIA found the applicant's testimony, which was corroborated by other objective evidence in the record, to be worthy of belief; however, it considered this insufficient to meet the statutory standards of eligibility for asylum and withholding of deportation.

The Board referred to the *Stevic* case, but remarked 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'. The asylum seeker's fear must be *well-founded* in the sense that, 'an individual's fear of persecution must have

its basis in external, or objective, facts that show there is a realistic likelihood he will be persecuted on his return':

> [t]he evidence must demonstrate that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.[34]

Subjective fears alone were not enough; they must 'have a sound basis in personal experience or in other external facts or events'. The various competing standards of proof (likelihood of persecution, clear probability of persecution, persecution as more likely than not), did not reflect meaningful distinctions in practice.

Although the Board's reasoning is well thought-out and retains a persuasive and pervasive logic, yet it finally demands too much of the asylum seeker, as other courts and other jurisdictions have found, and pays too little attention to the essentially future-oriented and hypothetical assessment attaching to the determination that a well-founded fear of persecution exists.[35]

(p. 60) In due course, the US Supreme Court was called on to rule precisely on the difference, if any, between a 'well-founded fear', and a 'clear probability' of persecution. UNHCR's *amicus curiae* brief in *INS v Cardoza-Fonseca*[36] examined the negotiating history of article 1 of the Convention, and demonstrated that the status of refugee had been intended for a person who has been persecuted or who has 'good reason' to fear persecution, and that the subjective fear should be based on an objective situation, which in turn made that fear plausible and reasonable in the circumstances. It concluded:

> No statistical definition is … appropriate to determine the reasonableness of an applicant's fear, given the inherently speculative nature of the exercise. The requisite degree of probability must take into account the intensity of the fear, the nature of the projected harm (death, imprisonment, torture, detention, serious discrimination, etc.), the general history of persecution in the home country, the applicant's personal experience and that of his or her family, and all other surrounding circumstances.[37]

The Supreme Court confirmed its earlier judgment in *Stevic* but rejected the Government's argument that the clear probability standard also controlled applications for asylum. The 'ordinary and obvious meaning' of the words used in the Refugee Act, its legislative history and the provisions of the Convention and Protocol, showed that Congress intended to establish a broad class of refugees eligible for the discretionary grant of asylum, and a narrower class with the statutory right not to be deported.[38] Giving the judgment of the Supreme Court, Justice Stevens emphasized the role of discretion. There is no entitlement to asylum, although its benefits once granted are broader than simple relief under 'withholding of removal';[39] the latter is 'country-specific', and merely prohibits deportation to the country or countries in which life or freedom would be threatened. Moreover, while it constrains discretion in the matter of *non-refoulement*, 'the Protocol does not require the granting of asylum to anyone'.[40] The Court found very different meanings in the statutory language. The 'would be threatened' criterion of the withholding of removal provision (and article 33 of the Convention) contains no subjective element; objective evidence showing persecution as more likely than not is therefore required. By contrast, the reference to fear in section 208(a), 'obviously makes the eligibility standard turn to some extent on the subjective mental state' of the applicant.[41] The 'well-founded' qualifier does not entail a

clear (p. 61) probability standard: ‘One can certainly have a well-founded fear of an event happening when there is a less than 50% chance of the occurrence taking place.’[42]

The Court did not elaborate the standard of proof more precisely, being of the view that a term like ‘well-founded fear’ is ambiguous to a point, and can only be given concrete meaning through a process of case-by-case adjudication; abstract speculation on the differences between the two standards has its limits, and it remains for the responsible authorities to develop a standard whose ‘final contours are shaped by application to the facts of specific cases’.[43]

The debate regarding the standard of proof reveals some of the inherent weaknesses of a system of protection founded upon essays in prediction. It is no easy task to determine refugee status; decision-makers must assess credibility and will look to the demeanour of the applicant. Information on countries of origin may be lacking or deficient, so that it is tempting to demand impossible degrees of corroboration. The applicant’s testimony may seem unduly self-serving, though it could scarcely be otherwise, absent anyone else to speak on his or her behalf.[44] The onus of establishing a well-founded fear of persecution is on the applicant, and some objective evidence is called for; but documentary corroboration is frequently unavailable or too general to be conclusive in the individual case.

Credibility remains problematic, but the nature of the exercise in prediction and the objective of protection call for account to be taken of consequences, and of degrees of likelihood far short of any balance of probability.[45] This indeed seems now to have been recognized in most jurisdictions involved in individual refugee determination.[46]

In *Adjei v Minister of Employment and Immigration*, for example, the Canadian Federal Court of Appeal approved ‘good grounds for fearing persecution’ as a description of what the evidence must show to support a claim to be a Convention refugee, posing the question, ‘Is there a reasonable chance that persecution would take place were the applicant returned to his country?’[47] Swiss law provides that the asylum seeker, ‘doit prouver ou du moins rendre vraisemblable qu’il est un réfugié’, although ‘vraisemblable’ appears to mean more than what is merely plausible.[48] The Australian High Court has applied the notion of (p. 62) a ‘real chance’, understood to mean a less than fifty per cent possibility,[49] while the United Kingdom House of Lords has confirmed the approach initiated in *Fernandez*: The ‘well-founded’ requirement, ‘means no more than that there has to be demonstrated a reasonable degree of likelihood of … persecution’.[50]

3.1 The European Union Qualification Directive

As part of the EU’s harmonization drive and efforts to reach a common asylum policy, the Qualification Directive was adopted in 2004[51] and a recast version was adopted in 2011.[52] In 2016, the European Commission proposed a Qualification Regulation to replace the Qualification Directive, which would directly bind Member States.[53] In late 2020, a New Pact on Migration and Asylum was proposed by the European Commission, which seeks to maintain political progress made towards the adoption of the Qualification Regulation.[54]

The recast Qualification Directive was intended to strengthen the protection offered under the original Directive.[55] The Commission’s initial proposal acknowledged reports on ‘deficiencies concerning the terms of the Directive and the manner in which it is applied in practice’, and its conclusion that the ‘vague and ambiguous’ nature of the minimum standards meant that they were ‘insufficient to secure full compatibility with … evolving human rights and refugee standards’.[56] Although improvements have (p. 63) been made, the final text retains certain problematic clauses from the original Qualification Directive.[57]

Article 7, on ‘actors of protection’, has been amended to provide that protection against persecution or serious harm must be ‘effective and of a non-temporary nature’, and that an actor of protection must be ‘willing and able’ to offer such protection.[58] However, non-State actors remain potential actors of protection.[59] This position has been criticized by UNHCR, amongst others.[60]

Article 8 has been amended to provide that an applicant may only be deemed to have access to internal protection in his or her country of origin if it is possible to ‘safely and legally travel to and gain admittance to that part of the country’, and he or she ‘can reasonably be expected to settle there’.[61] A Member State may only refuse to provide protection on the (p. 64) basis that an internal protection alternative is available if the applicant ‘has no well-founded fear of being persecuted or is not at real risk of suffering serious harm’ *or* ‘has access to protection against persecution or serious harm as defined in Article 7’.[62] Member States are now also required to ensure that when undertaking an assessment, ‘precise and up-to-date information’ on the prevailing general circumstances and the applicant’s personal circumstances are obtained from ‘relevant sources’, such as UNHCR and the European Asylum Support Office (EASO). These amendments were incorporated in part to better align the provision with the European Court of Human Rights’ judgment in *Salah Sheekh*.[63]

Article 9, on ‘acts of persecution’, clarifies that an applicant may be entitled to protection where the relevant acts of persecution are not carried out for reasons of race, religion, nationality, membership of a particular social group, or political opinion, but the *absence of protection* is connected to a Convention ground.[64] In article 10, references to gender have been strengthened,[65] although the problematic cumulative approach to assessing the existence of a particular social group has been maintained.[66] The Member States’ purported right to reduce the benefits of a refugee whose status was ‘obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a refugee’ has been deleted.[67]

Significant changes were also made to the regime for subsidiary protection, improving the rights of beneficiaries and their family members[68] in relation to residence permits;[69] travel documents;[70] health care;[71] and access to employment, training, and integration programmes.[72] However, subsidiary protection holders continue to possess fewer rights than refugees in certain respects.[73]

(p. 65) Additional amendments include changes to: the definition of ‘family’;[74] the cessation clauses;[75] general rules on vulnerability;[76] language requirements when providing information to beneficiaries;[77] the tracing of family members of unaccompanied minors;[78] and the recitals.[79]

In its final form, the recast Qualification Directive, like the original Directive, combines disparate elements, some mandatory, others optional.[80] Differences of approach among EU Member States are likely to remain, but whether as ‘higher standards’ is questionable,[81] and certain key elements are still unclear, for example, the relationship of the Directive to the 1951 Convention/1967 Protocol and perhaps also to fundamental rights.[82] The recital’s statement of the goals to be achieved is only partially matched by the content which follows, and inconsistencies with governing, emerging or consolidating international standards are apparent.

The recast Qualification Directive has a place in an overall scheme to establish a ‘common policy on asylum’, including a Common European Asylum System. This in turn is to be based on ‘the full and inclusive application’ of the 1951 Convention and the 1967 Protocol, which are recognized as the ‘cornerstone of the international legal regime for the protection of refugees’.[83] The main objective is to ensure that Member States ‘apply common criteria’ for the identification of those generally in need of protection. The recast Qualification Directive asserts its intention to go further than the original Directive,

confirming its principles as well as seeking 'to achieve a higher level of approximation of the rules on the recognition and content of international protection on the basis of higher standards'.[84] The recast Directive reiterates that 'Member States should have the power to introduce or maintain more favourable provisions'.[85]

(p. 66) The goal of common criteria in the determination of Convention refugee status is to be realized in regard to the recognition of refugees through the introduction of 'common concepts of protection needs' in regard to applications *sur place*,[86] sources of harm and protection, internal protection, and persecution, including the reasons for persecution and particularly membership of a particular social group. In keeping with the times, the Directive also deals with the terrorism dimension, endorsing the Security Council view on the purposes and principles of the United Nations, and embracing a concept of *national* security and public order which encompasses *international* terrorism.[87]

While making provision for subsidiary protection,[88] the Directive also seeks to draw the line against providing protection from 'risks to which a population … or section of the population is generally exposed'.[89] It is doubtful whether any such simple line can be drawn, for international law and the legal protection of refugees are in constant development, and evaluation at regular intervals is therefore proposed, with account to be taken 'in particular' of the evolution of international obligations regarding *non-refoulement*;[90] presumably, this would not exclude consideration of other protecting norms and standards.[91]

Alternative terminology and efforts to describe international legal concepts in other words are sometimes harmless and sometimes helpful, but they can also be confusing. For example, the variation between the words chosen to define the refugee in article 2(d) of the recast Qualification Directive and those in article 1A(2) of the 1951 Convention is mostly harmless, and in one respect correctly clarifies an occasionally recurring misunderstanding in relation to stateless refugees.[92] The definition of 'family members' has been amended in article 2(j) of the Recast Qualification Directive, and while it chimes with EU law, it is not yet compatible with the international concept.[93]

The first major point of contention to which UNHCR and others have called attention is the Directive's limitation to 'third country nationals', that is, to individuals who are not EU citizens. This is prima facie incompatible with the 1951 Convention, so far as article 42 of the Convention permits no reservation to the refugee definition in article 1, while article 45, which provides that 'Any Contracting State may request revision of this Convention at any time' by way of notification to the UN Secretary-General, has not been exercised.

The revision of multilateral treaties is also governed by established rules of general international law, in particular, those set out in articles 40 and 41 of the 1969 Vienna Convention on the Law of Treaties. Article 41, dealing with modification between certain parties only, confirms that an agreement to modify is permissible only where provided for by the treaty or where, such modification not being prohibited by the treaty, it 'does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations', and 'does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole'.[94] In its commentary, the International Law Commission stated that 'the very nature of the legal relation (p. 67) established by a treaty requires that every party should be consulted in regard to any amendment or revision'.[95]

Specifically with regard to article 41, the International Law Commission recorded its doubts regarding '*inter se* agreements' for modification, which, history showed, were more likely to be incompatible with the object and purpose of the treaty.[96] Paragraph 2 of article 41 was therefore intended as a further protection for all the parties against 'illegitimate modifications';[97] no other parties to the 1951 Convention/1967 Protocol appear to have been so notified,[98] and it is also uncertain to what extent the EU modification will affect the

rights of other States party or the performance of their obligations, at least so long as no EU State generates refugees. If mainly at present at the theoretical level, this raises issues of importance and interest to general international law which are worthy of further exploration at another time. In particular, the implicit logic of a single European territory without internal borders (if such is ever achieved) challenges certain basic assumptions regarding, among others, the territorial scope of international obligations accepted by the territory's constituent elements, namely, States.[99]

The Directive/Convention link is unclear in other respects. Article 3, for example, accepts that Member States may introduce or retain more favourable standards for determining who is a refugee, 'in so far as these standards are compatible' with the Directive. The possibility that the Directive, now or in the future, may be incompatible with or lag behind the Convention or other relevant international protection standards is not addressed.[100]

4. Persecution: issues of interpretation

'Persecution' is not defined in the 1951 Convention.[101] Although the benefits of 'indeterminacy'[102] are generally recognized, there have been some efforts to elucidate the (p. 68) concept.[103] Under the Hathaway and Foster approach, 'a risk of "being persecuted" requires evidence of a sustained or systemic denial of human rights demonstrative of a failure of state protection'.[104] While the language of this proposed test has not changed since the first edition of Hathaway's work, its content has been clarified. In particular, the authors now note that the risk of 'sustained'—or 'ongoing'—denial of a human right may be fulfilled through a 'single harm', including 'death or severe torture'.[105] Questions of precisely *which* human rights are engaged remain the subject of debate.[106] While these efforts have provided some guidance on the notion of persecution (in particular, the conceptualization of persecution as constituting serious harm coupled with a failure of State protection),[107] care must always be taken not to stray too far from the words of the Convention itself. As the New Zealand Court of Appeal has noted, 'there is considerable danger in using concepts designed to elucidate the meaning of Refugee Convention terms as substitutes for the definition of refugee in the Refugee Convention.'[108]

Articles 31 and 33 of the Convention refer to those whose life or freedom 'was' or 'would be' threatened,[109] and the 1984 UN Convention against Torture defines torture as covering:

(p. 69)

> [a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person … It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[110]

Although discrimination may be a factor, torture, unlike Convention refugee status, need not necessarily be linked to specific indices such as race, religion, nationality, social group, or political opinion.[111] Other acts amounting to persecution on the particular facts of the case may include those covered by the prohibition of cruel, inhuman, or degrading treatment or punishment,[112] or punishment, or repeated punishment for breach of the law, which is out of proportion to the offence. In other respects, a margin of appreciation is left to States in interpreting this fundamental term, and the jurisprudence, not surprisingly, is sometimes inconsistent. Specific decisions by national authorities are some evidence of the content of the concept, as understood by States, but comprehensive analysis requires the general notion of persecution to be related to developments within the broad field of human rights. Article 9 of the recast EU Qualification Directive, which sets out for Member States the 'common concept' of persecution, provides that a relevant act *must* 'be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights', in particular, those rights which are non-derogable under the European Convention on Human Rights; or must amount to an accumulation of measures of equivalent severity. An

illustrative list of ‘acts of persecution’ follows, ranging from the general (physical or mental violence, discrimination) to the particular (‘prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion’).[113] Acts of ‘a gender-specific or child-specific nature’ are expressly included.[114] The recast Qualification Directive now also provides that there must be either a connection between the reason for persecution (as set out in article 10) and the relevant acts of persecution, or ‘*the absence of protection against such acts*’.[115] This addition brings within the ambit of ‘persecution’ those cases in which the (p. 70) act of persecution is committed for private or criminal ends, but the State’s unwillingness to provide protection is motivated by a Convention reason.[116]

Australia’s Migration Act also seeks to ‘interpret’ the Convention refugee definition. Persecution must involve ‘serious harm’ to the applicant, and ‘systematic and discriminatory conduct’.[117] ‘Serious harm’, in turn, is described in a non-exhaustive list as including a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood of any kind, where such hardship or denial threatens the applicant’s capacity to subsist.[118] Persecution also implies an element of ‘motivation’ on the part of those who persecute, in the sense that people are persecuted because of something perceived about them or attributed to them. The Act provides that a Convention ground must be ‘the essential and significant reason’ for the persecution feared.[119] Finally, the applicant must have a well-founded fear, that is, a fear based on a ‘real chance’ of persecution.[120] The Migration Act further places a burden of proof on an applicant to show that any conduct in Australia was engaged in ‘otherwise than for the purpose of strengthening the person’s claim to be a refugee’, restricting certain applicants’ ability to make a successful *sur place* claim.[121]

Fear of persecution and lack of protection are themselves interrelated elements, as article 1A(2) of the 1951 Convention makes clear. The persecuted clearly do not enjoy the protection of their country of origin, while evidence of the lack of protection on either the internal or external level may create a presumption as to the likelihood of persecution and to the well-foundedness of any fear.[122] The core meaning of persecution readily includes (p. 71) the threat of deprivation of life or physical freedom.[123] In its broader sense, however, it remains very much a question of degree and proportion; less overt measures may suffice, such as the imposition of serious economic disadvantage, denial of access to employment, to the professions, or to education, or other restrictions on the freedoms traditionally guaranteed in a democratic society, such as speech, assembly, worship, or freedom of movement.[124] Whether such restrictions amount to persecution within the 1951 Convention will again turn on an assessment of a complex of factors, including (1) the nature of the freedom threatened, (2) the nature and severity of the restriction, and (3) the likelihood of the restriction eventuating in the individual case.

4.1 Protected interests

The references to ‘race, religion, nationality, membership of a particular social group, or political opinion’ illustrate briefly the characteristics of individuals and groups which are considered worthy of special protection. These same factors have figured in the development of the fundamental principle of non-discrimination in general international law,[125] and have contributed to the formulation of other fundamental human rights. In its oft-quoted judgment in the *Barcelona Traction Case* in 1970, the International Court of Justice referred to the outlawing of genocide, slavery, and racial discrimination as falling within the emergent notion of obligations *erga omnes*.[126] The resulting rights, so far as they are embodied in international conventions, figure generally among those from which no derogation is permitted, even in exceptional circumstances.[127] ‘Non-derogability’ is not a fixed class in international human rights law, and persecution should not be considered as contingent on an indicator such as this. In practice, however, claims to refugee status are

commonly grounded in ‘basic rights’, including the right to life, to the extent that the individual is protected against ‘arbitrary’ deprivation;[128] the right to be protected against torture, or cruel or inhuman treatment or punishment;[129] the right not to be subjected to slavery or servitude;[130] the right not to be subjected to retroactive criminal penalties;[131] the right to recognition as a person before the law;[132] and the right to freedom of thought, conscience, and religion.[133] Although not included within the same fundamental class, the following (p. 72) rights are also relevant in view of the frequent close connection between persecution and personal freedom: the right to liberty and security of the person, including freedom from arbitrary arrest and detention;[134] and the right to freedom from arbitrary interference in private, home, and family life.[135]

Recognition of these rights is essential to the maintenance of the integrity and inherent human dignity of the individual. Persecution within the Convention thus comprehends measures, taken on the basis of one or more of the stated grounds, which threaten deprivation of life or liberty; torture or cruel, inhuman, or degrading treatment; subjection to slavery or servitude; non-recognition as a person (particularly where the consequences of such non-recognition impinge directly on an individual’s life, liberty, livelihood, security, or integrity); and oppression, discrimination, or harassment of a person in his or her private, home, or family life.

4.2 The ways and means of persecution

Persecution is a concept only too readily filled by the latest examples of one person’s inhumanity to another, and little purpose is served by attempting to list all its known measures. Assessments must be made from case to case, taking account, on the one hand, of the notion of individual integrity and human dignity and, on the other hand, of the manner and degree to which they stand to be injured. A straightforward threat to life or liberty is widely accepted,[136] and the repeated condemnation of a wide range of activities involving violation of international humanitarian law, genocide, crimes against humanity and related offences should also be taken into account, given the recognition of responsibility at both State and individual level.

Certain measures, such as the forcible expulsion of an ethnic minority or of an individual, will clearly show the severance of the normal relationship between citizen and State, but the relation of cause and effect may be less clear in other cases. For example, expulsion may be encouraged indirectly, either by threats[137] or by the implementation of apparently unconnected policies. Thus, in Vietnam after 1978, State policies aimed at the restructuring of society and the abolition of the bourgeoisie[138] began to be implemented, giving rise among those affected to serious concern for their future life and security. Those in any way associated with the previous government of South Vietnam were already liable not only to ‘re-education’,[139] but thereafter also to surveillance, to denial of access to employment and the ration system, or to relocation in a ‘new economic zone’.[140] The situation of ethnic Chinese was exacerbated by the deterioration in relations and subsequent armed conflict with the People’s Republic of China.[141] The net result was a massive exodus of asylum seekers by boat and land to countries in the region. By contrast, Myanmar’s ‘clearance operations’ against its (p. 73) Rohingya minority in 2017 were more overt, and both preceded and followed by discriminatory restrictions on economic, social, and cultural rights.[142]

4.2.1 Persecution as a crime in international law

The jurisprudence of various international tribunals might provide insights, first, into the meaning of persecution and, secondly, into the present-day scope of war crimes as a basis for exclusion. Persecution was certainly acknowledged by the International Military Tribunal in a number of post-Second World War trials,[143] and article 5 of the Statute of the International Criminal Tribunal for Former Yugoslavia (ICTY) authorized the prosecution of those responsible for ‘persecutions on political, racial and religious grounds’, ‘when

committed in armed conflict, whether international or internal in character, and directed against any civilian population'.[144]

While the jurisprudence of the ICTY is replete with instances of persecution, its value for the purpose of interpreting the 1951 Convention is necessarily limited by its criminal law context and by the Tribunal's approach to persecution as a crime, rather than as protective principle in the form of well-founded fear. In *Blaškić* and other cases, for example, the Appeals Chamber has defined persecution as a crime against humanity that involves, 'an act or omission which … (1) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and (2) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)'.[145]

The Appeals Chamber has also held that acts of persecution, whether considered separately or together, should reach a certain level of severity, and that although discriminatory intent is essential,[146] it is not sufficient.[147] Nevertheless, among the various acts that (p. 74) may constitute persecution, it has accepted instances of serious bodily and mental harm, including rape and sexual assault; the destruction of property, depending on its nature and extent; attacks in which civilians are targeted; and deportation, forcible transfer, and forcible displacement. In each case, the Tribunal looked to the gravity of the crimes, when compared with those set out in article 5 of the ICTY Statute.[148]

The Statute of the International Criminal Court appears to take a more restricted approach. On the one hand, it reiterates the necessity for a deprivation of fundamental human rights, emphasizes the element of discriminatory intent, and formally extends the range of impermissible grounds of distinction; but on the other hand, it also requires that persecution be committed in connection with another crime against humanity or crime within the jurisdiction of the Court:

> ### *Article 7—Crimes against humanity*
>
> 1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack …
>
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, [149] or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court …
>
> 2. For the purpose of paragraph 1 …
>
> (g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity … [150]

(p. 75) No asylum seeker is required to show that the crime of persecution has been or is likely to be committed, and certain of the elements of the crime, for example, in relation to 'intent', engage evidential issues far beyond the requirements of the well-founded fear test. The offences committed during the Yugoslavia conflict, including deportation and forcible transfer, were nevertheless frequently connected to the concept of 'ethnic cleansing'.[151] Here, the jurisprudence of the Tribunal may be of greater assistance, so far as it illustrates and increases understanding of the ways and means of persecution. It also may be relevant, of course, to the question of *exclusion*. In the Canadian case of *Mugesera*, for example, the

Supreme Court of Canada found the applicant to be inadmissible by reason of his having committed a crime against humanity outside Canada, namely, 'persecution by hate speech'.[152] In the case of *Krnojelac*, the Appeals Chamber took account of article 49 of the Fourth Geneva Convention, article 85 of Additional Protocol I and article 17 of Additional Protocol II, and found that these instruments 'prohibit forced movement within the context of both internal and international armed conflicts'. This prohibition is aimed at 'safeguarding the right and aspiration of individuals to live in their communities and homes without interference', and if forcible displacement is committed with the requisite discriminatory intent, it may constitute the crime of persecution.[153] In *Simić*, the Trial Chamber noted that displacement is only illegal when it is 'forced', but that this does not require physical force:

> [i]t may also include 'the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment'. The essential element is that the displacement be involuntary in nature, that 'the relevant persons had (p. 76) no real choice'. In other words, a civilian is involuntarily displaced if he is 'not faced with a genuine choice as to whether to leave or to remain in the area'.[154]

The lack of genuine choice, in turn, may be inferred from, among others, threatening and intimidating acts, shelling of civilian objects, burning of civilian property, and the commission or threat to commit crimes 'calculated to terrify the population and make them flee the area with no hope of return'.[155]

4.3 Agents of persecution

Cause and effect are yet more indirect where the government of the country of origin cannot be immediately implicated. Refugees, for example, have fled mob violence or the activities of so-called 'death squads', while governments may be unable to suppress such activities, or unwilling or reluctant to do so, or even colluding with those responsible. In such cases, where protection is in fact unavailable, persecution within the Convention can result, for it does not follow that the concept is limited to the actions of governments or their agents.[156]

The term, 'agent of persecution', is somewhat misleading. An 'agent' usually acts for and on behalf of another, the 'principal'. In the law of contract, for example, an agent is empowered to represent and to conclude agreements that bind the principal. In some cases, the agent who acts beyond the bounds of specific authority may also bind the principal, and even on occasion one who, having no authority, holds him-or herself out as representing a principal may also bind the latter, unless the principal takes steps to avoid responsibility. In agency cases, therefore, the essential link is the actual or implied conferral upon another of authority to act.

Neither the 1951 Convention nor the *travaux préparatoires* say much about the source of the persecution feared by the refugee,[157] and no necessary linkage between persecution (p. 77) and government authority is formally required. However, the Convention does recognize the relation between protection and fear of persecution. A Convention refugee, by definition, must be *unable* or *unwilling* to avail himself or herself of the protection of the State or government.[158] This connection is echoed in the recast EU Qualification Directive, where articles 6 and 7 deal with 'actors of persecution or serious harm' and 'actors of protection', respectively. Persecutors include the State, parties or organizations controlling all or a substantial part of the State, and non-State actors, provided that the State or those parties or organizations controlling all or a substantial part of it 'are unable or unwilling to provide protection against persecution or serious harm'.[159] Protection, in turn, may be provided by the State or by 'parties or organisations, including international organisations,

controlling the State or a substantial part of the territory of the State' if certain conditions are met.[160] Grahl-Madsen ties persecution 'to acts or circumstances for which the government (or, in appropriate cases, the ruling party) is responsible, that is, … acts committed by the government (or the party) or organs at its disposal, or behaviour tolerated by the government in such a way as to leave the victims virtually unprotected by the agencies of the State'.[161] The decisive factor, in his view, is the 'place' of the acts or atrocities in the general situation prevailing in the country of origin, for example, whether they are sporadic and rapidly terminated, or 'continue over a protracted period without the government being able to check them effectively', thereby amounting to a flaw in the organization of the State.[162]

4.3.1 Agents of persecution and State responsibility

The purpose is not to attribute responsibility, in the sense of State responsibility,[163] for the persecution. If it were, then 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 the responsibility of the State.[164] As with the putative question of persecutory intent, so the issue of State responsibility for persecution, relevant though it may be in other circumstances, is not part of the refugee definition. (p. 78) Analogous aspects may arise, however, in considering the availability and/or sufficiency of local protection. Here, the law of State responsibility provides some parallel illustrations; for example, if the acts of private groups or individuals are attributable to the State, then the lack of adequate local protection can be inferred. Likewise, where the State is either unable or unwilling to satisfy the standard of due diligence in the provision of protection, the circumstances may equally found an international claim, as provide a basis for fear of persecution within the meaning of the Convention. The correlation is coincidental, however, not normative. The central issue remains that of *risk of harm amounting to persecution*; the principles and practice of State responsibility can contribute to that assessment, for example, by confirming the level of protection and judicial or other guarantees that may be due under universal and regional human rights instruments.[165]

Moreover, while the inability in fact of a State to exercise control in certain circumstances may entail an absence of responsibility vis-à-vis the rights of other States,[166] there is no basis in the 1951 Convention, or in general international law, for requiring the existence of effective, operating institutions of government as a pre-condition to a successful claim to refugee status. In the same way, the existence or non-existence of governmental authority is irrelevant to the issue of individual responsibility for genocide, war crimes, or other serious violations of international humanitarian law.

Whether non-State actors, including international organizations, are capable of providing 'protection' against persecution remains controversial. As noted above, article 7 of the recast Qualification Directive stipulates that such entities may provide protection if they control 'the State or a substantial part of the territory of the State'; are 'willing and able to offer protection'; and that protection is 'effective and of a non-temporary nature'.[167] In *Abdulla*, the CJEU accepted that 'international organisations controlling the State or a substantial part of the territory of the State, including by means of the presence of a multinational force in the territory' could constitute actors of protection under article 7 of the original Qualification Directive.[168] UNHCR, amongst others, does not consider that a non-State actor (or organization) is generally capable of providing protection against persecution.[169](p. 79) UNHCR's position is particularly significant given that the Common European Asylum System is 'based on the full and inclusive application' of the 1951 Convention.[170] In its comments on a proposed Qualification Regulation, UNHCR noted that:

> It would be inappropriate to equate national protection provided by States with the activities of a certain administrative authority, which may exercise some level of de facto—but not de jure—control over territory. Such control is often temporary and without the range of functions and authority of a State. Importantly, such non-State entities and bodies are not parties to international human rights treaties, and therefore cannot be held accountable for their actions in the same way as a State. In practice, this generally means that their ability to enforce the rule of law is limited. Specifically in respect of international organisations, such as organs and agencies of the United Nations, they enjoy privileges and immunities.[171]

4.4 Fear, intent, motive, and the rationale for persecution

Applications for refugee status are sometimes denied on the ground that the claimant has failed to prove either that the law was enacted with intent to persecute, or that the authorities in his or her country of origin themselves *intended* to persecute the individual for one or other Convention reason. Proof of legislative or organizational intent is notoriously hard to establish and while evidence of such motivation may be sufficient to establish a claim to refugee status, it cannot be considered a *necessary* condition.

Nowhere in the drafting history[172] of the 1951 Convention is it suggested that the motive or intent of the persecutor was ever to be considered as a *controlling* factor in either the definition or the determination of refugee status. The debate in the *Ad hoc* Committee regarding the 'precedent' of the IRO Constitution's approach to classification and description, considered in context, reveals itself as a debate, not about fear, intention, or motive, but one between those who, like the United Kingdom, France, and Belgium, favoured a definition in general terms; and those who, like the United States, preferred a (p. 80) detailed statement of the various categories of refugees who should receive international protection.

As revised, the definition which emerged on 30 January 1950 was substantially that which was adopted in July 1951, at the Conference of Plenipotentiaries.[173] As the Israeli delegate observed at the time, '[A]ll the *objective* factors which would make it possible to characterize a person as a refugee were now known … (and) … contained in paragraph 1.'[174] The only *subjective* elements of relevance, for this delegate, went to the 'horrifying memories' of past persecution which might justify non-return to the country of origin. The (subjective) state of the *persecutor's* mind was never mentioned. As the *Ad hoc* Committee stated to ECOSOC in its comments on the draft:

> The expression 'well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion' means that a person has either been actually a victim of persecution or can show good reason why he fears persecution.[175]

Persecution for Convention reasons has sometimes been read to mean 'the infliction of suffering *because of or on account of* the victim's race, beliefs or nationality, etc'.[176] Such a seemingly innocuous change in the wording, however, distorts the natural meaning of the language and can create additional evidentiary burdens for the claimant. In particular, perhaps unwittingly, it may import a *controlling* intent on the part of the persecutor, as an element in the definition.

Of course, intent is relevant; indeed, evidence of persecutory intent may be conclusive as to the existence of well-founded fear, but its absence is not necessarily conclusive the other way. A persecutor may intend to harm an individual because of/for reasons of/on account of that person's race or religion.[177] Similarly, a persecutor may intend to harm an individual because of an opinion expressed, or a decision or action taken, irrespective or regardless of that individual's actual motivation or conviction. If that opinion, decision, or action falls

within the category of protected interests (freedom of religion, expression, opinion, conscience, and so on), and *if* the harm visited or feared is in fact of a degree to amount to persecution, then a sufficient link may be inferred on which to base a well-founded fear of persecution within the meaning of the Convention. There are slight but important (p. 81) differences between the terms *on account of* and *for reasons of*. 'On account of', which is *not* the language of the Convention, implies an element of conscious, individualized direction which is often conspicuously absent in the practices of mass persecution.

The Convention definition offers a series of objective elements by which to describe the refugee. The *travaux préparatoires* suggest that the only relevant intent or motive would be that, not of the persecutor, but of the refugee or refugee claimant: one motivated by personal convenience, rather than fear, might be denied protection;[178] while one with horrifying memories of past persecution might yet continue to receive protection, notwithstanding a change of circumstances in the country of origin.[179] Otherwise, the governing criterion remains that of a serious possibility of persecution, not proof of intent to harm on the part of the persecutor.

5. The refugee definition and the reasons for persecution

5.1 General matters

A claimant to refugee status must be 'outside' his or her country of origin,[180] and the fact of having fled, of having crossed an international frontier, is an intrinsic part of the quality of refugee, understood in its ordinary sense. Certain States may provide for those who would be considered as refugees once they took flight,[181] and a growing body of practice aims to bring some measure of protection and assistance to the internally displaced, but this in no way alters the basic international rule.[182]

The Convention requires neither that the putative refugee shall have fled by reason of fear of persecution, nor that persecution should have actually occurred. The fear may derive from conditions arising during an ordinary absence abroad (for example, as student, diplomat or holiday-maker), while the element of well-foundedness looks more to the future, than to the past. Subjective and objective factors thus tend to elide, one with the other.[183] Fear, reflecting (p. 82) the focus of the refugee definition in part at least on factors personal to the individual, and the degree to which it is felt, are incapable of precise quantification.[184] Fear may be exaggerated or understated, but still be reasonable.[185] It is by no means clear, however, whether from the definition, jurisprudence or commentary, how much of a role the subjective element is expected to play in a determination process that is practically oriented to the assessment of *risk*. If the applicant's statements in regard to his or her fear are consistent and credible, then little more can be required in the way of formal proof.[186] What seems to be intended, however, is not so much evidence of subjective fear, as evidence of the subjective aspects of an individual's life, including beliefs and commitments. These help not only to locate the claimant in a social and political context, but also go to the double issue of personal credibility and credible, reasonable fear.[187] For the heart of the question is whether that 'subjective' fear is well-founded; whether there are sufficient facts to permit the finding that this applicant, in his or her particular circumstances, faces a serious possibility of persecution.[188]

Problems of assessment cannot be pursued very far in the abstract. All the circumstances of the case have to be considered, including the relation between the nature of the persecution feared and the degree of likelihood of its happening. At each stage, hard evidence is likely to be absent, so that finally the asylum seeker's own statements, their

force, coherence, and credibility must be relied on, in the light of what is known generally, from a variety of sources, regarding conditions in the country of origin.[189]

(p. 83) 5.1.1 'Good faith' and activities in the country of refuge

The UK Court of Appeal decision in *Danian*[190] is a fairly typical example of a case addressing the question of whether an individual who has engaged in activities in the country of refuge with a view to building a refugee case can nonetheless come within the terms of the 1951 Convention, or whether his or her claim is defeated by lack of 'good faith'. As has been reiterated on many occasions already, the Convention's central premise is that protection should be granted to a person with a well-founded fear of being persecuted for a Convention reason. In the determination of status, the credibility of the claimant and of information relating to his or her country of origin are of critical importance, but the Convention makes no provision as to character, and the essential question remains that of risk of relevant harm if returned.[191] There is no doubt that a person may become a refugee after leaving their country of origin, and the UNHCR *Handbook* recognizes that,

> A person may become a refugee 'sur place' as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.[192]

In deciding that the claimant in *Danian* fell outside the 1951 Convention,[193] the United Kingdom Immigration Appeal Tribunal relied on a number of decisions by the New Zealand Refugee Status Appeals Authority (RSAA), the administrative body then responsible for hearing appeals from initial decisions by officials.[194] In one case in particular, the RSAA had concluded that there was indeed a 'good faith' requirement imposed on asylum seekers, although no legal authority was offered in support of the proposition. Nevertheless, in its view, 'without the good faith requirement, individuals may unilaterally determine the grant of (p. 84) refugee status to themselves'. This somewhat surprising statement seems to ignore both the criteria set out in article 1A(2) and the particular responsibility of decision-makers in the determination of refugee status, which requires them to assess the personal experiences and credibility of the individual claimant in context, and to assess the likely behaviour of the State of origin or other putative persecutor if the claimant were to be returned. To give primary weight to any less than creditable actions of the individual leaves half the question begging. In addition, even a 'good faith claimant', such as one moved by a sincere change of faith,[195] in effect 'unilaterally' determines the conditions that justify the grant of refugee status.

In fact, the RSAA's views on good faith were unnecessary to the decision, the tribunal finding that the risk of persecution was non-existent. The UK Immigration Appeals Tribunal (IAT) also found that the claimant did not have a well-founded fear of persecution, but it took the RSAA's views one step further:

> the appellant falls within the category of person who is a refugee *sur place*, but who has acted in bad faith. As he has acted in bad faith, he falls outwith the Geneva Convention. He is not a person to whom the Convention applies; this would be our view regardless of whether his activities post 1995 may have brought him to the

> attention of the Nigerians and *regardless of whether his fear of persecution may be well founded*. (emphasis added)

Both the RSAA and the IAT relied heavily on Grahl-Madsen,[196] but also appear to have misconstrued Hathaway,[197] and were unable to show any more specific authority for their respective positions. Following the decision in *Re HB*, 'good faith' was invoked in a number of other decisions, although on each occasion the (negative) decision itself was based on the absence of a well-founded fear.[198] Australian decision-makers also flirted with the good faith requirement,[199] but in *Mohammed v Minister for Immigration and Multicultural Affairs*, the Federal Court of Australia emphasized that, '[A]t all times … the determination to be made is whether there is a genuine fear of persecution and whether that fear is well-founded … [and that] … recognition of refugee status cannot be denied to a person whose voluntary acts have created a real risk that the person will suffer persecution occasioning serious harm if that person is returned to the country of nationality.'[200]

(p. 85) In *M v Secretary of State for the Home Department*,[201] the United Kingdom Court of Appeal was concerned, not with the claimant's self-serving actions, but with the question, whether 'a person who puts forward a fraudulent and baseless claim for asylum … is not … able to bring himself within [the 1951 Convention]'. The Court was unanimously of the view that such a proposition could not be supported. Millett LJ noted that such a person,

> [m]ay be guilty of an attempt to pervert the course of justice and, in theory at least, at risk not only of having his claim dismissed but of finding himself the subject of criminal proceedings. But he *is not thereby deprived of the protection of the convention* … Express exceptions are provided for in the convention itself; they do not include the case where the applicant for asylum has made a previous claim which has been found to be fraudulent and baseless. If, therefore, despite having made such a claim and having had it rejected he can nevertheless at any time thereafter and on whatever basis satisfy the authorities that he has a well-founded fear of persecution for a convention reason if he is returned to the country of his nationality, it would be a breach of the United Kingdom's international obligations under the convention to return him to face possible death or loss of freedom.[202]

In his Lordship's view, the asylum seeker still faced the hurdle of establishing a well-founded fear: 'Whether he can do so or not will largely turn on his credibility, and an applicant who has put forward a fraudulent and baseless claim for asylum is unlikely to have much credibility left.'[203]

Some States, however, have now legislated a good faith requirement.[204] The New Zealand Immigration Act provides that a refugee and protection officer 'must decline to accept for consideration a claim for recognition as a refugee if the officer is satisfied that 1 or more of the circumstances relating to the claim were brought about by the claimant—(a) acting otherwise than in good faith; and (b) for a purpose of creating grounds for recognition [as a refugee]'.[205] In Australia, the Migration Act 1958 states that '[i]n determining whether the person has a well-founded fear of persecution … *any conduct engaged in by the person in Australia is to be disregarded* unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee'.[206] The recast Qualification Directive provides that the assessment of an application for international protection includes taking into account 'whether the applicant's activities (p. 86) since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country'.[207] When considering a *sur place* claim, Member States may 'determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on

circumstances which the applicant has created by his or her own decision since leaving the country of origin'.[208]

5.1.2 Nationality and statelessness

Article 1A(2) of the Convention makes separate provision for refugees with a nationality and for those who are stateless.[209] For the former, the relevant criterion is that they should be unable or unwilling to avail themselves of the protection of their State of nationality, while the latter should be unable or unwilling to return to their State of former residence.[210] In cases of dual or multiple nationality, refugee status will only arise where the individual in question is unable or unwilling, on the basis of well-founded fear, to secure the protection of any of the States of nationality. The second paragraph of Article 1A(2) provides that,

> In the case of a person who has more than one nationality, the term the 'country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.[211]

Although apparently straightforward, the interpretation of this provision has given rise to difficulty, particularly with regard to whether the second or other nationality must be 'effective' (and what that entails); whether it includes the individual who is not in fact a national, but may have an opportunity to claim nationality; and whether such an individual (p. 87) has a choice and if so, whether he or she can be expected or 'obliged' to exercise that choice and to take the steps necessary to obtain the other nationality. In principle, the alternative nationality 'exception' would appear to call for attention only once the individual has been found to have a well-founded fear of persecution in his or her country of 'primary nationality', when it would fall to the putative State of asylum to adduce evidence to show that it is not obliged to recognize refugee status and to provide protection—to show, therefore, that the asylum seeker *is* in fact a national of another country. In practice, decisions may be run together, and account taken also of how exactly, if at all, this paragraph has been transposed into local law. Section 36(3) of Australia's Migration Act, for example, allows for the denial of protection to an asylum seeker,

> who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.[212]

The interpretation of the paragraph has also come up on appeal. In one case involving Israel's Law of Return, the Court overturned a tribunal finding on the ground that the Israeli law necessarily implied a 'genuine desire' on the part of the individual, and that the right to enter and reside in Israel was therefore not, 'an existing right but rather a conditional or contingent right'.[213]

In earlier cases involving the status of Timorese seeking refugee status in Australia prior to independence, the Court had described its role as requiring it to consider whether putative Portuguese citizenship was a 'nationality that is effective as a source of protection and … not merely formal.'[214] In another case, the Administrative Appeals Tribunal had noted that 'an East Timorese must apply for Portuguese citizenship before he or she can enjoy protection from the Portuguese authorities … Applications are considered on a case by case basis. It is not an automatic process'. In the circumstances, the Tribunal was not satisfied that the applicant would receive effective protection in Portugal.[215]

Canada has also adopted its own interpretation, and section 96(a) of the Immigration and Refugee Protection Act 2001, continuing the approach of earlier legislation, provides that a Convention refugee must be 'outside each of their countries of nationality and … unable or, by reason of [well-founded] fear, unwilling to avail themself of the protection of each of those countries.' The Federal Court of Appeal, interpreting and applying Canadian law rather than the Convention, approved denial of protection where, at the time of the hearing, it was shown that the claimant was entitled to acquire by 'mere formalities', the citizenship of a country with respect to which he or she had no well-founded fear of persecution; the question was whether acquiring such citizenship was 'within the control of the (p. 88) applicant'.[216] The jurisprudence is inconsistent, however, where there is no automatic entitlement to citizenship and the individual simply fails to access possible protection.[217]

The starting point is the ordinary meaning of the words in context, and the ordinary meaning of the relevant words of the second paragraph of Article 1A(2) of the 1951 Convention would seem clear: 'the term "the country of his nationality" shall mean each of the countries of which he *is* a national' (emphasis added). The word 'is' posits a given legal status, and contrasts with other formulations which the drafters might have chosen but did not, such as 'may be', 'might be', or 'has the possibility to be'. The present tense, moreover, invites the application of the strictly literal meaning which that tense implies, and therefore a finding that the individual *is* a national of the State in question at the date of decision. The 'ordinary meaning' approach—'a status actually and presently held'—was expressly adopted by the Full Court of the Federal Court of Australia in *FER17* in 2019,[218] when it rejected the argument that the term 'a national' in the Migration Act included not only someone with an existing status, but also someone possessing a present capacity to acquire that status.[219]

As a matter of law, therefore, the expectation that an individual seek the protection of another country arises only in the case that he or she 'is a national'; in practice, however, the situation can be less clear. The Convention does not itself require the putative refugee to exhaust all possibilities of alternative national protection before seeking its protection, but it may be argued that he or she ought to take 'reasonable steps' to *obtain* such other nationality, rather than simply to avail themselves of one already conferred or existing.[220] It is sometimes said, for example, that the asylum seeker does not have a choice whether to accept another citizenship, but where this requires an exercise of will on his or her part, then the underlying assumptions require closer interrogation. The 'right' to change nationality,[221] whether or not recognized in customary international law, implies an exercise of will and applies equally to the right, in the case of dual or multiple nationality, to change the dominant nationality by making changes in the 'facts of attachment' and relocating the centre of one's social, cultural, and economic life. There is no rule of international law which presently operates to convert the individual's right to change nationality into a duty to embrace the nationality of a country to which he or she does not in fact feel attached.

(p. 89) In *MA (Ethiopia)*, however, the Court expressed a number of views in obiter which, putting the evidential cart before the definitional horse, reflect a certain misapprehension of the term 'refugee' and the process of refugee determination.[222] Thus, notwithstanding the centrality of a well-founded fear of persecution to the definition of a refugee, Lord Justice Elias referred to 'the well-established principle that, before an applicant can claim the protection of a surrogate state, he or she must first take all reasonable steps to secure protection from the home state'.[223] To this, Lord Justice Burnton added that, 'refugee status is not a matter of choice. A person cannot be entitled to refugee status solely because he or she refuses to make an application to her embassy, or refuses or fails to take reasonable steps to obtain recognition of her nationality.'[224]

Neither the incidental recognition that there 'may be cases where it would be unreasonable' to require a refugee applicant to approach their embassy,[225] nor Burnton LJ's use of the words 'solely' and 'reasonable', disguise the fact that, if applied generally, their approach would invert the norm and place impractical and often impossible hurdles in the way of the asylum seeker.[226] It is comprehensible if, but only if, it is confined to its facts and context, including the Court's evident a priori conclusion that the claimant had neither established a well-founded fear of persecution in the country which it had found to be her country of nationality, nor overcome that 'preliminary' finding by showing, on the evidence, that she was unwilling, owing to such fear, or unable, to avail herself of the protection of that country.

In the matter of evidence and proof, the most obvious and easiest course is to adduce one or more official acts of the putative State of second nationality, such as a passport or certificate of citizenship; in the absence of such documentation, it is open to the State to seek, through diplomatic channels, official confirmation of citizenship. Clearly, this would avoid the expense and time spent speculating on the effects of foreign law, the meaning of words in translation, and the evaluation of expert and perhaps conflicting testimony. In practice, however, that is what commonly happens and the resulting inconsistencies can be seen in the way in which different countries approach the situation of asylum seekers from North Korea.[227] In brief, the South Korean Constitution identifies its territory as comprising the whole of the Korean peninsula and its adjacent islands, and the South Korean Nationality Act appears to accept that many nationals of North Korea are also nationals of South Korea.[228] In one Australian case, in which it was 'common ground that, at all material times, each of the Appellants had the right to enter and reside in South Korea', the Court rejected their applications on the basis that they had not taken all possible steps to avail (p. 90) themselves of the right to enter and reside in South Korea.[229] In one UK case, however, the Upper Tribunal was of the view that if the applicant,

> [i]s entitled to nationality, subject only to his making an application for it, he is also to be regarded as a national of the country concerned. But if he is not a national and may be refused nationality, he is not to be treated as being a national of the country concerned.[230]

Whether an individual 'ought' to apply is a matter of evidence, rather than principle, the question being whether the evidence shows that nationality will be acquired on application, or whether its grant is a matter of discretion.[231] The Upper Tribunal accepted that the North Korean applicants acquired South Korean citizenship at birth, but found on the evidence that, because they had been outside Korea for more than ten years, South Korea would treat them as having lost their South Korean nationality. 'For that reason they have no subsisting or demonstrable entitlement to South Korean nationality documents: they would have to apply to re-acquire South Korean nationality, and we see no reason to suppose that it would be granted to them as a matter of routine.'[232] Similarly, the Dutch Council of State took the view that the 'protection alternative' applies only if the applicant actually has the nationality of another State; even though North Koreans may have a claim to nationality, security checks can lead to its loss and it had not been shown that the conditions for acquisition of citizenship had been met.[233]

Recent practice on deprivation of citizenship reveals a tendency among certain States, even previously staunch advocates against statelessness, to attach considerable weight to 'possible' citizenships, as a way of enlarging their discretion.[234] Although the jurisprudence is not concordant, there are clear differences between deprivation of citizenship, on the one hand, where States may hope to demonstrate that, because of putative claims to alternative citizenship, their action will *not* result in statelessness; and determinations of status as refugee or stateless person, on the other, where a focus on ordinary meaning and present status may better serve the object and purpose of protection.[235] A claimant with a well-

founded fear of being persecuted ought not to be denied protection as a refugee on the basis of specious assertions as to the availability of alternative protection; the burden therefore is on the (p. 91) authority that would deny refugee status to prove that the individual *is* in fact considered as a national by another State according to its law.

Statelessness and refugee status are by no means identical phenomena.[236] On occasion, those fleeing may be deprived of their nationality, but it is quite common also for the formal link to remain for some time. Following the Russian revolution in 1917, for example, large numbers of citizens were eventually stripped of their status and for years Soviet Jews leaving the country permanently were required to renounce their citizenship.[237]

One question which has arisen, however, is whether a stateless person unable to return to his or her country of former habitual residence may qualify as a Convention refugee without having to show that he or she is outside such country by reason of a well-founded fear of persecution. The possibility that a different standard of protection was intended for stateless refugee claimants arises from a grammatical 'anomaly' in article 1A(2), which appears not to apply the 'well-founded fear' requirement in the same way to those with and those without a nationality. If interpreted literally, as Cooper J. said in *Rishmawi v Minister for Immigration and Multicultural Affairs*, the effect would be that 'a stateless person outside his or her country of former habitual residence for a reason other than a Convention reason and unable to return to it for whatever reason other than a Convention reason would by definition be a refugee'.[238] That there are indeed certain practical differences between stateless and other refugees has been recognized in a number of judicial decisions. Courts in Austria and Germany, for example, have found in favour of refugee claimants outside their country of former habitual residence and unable to obtain its protection or to return there.[239] As noted above, Canadian law imposes the requirement of well-founded fear on both categories, as a condition of presence outside the country of nationality/country of former habitual residence,[240] but the stateless person's particular lack of protection has been recognized by Canadian courts. In *Thabet v Minister of Citizenship and Immigration*, the Federal Court of Appeal said that,

> [i]t is important to note the key distinction between the two groups of people so that neither advantages nor disadvantages are created. The distinction is contained in the wording of the refugee definition itself. In the case of nationals it talks of the claimant being 'unwilling (p. 92) to avail himself of the protection of that country'. In the case of stateless persons it talks only of an unwillingness to return to that country. In this latter case the question of the availment of protection does not arise … The definition takes into account the inherent difference between those persons who are nationals of a state, and therefore are owed protection, and those persons who are stateless and without recourse to state protection. Because of this distinction one cannot treat the two groups identically, even though one should seek to be as consistent as possible.[241]

The view now generally accepted, which makes sense in pursuit of a 'single test' for refugee status, is that no substantial difference is intended between stateless and other refugees, and that the Convention aims to provide protection to a person, whether outside their country of nationality, or, not having a nationality and outside their country of former habitual residence, who has a well-founded fear of being persecuted on Convention grounds.[242]

5.1.3 Deprivation of citizenship, persecution, and the country of one's nationality

The 1951 Convention is not concerned with nationality as such,[243] save insofar as it is one of the indicators of the locus of persecution (former habitual residence being the other), and as the source of possible protection. The 'country of one's nationality' is not a term of art, except in that one respect, and given the evidential focus on well-founded fear, there is no reason to suppose, either that it ceases to be the 'relevant country of reference', or that refugee status decision-makers need to be concerned with whether a particular act of deprivation of citizenship is or is not in accordance with international law; from the latter perspective, the act of deprivation is simply another fact that may contribute to a finding of well-founded fear, beyond which it has no legal significance whatsoever.

Nationality, considered as the right to have rights, usefully emphasizes the everyday importance of citizenship, even as it simultaneously recalls Hannah Arendt's 'prophetic skepticism' about the enforceability of international human rights.[244] For Arendt, any proclamation of antecedent or inalienable rights, such as being born free and equal in dignity, counted for nothing unless one were a member of a community organized to protect and guarantee them.[245] With this in mind, as Kesby puts it, 'nationality is not simply a necessary legal status for the exercise of a limited range of national rights, but in practice often for the full range of human rights, from rights of freedom of movement to the right to education and health care.'[246]

(p. 93) The references to nationality in Article 1A(2) lead to some confusion on occasion, with regard both to the appreciation of well-founded fear and to the relevant country against which such fear is to be assessed. Deprivation of citizenship and its counterpart, denial of the right to return, are often equated with persecution. International law certainly provides the bases upon which to characterize denationalization as arbitrary, discriminatory and even as 'non-opposable' to other States, but whether it amounts to persecution in the sense of the 1951 Convention is another matter. The easy answer, and therefore probably the correct one, is that it all depends. The present state of the jurisprudence remains tilted in favour of the State's sovereign competence in nationality matters, rather than towards the individual to whom certain duties are owed. This may be due in part to the nature of a 'well-founded fear of being persecuted' and to the impression that denationalization is a once and for all act, incapable of being repeated, not sufficiently 'forward looking', and thus falling outside certain a priori assumptions about persecution.[247] A more detailed examination of context and circumstance is called for, however, premised on the 'right to have rights' as fundamental and looking more closely at the conditions underlying denial or deprivation and their impact on the lives of those affected.[248] On the one hand, it may be argued that denial or deprivation of citizenship is not indicative of a well-founded fear of persecution unless it is clearly linked to the likelihood of ill-treatment, threats to life or liberty, serious violations generally of civil and political rights, or the flagrant denial of economic, social and cultural rights. On the other hand, the situation in fact of those affected may be better appreciated if the fundamental nature of nationality is the starting point, and the ensuing assessment then recalibrated to equate breaking that link with the denial of protection.

The German Federal Administrative Court, for example, while taking account of all the circumstances, has nevertheless held that the effects of deprivation of citizenship for a reason relevant to asylum do not cease with the act of deprivation itself, which causes significant, ongoing harm.[249] Similarly, the Court of Appeal in the United Kingdom, while accepting that deprivation of nationality did not necessarily give rise to refugee status,

found in the instant case that not enough attention had been given to ‘the loss and continued loss of civil rights’.[250] Lord Justice Jacob went so far as to say that,

> Once a claimant for refugee status has established that their country of origin has taken away their nationality on the grounds of race, they in my view have established a prima facie case for such status … They have ‘lost the right to have rights’ … And they have (p. 94) already been put in the position that their home state will not let them in—they cannot even go home.[251]

The linkage between citizenship and enjoyment of a whole range of rights may therefore be what distinguishes its denial presumptively from threats to other protected rights and interests.

A further element of confusion may arise where the fact of deprivation of citizenship is seen as somehow changing the locus, so that the acting State is no longer the ‘country of reference’ for the purposes of Article 1A(2), and a claimant so affected must be treated differently.[252] This approach is unnecessarily legalistic, even if it appears to be driven in part by a commendable desire for refugee status decision-makers not to be seen as recognizing denationalization which is inconsistent with international law or which, given its egregious nature, is otherwise not opposable to other States. Understandably, there is some reluctance to insist that an individual continues to enjoy a status which they manifestly do not, but the determination of refugee status does not do this. In most cases it will be illogical to characterize the applicant for refugee status deprived of nationality as a stateless claimant, and their country as therefore a country of former habitual residence; what matters are the facts giving rise to a well-founded fear of persecution, one of which is or may be the arbitrary or discriminatory deprivation of citizenship.

This confusion and the resulting dilemmas are easily avoided by a straightforward, non-technical approach to Article 1A(2) that is fully consistent with the ordinary meaning of words, considered in context and in light of the object and purpose of the Convention. This demands less concern with the international ‘validity’ of deprivation of citizenship (a matter for other tribunals), and greater attention to approaching nationality contextually and as one of the indices of protection or no protection. It does not matter that the act of deprivation is not opposable or not to be recognized; refugee status determination is not about the opposability of the acts of States, but about whether their actions, including with regard to nationality, are sufficient to indicate the well-foundedness of fear of being persecuted and the lack of protection.[253]

Of course, the facts *may* dictate a more nuanced approach, for example, where an individual, having been deprived of citizenship in one State, establishes residence in another, from which he or she is then obliged to move on.[254]

(p. 95) 5.2 Reasons for persecution

The Convention identifies five relevant grounds of persecution, all of which, in varying degrees, have been correspondingly developed in the field of non-discrimination.[255] The linkage to discrimination has been taken up in many leading decisions in different jurisdictions, although the extent to which discrimination is always a *necessary* element of persecution raises some theoretical issues.[256] While gender, gender identity, and sexual orientation are not specified grounds of persecution in the Convention, they are commonly encapsulated under ‘particular social group’, although they could also come within the other grounds.[257]

5.2.1 Race

With regard to *race,* account should be taken of article 1 of the 1966 Convention on the Elimination of All Forms of Racial Discrimination which defines that practice to include distinctions based on 'race, colour, descent, or national or ethnic origin'.[258] Given legal developments over the last fifty or so years, the broad meaning can be considered valid also for the purposes of the 1951 Convention, although interpretative developments are ongoing. Achiume, for example, adopts Haney López's definition of race as 'the historically contingent social systems of meaning that attach to elements of morphology and ancestry'.[259] Reviewing the jurisprudence of the International Criminal Tribunals in 2000, Verdirame noted a shift towards the greater use of 'subjective criteria', including self-perception and the perception of others: 'The Tribunals are … beginning to acknowledge that collective identities, and in particular ethnicity, are by their very nature social constructs, "imagined" identities entirely dependent on variable and contingent perceptions, and *not* social facts, which are verifiable in the same manner as natural phenomena or physical facts.'[260]

(p. 96) Recognizing race as a socially constructed concept also directs attention towards the perception of the persecutor.[261] As is the case for other Convention grounds, a person may be entitled to refugee status where he or she is perceived by the persecutor to be a member of a particular race, regardless of whether or not he or she self-identifies with that race.[262]

Persecution on account of race is all too frequently the background to refugee movements in all parts of the world.[263] The international community has expressed particular abhorrence at discrimination on racial grounds, as evidenced by repeated resolutions of the General Assembly, but the point at which such practices amount to persecution in and of themselves is more controversial.[264]

5.2.2 Religion

Religion has long been the basis upon which governments and peoples have singled out others for persecution. In 1685, thousands of Huguenots fled from France to England and Prussia after revocation of the Edict of Nantes opened the way to massacre and oppression. The late nineteenth century witnessed pogroms of Jews in Russia and of Armenian Christians in Ottoman Turkey. The past century likewise saw large-scale persecution of Jews (p. 97) under the hegemony of Nazi and Axis powers up to 1945, with later targets in other regions including Jehovah's Witnesses in Africa and among the Commonwealth of Independent States, Muslims in Myanmar, Baha'is in Iran, Ahmadis in various Islamic countries, and believers of all persuasions in totalitarian and self-proclaimed atheist States.[265]

Article 18 of the 1966 Covenant on Civil and Political Rights, elaborating article 18 of the Universal Declaration of Human Rights, prescribes that everyone shall have the right to freedom of thought, conscience, and religion, which shall include the freedom to have or adopt a religion or belief of choice and the freedom to manifest such religion or belief.[266] Article 18 'protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief', and encompasses newly established religions and those practised by religious minorities.[267] No one is to be subject to coercion which would impair the freedom to have or adopt a religion or belief of choice.[268]

In 1962, the General Assembly requested the Commission on Human Rights to draw up a draft declaration and draft convention on the elimination of all forms of intolerance (p. 98) based on religion or belief,[269] and in 1967 it took note of the Preamble and article 1 of a proposed convention,[270] in which the Third Committee had suggested that the expression 'religion or belief ' should include 'theistic, non-theistic and atheistic beliefs'.[271] The Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, adopted in 1981, indicates the interests to be protected, the infringement of which may signal persecution.[272] The 'content' of the right to freedom of thought,

conscience and religion continues to be the subject of enquiry, although there have been advances in recent years, particularly in relation to conscientious objection to military service.[273]

Claims based on the 'religion' ground under the 1951 Convention present their own challenges, both for advocates and decision-makers.[274] Conversion while in a country of potential refuge can raise particular evidentiary and credibility issues,[275] and is the case for other Convention grounds, an individual cannot be expected to conceal his or her religion in order to avoid persecution.[276] In *Y & Z*, the CJEU considered whether an applicant's fear of persecution could be considered well-founded if he or she could 'avoid exposure' by 'abstaining from certain religious practices'.[277] The Court found,

> [w]here it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, (p. 99) he should be granted refugee status … The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.[278]

The Court's finding in *Y & Z* leaves it unclear whether an individual who would conceal their religious beliefs or practices precisely in order to avoid persecution could, for that reason, be denied asylum. This position has been rejected in relation to several grounds of the Convention definition on bases that are broadly applicable,[279] and should similarly be rejected here.[280] An applicant who would behave 'discreetly' in their country of origin due, at least in part, to a well-founded fear of persecution is entitled to protection under the Convention.

5.2.3 Nationality

The reference to persecution for reasons of *nationality* is somewhat odd, given the absurdity of a State persecuting its own nationals on account of their membership of the body politic. Those who possess the nationality of another State will, in normal circumstances, be entitled to its protection and so fall outside the refugee definition. Conceivably, the nationals of State B resident in State A could find themselves persecuted on account of their nationality, driven out to a neighbouring country, and yet still denied the protection of State B, particularly that aspect which includes the right of nationals to enter their own State.[281] However, nationality in article 1A(2) of the 1951 Convention is usually interpreted more loosely, to include origins and the membership of particular ethnic, religious, cultural, and linguistic communities.[282] It is not necessary that those persecuted should constitute a minority in (p. 100) their own country, for oligarchies traditionally tend to resort to oppression.[283] Nationality, interpreted in this way, illustrates the points of distinction which can serve as the basis for the policy and practice of persecution.[284] It may, for example, be relied on in claims by children who are denied the right to a nationality at birth, or access to education or health services.[285] There may be some overlap between the various grounds and, likewise, factors derived from two or more of the criteria may contribute cumulatively to a well-founded fear of persecution.

5.2.4 Membership of a particular social group

Further potential overlap lies in the criterion, *membership of a particular social group*.[286] The 1951 Convention is not alone in recognizing 'social' factors as a potential irrelevant distinction giving rise to arbitrary or repressive treatment. Article 2 of the 1948 Universal Declaration of Human Rights includes 'national or social origin, property, birth or other status' as prohibited grounds of distinction,[287] a form of words repeated in article 2 of the 1966 Covenants on Economic, Social, and Cultural Rights and Civil and Political Rights; it

also appears in article 26 of the latter Covenant, which calls for equality before and equal protection of the law.

The *travaux préparatoires* provide little explanation for why 'social group' was included. The Swedish delegate to the 1951 Conference simply stated that social group cases existed, and that the Convention should mention them explicitly.[288] The lack of substantive debate (p. 101) on the issue suggests that contemporary examples of such persecution may have been in the minds of the drafters, such as resulted from the 'restructuring' of society then being undertaken in the socialist States and the special attention reserved for landowners, capitalist class members, independent business people, the middle class and their families.

The initial intention may thus have been to protect known categories from known forms of harm; less clear is whether the notion of 'social group' was expected or intended to apply generally to then unrecognized groups facing new forms of persecution. The answer to that question will never be found, but there is no reason in principle why this ground, like every other, should not be progressively developed.[289] The experience of 1951 is also illustrative, for its implicit reference to the perception or attitude of the persecuting authority. It is still not unusual for governments publicly to write off sections of their population—the petty bourgeoisie, for example, or the class traitors; and even more frequent will be those occasions on which the identification of groups to be neutralized takes place covertly. In eastern Europe in the late 1940s and the 1950s, groups and classes and their descendants were *perceived* to be a threat to the new order, whatever their individual qualities or beliefs. In Vietnam in the late 1970s, the bourgeoisie were similarly seen as an obstacle to economic and social restructuring (in circumstances in which class and ethnicity happened to combine). The *characteristics* of the group and its individual members were what counted. More recently, attention has focused on other discrete candidate groups, such as those based on sex,[290] sexual orientation and gender identity,[291] disability,[292] and HIV/AIDS status,[293] among others.[294] As paragraph 78 of the UNHCR *Handbook* puts it:

> Membership of a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the government or because the political outlook, (p. 102) antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.

Especially important is the conjunction of 'internal' characteristics and 'external' perceptions.[295] *Linking*, rather than unifying, characteristics, more accurately represent social reality, while circumstances external to the group may have isolated it from the rest of society, or may lead to its separate treatment.

A superficial linguistic analysis suggests people in a certain relation or having a certain degree of similarity, or a coming together of those of like class or kindred interests. A fully comprehensive definition is impracticable, if not impossible, but an essential element in any description would be a combination of matters of choice with other matters over which members of the group have no control. In determining whether a particular group of people constitutes a 'social group' within the meaning of the Convention, attention should therefore be given to the presence of linking and uniting factors such as ethnic, cultural, and linguistic origin; education; family or other background; economic activity; shared values, outlook, and aspirations.[296] Also highly relevant are the attitudes to the putative social group of other groups in the same society and, in particular, the treatment accorded to it by State authorities. The importance, and therefore the identity, of a social group may well be in direct proportion to the notice taken of it by others— the view which others have of us—particularly at the official level. The notion of social group thus possesses an element

of open-endedness capable of expansion, as the jurisprudence shows, in favour of a variety of different classes susceptible to persecution.[297]

5.2.4.1 The concept develops

The 1986 United States case of *Sanchez-Trujillo v INS* illustrates some of the problematic issues that arise in identifying a social group at risk of persecution.[298] The asylum applicants (p. 103) from El Salvador based their claim on membership of a class that included young, urban, working-class males, who were further identified as unwilling to serve in the armed forces of their country.[299] Anticipating the need to 'identify a cognizable group', the claimants adduced fairly cogent statistical evidence showing the numbers of such young, urban non-combatant males who figured among the disappeared and the dead, to which they added personal testimony and experience. The Court found little guidance in the UNHCR *Handbook* reference to 'persons of similar background, habits or social status',[300] considering instead that a social group implied 'a collection of people closely affiliated with each other who are actuated by some common impulse or interest'. Moreover, 'a voluntary associational relationship' was also required, 'which imparts some common characteristic that is fundamental to their identity'. In the Court's view, 'family members' were a prototypical example, conveniently meeting its criteria of affiliation, common interest, or association. The family also has the advantage of being finite; it is usually small, readily identifiable, and terminable with difficulty. Potentially larger categories, including so-called statistical groups, such as the red-headed, the blue-eyed, or the over six-feet tall,[301] were dismissed, even though such arbitrary classifications have been the basis for persecutory practices in the past. Like others before and since, this Court was evidently anxious to guard against 'sweeping demographic divisions' that encompass a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings. Thinking and application have progressed substantially in the subsequent practice of States and tribunals, if not always without difficulty.

During the 1990s, the social group category produced several, not always easily reconcilable, judgments in different jurisdictions and particularly in Canada. The cases there involved China's 'one-child policy', so far as it was claimed that the parents of one or more children might run the risk of forcible sterilization and whether a social group could be based on sexual orientation, or on a fear of 'domestic' violence in their own country by women unable to obtain protection locally.[302]

In *Cheung*, the Canadian Federal Court of Appeal held that 'women in China who have (more than) one child and are faced with forced sterilization satisfy enough of the … criteria to be considered a particular social group'.[303] In *Chan*, another case based on fear of forced sterilization (this time by a father), a majority of the Supreme Court dismissed the appeal on (p. 104) the ground that the appellant had not discharged the burden of proof, with respect either to the subjective or objective elements.[304]

Ward concerned a resident of Northern Ireland who had voluntarily joined the Irish National Liberation Army (INLA), a terrorist group dedicated to the political union of Ulster and the Irish Republic. Detailed to guard innocent hostages, he facilitated their escape on learning that they were to be executed. The INLA in turn 'court-martialed' and tortured him and decided that he should be killed. Amongst other grounds, he claimed to fear persecution by reason of membership in the particular social group constituted by the INLA. The Supreme Court of Canada held that the group of INLA members were not a 'particular social group'; its membership was not characterized by an innate characteristic or an unchangeable historical fact, while its objectives also could not be said to be so fundamental to the human dignity of its members.[305]

The Supreme Court in *Ward* recognized also that the process of interpreting particular social group should reflect certain themes, namely, human rights and anti-discrimination. It considered that there were three possible categories of social group: (1) those defined by an innate or unchangeable characteristic, for example, individuals fearing persecution by reason of gender, linguistic background, and sexual orientation; (2) those whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association, for example, human rights activists;[306] and (3) those associated by a former voluntary status, unalterable due to its historical permanence. Given that 'one's past is an immutable part of the person',[307] the third category belongs essentially to the first.

5.2.4.2 The categories of association

The *Ward* judgment is of major importance on a variety of issues, but the analysis of the social group question raises a number of concerns. What is meant by 'groups associated by a former voluntary status', is far from clear. The Court said that this sub-category was included 'because of historical intentions'. However, there is no evidence to suggest that those apparently intended to benefit from the social group provision, the former capitalists of eastern Europe, were ever formally associated one with another. They may have been, but (p. 105) equally they may not. What counted at the time was the fact that they were not only *internally* linked by having engaged in a particular type of (past) economic activity, but also *externally* defined, partly if not exclusively, by the perceptions of the new ruling class.[308]

As the Supreme Court in fact recognized, capitalists were persecuted historically, 'not because of their contemporaneous activities but because of their past status *as ascribed to them by the Communist leaders*'.[309] In this sense, they were persecuted not because they were *former* capitalists, but because they *were* former capitalists; not because of what they had done in the past, but because of what they were considered to be today; not because of any actual or imagined voluntary association, but because of the perceived threat of the class (defined *incidentally* by what they had once done) to the new society. The approach of the new ruling class to the capitalist class reveals a clear overlap between *past* activity and/or status and the perception of a *present* threat to the new society.[310]

Having proposed a 'limiting' approach to social group,[311] it is hardly surprising that the Supreme Court at first seems conservative in its list of innate or unchangeable characteristics: 'such bases as gender, linguistic background and sexual orientation'.[312] In fact, this approach is not as restrictive as might appear; the list is clearly illustrative, and in principle other innate or unchangeable factors relevant to non-discrimination in the enjoyment of fundamental rights may also be included, such as ethnic or cultural factors, education, family background, property, birth or other status, national or social origin;[313] in short, the very sorts of *social* factors that are or ought to be irrelevant to the enjoyment of fundamental human rights.

(p. 106) Economic activity, shared values, outlook, and aspirations should not be excluded, because either they are part of the unchangeable past,[314] or they describe, if only generally, the idea of individuals associated for reasons fundamental to their human dignity, and the sort of 'value' association which voluntary participants ought not to be required to forsake.

5.2.4.3 Common victimization

In *Ward*, the Supreme Court was clearly of the view that an association of people should not be characterized as a particular social group, 'merely by reason of their common victimization as the objects of persecution';[315] on this point, it has been joined by courts in other jurisdictions.[316] The essential question, however, is whether the persecution feared is the *sole* distinguishing factor that results in the identification of the particular social group. Taken out of context, this question is too simple, for wherever persecution under the law is the issue, legislative provisions will be but one facet of broader policies and perspectives,

all of which contribute to the identification of the group, adding to its pre-existing characteristics.

For example, parents with one or more children can be considered as an identifiable social group because of (1) their factual circumstances and (2) the way in which they are treated in law and by society. Arbitrary laws might subject red-headed people, mothers of one or more children, and thieves to a variety of penalties, reflecting no more than the whims of the legislator. Where such laws have a social and political context and purpose, and touch on fundamental human rights, such as personal integrity or reproductive control, then a rational basis exists for identifying red-headed people and mothers of one or more children as a particular social group, *in their particular circumstances*, while excluding thieves.[317] For the purposes of the Convention definition, internal linking factors cannot be considered in isolation, but only in conjunction with external defining factors, such as perceptions, policies, practices, and laws.

Treatment amounting to persecution thus remains relevant in identifying a particular social group, where it reflects State policy or civil society attitudes towards a particular class.[318] As the penal law embodies State policy on criminals, so other laws and practices may illustrate policy towards individuals or groups who assert fundamental rights, for example, with respect to family life or conscience.[319] In both cases, the penalties help to identify the group at risk; so far as they also exceed the limits of reasonableness and proportionality, they may (p. 107) also cross the line from permissible 'sanction' for contravention of a particular social policy into impermissible persecution.

5.2.4.4 Gender-based claims

Although the principle of non-discrimination on the ground of sex is now well established in international law,[320] a reference to sex or gender was not included in article 1A(2) as the basis for a well-founded fear of persecution.[321] The interpretation of the Convention has however evolved to ensure greater protection those who fear persecution on the basis of gender.[322] Gender is defined in UNHCR Guidelines as 'the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another'.[323] As LaViolette notes, 'gender-based persecution is not necessarily the same as persecution due to one's sex, but rather includes persecution of persons who refuse to conform to social criteria specific to men and women'.[324] Although women's experiences tend to be the focus of such claims, male or intersex applicants may also fear persecution on this basis.[325]

Women may of course base a claim for refugee status on any of the five grounds in Article 1A(2) of the Convention.[326] However, a particular need for protection in this field was recognized as claims began to be made by women seeking refuge from 'domestic' violence and from gendered violence in society, such as sexual violence and female genital mutilation (p. 108) (FGM).[327] From the perspective of interpretation, however, the problem with much of the violence against women is precisely that it is perceived, either as 'domestic', or as individual and non-attributable to the State or other political structure.[328] The term 'domestic violence' is commonly used to describe spousal violence applied in a domestic setting, out of the public eye, and for reasons personal to the aggressor. It is 'private', unlike the 'public' dimension to so much political, ethnic, or religious persecution, and it tends to serve individual, usually male, ends, such as aggression, sadism, oppression, or subjection.[329] Violence has been considered as non-attributable to the State, when perpetrated by random individuals for personal reasons, including soldiers, policemen, or other holders of public authority, such as civil officials or State religious leaders, when acting outside or beyond authority.

Many societies have long turned a blind eye to domestic violence, on the ground that unless it was 'excessive', it was not a proper matter for State involvement or State penalties. The *policy* implicit in such a laissez-faire approach, not surprisingly, has found its reaction in the proposition that *all* violence against women is political, or in its slightly less radical variant, that all violence against women should be presumed to be political unless and until the State is shown to provide effective protection. Thus, it is argued, being a woman is a sufficiently political statement in itself, so far as violence against women, domestic, sexual or public, is part of the process of oppression.

Within the scheme of international protection offered by the 1951 Convention relating to the Status of Refugees and its national counterparts, such an approach has not found support as such, and periodic proposals to add sex or gender to the list of Convention reasons have not been taken up. Gender-based claims have nonetheless been recognized as coming within the refugee definition, challenging the private/public distinction and drawing by analogy on rights-based approaches in other circumstances, on increasing sensitivity to the frequently systemic character of denials of rights to women, and on underlying obligations incumbent on all States to protect the human rights of everyone within their territory and subject to their jurisdiction. Executive Committee Conclusion No. 39 (1985) was an early step towards better protection, although it simply recognizes that States, 'in the exercise (p. 109) of their sovereignty', may interpret 'social group' to include women who face harsh or inhuman treatment for having transgressed the social mores of their community.[330] The 1993 UN Declaration on the Elimination of Violence against Women,[331] moreover, acknowledges that all States have an obligation to work towards its eradication.

What might at first glance appear as 'domestic' violence may enter the public arena and therefore the traditional refugee domain when it passes into the ambit of State-sanctioned or State-tolerated oppression. This raises evidential considerations of some magnitude, however, and at a certain point cases call rather for a value judgment, than a purely factual assessment of conditions in this or that country. Nevertheless, gender-related persecution will often have political purposes, including the enforcement of conformity to a particular religious, cultural, or social view of society;[332] such persecution has included torture or oppression by State agents at the individual level, as well as more generalized harassment by sections of the public.[333] Rape by a soldier, policeman, or person in authority, for example, may be characterized as the unauthorized private act of an individual, and therefore not persecution. An examination of the context in which the act takes place, however, may disclose a manifestation of public State authority; the conditions and the occasion may as much be the responsibility of the State, as the failure to provide an effective remedy. For women suffer particular forms of persecution *as women*, and not just or specifically because of political opinion or ethnicity. Even though men too may be sexually abused, their gender is not generally a consideration, although the abuse may be intended also to humiliate them when considered in the light of traditional societal norms. Women may be raped because of their politics, but they are also raped because they are women and because rape inflicts a particular indignity and promotes a particular structure of male power.[334]

Even if 'domestic' violence is given a public, political face, however, there is still some distance between the act and the *reasons* in the Convention definition.[335] The State is unwilling or unable to prevent or punish such violence as might otherwise amount to persecution, but (p. 110) *why* is the claimant so affected? The language of political opinion does not readily fit, and the question is whether membership of a particular social group will establish the sufficient link. Persecution on account of gendered discrimination may be due both to a claimant's gender and their political opinion (much as an apartheid activist could be targeted both due to their opinion and their race). Many cases may therefore call for more than superficial examination. Dauvergne, for example, categorizes political opinion cases as (1) involving 'women resisting or rejecting traditional norms, but not otherwise

engaging in political activity, nor in any activity that is directed towards the state, and who have not articulated their actions in political terms' (the 'true challenge', in her view); (2) opinions that the female applicant identifies as feminist; and (3) men challenging 'traditional roles or practices assigned to women'.[336]

Within the EU, the recast Qualification Directive now provides in article 10(1)(d) that '[g]ender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group'.[337] This language is an improvement on the somewhat equivocal language in the original Directive, which provided that while '[g]ender related aspects' could be considered by Member States, they did not, of themselves, create a 'presumption' of membership of a particular social group.[338]

If it is assumed that gender, in principle, is a sufficient identifying factor held in common, so that all women may comprise a social group, is this enough for Convention purposes to show that a woman who fears violence would be persecuted *for reasons of* membership in that group?[339] The answer, some have argued, lies in further sub-categorization, and in *Islam*, for example, counsel argued that some three characteristics set the appellants apart from the rest of society, namely, gender, suspicion of adultery, and unprotected status.[340] In this case, the applicants, citizens of Pakistan otherwise unconnected with each other, (p. 111) suffered violence in their country of origin after their husbands had falsely accused them of adultery. They applied for asylum in the United Kingdom on the ground that having been abandoned by their husbands, lacking any other male protection and condemned by the local community for sexual misconduct, they feared persecution if returned, in that they would be physically and emotionally abused, ostracized and unprotected by the authorities, and might be liable to death by stoning. Three judges (Lord Steyn, Lord Hoffmann, and Lord Hope) considered that women in Pakistan constituted a particular social group, because they were discriminated against as a group in matters of fundamental human rights, because the State gave them no protection, and because they were perceived as not being entitled to the same human rights as men. Two judges (Lord Steyn and Lord Hutton) considered that the applicants also belonged to a more narrowly defined particular social group, the unifying characteristics of which were gender, being suspected of adultery, and lacking protection from the State and public authorities. Although not all members of the group were persecuted, the persecution feared by the applicants was sanctioned or tolerated by the State for reasons of membership of a particular social group; they were accordingly entitled to asylum.[341]

As this case demonstrates, when taking account of conditions in a particular country, it may become clear that the group within the group is identifiable by reference to the fact of their liability, exposure or vulnerability to violence in an environment that denies them protection. Such a social group of women may be additionally identifiable by reference to other descriptors, such as race or class, which leads to their being denied protection in circumstances in which other women in the same society are not (so) affected or deprived. They face violence amounting to persecution, and other denials of rights, because of their gender, their race, and their class and because they are unprotected.[342] Clearly, gender *is* used by societies to organize or distribute rights and benefits; where it is also used to deny rights or inflict harm, the identification of a gender-defined social group has the advantage of external confirmation.[343]

In the United States, a woman's capacity to seek asylum on the basis of domestic violence remains highly contested at the time of writing. In the 2018 decision *Matter of A-B-*,[344](p. 112) the US Attorney General[345] overruled the BIA's grant of asylum to the applicant, using it to vacate a 2014 BIA precedent decision that 'married women in Guatemala who are unable to leave their relationship' constitute a particular social group.[346] The Attorney General stated that '[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum'.[347] The

ultimate effect of the Attorney General's decision is for the most part to deny meritorious claims at the first instance, either in the asylum offices or the immigration courts. Federal courts of appeals have taken different approaches as to whether, in practice, it precludes asylum claims based on domestic (or gang related) violence, but very few applicants have the considerable resources required to pursue their case to the federal appellate level.[348] Anker considers the jurisprudence to be 'in flux',[349] but identifies 'signs of new attention to *gender per se*' in the wake of the Attorney General's decision.[350] The underlying problem for domestic violence and many other claims is the convoluted and constricted interpretation of 'particular social group' under United States law, which makes it nearly impossible to formulate a cognizable group. At the time of writing, the new US president has directed the relevant agencies to review the US approach to domestic or gang violence claims 'to evaluate whether the United States provides protection … in a manner consistent with international standards'.[351] More importantly, the same agencies of Justice and Homeland Security have been tasked with promulgating regulations addressing the circumstances under which a person should be considered a member of a particular social group, as that term is derived from the 1951 Convention and 1967 Protocol.[352] This reappraisal, couched as it is in terms of the international legal (p. 113) obligations of the United States, provides an opportunity to realign US asylum jurisprudence with international standards.[353]

5.2.4.5 Sexual orientation and gender identity claims

An evolutionary interpretation of the article 1A(2) of the 1951 Convention has also facilitated the protection of lesbian, gay, bisexual, transgender, and intersex (LGBTI) asylum seekers. Claims on the basis of sexual orientation and gender identity are not expressly mentioned in the 1951 Convention, although persecution occurred on such bases in the Second World War.[354] In recent decades, greater attention has been paid both to LGBTI individuals' rights and to their susceptibility to persecution.[355] It is now recognized that persecution on the basis of actual or imputed sexual orientation or gender identity falls within the ambit of the Convention.[356]

Recent jurisprudence grapples instead with how to identify those with a well-founded fear of persecution. In the United Kingdom Supreme Court case *HJ (Iran)*,[357] the parties to the joined appeals accepted that 'practising homosexuals' constituted a particular social group within the meaning of article 1A(2) of the 1951 Convention. Might the appellants nonetheless fall outside Convention protection if persecution could be avoided by concealment, and should they be expected to conduct themselves accordingly? In his judgment, Lord Hope stressed that the group in question was defined by an immutable characteristic—sexual identity—which could not be changed:

> To pretend that it does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny the members of this group their fundamental right to be what they are.[358]

(p. 114) This clear statement captures perfectly one of the essentials of the refugee definition, which protects those who fear persecution because of who they are, and who should not lose that protection if, fearing persecution, they might seek to conceal their 'true' identity. The simplicity of this approach is self-evident and it has been transposed and applied, without difficulty, to the analogous situation of the right to hold, and therefore also not to hold, political beliefs.[359] It underpins the judgments of the Court of Justice of the European Union (CJEU) in *Y & Z*, on religious persecution,[360] and *X, Y, & Z*,[361] on sexual orientation, respectively, and has been adopted by the European Court of Human Rights.[362] A similar approach has been taken in other jurisdictions.[363] While this jurisprudential development is welcome, there is some evidence that decision-makers are now placing more emphasis on credibility as a reason for rejection, already a fraught issue.[364] In addition, there appears to be an inherent difficulty in determining why a person would live

'discreetly' if returned. In *HJ (Iran)*, the Court drew a distinction between living discreetly where 'a material reason' was to avoid persecution, and doing so 'simply because that was how [the applicant] would want to live, or because of social pressures'.[365] In *YD (Algeria*), the Court of Appeal considered the case of a young gay man who had fled to the UK aged 15, fearing that his uncle would kill him because of his sexuality, and that he 'would be judged and treated badly, and would be in danger, in Algeria'.[366] The First-tier Tribunal had found that he would not live openly as a gay man if returned to Algeria, but that this decision would not 'necessarily' be based on fear of persecution.[367] Relying on an earlier country guidance decision, the Court of Appeal accepted that while '[v]ery few gay men live openly' in Algeria,[368] this was due to 'social, (p. 115) cultural and religious norms in a conservative society subject to strict Islamic values', which did not amount to persecution.[369] The country guidance decision itself acknowledged the 'conundrum':

> If there is no evidence of persecution of gay men who have escaped ill-treatment from family by relocating elsewhere, why is there no evidence of gay men feeling able to live openly? Alternatively, is the absence of evidence of physical ill-treatment of gay men due to the fact that there are no gay men living openly?[370]

One may reasonably question if this conundrum can be resolved neatly,[371] particularly in relation to a society (like Algeria) in which homosexuality is criminalized.[372]

In *X, Y, & Z*, the Fourth Chamber accepted as 'common ground that a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it', finding support for this proposition in article 10(1)(d) of the original Qualification Directive,[373] and, with regard to social perceptions, in the criminal laws that specifically target homosexuals. On the issue of criminalization, the Court's position was limited by the scope of the referred question, which asked whether criminalization of homosexual activities and the threat of imprisonment constituted an act of persecution under article 9(1)(a) of the original Qualification Directive, read in conjunction with article 9(2)(c).[374] Accordingly, the Court did not specifically examine whether criminalization of homosexual activities constituted 'legal, administrative, police, and/or judicial measures *which are in themselves discriminatory*' under article 9(2)(b), but focused instead on '*prosecution or punishment* which is disproportionate or discriminatory' under article 9(2)(c).[375] Within these parameters, the Court reiterated that persecution connotes acts that are sufficiently serious, and that 'not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness'. In such circumstances, the mere existence of legislation did not reach the necessary threshold, although imprisonment in consequence thereof might do, 'provided that it is actually applied in the country of origin which adopted such legislation'.[376]

Finally, the Court came also to 'activities' and the question of concealment or restraint. As the United Kingdom Supreme Court had done in *HJ (Iran)*, and as the CJEU had done in (p. 116) relation to religion in *Y & Z*, the Court here rejected the idea of concealment as 'incompatible with the recognition of a characteristic so fundamental to a person's identity that [they] cannot be expected to renounce it'.[377] What mattered was whether, if required to return, the asylum seeker's homosexuality would expose him or her to a genuine risk of persecution. It was unnecessary, moreover, 'to distinguish acts that interfere with the core areas of the expression of sexual orientation, even assuming it were possible to identify them, from acts which do not affect those purported core areas'.[378]

While the focus of this jurisprudence on the nature of fundamental characteristics aligned to the risk of persecution is relatively straightforward, it has attracted criticism from certain advocates and commentators.[379] One area of contention is the finding in *X, Y, & Z* that criminalization of homosexuality does not, in and of itself, constitute 'persecution'.[380] This finding is in part an aspect of the restricted scope of the referred question examined by the Court.[381] However, the same conclusion was reached by the Court of Appeal in *YD*

(Algeria),[382] and by the European Court of Human Rights in *B & C v Switzerland*.[383] In *B & C*, the Court found that 'the mere existence of laws criminalising homosexual acts in the country of destination does not render an individual's removal … contrary to Article 3 of the Convention. What is decisive is whether there is a real risk that these laws are applied in practice'.[384]

As a general principle, focus on the risk to the *individual* requires that criminalization of homosexuality be treated as a factor amongst others in determining whether a well-founded fear of persecution exists—doctrine is tied to consideration of the individual's particular situation in context.[385] In practice, cases will turn not on whether rarely enforced (p. 117) laws can amount to 'persecution' in and of themselves, but instead on the risks posed by non-State actors, and the State's 'unwillingness and inability' to protect against those risks, as evidenced by the existence of such laws.[386]

As noted elsewhere, however, the criminal law can be an indicator of State policy towards particular individuals or groups; in turn, it may both identify certain groups and, where application of the law exceeds the limits of reasonableness and proportionality, amount to persecution.[387] With respect, it is difficult to see how a law which criminalizes an individual's 'fundamental right to be what they are' with a term of imprisonment, for example, could fall within these limits. Unless a true dead letter,[388] the very existence of such law may raise a reasonable apprehension of prosecution and thus of persecution. The criminalization of sexual orientation can also have a chilling effect on an individual's potential to live a full life as a member of a polity, to express themselves freely, to call on and to receive the assistance of authorities in cases of discrimination or threats, and to enjoy respect and dignity for their private lives.

5.2.4.6 A social view of 'social group'

The jurisprudence of recent years shows courts and tribunals in different jurisdictions wrestling with the concept of particular social group, and a coherent, general approach is beginning to emerge.[389] Clearly, there are social groups other than those that share immutable characteristics, or which combine for reasons fundamental to their human dignity. Drawing the contours of such groups by reference to the likelihood of persecution confuses the issues of identity and risk, despite the fact that each is relevant to the other. The individualized approach of the Convention refugee definition requires attention to personal circumstances, time, and place, all of which may combine to distinguish those at risk from others who may share similar characteristics and yet not be in danger. Although there will be policy pressures to limit refugee categories in periods of increased population displacement, there is no rational basis for denying protection to individuals who, even if divided in lifestyle, culture, interests, and politics, may yet be linked across another dimension of affinity.

There is probably no single coherent definition, but rather a set of variables, a 'range of permissible descriptors'. These include, for example, (1) the fact of voluntary association, where such association is equivalent to a certain *value* and not merely the result of accident or incident, unless that in turn is affected by the way it is perceived; (2) involuntary linkages, (p. 118) such as family, shared past experience, or innate, unalterable characteristics; and (3) the perception of others.[390]

In the cases considered above, the courts inclined towards relatively simple bases of categorization, relying on innate or unchangeable characteristics and notions of association for reasons fundamental to human dignity. There are many 'natural' meanings of 'social', however, which have received little or no attention, but which may also prove a sufficient and appropriate basis for defining or describing social groups for the purposes of the Convention. Beyond the ideas of individuals associated, allied, or combined, characterized by mutual intercourse, united by some common tie,[391] stand those who, in simple sociological terms, are *groups in society*, in the ordinary, everyday sense which describes

the constitution or make-up of the community at large. This is most evident in the use of language to describe, for example, the landlord class, the working class, the ruling class, the bourgeoisie, the middle class, even the criminal class. For this reason it helps to emphasize, not so much that the group is, as it were, 'set apart from society', as that it is essentially a group *within* society which is faced with persecution within the social context of that very society (including its attitudes, prejudices, and actions).[392] The principle of non-discrimination, linked to fundamental rights, serves to distinguish between those deserving protection, because their social origins or situation now put them at risk; and those who do not, such as those who are liable to penalties for breach of the law, considered in its ordinary, common law sense.[393]

If a sociological approach is adopted to the notion of groups in society, then apparently unconnected and unallied individuals may indeed satisfy the criteria: mothers; mothers (p. 119) and families with two children; women at risk of domestic violence; capitalists; former capitalists, homosexual, bisexual, transgender, or intersex asylum seekers, and so on. Whether they then qualify as refugees having a well-founded fear of persecution by reason of their membership in a particular social group will depend on answers to related questions, including the perceptions of the group shared by other groups or State authorities, policies, and practices vis-à-vis the group, and the risk, if any, of treatment amounting to persecution. It can be difficult to recognize when discrimination shades into persecution, particularly where minority or even majority groups are systematically treated less favourably than others. One defining moment may occur when the individual group member chooses to oppose the system, by overt action or simply by non-conformity, actual or perceived. The proximate cause may be action or non-conformity, but the underlying *reason for* the persecution can often clearly be elsewhere; so with the social group, women, particularly in societies in which the attitudinal dimension indicates necessary conformity with another's particular image of herself.[394]

5.2.5 Political opinion

Finally, the Convention adduces fear of persecution for reasons of political opinion. Article 19 of the 1948 Universal Declaration of Human Rights provides that: 'Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' The basic principle is restated in article 19 ICCPR 66, but the right to freedom of expression is qualified there by reference to 'special duties and responsibilities'. The expression of certain types of opinion may therefore be judged unacceptable.[395] Article 19 ICCPR 66 also protects the right not to hold an opinion,[396] to change one's opinion,[397] and not to express one's opinion.[398]

In the 1951 Convention, 'political opinion' should be understood in the broad sense, to incorporate, within substantive limitations now developing generally in the field of human rights, any opinion on any matter in which the machinery of State, government, and policy may be engaged.[399] The typical 'political refugee' is one pursued by the government of a (p. 120) State or other entity on account of his or her opinions, which are an actual or perceived threat to that government or its institutions, or to the political agenda and aspirations of the entity in question.[400] A position of political neutrality—whether held by 'the conscientious non-believer or the indifferent non-believer'—can also fall within the ambit of political opinion, particularly when considered together with evidence regarding the perception or intentions of the persecutor.[401] Political opinions may or may not be expressed, and they may be rightly or wrongly attributed to the applicant for refugee status.[402] If they have been expressed, and if the applicant or others similarly placed have suffered or been threatened with repressive measures, then a well-founded fear may be made out. Problems arise, however, in assessing the value of the 'political act', particularly if the act itself stands more or less alone, unaccompanied by evident or overt expressions of opinion.[403] Political activity undertaken in the country of (potential) refuge also poses

evaluation challenges, some of which have been examined above in the context of 'good faith'.[404]

In principle, there is no reason why a well-founded fear of persecution should not be based on activity after departure. French doctrine, for example, appears not to rule out this possibility, and the jurisprudence also does not discriminate against those who may even have left their country of origin for reasons of personal convenience. The cases summarized in an early French commentary nevertheless emphasize an *active* political role of the sort (p. 121) likely to give rise to a fear of persecution, and whether the claimant is likely to have come to the attention of the authorities of his or her country of origin.[405]

Article 54 of the Swiss law on asylum comes to the issue from the perspective of 'subjective reasons arising after flight', and provides that asylum is not granted to a person who has only become a refugee by leaving his country of origin or by reason of their subsequent activities.[406] However, although 'asylum' may be refused in this limited class of case, the application of the principle of *non-refoulement* continues to be accepted.[407] Hullman, for example, cites one case where knowledge of the individual concerned had likely come into the possession of the authorities of the country of origin (because of actions taken by the Swiss authorities), and refugee status was upheld.[408] Although some European doctrine has typically attached particular importance to political activities *sur place* being a continuation of activities begun in the country of origin, this may be intended to go to the questions of credibility and 'well-foundedness', as the ordinary meaning of article 1A(2) would imply. Article 5 of the recast EU Qualification Directive, however, has failed to reconcile different approaches consistently with the Convention. On the one hand, post-departure activities 'may' be the basis for a well-founded fear of persecution; on the other hand, though 'without prejudice' to the 1951 Convention, Member States may decide not to grant refugee status in a *subsequent* application where the risk of persecution is based on circumstances which the applicant has created since leaving his or her country of origin.[409] The drafting clearly discloses doubt as to the correctness of such action in international law, and is also internally inconsistent; it supposes the existence in fact of a risk of persecution, but suggests discretion to disregard the individual's well-founded fear.[410]

(p. 122) If the central issue of risk of relevant harm for a Convention reason is kept in focus, then it will be seen that there is no rational basis for distinguishing between an individual whose opinions and activities in the country of refuge represent a continuation of opinions and activities begun in the country of origin, and one whose political engagement only begins when he or she has left their homeland. The notion of continuity, as an evidential requirement, may provide some assurance that the person concerned is indeed a person of sincerely held opinions, such as might attract the attention of a persecutor, but this is one aspect only of the issue of credibility. Equally, there is no rational basis for distinguishing in the matter of refugee status between the innocent bystander to whom political opinions are imputed by the persecutor, and the less than innocent bystander whose self-interested actions lead the persecutor also to impute political opinions to the person concerned.[411] The so-called good faith requirement seems to offer an answer to manipulation of the system, but it has no legal authority, is not mentioned in the Convention, and is not supported by any general principle of international law. What remains relevant in every case, however, is the question of credibility as it applies both to the claimant and to evidence relating to the country of origin.[412]

It is equally no answer to a prospective refugee claim that the individual ought to cease to engage in or moderate the conduct[413] or political activities targeted by the authorities or by non-State actors, or that they could conceal their political opinion, where such concealment is necessary in order to avoid persecution.[414]

Although there are many recognized limitations attaching to human rights and fundamental freedoms, there is also commonly a ‘core content’ which, it has been held in related contexts, no one should be required to deny.[415] For example, the right to freedom of (p. 123) opinion, including political opinion, is invariably linked to freedom of expression, without which the former is practically meaningless.[416] Moreover, political opinion and political activity are inherently linked; ‘activity’ is implicit in the concept of freedom to hold opinions, and is directly related to the exercise of ‘political rights’ at large.[417] As the UNHCR *Handbook* observes with regard to a potential ‘political’ refugee,

> There may … be situations in which the applicant has not given any expression to his opinions. *Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities*. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion.[418]

6. Persecution: issues of application

6.1 Persecution and laws of general application

Applications for refugee status are often denied on the ground that the claimant fears not persecution, but prosecution under a law of general application. Experience shows, however, that the law can as well be the instrument of persecution as any other measure. The question then is, if some laws can be the instruments of persecution, which are they? In 1993, the Canadian Federal Court of Appeal offered the following propositions with respect to persecution and an ordinary law of general application: (1) the Convention refugee definition makes the intent or any principal effect of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution; (2) the neutrality of such law vis-à-vis the five Convention grounds must be judged objectively; (3) an ordinary law of general application, even in non-democratic societies, should be presumed valid and neutral, and it is for the claimant to show that the law is persecutory, either inherently or for some other reason; and (4) the claimant must show not that a particular regime is generally oppressive, but that the law in question is persecutory in relation to a Convention ground.[419]

(p. 124) The relationship between laws of general application and persecution has been a controversial aspect of claims based on the alleged impact of China’s ‘one child policy’, and in those involving conscientious objectors. Claimants in different jurisdictions argued that their being liable to forcible sterilization for breach of China’s ‘one child’ policy amounted to persecution within the meaning of the Convention, and decisions in the matter have also been open to political considerations.[420] In *Chang*, for example, the US Board of Immigration Appeals held that the policy is not persecutory and does not, by itself, create a well-founded fear of persecution, ‘even to the extent that involuntary sterilization may occur’. To qualify for asylum, it found, the claimant must show that he or she is at risk because the policy is being selectively applied on Convention grounds, or being used to punish for those reasons.[421] The Canadian Federal Court of Appeal took a different approach in *Cheung*, emphasizing that ‘the forced sterilization of women is a fundamental violation of basic human rights’ which constitutes ‘cruel, inhuman and degrading treatment’.[422] The Court in *Cheung* diverged from the Board’s findings in its assessment that ‘forced sterilization of Chinese women who have had a child is not a law of general application’, but nonetheless noted that,

> [e]ven if forced sterilization were accepted as a law of general application, that fact would not necessarily prevent a claim to Convention refugee status … [I]f the punishment or treatment under a law of general application is so Draconian as to be completely disproportionate to the objective of the law, it may be viewed as persecutory. This is so regardless of whether the intent of the punishment or treatment is persecution.[423]

Every government has the right to enact, implement, and enforce its own legislation, inherent in its sovereignty and in the principle of the reserved domain of domestic jurisdiction. Notwithstanding the presumption of legitimacy in the legislative field, the discriminatory application of law or the use of law to promote discrimination may tend to persecution.[424] In this sense, a human rights perspective can inform the approach to persecution, for example, (p. 125) by indicating which rights are absolute, which may be 'subject to such restrictions as are prescribed by law and reasonably necessary in a democratic society', whether restrictions are reasonably necessary, and whether any prohibition or penalty is proportional to the (social) objective that the legislation aims to achieve. The issues involved can be illustrated by reference to what has been called the offence of *Republikflucht*, arising out of the restrictions often imposed by totalitarian States on travel abroad by their nationals. When unauthorized border-crossing and absence abroad beyond the validity of an exit permit attract heavy penalties, the question is whether fear of prosecution and punishment can be equated with a well-founded fear of persecution on grounds of political opinion, especially where the claim to refugee status is based on nothing more than the anticipation of such prosecution and punishment.[425]

On the one hand, the individual involved is simply treated according to law; on the other hand, the object and purpose of such laws might show that leaving or staying abroad is treated as a *political act*, either because it reflects an actual and sufficient political opinion, or because the State authorities may attribute dissident political opinion to the individual concerned.[426]

Lèse majesté offences provide a second example addressed by UNHCR in a recent Guidance Note.[427] Such laws place restrictions on freedom of expression that may in certain circumstances underpin an asylum claim, whether or not the law is applied in a (p. 126) discriminatory manner,[428] and whether the harm arising is sufficient to constitute persecution requires an analysis of the applicant's individual circumstances.[429]

6.1.1 Conscientious objectors

Issues of 'causation', attribution, and the motives for treatment amounting to persecution are also raised by asylum seekers who base their claim upon the fear of prosecution and punishment for conscientious objection to military service, or upon fear of sanctions imposed by non-governmental armed opposition elements. Objectors may be motivated by reasons of conscience or convictions of a religious, ethical, moral, humanitarian, or philosophical nature;[430] they may be opposed to their own government, or to its policy on this occasion; they may object to all wars or to particular wars; they may consider the conflict to be contrary to international law, either in itself or because of the methods being employed; or they may simply not want to kill or be killed.[431] Against their claim to be refugees, it may be argued that they are punished not on account of their beliefs, but because of their failure to obey a law of universal application, that the 'right' to refuse to do military service is not a recognized human right, that punishment does not necessarily amount to persecution, and that there is no sufficiently close connection between refusal to serve and a Convention-based motivation.[432]

In our view, however, the fundamental issues in determining entitlement to protection by an applicant on the basis of objection to military service are the sincerity of the conviction which sets him or her in opposition to their government, and the risk of treatment amounting to persecution, by reason of such objection. Serious questions relating to cause and motive must nevertheless be addressed.

(p. 127) **6.1.1.1** The right of conscientious objection

As noted in previous editions of this work, decision-makers dealing with refugee claims involving refusal to do military service have frequently queried whether any right to conscientious objection existed, whether punishment in such circumstances amounted to persecution, and, if so, whether it was on account of a Convention reason, particularly if imposed under a law of general application applied without discrimination. The past decade has seen rapid development in this field; in 2007, it was possible to observe that, although the right to freedom of conscience itself was almost universally endorsed, no international human rights instrument yet recognized the right of conscientious objection to military service.[433] Today, that right has now been recognized by the European Court of Human Rights under article 9 ECHR 50, and by the Human Rights Committee under article 18 ICCPR 66.[434] It is also accepted by the Human Rights Council[435] and the Office of the United Nations High Commissioner for Human Rights,[436] and is recognized in the Charter of Fundamental Rights of the European Union, albeit only 'in accordance with the national laws governing the exercise of this right'.[437]

In the United Kingdom case of *Sepet and Bulbul* in 2003, Lord Bingham declined to find a right of conscientious objection with 'a measure of reluctance', given that recognition 'may well reflect the international consensus of tomorrow'.[438] Although State practice is not uniform and there remain gaps in implementation,[439] it can now be said that a right (p. 128) of conscientious objection is recognized under international law. Thus, attention must be turned to the parameters of that right, rather than its existence per se.

Jurisprudence from the institutions mentioned above and guidance from UNHCR provide some indications on the scope and content of the right.[440] In 2011, the European Court of Human Rights, for the first time, recognized a right to conscientious objection to military service under article 9 ECHR 50 in *Bayatyan*.[441] The applicant was a Jehovah's Witness who was sentenced to two and a half years' imprisonment after refusing a summons to perform military service; he had been willing to undertake civilian service, but none was available. In finding Armenia to have violated article 9, the Court departed from the Commission's earlier case law,[442] emphasized developments in Europe and internationally,[443] and concluded that,

> opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.[444]

The protection guaranteed by art. 9 ECHR 50 is not absolute and may be 'subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others'.[445] Within the European context, therefore, States retain a margin of appreciation in deciding whether, and to what extent, an interference is necessary, although, as the Court emphasized, that margin is confined and structured by other considerations, including the 'need to maintain true religious pluralism' and the impact of 'any consensus and common values emerging from the practices of State parties'.[446] The Court did not consider Armenia's restriction on the applicant's freedom to be 'necessary in a democratic society', given the widespread adoption of alternatives to

military service in member States. Accordingly, it considered that a State that did not offer alternative service enjoyed 'only a limited margin of appreciation' and was required to advance 'compelling reasons to justify any interference'.[447]

The Court's judgment in *Savda v Turkey*[448] further clarified that, in principle, article 9 also protects pacifist and anti-militarist views not motivated by religious conviction, and (p. 129) the guarantees implicit in that provision require a procedure by which claims to conscientious objection must be determined according to law. A system that does not provide for alternative service and for an accessible and effective procedure for determining entitlement thereto will also fail to achieve that fair balance.[449] The protection afforded to conscientious objectors under ECHR 50 was further strengthened in the 2017 judgment in *Adyan*.[450] That case concerned four convicted Jehovah's Witnesses who declined to participate either in military service or in the alternative service available to conscientious objectors, on the basis that it was 'not of a genuinely civilian nature'. The Court concluded that the introduction of alternative service in itself was not sufficient to show compliance with article 9 ECHR 50, and that the Court must 'verify that the allowances made were appropriate for the exigencies of an individual's conscience and beliefs':

> the right to conscientious objection guaranteed by Article 9 of the Convention would be illusory if a State were allowed to organise and implement its system of alternative service in a way that would fail to offer—whether in law or in practice—an alternative to military service of a genuinely civilian nature and one which was not deterrent or punitive in character.[451]

In *Adyan*, the Court found the alternative service to fall short on both counts. While the work was of a civilian nature and primarily accountable to the heads of civilian institutions, military authorities were 'actively involved' in supervising it. It was therefore held not to be 'of a genuinely civilian nature'.[452] The increased length of the alternative service (42 months, as compared to 24 months of military service) was considered to have a 'deterrent effect' and ultimately to be punitive.[453] Accordingly, the Court found a violation of article 9 ECHR 50.

The Human Rights Committee's approach has also shifted recently. The ICCPR provides a guarantee of freedom of thought, conscience and religion in article 18, subject to 'such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. Article 8 provides that 'forced or compulsory labour' does not include '[a]ny service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors'.[454] In 2006, the Human Rights Committee determined for the first time that the conviction of two Jehovah's witnesses who refused to serve in circumstances where no civilian alternative was available breached article 18 ICCPR 66.[455] The Committee found that article 8,

(p. 130)

> neither recognizes nor excludes a right of conscientious objection. Thus, the present claim is to be assessed solely in the light of article 18 of the Covenant, the understanding of which evolves as that of any other guarantee of the Covenant over time in view of its text and purpose.[456]

The Committee concluded that the authors' conviction and sentence restricted their ability to *manifest* their religion or belief.[457] Article 18(3) provides that '[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. The Committee considered that the restriction was not

necessary under article 18(3), noting that there were no laws recognizing conscientious objectors or providing for alternate service in the Republic of Korea.[458]

Since then, the Committee has changed its analysis of the right to conscientious objection quite dramatically. In a long line of cases, it has recognized the right to be *inherent* in the right to freedom of thought, conscience, and religion,[459] such that analysis should be carried out wholly under article 18(1) rather than article 18(3) ICCPR 66. In *Atasoy*, the Committee set out the implications of this shift:

> It is precisely because freedom of thought, conscience and religion is inherent in conscientious objection to compulsory military service, as recognized by the Committee, that the matter cannot be dealt with under article 18, paragraph 3. *There can now be no limitation or possible justification under the Covenant for forcing a person to perform military service*.[460]

The Committee's espousal of an unconditional right to object has not escaped critique.[461] A consistent minority position in the Committee maintains that the majority's explanation for its analytic shift is unpersuasive and that conscientious objection should instead be analysed under article 18(3).[462] The minority challenge is based on two grounds. First, it argues (p. 131) that the majority does not present a persuasive argument as to *why* conscientious objection to military service should be treated as an absolute right.[463] Secondly, it argues that the majority view does not provide a basis for distinguishing the (absolute) right of conscientious objection to military service from 'other claims to exemption on religious grounds from legal obligations'.[464] Although the reasoning in the views themselves are summarily expressed, some answer to these critiques is provided in individual opinions by members of the majority.[465]

Practically, the distinction between the positions of the European Court of Human Rights and the Human Rights Committee may not be so great, since the latter has consistently held that a conscientious objector may be compelled to undertake a civilian alternative service 'outside the military sphere and not under military command', provided that the alternative service is 'not of a punitive nature'.[466] It has also clarified that the 'absolute' right does not extend to other issues of conscience, such as the refusal of mandatory education or payment of taxes, on the basis that 'military service … implicates individuals in a self-evident level of complicity with a risk of depriving others of life.'[467] Nonetheless, the distinction between the 'passive' holding of a belief and its 'active' manifestation is a crucial one, and there is much to recommend the minority position.[468] Be that as it may, the Committee's revised interpretation of article 18 has been consistently applied, accepted by UNHCR in its Guidelines on International Protection No. 10,[469] and endorsed by the Office of the United Nations High Commissioner for Human Rights.[470]

(p. 132) Earlier jurisprudence on applications for asylum based in conscientious objection claims must also now be revisited in light of these international developments. For example, it is unlikely that two of the three key findings in the 2003 United Kingdom case *Sepet and Bulbul*—on causation and conscience respectively—would be sustained if the case were considered today.[471] The third key finding—that the treatment feared by the claimants, even if severe enough to amount to persecution, was not 'caused' by their belief, but by their refusal to obey a law of general application—was critically assessed in the third edition of this work.[472]

6.1.1.2 The right to object to participation in conflict 'condemned by the international community'

The context in which the individual exercises his or her freedom of conscience is determined not only by personal motivation and sincerity of belief, but also by the particular facts and broader political issues. This, in turn, may include positions taken by external actors, such as the Security Council, the General Assembly, other States, regional organizations, and so on.[473] 'International public policy' may be confirmed, for example, where the military operation objected to is 'condemned by the international community as contrary to basic rules of human conduct',[474] as the Security Council has done, for example, in relation to a number of conflicts. However, 'international condemnation' is not a term of art and evidence of such views may be obtained from a variety of sources.

Courts have recognized that a person who objects to participating in an internationally condemned conflict can claim that the risk of prosecution amounts to persecution,[475] and in *Sepet and Bulbul*, Lord Bingham said,

(p. 133)

> There is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community, or where refusal to serve would earn grossly excessive or disproportionate punishment.[476]

The recast EU Qualification Directive includes in its list of 'acts of persecution' 'prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion'.[477] The CJEU clarified the scope of this sub-provision in the 2015 case of *Shepherd v Germany*,[478] which concerned a US citizen who had unsuccessfully sought asylum in Germany. The applicant enlisted in the US army in December 2003 and subsequently served in Iraq, working in helicopter maintenance. In 2007, while his unit was stationed in Germany, he received a travel order to return to Iraq. Ten days after receiving the order, he left the army, 'believing that he must no longer play any part in a war in Iraq he considered illegal, and in the war crimes that were, in his view, committed there.'[479] The applicant argued that his desertion carried the risk of criminal prosecution and social ostracism.[480] The CJEU characterized the referring Court's questions 'in essence' as asking whether article 9(2)(e),

> must be interpreted as meaning that certain circumstances, relating in particular to the nature of the tasks performed by the soldier concerned, the nature of his refusal to perform military service, the nature of the conflict in question and the nature of the crimes which that conflict is alleged to involve, have a decisive influence in the assessment which must be carried out by the national authorities in order to verify whether a situation such as that at issue in the main proceedings falls within the scope of that provision.[481]

The CJEU determined that article 9(2)(e) had broad personal scope—encompassing 'all military personnel, including logistical or support personnel'—but a high evidentiary (p. 134) threshold.[482] The applicant must establish that it is 'highly likely' that war crimes will be committed, while the national authorities must determine, as part of their factual assessment, that it is 'credible' that war crimes would be committed.[483] Operations carried out under a UN mandate are presumed (although this presumption is rebuttable) not to involve the commission of war crimes.[484] Finally, the applicant must show that refusal to serve is the 'only means' by which to avoid participation in the alleged war crimes.[485] The Court also considered whether prosecution for desertion could constitute an act of

persecution under articles 9(2)(b)–(c) of the Directive.[486] The Court emphasized each State's 'legitimate right to maintain an armed force', finding nothing to suggest that a criminal sentence of up to five years was beyond what was necessary to exercise that right.[487] The influence of this case on international refugee law will necessarily be tempered by the fact that it is limited to an interpretation of article 9 of the Directive, which gives a particularly narrow scope to the notion of conscientious objection.[488]

6.1.1.3 The nature of the dispute between the individual and the State

Conscientious objection raises questions as to the appropriate theoretical basis on which to distinguish between those opponents of State authority who do, and those who do not, require international protection. For example, sincerely held reasons of conscience may motivate the individual who refuses to pay such proportion of income tax as is destined for military expenditures;[489] or the shopkeeper who wishes to trade on Sundays; or the parents who, on grounds of religious conviction, refuse to send their children to public schools.

The distinction between the 'passive' holding of a belief and its 'active' manifestation is key to understanding the boundaries of the relationship between the individual and the State. To a degree, the conflict between these individuals and the State is attributable to the 'choice' of the individual, who elects to place matters of principle or belief over obligations in law. The unrecognized conscientious objector to military service is constrained, in (p. 135) a direct physical sense, to act either in a way contrary to conscience or to face punishment. The objector must choose either to participate in the violence opposed, or to suffer the sanction. The reluctant taxpayer, on the other hand, has only to tolerate the use of funds for military purposes,[490] while the would-be Sunday trader is simply restrained from transacting business at will.[491] Again, the conscientious objector is distinguishable because the State requires his or her *active* complicity in military service, not just tolerance or restraint or restrictions on certain conduct.[492]

A 1988 Council of Europe report emphasized the centrality of 'compelling reasons of conscience' in this context, in preference to a listing of 'acceptable' reasons for objection.[493] Leaving aside any cumulative factors supporting refugee status (such as personal, social, religious or political background), the conscientious objector is also distinguishable from the 'mere' draft evader or deserter by the sincerely held opinion. This locates the conflict of individual and State within the realm of competing (but nonetheless lawful) rights or interests, and separates out others whose motivations may be purely self-regarding and devoid of any recognized human rights basis.

Nor, as discussion above on internationally condemned conflicts and recent case law has illustrated, does it matter that the individual seeking protection is a 'partial objector'.[494] As Eide and Mubanga-Chipoya noted many years ago:

> Partial conscientious objection to military service … is built on the conviction that armed force may be justified under limited circumstances, derived from standards of international or national law or morality. Objection based on reference to standards of international law may concern the purpose for which armed force is used, or it may concern the means and methods used in armed combat.[495]

(p. 136) Finally, questions of conscience may evolve over time. There can therefore be no presumption that an enlisted soldier does not hold a conscientious objection to military service, whether partial or in its entirety.[496]

The fundamental issue in determining entitlement to protection as a refugee on the basis of objection to military service remains the sincerity of the conviction which sets the individual in opposition to their government, and the risk of treatment amounting to persecution. Military service and objection thereto, seen from the point of view of the State, are also issues which go to the heart of the body politic. Refusal to bear arms, however motivated,[497] reflects an essentially political opinion regarding the permissible limits of

State authority; it is a political act.[498] The 'law of universal application' can thus be seen as singling out or discriminating against those holding certain political views.[499] While the State has a justifiable interest in the maintenance of its own defence,[500] the measures taken to that end should at least be 'reasonably necessary in a democratic society';[501] specifically, there ought to exist a reasonable relationship of proportionality between the end and the means.[502] In *Sepet and (p. 137) Bulbul*, the Court, having failed to associate the refusal to do military service with the right to freedom of conscience, thereupon also failed to situate the exercise of that right in its inherently political context and to consider the responsibility of the State to accommodate relevant difference.

Alternative service can help to reconcile the situation in a way that promotes community interests in defence and equality of treatment, and the individual's interest in his or her own conscience.[503] Whether alternative service meets international standards is a question of fact in each case, having regard to conditions, nature, and duration.[504] In the absence of genuine alternative service, or where insufficient weight is given to a sincerely held belief going to conscience, the likelihood of prosecution and punishment must be examined in order to determine whether they amount to persecution. This may be the case where the treatment is disproportionate, excessive or arbitrary, and whether it derives from official or unofficial sources.

6.1.1.4 Establishing a well-founded fear of being persecuted

A critical issue, therefore, is the circumstances under which the punishment or treatment, legal or extra-legal, feared by the claimant amounts to persecution. As a matter of principle, States are free to recognize conscientious objection *in itself* as a sufficient ground upon which to base recognition of refugee status. In this sense, they are free to attribute such value to the fundamental right to freedom of conscience that *any* measures having as their object to compel the individual to act contrary to sincerely held belief, or any punishment, such as deprivation of liberty, imposed to that end, amounts to persecution within the meaning of the 1951 Convention, regardless of its duration.[505]

As a matter of practice, however, States determining refugee status hold back from such absolute positions, in favour of taking full account of all the circumstances.[506] International human rights law attaches special importance to the individual's freedom of conscience. The standards of reasonableness and proportionality must be applied to the particular facts of each case. Whether prosecution and punishment amount to persecution in the sense of the Convention will depend on the object and purpose of the law, the precise motivation of the individual who breaches such law, the 'interest' which such individual asserts and the nature and extent of the punishment. This in turn invites attention to (1) the genuineness of the applicant's beliefs, as a manifestation of freedom of conscience; (2) the nature of the individual's objection, so far as it may be relevant to the nature of the military conflict at issue (if any), or the way in which war is being waged; (3) the legality of the military action (p. 138) (if any), for which conscription is employed; (4) the scope and manner of implementation of military service laws; (5) the selective conscription of particular groups within society, and the bases of such distinctions; (6) the extent to which the right of conscientious objection is recognized, if at all; (7) the type of alternative service available, if any, its length and conditions by comparison with military service, and the treatment of conscientious objectors performing such service; (8) the manner of prosecution and the proportionality and likelihood of punishment of conscientious objectors in the absence of alternative service; (9) the treatment of conscientious objectors subject to such punishment, including the extra-legal activities of paramilitary groups or sections of the populace; and (10) the extent to which penalties for conscientious objection may be employed selectively, against specific racial, religious, social, or political groups.

Finally, just as the right to freedom of expression ensures the protection of opinions from right to left, so the right to freedom of conscience protects beliefs and the manifestation of belief. An applicant who falls outside the parameters of the right of conscientious objection to military service may nonetheless have an arguable claim under the general protection guaranteed by rights to freedom of conscience.[507]

6.1.2 Political and non-political offenders

Similar considerations apply to the related question of non-extradition of political offenders. The IRO Constitution excluded 'ordinary criminals who are extraditable by treaty' as well as 'war criminals, quislings, and traitors' and a variety of other 'undeserving' groups; the UNHCR Statute and the 1951 Convention contain equivalent provisions.[508] The exception in favour of political offenders developed in the nineteenth century in the context of bilateral extradition arrangements, and is not the consequence of any rule of general international law. No intrinsic duty obliges States to surrender fugitive criminals and extradition itself has traditionally been seen as a gloss upon the rule which permits the grant of territorial asylum.[509] In practice, characterization of an offence as 'political' is left to the authorities of the State from which extradition is requested, and the function of characterization itself is evidently one in which political considerations will be involved, including the self-interest of the requested State as reflected in its military and other alliances.[510] Not surprisingly, divergent attitudes are revealed in municipal law. For example, the political offence exception did not figure in the extradition arrangements existing between Eastern European socialist States,[511] although their constitutions commonly recognized the institution of asylum.[512] In contrast, certain Western European States developed an elaborate comprehensive approach to purely political offences, complex political offences, and related (p. 139) political offences, all of which might justify non-extradition.[513] Nevertheless, the weight to be accorded to the motives of the offender varied from jurisdiction to jurisdiction,[514] as did the practice on substantive limitations to the political offence exception. Some States have long excluded assassination of the head of State, while others have explicitly excluded acts of barbarism or offences the suppression of which is required under international obligations.[515] Moreover, appreciation of the political character of offences is clearly likely to vary according to the particular perspective of the requested State.[516]

Much of the early debates and the jurisprudence concentrated on acts committed during the course of an insurrection,[517] and successive decisions of courts in the United Kingdom have limited the exception to offences committed in the context of parties in opposition and conflict.[518] To a significant extent, and taking account also of internationally agreed limitations, this approach is confirmed in the jurisprudence of the United States and other countries. The offence should have been committed in the course of some political dispute or conflict, and have been related to the promotion of political ends. Intention or motive is not conclusive, however, and there is a presumption against classifying as political those offences which may be loosely described as common law crimes, such as murder and robbery. Inherent limitations on the category of political offences, by reference to their nature and circumstances, are now the norm.

In the Federal Republic of Germany, for example, the law on international judicial assistance in criminal matters expressly excludes executed or attempted genocide, murder, and manslaughter from recognized political offences.[519]

(p. 140) The French Code of Criminal Procedure provides that there shall be no extradition, 'Lorsque le crime ou délit a un caractère politique ou lorsqu'il résulte des circonstances que

l'extradition est demandée dans un but politique'.[520] In a 1958 decision, for example, the *Office français de protection des réfugiés et apatrides* (OFPRA) applied the rule that,

> Par crime de droit commun … il y a lieu d'entendre toute infraction qui n'est pas commise à l'occasion de la lutte de l'intéressé contre les autorités responsables des persécutions dont l'intéressé est ou a été victime, sans d'ailleurs qu'il y ait lieu de donner au mot 'crime' le sens précis que lui prête le droit interne français.[521]

Homicides and, in particular, the deaths of civilians or even State officials chosen at random, have been consistently found to fall outside the protection of the political offence.[522]

Neither intention, nor the presence or absence of political motives alone will be sufficient to determine the characterization of the offence.[523] In *McMullen v INS*, the US Court of Appeals for the Ninth Circuit expressly rejected 'the argument that places the determination … on the alien's state of mind. The law focuses on the circumstances surrounding the acts.'[524] Quoting the first edition of this work,[525] among other sources, the Court further observed:

> Of course, for a criminal act to be 'political', the individual must have been motivated by political reasons … However, 'motivation is not itself determinative of the political character of any given act.' … The critical issue is 'whether there is a close and direct causal link between the crime committed and its alleged political purpose and object.'[526]

Notwithstanding certain contradictory elements, United States jurisprudence generally supports the view that indiscriminate violence is not a protected political act.[527] In *Ordinola*, (p. 141) the Court considered whether the actions of a former Chilean paramilitary squad coordinator—including the alleged kidnapping and murder of civilians—fell within the political offence exception.[528] Applying the 'incidence test',[529] the Court found that while the actions occurred in the course of a violent political uprising, they could not be considered 'incident to or in furtherance of quelling the violent uprising',

> the magistrate judge's reasonable finding that Ordinola's alleged offenses were carried out against innocent civilians largely dooms Ordinola's argument … To have been considered political offenses, Ordinola's actions would had to have been in some way proportional to or in furtherance of quelling the Shining Path's rebellion … terror, for terror's sake, was not a sufficient method of quelling the Shining Path's uprising.[530]

McMullen concerned a former member of the Provisional IRA, who had successfully resisted extradition from the United States, and who now sought asylum and withholding of deportation to the Republic of Ireland.[531] The Ninth Circuit addressed precisely the issue, whether the petitioner was ineligible for asylum by reason of there being serious reasons to consider that he had committed a serious non-political crime. Emphasizing the asylum context, the Court favoured the use of a balancing approach to the alleged serious non-political crime, in which the proportionality of the act to its objective and the degree of atrocity would be taken into account. It noted that terrorist activities were involved, including indiscriminate bombing campaigns, murder, torture, and maiming of innocent civilians who disagree with the objectives and methods of the Provisional IRA. In the view of the Court, 'such acts are beyond the pale of protectable "political offence" '. There was no sufficient link between the acts and the political objective; they were so barbarous, atrocious, and disproportionate as to amount to serious non-political crimes. At several places, the Court stresses the civilian targets of Provisional IRA terrorist activities, in a manner that recalls the special protection accorded to civilians under the laws of war, and

presents an analogy with the mandatory exclusion from the Convention of those who have committed war crimes.[532]

(p. 142) In *T v Secretary of State for the Home Department*, the House of Lords divided over the correct approach to 'political offence'. Lords Keith, Browne Wilkinson, and Lloyd were of the view that there must be both a political purpose and a sufficiently close and direct link between the crime and the purpose; they further considered that the means employed, including the target and the likelihood of indiscriminate killing of members of the public, may 'break' the link and make the connection too remote. For Lords Mustill and Slynn, however, acts of violence such as the indiscriminate killing of persons unconnected with the government could not, by definition, amount to political crimes, and while the gravity of the offence was relevant to whether it was 'serious' for the purposes of article 1F(b), 'the crime either is or is not political when committed, and its character cannot depend on the consequences which the offender may afterwards suffer if he is returned.'[533]

In the absence of any definition or list of political crimes, national or international, this reasoning appears to beg the question, for experience shows that a crime may indeed be 'political' *precisely* because of the consequences which await the offender. Lord Mustill's query of the approach adopted in *McMullen* to questions of means and ends and proportionality also misses the point: 'why should a crime which would have been political in nature be turned into one which is not political, simply because the judge deems the offender to have gone too far?'[534]

The short answer is because that is how different jurisdictions have in fact placed limitations on the extent of immunity from extradition, and because few crimes are necessarily and inherently 'political', and because any crime ought to be considered in context; and finally, because the decision to be made itself has an inherently 'political' dimension. The idea that an offence 'either is or is not political when and where committed' may be appropriate from the single perspective of the criminal, but that view alone has not been accepted as sufficient by the courts. Lord Mustill suggested writing 'terrorism' into the modern concept of the political crime, and took the League of Nations definition ('criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public'[535]) as an appropriate, objective model.

Lord Lloyd, on the other hand (who cited the approval in *McMullen* of the test proposed in the first edition of this work), was of the view that a definitive answer to the political crime question was unlikely: 'The most that can be attempted is a description of an idea.' Nevertheless, that could still be done:

> A crime is a political crime for the purposes of article. 1F(b) … if, and only if (1) it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public.[536]

(p. 143) In the European context, the development, or consolidation, of a restrictive approach to the political offence has reflected regional developments, such as the 1977 European Convention on the Suppression of Terrorism, as well as recognition of the new dimension of terrorist violence introduced by military and paramilitary organizations. From an international legal perspective, this progression is by no means new; already in 1948, States had agreed that genocide should not be considered a political offence for extradition

purposes, and subsequent years have seen broad agreement on the depoliticization of other offences, such as hijacking, hostage-taking, and offences against diplomats.[537]

In general, it may be concluded that an offence will not be considered political if (1) it is *remote*, in the sense that there is no sufficient 'close and direct causal link between the crime committed and its alleged political purpose'; and (2) if it is *disproportionate* in relation to the political aims. Beyond the traditional field of political opposition, conflict and violence, one as yet unexplored area of political activity concerns 'whistleblowers' and those who obtain and disseminate information which States deem confidential, secret, or essential to national security. Depending on the circumstances and the procedural context, any related claim to international protection as a refugee will require close analysis of the nature of the activity, its relation to human rights, including freedom of expression, the right to disseminate information, and the public's 'right to know', considered against the State's sovereign interest in securing its own information and the personal data of individuals. Where the information in question discloses the commission of international crimes, that too must be factored in, as must the treatment and penalties likely to be imposed on the whistleblowers themselves.[538]

At one time it might have been fashionable to argue that the international community did not exist for the purpose of preserving established governments, and that the political offence exception was therefore valuable for the dynamic quality it brought to the relations between States, on the one hand, and between States and their citizens, on the other hand.[539] International law, however, provided no guidance on the substance of the concept of political offence, other than its outermost limits, and States retained the broadest discretion. Given the range now of agreements restricting the concept of political offence, as well as (p. 144) the increasingly common rejection of political violence, particularly where innocent lives are taken or put at risk, it is increasingly open to question whether much remains in the way of core content. The underlying humanitarian issues—protection against persecution, torture, inhuman treatment, and so on—and what might be termed the expanding responsibilities of States in regard to an international *ordre public*, are in tension.[540] Arguably, the mere commission of a political offence is not sufficient to qualify a person for refugee status, which arises only where the anticipated punishment shades into persecution.[541] Alternatively, it may be that certain offences are inherently political, that their commission reflects the failure of a State to protect a greater and more valued interest, so that any punishment would be equivalent to persecution.

6.2 Persecution and situations of risk

6.2.1 Internal protection/flight/relocation alternative

There is no reason in principle why an asylum seeker's fear of persecution should relate to the whole of his or her country of origin;[542] for various reasons, it may be impossible or impracticable for the asylum seeker to move internally, rather than to cross an international frontier.[543] There is also authority for the principle that, if 'internal flight' is to justify the denial of international protection, then it should be *reasonable* for the potential refugee to relocate to a safe area, although that apparently simple notion has given rise both to extensive discussion and to a range of not always consistent applications.[544] Even the name of the (p. 145) concept is vexed, and, as noted below, the prevailing approach has been subject to criticism in academic commentary.[545]

While different jurisdictions have held that the principal criterion is the availability in fact of effective protection against persecution in another region,[546] decisions have varied in regard to the requisite level of protection of other rights, such as those necessary to maintaining some sort of social and economic existence.[547] In *ex parte Robinson*, a 1997 decision of the UK Court of Appeal,[548] it was said that all the circumstances should be considered, 'against the backcloth that the issue is whether the claimant is entitled to refugee status'. The Court referred to various tests, including the reasonable accessibility of

the safe place, whether great physical danger or undue hardship had to be faced getting or staying there, and whether the 'quality of the internal protection' met 'basic norms of civil, political and socio-economic human rights'. In the end, however, having listed the various tests, Woolf LJ opted for that proposed by Linden JA in the Canadian case of *Thirunavukkarasu*,[549] namely, 'would it be unduly harsh to expect this person … to move to another less hostile part of the country?' This was particularly helpful, so far as the words 'unduly harsh' fairly reflect that what is in issue is whether a person claiming asylum can reasonably be expected to move to a particular part of the country.[550] The recast Qualification Directive incorporates a 'reasonableness' standard into its test for internal protection, drawing on conditions laid down by the European Court of Human Rights in its judgment in *Salah Sheekh*.[551] The (p. 146) United States Asylum Regulations also look to the reasonableness of relocation, and provide that consideration should be given to,

> the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for asylum.[552]

Exactly how to apply the 'reasonableness test' was examined by the UK House of Lords in *Januzi v Secretary of State for the Home Department*.[553] The Court considered but soundly rejected the argument that the 'reasonableness' of relocation is to be judged by 'whether the quality of life in the place of relocation meets the norms of civil, political and socio-economic human rights'.[554] Lord Bingham based his judgment firmly in the words of the 1951 Convention, beginning with the requirement that refugee status be based on a well-founded fear of persecution; if there is a place in which there is no fear of persecution and protection is available, and if the claimant could reasonably be expected to relocate there, then he or she cannot be said to be outside their country of origin by reason of well-founded fear.[555] Moreover, the Convention provided no justification for such an extensive 'human rights test', which could also not be implied, for the Convention's essential purpose was 'to ensure the fair and equal treatment of refugees in countries of asylum'.[556] In further support, he noted that the rule was not expressed in article 8 of the original EU Qualification Directive, that it was not sufficiently supported in the practice of States as to give rise to a rule of customary international law, and that it would lead to anomalous consequences.[557] Instead, the Court found assistance in UNHCR's Guidelines on internal flight, in particular, for their focus on the standards prevailing generally in the country of nationality and for the manner in which the reasonableness question is framed: 'Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there.'[558] As expressed by Lord Hope, (p. 147) 'the words "unduly harsh" set the standard that must be met', if relocation is to be considered unreasonable.[559] Lord Hope did note, however, that,

> The fact that the same conditions apply throughout the country of the claimant's nationality is not irrelevant to the question whether the conditions in that country generally as regards the most basic of human rights that are universally recognised —the right to life, and the right not to be subjected to cruel or inhuman treatment— are so bad that it would be unduly harsh for the claimant to have to seek a place of relocation there. … one does not need to rely on the European Convention on Human Rights to conclude that if conditions are that bad relocation there would be unduly harsh.[560]

In *AH (Sudan) v Secretary of State for the Home Department*, the House of Lords elaborated on the test in *Januzi*.[561] Lord Bingham noted that 'a claimant for asylum could not reasonably or without undue hardship be expected to return to a place where his rights under article 3 [ECHR 50] or its equivalent might be infringed', while emphasizing that there was no need to demonstrate such a risk in order to meet the 'unreasonable or unduly harsh' test.[562] The *Januzi* test was 'one of great generality, excluding from consideration very little other than the standard of rights protection which an applicant would enjoy in the country where refuge is sought'.[563] Lord Bingham also recalled that the 'humanitarian object' of the Convention,

> [i]s to secure a reasonable measure of protection for those with a well-founded fear of persecution in their home country or some part of it; it is not to procure a general levelling-up of living standards around the world, desirable though of course that is.[564]

(p. 148) The *Januzi* approach was not followed in New Zealand,[565] and although it found some support in the Australian High Court, it has since been overtaken by legislative developments.[566] A 2014 amendment to the Migration Act 1958 provides that a person will only be considered to have a well-founded fear of persecution if 'the real chance of persecution relates to *all areas* of a receiving country.'[567] In our view, this amendment is inconsistent with the 1951 Convention and with international practice.[568] In 2020, the Full Court of the Federal Court of Australia found that while 'the reference … to all areas of a receiving country is not qualified by a criterion of reasonableness', it should nonetheless 'be construed to mean all areas of a receiving country where there is safe human habitation and to which safe access is lawfully possible.'[569] The Court did not consider it necessary to determine the practical differences between this construction and the reasonableness test endorsed in *Januzi*.[570]

While the 'reasonableness' test seems to have gained general acceptance in the courts, several commentators continue to argue for approaches that take greater account of general human rights considerations, if not of specific international legal obligations.[571] It remains to be seen whether, and to what extent, courts and States in their practice will be prepared to accommodate these calls.

(p. 149) 6.2.2 Flight from armed conflict and violence

The fact of having fled from civil war is not incompatible with a well-founded fear of persecution in the sense of the 1951 Convention.[572] Too often, the existence of civil conflict is perceived by decision-makers as giving rise to situations of general insecurity that somehow exclude the possibility of persecution.[573] A closer look at the background to the conflict, however, and the ways in which it is fought, will often establish a link to the Convention. As the Canadian Federal Court of Appeal stated in one case, 'a situation of civil war … is not an obstacle to a claim provided that the fear is not that felt indiscriminately by all citizens as a consequence … , but that felt by the applicant himself, by a group with which he is associated, or, even by all citizens on account of a risk of persecution based on one of the reasons stated'.[574] The 2016 UNHCR Guidelines on refugee status in situations of armed conflict and violence note:

> The fact that many or all members of particular communities are at risk does not undermine the validity of any particular individual's claim. *The test is whether an individual's fear of being persecuted is well-founded*. At times, the impact of a situation of armed conflict and violence on an entire community, or on civilians

> more generally, strengthens rather than weakens the well-founded nature of the fear of being persecuted of a particular individual.[575]

No 'higher level of severity or seriousness' of harm need be shown in a situation of armed conflict and violence as compared to other situations, 'nor is it relevant or appropriate to assess whether applicants would be treated any worse than what may ordinarily be "expected" in situations of armed conflict and violence'.[576] It nevertheless remains for the applicant to (p. 150) show that he or she is unable to obtain the protection of the State, and to establish the requisite Convention link.[577]

In other situations, it may be argued that the Convention does not and cannot apply to a conflict between two competing groups, or when there is no effective government responsible for the implementation of international obligations relating to human rights. A number of earlier German and French decisions and commentators, for example, drew distinctions between the civil war in Liberia and that in Somalia, finding for refugee status in the former (where rival factions had divided power between themselves and were competing for supremacy);[578] and denying it in the latter (where clans, sub-clans, and factions competed amongst themselves, but none emerged as an authority in fact, controlling territory and possessing a minimum of organization).[579] This reasoning, which draws on the 'old' legal history of civil war and recognition of belligerency, has no obvious relevance to the 1951 Convention.

Likewise, in our view, both the reasoning and the result in the UK case of *Adan v Secretary of State for the Home Department*[580] disclose a number of problems. The House of Lords found, *inter alia*, that the appellant was not a refugee from Somalia, then in a situation of clan-based civil war, in that he could not show a well-founded fear of persecution for a Convention reason. Lord Lloyd referred to 'the principle that those engaged (sic) in civil war are not, as such, entitled to the protection of the Convention so long as the civil war continues, even if the civil war is being fought on religious or racial grounds'.[581] Referring to the Immigration Appeal Tribunal's conclusion that all sections of society in northern Somalia were equally at risk so long as the civil war continued, Lord Lloyd considered that there was 'no ground for differentiating between Mr. Adan and the members of his own or any other clan'.[582] It is not clear why, in the passage quoted above, Lord Lloyd referred to those 'engaged' in civil war, as opposed to those affected or potentially affected by it.[583] The claimant's case was not based on his active involvement in the conflict, but on the risk faced (p. 151) from the conflict, by reason of his clan membership. Indeed, any 'involvement' in such a conflict might well justify exclusion under article 1F(a), particularly if persecution or other war crimes are committed.

Moreover, the logic of denying refugee status to those affected by a civil conflict which itself engages or is driven by one or other Convention ground is not clear, and indeed, is not supported by authority; in our view, it is wrong.[584] The idea of 'differential risk' or 'differential impact', also relied on by Lord Lloyd, may well be a misreading of an academic gloss,[585] and the concept is roundly rejected by UNHCR in its 2016 Guidelines.[586] Ultimately, in cases such as these, it is hardly necessary to go beyond the words of the Convention.[587]

Finally, the application of international humanitarian law (IHL) when assessing refugee status arising from a situation of armed conflict has been the subject of some debate; Storey has argued that IHL should be treated 'in certain contexts as a primary reference point and as a starting-point' when dealing with claims for international protection,[588] while Zimmermann and Mahler consider that 'acts in accordance with applicable norms of international humanitarian law, even if they cause damage to civilians or civilian objects, cannot amount to persecution'.[589] In this respect, we find Durieux's conceptualization of armed conflict as 'contextual, and therefore in a sense, neutral' compelling.[590] As he notes,

‘when a (p. 152) decision-maker is faced with a claim to protection under the Refugee Convention, the subject matter is *not* armed conflict, it is persecution’.[591]

6.2.3 The individual and the group

Wherever large numbers of people are affected by repressive laws or practices of general or widespread application, the question arises whether each member of the group can, by reason of such membership alone, be considered to have a well-founded fear of persecution; or does persecution necessarily imply a further act of specific discrimination, a singling out of the individual?[592] Where large groups are seriously affected by a government’s political, economic, and social policies or by the outbreak of uncontrolled communal violence, it would appear wrong in principle to limit the concept of persecution to measures immediately identifiable as direct and individual.[593] General measures, aimed as often at ‘restructuring’ society as at maintaining the *status quo*,[594] will frequently be directed at groups identifiable by reference to the Convention reasons for persecution, and carried through with the object, express or implied, of excluding them from or forcing them into mainstream society. Where individual or collective measures of enforcement are employed, such as coercion by denial of employment or education, restrictions on language and culture, denial of access to food supplies, expropriation of property without compensation, and forcible or involuntary relocation, then fear of persecution in the above sense may exist; mere membership of the affected group can be sufficient. Likewise, where punishment under a law of general application may result, any necessary condition of singling out would be met by the decision to prosecute in a given case. Already in 1990, the US Asylum Regulations had explicitly dispensed with the ‘singling out’ or ‘targeting’ requirement, which now extends if the applicant can show ‘a pattern or practice … of persecution of a group persons *similarly situated* to the applicant’, and his or her ‘own inclusion in, and identification with, (p. 153) such group of persons such that his or her fear of persecution upon return is reasonable’.[595] Whether a well-founded fear of persecution exists will depend upon an examination of the class of persons in fact affected, of the interests in respect of which they stand to be punished, of the likelihood of punishment, and the nature and extent of the penalties.

6.3 Children as asylum seekers

In each and every situation involving children in flight or otherwise on the move, the best interests of the child remain a primary consideration, considered together with what is effectively a charter in their regard—the 1989 Convention on the Rights of the Child.[596] In practice, a preliminary issue in all cases involving children and young persons, is whether they are accompanied. In principle, this has no bearing on whether they are refugees, but may affect how their claims are dealt with, as well as the solutions which may be proposed. Unaccompanied children, in particular, need special attention, and a guardian or other person competent to protect their interests.[597]

The relationship between the regime of child protection and that of refugee protection is not yet perfect, and can lead to anomalies in practice and analysis. The UNHCR *Handbook* locates the refugee status of accompanied dependants, including children, in the context of family unity. If the head of the family is recognized as a refugee then, all things being equal,[598] the ‘dependants are normally granted refugee status according to the principle of family unity’.[599] Practical reasons and procedural convenience subordinate individual claims to an alternative principle, and the child’s status is relegated to that of dependency.[600] (p. 154) This may often reflect social realities in the case of accompanied children, although UNHCR maintains that accompanied children are entitled to claim refugee status in their own right.[601] A more comprehensive approach is particularly required for the unaccompanied in search of protection, but the UNHCR *Handbook*, drafted some ten years before the CRC 89, focuses on refugee status as a primary consideration. With this underlying premise, the *Handbook* somewhat misleadingly invokes ‘mental

development and maturity' as the criterion for determining the existence of a well-founded fear of persecution.[602] The approach to refugee status in terms of maturity is misguided for several reasons,[603] and seems to have been implicitly departed from in UNHCR's 2009 Guidelines on Child Asylum Claims.[604] The Guidelines, adopted 20 years after the CRC 89, endorse a 'child-sensitive application of the refugee definition', consistent with developments in international human rights law.[605] They eschew the Handbook's presumption that minors under the age of 16 are 'not … sufficiently mature' to hold a well-founded fear,[606] but do emphasize that, '[d]ue to their young age, dependency and relative immaturity, children should enjoy specific procedural and evidentiary safeguards to ensure that fair refugee status determination decisions are reached with respect to their claims'.[607]

However, the question of how best to assess a 'well-founded fear of being persecuted' in light of a child's maturity, understanding of a situation, and capacity to feel fear remains. Claims by children are considered by some commentators to be an archetypal example of why including a 'subjective' element in the well-founded fear test is misconceived.[608] The general approaches advocated in the Handbook—having 'greater regard to certain objective factors', or imputing parental fear to the child—appear often to hold sway.[609] More simply, courts may ignore the subjective element entirely when assessing a child's 'well-founded (p. 155) fear'.[610] Although maturity is generally irrelevant to the question whether or not a child may be persecuted, UNHCR's Guidelines do note that '[i]ll-treatment which may not rise to the level of persecution in the case of an adult may do so in the case of a child'.[611]

In contrast with what may appear to be an overly elaborate adaptation of refugee status determination procedures to children, the principle of the *best interests of the child* looks more straightforward—it requires that decisions on behalf of the child be taken on the basis of all the circumstances, including his or her personal situation and the conditions prevailing in the child's country of origin.[612] Ultimately, the welfare of the child, and the special protection and assistance which international law requires must take precedence over the narrow concerns of refugee status.[613] Decisions are needed for and on behalf of the unaccompanied child, which take account of his or her best interests and effectively contribute to the child's full development, preferably in the environment of the family. To channel children in flight into refugee status procedures will often merely interpose another obstacle between the child and a solution.

That being said, however, in some jurisdictions at present a successful refugee claim may be the only way by which to access child welfare services.[614] The United Kingdom immigration rules appear to be premised on the assumption that a child arriving alone is in need of protection and assistance. So far as such child may apply for asylum, the rules require priority treatment, close attention to welfare needs, and care in interviewing.[615] Nevertheless, the child's best interests are a primary concern. The likelihood of risk of harm in his or her country of origin must be factored in, but in many cases the most appropriate solution may still be reunion with family members who have remained behind.[616] Clearly, and as experience has too often confirmed, prolonged detention in a closed camp has a serious negative effect on any child's development, and must be avoided through prompt and appropriate decision-making.[617]

(p. 156) 7. Persecution and lack of protection

Persecution under the Convention is thus a complex of reasons, interests, and measures. The measures affect or are directed against groups or individuals for reasons of race, religion, nationality, membership of a particular social group, or political opinion. These reasons in turn show that the groups or individuals are identified by reference to a classification which ought to be irrelevant to the enjoyment of fundamental, protected interests. Persecution results where the measures in question harm those interests and the integrity and inherent dignity of the human being to a degree considered unacceptable under prevailing international standards or under higher standards prevailing in the State

faced with determining a claim to asylum or refugee status.[618] An element of relativity is perhaps inherent and inescapable in determining the value to be attributed to the protected interest (for example, life and freedom of conscience), and the nature or severity of the measure threatened (for example, death and some lesser interference).

Although persecution itself is undefined by any international instrument, an approach in terms of *reasons*, *interests*, and *measures* receives support by analogy from the human rights field. The International Convention on the Suppression and Punishment of the Crime of Apartheid,[619] for example, identifies the 'crime of apartheid' very much in these terms. The *reasons* are self-evident—race and racial domination; the *interests* threatened and in need of protection include the right to life; liberty of the person; freedom; dignity; participation in political, social, economic, and cultural rights; the right to work; the right to form trade unions; the right to education; the right to a nationality; freedom of movement and residence; freedom of opinion and expression; freedom of peaceful assembly and association; and non-discrimination. The *measures* that were used to defend apartheid and achieve its objectives included inhuman acts; systematic oppression; denial of rights; murder; (p. 157) infliction of serious bodily or mental harm; torture; cruel, inhuman or degrading treatment or punishment; arbitrary arrest; illegal imprisonment; deliberate imposition of substandard living conditions; legislative measures denying participatory rights; denial of development; segregation on racial lines; prohibition of mixed marriages; expropriation of landed property; forced labour; and denial of rights to political opponents.

The criteria for refugee status posited by article 1 of the 1951 Convention have the individual asylum seeker very much in mind. In the case of large numbers of asylum seekers, establishing a well-founded fear of persecution on a case-by-case basis can be impossible and impracticable. A prima facie or group determination, based on evidence of lack of protection, may therefore be the answer.[620] This solution is implied by the second leg of the refugee definition adopted in the 1969 OAU Convention and by the Cartagena Declaration, which extends to 'every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality', is compelled to seek refuge in another country. UNHCR's Guidelines on the prima facie recognition of refugee status set out its legal basis and several 'procedural and evidentiary aspects'[621] and stipulate also that '[e]ach refugee recognized on a prima facie basis benefits from refugee status in the country where such recognition is made, and enjoys the rights contained in the applicable convention/ instrument'.[622]

Certainly, a group determination may be called for in the initial stages of any movement where protection and material assistance are the first priorities. It may also be appropriate where groups that are not arriving on a large-scale basis nonetheless 'share a readily apparent common risk of harm'.[623] Establishing that civil war has broken out, that law and order have broken down, or that aggression is under way is relatively simple.[624] The notion of lack of protection, however, is potentially wider and invites attention to the general issue of a State's duty to protect and promote human rights. Clearly, not every failure by the State to promote and protect, for example, the various rights recognized by the 1966 Covenants, will justify flight across an international frontier and a claim to refugee status.[625] Not all the (p. 158) rights are fundamental, some are subject to progressive implementation only, while others may in turn be the subject of permissible derogations.[626]

The list of fundamental protected interests proposed above can be expanded in the future, as hitherto unrecognized groups and individuals press their claims, and as the value of certain economic and social rights is increasingly accepted.[627] Although States generally do not appear willing to accept any formal extension of the 1951 Convention refugee definition, their practice commonly reflects recognition of the protection needs and entitlements of a broader class. Nevertheless, one legal implication of developments in favour of refugees and of human rights generally is that there are limits to the extent of

State power. If individuals, social groups, and classes are at the absolute disposal of the State, then repression, re-education, relocation or even expulsion aimed at the restructuring of society can be considered comprehensible, even acceptable. But where there are limits to State power, and individuals and groups have rights against the State or interests entitled to recognition and protection, then such measures may amount to persecution. The traditional response to those who flee in fear of persecution has been to grant protection, although States, the United Nations, and UNHCR now regularly call for greater attention to causes. The necessary machinery and modalities for international cooperation to achieve these ends remain seriously underdeveloped, however, particularly when contrasted with the admittedly incomplete international refugee regime. With increased pressure to move likely in the coming decades across a broad spectrum of drivers —persecution, conflict, climate change, competition for resources, underdevelopment, poverty, and inequality—there will be a continuing need both for protection and for stronger institutions. In this context, international refugee law, international human rights law, and international humanitarian law will provide the foundations for progressive development.

Footnotes:

1 To the drafters of the 1951 Convention, at least initially, the absence of a clear legal status necessarily had repercussions on the refugee's right to recognition as a person before the law, as required by art. 6 UDHR 48, while such status was also essential in order to enable the refugee 'to lead a normal and self-respecting life'. See UN doc. E/AC.32/2 (3 Jan. 1950) *Ad hoc* Committee on Statelessness and Related Problems. Memorandum by the Secretary-General. Annex. Preliminary Draft Convention, para. 13. These references were dropped from the final version of the Preamble; today, although 'refugee status' is understood more as the formal confirmation of entitlement to international protection or asylum in the sense of solution, than as a particular civil quality, its absence or denial may well entail the marginalization of substantial numbers of individuals otherwise in need of refuge.

2 See Steinbock, D. J., 'The refugee definition as law: issues of interpretation', in Nicholson, F. & Twomey, P., eds., *Refugee Rights and Realities* (1999) 13.

3 See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued 2019) para. 28; Grahl-Madsen, A., *The Status of Refugees in International Law*, vol. 1 (1966) 340; Tribunal civil, Verviers (15 nov. 1989), *X c/ Etat belge:* see (1989) 55 *RDDE* 242; Inter-American Commission on Human Rights, 'Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System', OEA/Ser.L/V/II.106, doc. 40 rev. (28 Feb. 2000) para. 118. The declaratory character of refugee status determination is formally recognized in Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, recital (21).

4 See, generally, Grahl-Madsen (n 3); Weis, P., 'The Concept of the Refugee in International Law' (1960) *Journal du droit international* 1; Schnyder, F., 'Les aspects juridiques actuels du problème des réfugiés' (1965-I) *Hague Recueil* 339; Aga Khan, S., 'Legal Problems relating to Refugees and Displaced Persons' (1976-I) *Hague Recueil* 287; Anker, D. E., *Law of Asylum in the United States* (June 2020 update); Hathaway, J. C. & Foster, M., *The Law of Refugee Status* (2nd edn., 2014); Carlier, J. Y., 'Droit d'asile et des réfugiés: de la protection aux droits' (2008) *Hague Recueil* 90; Kälin, W., *Grundriss des Asylverfahrens* (1990); Germov, R. & Motta, F., *Refugee Law in Australia* (2003); Stevens, D., *UK Asylum Law and*

Policy (2004); Alland, D. & Teitgen-Colly, C., *Traité du droit d'asile* (2002); Marx, R., *Kommentar zum Ausländer - und Asylrecht* (2. Aufl., 2005); *Kommentar zum Asylverfahrensgesetz*, (6. Aufl., 2005); Tiberghien, F., *La protection des réfugiés en France* (2ème édn., 1988).

5 The situation of refugees acknowledged under earlier arrangements and formally included in both Statute and Convention is not examined further; cf. Statute, para. 6(a)(1) and 1951 Convention, art. 1A(1); Grahl-Madsen (n 3) 108–41; Tiberghien (n 4) 401–41.

6 The term 'mandate refugee' will signify a refugee within the competence of UNHCR according to its Statute, or according to specific General Assembly resolutions. French law recognizes as refugees 'toute personne persécutée en raison de son action en faveur de la liberté ainsi qu'à toute personne sur laquelle le Haut-Commissariat des Nations unies pour les réfugiés exerce son mandat aux termes des articles 6 et 7 de son statut … ou qui répond aux définitions de l'article 1er de la convention de Genève du 28 juillet 1951': see art. L711–1, Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA) http://www.legifrance.gouv.fr/. There is no obligation on a State party to accept an asylum application from an individual who has been accorded refugee status by UNHCR; however, the UK Supreme Court considers that a national decision-maker should give 'close attention' to a UNHCR decision and take 'considerable pause before arriving at a different conclusion': *I.A. (Appellant) v Secretary of State for the Home Department* [2014] UKSC 6, paras. 29, 49.

7 The term 'Convention refugee' will signify a refugee within the meaning of the 1951 Convention and/or 1967 Protocol.

8 Recognition as a Convention, but not as a mandate refugee would import no consequences of significance.

9 These optional limitations are not discussed further; see Grahl-Madsen (n 3) 164–72.

10 Statute, para. 8(a).

11 Art. 35 of the Convention; art. II of the Protocol.

12 Given the variety of State-administered procedures, which may engage UNHCR in different capacities, Burson considers that RSD should not be seen in 'binary terms, performed by either the State or UNHCR' but 'on a structural spectrum': Burson, B., 'Refugee Status Determination', in Costello, C., Foster, M., & McAdam, J., eds., *The Oxford Handbook of International Refugee Law* (2021) 578.

13 Cf. various State objections, cited at Ch. 2, s. 3.2.

14 During 2018, UNHCR conducted refugee status decision-making in 55 countries with partial or non-functioning asylum systems, registering some 227,800 applications. In 2019, UNHCR proposed to establish an 'Asylum Capacity Support Group', as called for in the Global Compact on Refugees: see 'Note on International Protection': UN doc. A/AC.96/1189 (11 Oct. 2019) para. 11; Global Compact on Refugees: UN doc. A/73/12 (Part II) para. 62. See also, 'Refugee Status Determination', EC/67/SC/CRP.12 (2016), discussing UNHCR's 'new strategic direction for RSD'.

15 UNHCR's determination operates as a filter in such cases, although the final decisions on both status and acceptance are increasingly taken by governments themselves.

16 See Alexander, M., 'Refugee Status Determination Conducted by UNHCR' (1999) 11 *IJRL* 251; Kagan, M., 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006) 18 *IJRL* 1.

17 See UNHCR, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate' (Aug. 2020); https://www.refworld.org/docid/5e870b254.html. For critique of the 2003 version, see 'Document: Re: Fairness in UNHCR RSD Procedures: Open Letter', (2007) 19 *IJRL* 161.

18 See further Ch. 11, ss. 2–4.

19 Cf. art. 31(1), 1969 Vienna Convention on the Law of Treaties: 1155 UNTS 331. The UNHCR *Handbook* (n 3) was prepared at the request of States members of the Executive Committee of the High Commissioner's Programme, for the guidance of governments: UNHCR Executive Committee, Report of the 28th Session: UN doc. A/AC.96/549 (1977) para. 53.6(g). First published in 1979, it has been reprinted several times in many languages, generally with a new foreword by the current Director of International Protection and updated lists of States parties, and in recent editions, a compilation of UNHCR 'Guidelines' on selected issues of interpretation, which are referred to below. The content, however, is unchanged, being based on material and analysis available at the date of preparation, including UNHCR experience, State practice in regard to the determination of refugee status, exchanges of views between the Office and the competent authorities of Contracting States, and relevant literature. The *Handbook* has been widely circulated and approved by governments and is frequently referred to in refugee status proceedings throughout the world; however, courts citing it, even with approval, commonly note that it is not binding. See also, UNHCR, 'Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees' (Apr. 2001).

20 UNHCR *Handbook* (n 3) paras. 195–205.

21 *R v Governor of Brixton Prison, ex p. Ahsan* [1969] 2 QB 222, 233 (Goddard LCJ).

22 For example, did war service cause or contribute to cancer of the gullet leading to death? Cf. *Miller v Minister of Pensions* [1947] 2 All ER 372.

23 *Fernandez v Government of Singapore* [1971] 1 WLR 987. The Court considered and applied s. 4(1)(c) of the Fugitive Offenders Act 1967 which provided: 'A person shall not be returned under this Act … if it appears … that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinion.' See now, UK Extradition Act 2003, ss. 13, 81.

24 *Fernandez v Government of Singapore* (n 23) 993–4. Cf. the quantification of future losses, both pecuniary and non-pecuniary, which courts undertake in personal injury claims; see for example, *Davies v Taylor* [1972] All ER 836, *Jefford v Gee* [1970] 2 QB 130.

25 *Fernandez v Government of Singapore* (n 23) 994.

26 This point is made in somewhat different fashion in *T v Secretary of State for the Home Department* [1996] AC 742, 755 (Lord Mustill).

27 On approaches to fact-finding across civil, criminal, and administrative matters in Canadian jurisprudence, see generally Evans, H. C., *Refugee Law's Fact-Finding Crisis: Truth, Risk and the Wrong Mistake* (2018).

28 *Fernandez v Government of Singapore* (n 23) 994. This test remains applicable to ss. 13 and 81 of the Extradition Act 2003: see *Hilali v The National Court, Madrid* [2006] EWHC 1239 (Admin), [2006] 4 All ER 435, 449; *Government of Rwanda v Nteziryayo & Others* [2017] EWHC 1912 (Admin) para. 387 (although each uses the formulation 'reasonable grounds for thinking' in place of 'substantial grounds for thinking'). Cf. art. 2, Draft Convention on Territorial Asylum, proposing a 'definite possibility of persecution' as the criterion for the grant of asylum; also art. 3, CAT 84; art. 3, ECHR 50.

29 This approach should not be confused with ‘balancing’ (on which see further Ch. 4, s. 5.3.2), but reflects the inherent uncertainties in the nature of refugee claims and in the assessment of both personal and background information.

30 See further below n 38.

31 *INS v Stevic* 467 US 407 (1984); Weinman, S. C., ‘*INS v. Stevic*: A Critical Assessment’ (1985) 7 *HRQ* 391.

32 The Board of Immigration Appeals (BIA) hears appeals, among others, against the decisions of immigration judges pertaining to asylum; it is housed under the Department of Justice, Executive Office for Immigration Review. See http://www.usdoj.gov/eoir for decisions of the BIA and the Attorney General—the ‘Virtual Law Library’.

33 *Acosta*, 19 I&N Dec. 211 (BIA, 1985).

34 Ibid., 226.

35 Cf. *Bolanos-Hernandez v Immigration and Naturalization Service*, 767 F.2d 1277 (9th Cir., 1984, as amended on denial of rehearing and rehearing *en banc*, 14 Jun. 1985). The Court of Appeals held that while evidence of a general level of violence was not alone enough, the uncontroverted evidence of a threat to the applicant’s own life was sufficient to establish a likelihood of persecution. The documentary evidence submitted also illustrated the likely fate of those who refused to cooperate with the non-governmental forces, and that the guerrillas had both the ability and the will to carry out their threats; to require further corroborative evidence would impose an impossible burden.

36 480 US 421 (1987).

37 See UNHCR *Handbook* (n 3) para. 42: ‘In general, the applicant’s fear should be considered well-founded if he can establish, *to a reasonable degree*, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there’ (emphasis added). See also, Gibney, M., ‘A “Well-founded Fear” of Persecution’ (1988) 10 *HRQ* 109.

38 *INS v Cardoza-Fonseca* (n 36) 431.

39 Ibid., 428–9. The ‘*non-refoulement*’ provision of US law has been changed on a number of occasions. Section 243(h) of the INA initially simply empowered the Attorney General to withhold deportation if of the opinion that the individual would be subject to persecution. This was amended by the 1980 Refugee Act to require that the Attorney General, ‘shall not deport or return’ any such individual, if he or she determines that that person would be persecuted. However, s. 241(b)(3)(A) now reverts to discretionary mode, to provide that the Attorney General, ‘may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion’: INA, s. 241(b)(3), 8 USC § 1231(b)(3). Moreover, the discretionary element in asylum—an applicant bears the burden of proving not only statutory eligibility but also that he or she merits asylum—was enhanced under the Trump administration.

40 *INS v Cardoza-Fonseca* (n 36) 429, n 8.

41 Ibid., 430–1.

42 Ibid., 431.

43 Ibid., 452.

44 In their own way, both *Acosta* (n 33) and *Bolanos-Hernandez* (n 35) underline the importance of personal testimony and documentary evidence.

45 Cf. Inter-American Court of Human Rights, *Velásquez Rodríguez* (Forced Disappearance and Death of Individual in Honduras, 29 Jul. 1988): (1989) 28 *ILM* 291—with respect to the standard of proof, international jurisprudence recognizes the power of the courts to weigh the evidence freely. The standard adopted should take into account the seriousness of the finding; not only direct, but also circumstantial evidence, indicia and presumptions may be considered, and are especially important where the type of repression is characterized by attempts to suppress all information and the State controls the means to verify acts occurring within territory.

46 A similar approach has been taken in many complementary protection cases. See further Ch. 7, s. 3.5.

47 [1989] 2 FC 680, 683. Speaking for the Court, MacGuigan J said: 'It was common ground that the objective test is not so stringent as to require a *probability* of persecution. In other words, *although an applicant has to establish his case on a balance of probabilities, he does not nevertheless have to prove that persecution would be more likely than not …*' This test was endorsed by the Supreme Court of Canada in *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593, para. 120 (expressing preference for the formulation 'serious possibility'). See also *Salibian v MEI* [1990] 3 FC 250; *Arrinaj v Minister for Citizenship and Immigration* [2005] FC 773; *Li v Minister for Citizenship and Immigration* [2003] FC 1514; *Begollari v Minister for Citizenship and Immigration* [2004] FC 1340; *Sakthivel v Canada (Citizenship and Immigration)* [2015] FC 292.

48 Loi sur l'asile 1998, art. 7(1) 'Preuve de la qualité de réfugié'. The article continues : '2. La qualité de réfugié est vraisemblable lorsque l'autorité estime que celle-ci est hautement probable. 3. Ne sont pas vraisemblables notamment les allégations qui, sur des points essentiels, ne sont pas suffisamment fondées, qui sont contradictoires, qui ne correspondent pas aux faits ou qui reposent de manière déterminante sur des moyens de preuve faux ou falsifiés.'

49 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379—real, that is, substantial chance includes less than 50 per cent likelihood. The *Migration Act* 1958, s. 5J (meaning of *well-founded fear of persecution*) applies the 'real chance' test.

50 *R v Secretary of State for the Home Department, ex p. Sivakumaran* [1988] 1 AC 958, 1000 (Lord Goff), 994 (Lord Keith). The Administrative Appeals Court of Hesse (Federal Republic of Germany) ruled that the test of persecution was a 'reasonable likelihood': *Hessischer Verwaltungsgerichtshof*, 13 UE 1568/84 (2 May 1990). The *Tribunal Supremo* of Spain has also ruled that asylum seekers coming from countries in turmoil need only establish a *prima facie* case in order to qualify for asylum or be granted refugee status: *Tribunal Supremo, Recurso de apelación 2403/88: La Ley*, vol. X, No. 2276 (1989); *Aranzadi*, Tomo LVI, v. III (1989).

51 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12.

52 The Qualification Directive or the recast Qualification Directive bind 26 of the 27 EU Member States. Denmark opted out of both the original and recast Directives, in accordance with arts. 1 and 2 of the Protocol on the Position of Denmark annexed to the Treaty on European Union [2002] OJ C325/5, and the Treaty establishing the European Community [2002] OJ C325/33: Qualification Directive, recital (40); and recast Qualification Directive, recital (51). Ireland opted out of the recast Directive: see recast Qualification Directive, recital (50). The UK withdrew from the EU in 2020.

[53] European Commission, Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (13 Jul. 2016) COM(2016) 466 final.

[54] See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final (23 Sep. 2020) 3.

[55] The European Commission's initial proposal for a recast Directive notes its aim 'to ensure a higher degree of harmonisation and better substantive and procedural standards of protection, on the present legal basis, towards the establishment of a common asylum procedure and a uniform status': Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted COM(2009) 551 final (21 Oct. 2009) 3.

[56] Ibid., 2–3. The 2016 Regulation Proposal notes that '[w]hile the existing recast Qualification Directive has contributed to some level of approximation of the national rules, it appears that recognition rates still vary between Member States and there is equally a lack of convergence as regards decisions on the type of protection status granted by each Member State' and 'a considerable variation among Member States' policies in the duration of the residence permits granted, as well as regards to access to rights': European Commission (n 54) at 3–4 (citations omitted).

[57] See, for example, discussion in Peers, S., 'Legislative Update 2011, EU Immigration and Asylum Law: The Recast Qualification Directive' (2012) 14 *EJML* 199; Costello, C., *The Human Rights of Migrants and Refugees in European Law* (2016) Ch. 5.

[58] Recast Qualification Directive, art. 7(1)–(2). See also recast Directive Proposal (n 55) 6 (proposing the language 'effective and durable'), and its Annex, setting out a detailed explanation of the proposal (at 3). Costello considers the amendments to art. 7(2) to be a 'compromise outcome': Costello (n 57) 201, see also 227, citing European Parliament, Committee Civil Liberties, Justice and Home Affairs, *Report on the proposal for a directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (recast)* (COM(2009) 0551–C7-0250/2009–2009/0164(COD)) (14 July 2011). The Report's Explanatory Statement notes that '[t]here is a strongly held view in the [European Parliament] that, in principle, only states can be viewed as actors of protection: international bodies do not have the attributes of a state and cannot be parties to international conventions', and that the changes proposed to the original article 'aim to strengthen the requirements demanded of non-state actors if they are to be viewed as able to deliver effective and durable (now non-temporary) protection': at 39.

[59] Recast Qualification Directive, art. 7(1)(b) and recital (26) (with art. 7(1)(b) noting that protection may be provided by 'parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State'). See further recast Directive Proposal (n 55) Annex, 3; s. 4.3.

[60] UNHCR's suggestion to remove the reference to non-State actors in art. 7, on the basis that 'non-State actors in principle should not be considered actors of protection', as they 'do not have the attributes of a state and do not have the same obligations under international law', was not taken up by the drafters, despite receiving support from the European Economic and Social Committee: see 'UNHCR comments on the European Commission's

proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted COM(2009) 551 (21 October 2009)' (2010) 5; 'Opinion of the European Economic and Social Committee on the "Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted" (recast) COM(2009) 551 final/2 — 2009/0164 (COD)' 2011/C 18/14 (2011) 4.2. See also ECRE, *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Qualification Directive* (2 Mar. 2010) 6–8; 'ECRE Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)' (undated) 6–7 (criticizing the decision to retain 'non-State actors' and noting that such actors are 'extremely unlikely' to fulfil the requirements of effective and non-temporary protection in practice). This issue is discussed further below at s. 4.3.1.

61 In contrast, art. 8 of the original Qualification Directive stipulated merely that 'the applicant can reasonably be expected to stay in that part of the country'. Amendments to the Recital of the recast Qualification Directive further provide that internal protection should be 'effectively available'; that there is a presumption against the availability of effective protection when the State or its agents are the persecutory actors; and that, in the case of unaccompanied minors, 'the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available': see recital (27). See also Hathaway & Foster (n 4) 343.

62 See further discussion in s. 6.2.1 below.

63 See *Salah Sheekh v The Netherlands*, App. No. 1948/04 (ECtHR, 11 Jan. 2007) para. 141. See also recast Directive Proposal (n 55) 12; Peers (n 57) 212; Eaton, J., 'The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive' (2012) 24 *IJRL* 765.

64 Recast Qualification Directive, art. 9(3). See further recast Directive Proposal (n 55) 7–8.

65 The recast Qualification Directive provides that '[g]ender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group': art. 10(d). In contrast, the original Qualification Directive provided that '[g]ender related aspects *might* be considered, *without by themselves alone creating a presumption for the applicability of this Article*' (emphasis added). See also recast Qualification Directive, recital (30), and further Peers (n 57) 213.

66 Namely, that a group's members share an innate characteristic, common unchangeable background, or characteristic or belief so fundamental that they should not be forced to renounce it, *and* possess a 'distinct identity … perceived as being different by the surrounding society': art. 10(d). See further n 404 below.

67 'Purported', as it is hard to conceive how such a reduction in benefits could be carried out 'within the limits' of CSR 51 without falling foul of CSR 51, art. 3: see original Qualification Directive, art. 20(6). The corresponding clause on limiting the benefits of

those holding subsidiary status has also been deleted: see original Qualification Directive, art. 20(7).

68 Art. 23 of the recast Qualification Directive removes Member States' previous right to 'define the conditions applicable' to the provision of family members' benefits under arts. 24–34.

69 Art. 24 (providing that beneficiaries of subsidiary protection, and their family members, are entitled to a 'renewable residence permit which must be valid for at least 1 year and, in case of renewal, for at least 2 years'). Under the original Qualification Directive, holders of subsidiary protection were only entitled to a one-year renewable permit. See further Peers (n 57) 216.

70 Art. 25 (creating a general requirement to issue travel documents to beneficiaries and removing the prior caveat that Member States were only required to issue such documents '[w]hen serious humanitarian reasons arise that require [the beneficiary's] presence in another State').

71 Art. 30 (removing Member States' previous discretion to 'limit health care granted to beneficiaries of subsidiary protection to core benefits': compare original Qualification Directive, art. 30).

72 See arts. 26 and 34 (providing equal access to refugees and beneficiaries of subsidiary protection). See Peers (n 57) 217–18.

73 See further Ch. 7, s. 6.

74 The recast Qualification Directive removes the requirement that a minor child be 'dependent' and adds as a category 'the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried': see art. 2(j). See also recital (19); Peers (n 57) 207–8; also Ippolito, F. & Velluti, S., 'The Recast Process of the EU Asylum System: A Balancing Act between Efficiency and Fairness' (2011) 30(3) *RSQ* 24, 45; recast Directive Proposal (n 55) 23.

75 Arts. 11 and 16. See Peers (n 57) 214; Ch. 4.

76 Adding references to 'victims of human trafficking' and 'persons with mental disorders' to the indicative list of 'vulnerable persons' in art. 20(3).

77 Art. 22, providing that such information shall be 'in a language that they understand or are reasonably supposed to understand'. Compare art. 22, original Qualification Directive ('in a language likely to be understood by them'). See further Peers (n 57) 215.

78 Art. 31(5).

79 See Peers (n 57) 205–6.

80 The 2016 Regulation Proposal intends to pursue further harmonisation by providing for more prescriptive rules: European Commission (n 54) 4–5. See UNHCR's comments and recommendations: 'UNHCR comments on the European Commission Proposal for a Qualification Regulation—COM(2016) 466' (Feb. 2018) 9–10 (on applicant obligations), 15–16 (on internal protection), 22–3.

81 See Recast Qualification Directive, recital (10) and art. 3; and Costello, noting a 'worrying tendency to treat the [Qualification Directive] as embodying a ceiling rather than a floor of rights': Costello (n 57) 201, and also 31.

82 See Costello (n 57) 198–203; Peers (n 57) 208. On the original Qualification Directive, see Lambert, H., 'The EU Asylum Qualification Directive, its Impact on the Jurisprudence of the United Kingdom and International Law' (2006) 55 *ICLQ* 161; Klug, A., 'Harmonization of Asylum in the European Union—Emergence of an EU Refugee System?' (2004) 47 *German Yearbook of International Law* 594; also, Gil-Bazo, M.-T., 'Refugee Status,

Subsidiary Protection and the Right to be granted Asylum under EC Law' *New Issues in Refugee Research*, Research Paper No. 136 (2006).

83 Recast Qualification Directive, recitals (3)–(4). These words also appear in the original Qualification Directive (recitals (2)–(3)) and are taken from the Presidency Conclusions, Tampere European Council 15 and 16 October 1999 (Tampere Conclusions) para. 13; text in (1999) 11 *IJRL* 738. The Conclusions also identified the aim of 'an open and secure European Union, *fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments*, and able to respond to humanitarian needs on the basis of solidarity': ibid., para. 4 (emphasis added).

84 Recast Qualification Directive, recital (10). See also para. 8, recalling that 'considerable disparities remain between one Member State and another concerning the grant of protection and the forms that protection takes' and the intention to 'offer a higher degree of protection'.

85 Recast Qualification Directive, recitals (12), (14); arts. 1, 3. Peers notes that this is despite the fact that the EU now has the competence fully to harmonize EU law, in accordance with art. 78, TFEU: Peers (n 57) 204.

86 See general discussion of *sur place* claims in s. 5.1.1.

87 Recast Qualification Directive, recitals (25), (30)–(31), (37).

88 On which see further Ch. 7, s. 6.

89 Recast Qualification Directive, recital (35); cf. the scope of human rights protection described in Ch. 7.

90 Recast Qualification Directive, recital (48).

91 See further Ch. 7, s. 6.

92 See further s. 5.1.2.

93 See n 75.

94 1969 Vienna Convention on the Law of Treaties (n 19) art. 41(1)(b).

95 *Report* of the International Law Commission on its 18th Session (4 May–19 July 1966) 63, para. (9)—comment to draft art. 35, later art. 40; in its view, this requirement flowed 'directly from the obligation assumed by the parties to perform the treaty in good faith'.

96 *Report* of the International Law Commission (n 95) 65, paras. (1)–(3).

97 Art. 41(2) provides: 'Unless … the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.' The phrase 'illegitimate modifications' is used in the ILC Commentary to draft art. 37, the precursor to art. 41: (1966) II *Yearbook of the International Law Commission* 235.

98 The earlier 'Spanish Protocol' purported not to amend the Convention, but to establish a rebuttable presumption that all Member States are 'safe countries of origin': Declaration relating to the Protocol on asylum for nationals of Member States of the European Union: OJ C340 (10/11/1997) 141; see also the declaration by Belgium at 144. Bribosia, E. & Weyembergh, A., 'Extradition et asile: vers un espace judiciaire européen?' (1997) *Revue belge de droit international* 69.

99 Among others, the 'logic' would seem to imply EU-wide recognition of status granted in any of its parts, and effective implementation of Convention rights and standards within the Community as a whole.

100 On the question of the 'primacy' of the Convention and the international obligations of Member States, see Lambert (n 82) 183–90; Gil-Bazo (n 82).

101 UNHCR *Handbook* (n 3) paras. 51–65; Grahl-Madsen (n 3) 188–216; Hathaway & Foster (n 4) 182–6; Zimmermann, A. & Mahler, C., 'Article 1 A, para. 2', in Zimmermann, A., ed., *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 219. In the Rome Statute, persecution is defined as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity': Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art. 7(2)(g). However, this definition is specific to the context of art. 7, namely 'crimes against humanity', being acts 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack': art. 7(1). On the distinction between persecution as a crime and as a protective concept, see further s. 4.2.1.

102 See Maiani, F., 'The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach' *in Les Dossiers du Grihl: Les dossiers de Jean-Pierre Cavaillé, De la persécution* (Feb. 2010) (while also recognizing, conversely, that this indeterminacy leaves the definition 'vulnerable to restrictive interpretations, or even to manipulation').

103 See, for example, efforts to 'identify definitional features' in Storey, H., 'Persecution: Towards a working definition', in Chetail, V. & Bauloz, C., *Research Handbook on International Law and Migration* (2014) 459, 461, 516–17; and Storey, H., 'What Constitutes Persecution? Towards a Working Definition' (2014) 26 *IJRL* 272.

104 Hathaway & Foster (n 4) 183. This approach is described as both flexible and capable of providing 'guidance based on objective principle': ibid. It was presented in Hathaway, J. C., *The Law of Refugee Status* (1991) 102–5.

105 Hathaway & Foster (n 4) 195, n 78. The authors note that 'the phrase "sustained or systemic" has occasionally been misunderstood as necessarily requiring a risk of repeated harm (hence excluding one-off harm such as death). However, this has mostly now been understood to be an error': ibid., 195, n 78. For earlier critique of the 'sustained and systemic' approach on the basis of its presumed exclusion of a 'single-harm' risk, see Zimmermann & Mahler (n 101) 348–49 and Storey, 'Persecution: Towards a working definition' (n 103) 472–3. In this respect, the 'sustained and systemic' approach now seems more aligned to the language of the recast Qualification Directive: see art. 9(1)(a) ('an act must … be sufficiently serious by its nature *or* repetition'). But compare Migration Act 1958 (Australia), s. 5J(4) ('[p]ersecution must involve systematic *and* discriminatory conduct') (emphasis added). Compare also Canada and New Zealand, which each stick closely to the art. 1A(2) definition: Immigration and Refugee Protection Act (Canada), s. 96; Immigration Act 2009 (New Zealand), s. 129(1). See further discussion in the text below.

106 See, for example, Hathaway & Foster (n 4) 193–208 (directing attention to whether a 'generally accepted right *as codified in international law* is, on the facts of the case, at risk of being violated'. While recognizing that there will be cases where 'a threat is so far at the margins of a rights violation as to amount to a *de minimis* harm', they consider such cases will be 'exceptional': ibid., 204, 206). Compare Zimmermann & Mahler (n 101) 350, 353; Storey, 'Persecution: Towards a working definition' (n 103) 475–8, 517. See also Hathaway's original four-tier model in Hathaway (n 104) 108–12. For discussion of the particular question of socio-economic rights, see Zimmermann & Mahler (n 101) 356–7; Hathaway & Foster (n 4) 203–4; Foster, M., *International Refugee Law and Socio-Economic Rights* (2007) Ch. 3.

107 Hathaway & Foster (n 4) 183–6; see also *Islam v Secretary of State for the Home Department* [1999] 2 AC 629, 653 (Lord Hoffmann), accepting the formulation in the 1998 Refugee Women's Legal Group *Gender Guidelines for the Determination of Asylum Claims in the U.K* that 'Persecution = Serious Harm + The Failure of State Protection'.

108 *Refugee and Protection Officer v CV and CW* [2017] NZLR 585, 592, agreeing with the Tribunal's approach in *DS (Iran)* [2016] NZIPT 800788, para. 126, which rejected the argument that a 'real chance of a breach of a human right … of a sustained or systemic nature' was sufficient to meet the requirement of 'being persecuted' under the refugee definition, without any further assessment of a risk of 'serious harm': para. 111. The Tribunal considered that the Hathaway formulation was 'best regarded as epexegetic of "being persecuted", and not a replacement or substitute definition for the express Convention term': para. 125.

109 Cf. UNHCR *Handbook* (n 3) para. 51: '[i]t may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.'

110 The Convention requires a linkage between the act and a public official or other person acting in an official capacity. In *R v TRA* [2019] UKSC 51, [2019] 3 WLR 1073, 1103, para. 76, the UK Supreme Court found (by 4-1) that art. 1 was 'sufficiently wide to include conduct by a person acting in an official capacity on behalf of an entity exercising governmental control over a civilian population in a territory over which it exercises de facto control'.

111 The Committee against Torture's practice in reviewing State action in matters of refusal of admission and removal of those whose return may lead them to face the risk of torture contributes significantly to the consolidation of 'human rights-based protection'; see further Ch. 7.

112 See, for example, art. 16, CAT 84; art. 7, ICCPR 66; art. 3, ECHR 50; art. 5, ACHR 69; art. 5, ACHPR 81; art. 8, ArabCHR 04; all texts in Brownlie, I. & Goodwin-Gill, G. S., eds., *Brownlie's Documents on Human Rights* (6th edn., 2010).

113 The last-mentioned may be illustrative of the protection due to the conscientious objector but, in our view, it is not exhaustive; see further s. 6.1.1. See also, on the interpretation of art. 9 under the original Qualification Directive, Joined Cases C-71/11 and C-99/11 *Germany v Y & Z* (CJEU, Grand Chamber, 5 Sep. 2012); Joined Cases C-199/12 to C-201/12 *Minister voor Immigratie en Asiel v X, Y, & Z* (CJEU, 4th Chamber, 7 Nov. 2013).

114 Recast Qualification Directive, art. 9(2)(f).

115 Recast Qualification Directive, art. 9(3) (emphasis added). See also recital (29). Compare the 2004 Qualification Directive, art. 9(3). For discussion see IARLJ-Europe/EASO, 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (2016) 45 (noting that '[w]ith this addition, newly introduced by the [recast Qualification Directive], Article 9(3) addresses the issue of a causal link if persecution is inflicted by non-State actors alone or a combination of non-State and State actors'); Lehmann, J. M., 'Availability of Protection in the Country of Origin: An Analysis under the EU Qualification Directive', in Bauloz and others, eds., *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (2015) 137 (noting that while the definition of persecution remains rooted in harm, rather than a 'harm + a failure of state protection' approach, the amendment to art.

9(3) ‘effectively adopts the approach taken by the UK in *Shah and Islam*’). See n 107 and discussion in s. 3.1 above.

116 See discussion in recast Directive Proposal (n 55) 6–7, cited in IARLJ-Europe/EASO (n 115). ECRE considers that the amendment ‘significantly strengthens the protection of persons in situations where the risk of persecution emanates from non-State actors’, noting the particular case of gender-based persecution: ECRE Information Note on the Directive 2011/95/EU (n 60) 8.

117 Migration Act, s. 5J(4)(b)–(c).

118 Migration Act, s. 5J(5) (previously s. 91R(2)). Cf. *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55, (2000) 204 CLR 1—High Court of Australia: a single act may suffice and it is not necessary to show systematic persecution. See also Migration and Refugee Division Legal Services, Administrative Appeals Tribunal, ‘A Guide to Refugee Law in Australia’ (2020) Ch. 4 (updated Aug. 2020), 11–13 https://www.aat.gov.au/guide-to-refugee-law-in-australia , noting that *Ibrahim* ‘remains law insofar as the meaning of “systematic” is concerned’, despite predating the enactment of s. 91R and s. 5J: at 13.

119 Migration Act, s. 5J(4)(a) (emphasis added).

120 Migration Act, s. 5J(1)(b). See also *Chan v Minister for Immigration and Ethnic Affairs* (n 49). Storey critiques an earlier version of this statutory definition, as seeking to ‘fix on a definition of persecution without regard to whether it reflects this term’s universal definition. Indeed, its aim would appear to be to prevent judges from trying to achieve a universal definition’: Storey, ‘What Constitutes Persecution?’ (n 103) 274–5, citing Edwards, A., ‘Tampering with Refugee Protection: The Case of Australia’ (2003) 15 *IJRL* 192, 203.

121 Migration Act, s. 5J(6). See discussion of the origins of this provision (previously in s. 91R(3) of the Migration Act) in *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40, (2009) 238 CLR 642, 662–3, paras. 41–5 (Crennan and Kiefel JJ).

122 This passage (from the first edition of this work) was not clearly understood by Urie JA in *Canada (Attorney General) v Ward* [1990] 2 FC 667 (Federal Court of Appeal). He said that it was important to avoid confusing ‘the determination of persecution and ineffective protection’, that ‘the two concepts must be addressed and satisfied independently,’ and that the absence of protection did not serve as a presumption of persecution (at 680–1). On appeal, the Supreme Court of Canada, quoting the passage in the text, stated that having established that the claimant has a fear, the decision-maker is ‘entitled to presume that persecution will be *likely* and the fear *well-founded* if there is an absence of state protection. The presumption goes to the heart of the inquiry, which is whether there is a likelihood of persecution … The presumption is not a great leap … Of course, the persecution must be real—the presumption cannot be built on fictional events—but the *well-foundedness* of the fears can be established through the use of such a presumption’: *Canada (Attorney General) v Ward* [1993] SCR 689, 708 (emphasis in original). See also *Zalzali v Canada (Minister for Employment and Immigration)* [1991] 3 FC 605.

123 See Grahl-Madsen (n 3) 193, quoting Zink’s ‘restrictive’ interpretation.

124 Ibid., citing the liberal interpretations of Weis (n 4): ‘other measures in disregard of human dignity’; and Vernant, J., *The Refugee in the Post-War World* (1953) 8: ‘severe measures and sanctions of an arbitrary nature, incompatible with the principles set forth in the Universal Declaration of Human Rights’.

125 Cf. Goodwin-Gill, G. S., *International Law and the Movement of Persons between States* (1978) 66–87.

126 *Barcelona Traction* case [1970] ICJ Rep. 3, at 32.

127 Cf. art. 15(2) ECHR 50; art. 4 ICCPR 66; art. 27 ACHR 69; But see also Meron, T., 'On a Hierarchy of International Human Rights' (1987) 80 *AJIL* 1; Weil, P., 'Towards Relative Normativity in International Law?' (1985) 77 *AJIL* 413.

128 Art. 6, ICCPR 66.

129 Ibid., art. 7.

130 Ibid., art. 8.

131 Ibid., art. 15.

132 Ibid., art. 16. See n 1.

133 Ibid., art. 18.

134 Ibid., art. 9.

135 Ibid., art. 17.

136 'Enmity' or 'malignity' is not necessary: see, in the High Court of Australia, *S v Minister for Immigration and Multicultural Affairs* [2004] HCA 25, (2004) 217 CLR 387, 401, para. 38 (Gleeson CJ, Gummow and Kirby JJ).

137 As was done by President Amin in the case of the Ugandan expulsions in 1972.

138 Foreign Language Press, *The Hoa in Vietnam* (1978) 12.

139 Cf. Amnesty International, *1980 Report*, 241–6; *1982 Report*, 249–52.

140 Grahl-Madsen includes 'removal to a remote or designated place within the home country' in a list of measures which may amount to persecution: (n 3) 201.

141 Osborne, M., 'Indochinese refugees: causes and effects' (1980) 56 *International Affairs* 37, 38–44.

142 Human Rights Council, 'Report of the independent international fact-finding mission on Myanmar': UN doc. A/HRC/42/50 (42nd sess., 9–27 Sep. 2019) para. 80. See also paras. 23–5, 89–90 (noting that '[t]he Tatmadaw and ethnic Rakhine continue to prevent farmers from cultivating their lands and deliberately target their sources of food, including by burning paddy fields, confiscating farming and fishing tools, confiscating rice and other food stocks, and deliberately killing or confiscating livestock, such as cows, goats and chickens.')

143 See, for example, the *Nuremberg Trial Proceedings*, vol. 1, Indictment: Count One: http://www.yale.edu/lawweb/avalon/avalon.htm.

144 Art. 5(h). For the ICTY Statute and reports of judgments, see https://www.icty.org/. Art. 5 of the Statute, 'Crimes against humanity', also lists (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape… and (i) other inhumane acts. See also Statute of the International Tribunal for Rwanda, art. 3: SC res. 955 (8 Nov. 1994) Annex.

145 *Prosecutor v Tihomir Blaškić*, Case IT-95–14-A (29 Jul. 2004) Appeals Chamber, paras. 131–5. This formula has been repeated in several other decisions; see, for example, *Prosecutor v Dario Kordić and Mario Čerkez*, Case IT-95–14/2-A (17 Dec. 2004) Appeals Chamber, paras. 105–9; *Prosecutor v Vojislav Šešelj*, MICT-16-99-A (11 Apr. 2018) Appeals Chamber, Mechanism for International Criminal Tribunals, para. 159. The Appeals Chamber for the International Criminal Tribunal for Rwanda has adopted the same formula: see *Nahimana v Prosecutor*, Case No. ICTR-99-52-A (28 Nov. 2007) Appeals Chamber, para. 985, cited in *Prosecutor v Vojislav Šešelj.* See also *Popović and Others*, IT-05-88 (30 Jan. 2015) Appeals Chamber, paras. 761–2. Art. 3 of the Statute of the International Criminal Tribunal for Rwanda also provides for jurisdiction with regard to 'persecutions on political, racial and religious grounds'. However, it does not employ the language of 'armed conflict',

but requires that crimes against humanity be ‘committed as part of a widespread and systematic attack against any civilian population on *national, political, ethnic, racial or religious grounds*’ (emphasis added).

146 ‘Discriminatory intent’ is unique to the crime of persecution and is not an element in other crimes against humanity, such as murder; see *Prosecutor v Tadić*, Case IT-94–1 (15 Jul. 1999) Appeals Chamber, paras. 287–92, 305. The same has been held by the International Criminal Tribunal for Rwanda; see *Prosecutor v Akayesu*, ICTR-96–4 (1 Jun. 2001) Appeals Chamber, paras. 460–9. See also *Mugesera v Canada* [2005] SCC 40, Supreme Court of Canada (28 Jun. 2005) paras. 142–3.

147 *Prosecutor v Tihomir Blaškić* (n 145) para. 143. In *Nahimana and Others v Prosecutor* (n 145) para. 985, the Appeals Chamber noted that ‘not every act of discrimination will constitute the crime of persecution; the underlying acts of persecution, whether considered in isolation or in conjunction with other acts, must be of a gravity equal to the crimes listed under article 3 of the Statute’ (citations omitted). Although persecution generally refers to a series of acts, a single act can be enough: *Prosecutor v Mitar Vasiljević*, Case IT-98–32-A (25 Feb. 2004) Appeals Chamber, para. 113; and while the ‘gravity test’ will only be met by gross or blatant denials of fundamental rights, the relevant acts must be considered in context and in light of their cumulative effect: *Prosecutor v Radoslav Brđanin*, IT-99–36-T (1 Sep. 2004) Trial Chamber II, paras. 996–7, 1032–48.

148 Prosecutor v Tihomir Blaškić (n 145) paras. 149, 158, 167, 183, 185. For the other crimes listed in art. 5, see n 145 above. The Appeals Chamber in *Blaškić* (n 145), also approved the finding that the crime of persecution had developed in customary international law to encompass acts including ‘murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5’ (at para. 143, citing *Prosecutor v Kupreškić and Others*, Case IT-95–16 (14 Jan. 2000) Trial Chamber II, para. 615; see also paras. 580–1).

149 Para. 3 defines ‘gender’ as follows: ‘For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.’

150 For text of the ICC Statute, see https://www.icc-cpi.int/. The *Elements of Crimes* in relation to art. 7(1)(h) emphasize, ‘1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights … 4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court. 5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.’ International Criminal Court, *Elements of Crimes* (2013) 7: https://www.icc-cpi.int/. In *Kupreškić* (n 148) paras. 580–1, the Trial Chamber considered that the art. 7(1)(h) limitation in the ICC Statute was ‘not consonant with customary international law’; relying on art. 10 of the same Statute, it declined to adopt such an interpretation for the purposes of the ICTY. The International Law Commission’s draft articles on Crimes against Humanity also contain a ‘connection’ requirement: International Law Commission, ‘Crimes against humanity: Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on second reading: Prevention and punishment of crimes against humanity’ (71st sess., 29 Apr.–7 Jun. & 8 Jul.–9 Aug. 2019), art. 2(1)(h). Amnesty International has criticized the draft article as being both inconsistent with customary international law, and more restrictive than the Rome Statute: Amnesty International, ‘International Law Commission: The Problematic Formulation of Persecution under the Draft Convention on Crimes Against Humanity’ (Oct. 2018). The draft article as provisionally adopted at second reading, which post-dates Amnesty’s report, does not

extend to a connection with war crimes, genocide, or the crime of aggression, while the Rome Statute encompasses a connection with 'any crime within the jurisdiction of the Court'.

151 Cf. SC res. 819 (1993) (16 Apr. 1993) para. 5, in which the Security Council, '*Reaffirms* that any taking or acquisition of territory by threat or use of force, including through the practice of "ethnic cleansing", is unlawful and unacceptable'; and para. 7, in which it '*Reaffirms* its condemnation of all violations of international humanitarian law, in particular the practice of "ethnic cleansing" and reaffirms that those who commit or order the commission of such acts shall be held individually responsible in respect of such acts'.

152 *Mugesera v Canada* (n 146) paras. 146, 150. Referring to the importance of interpreting domestic law in accordance with the principles of customary international law and with Canada's international obligations, the Court noted the specific relevance of sources such as the jurisprudence of international criminal tribunals: para. 82. On the issue of hate speech as persecution, see also *Nahimana and Others v Prosecutor* (n 145) paras. 986–8 (considering 'the context in which these underlying acts take place is particularly important for the purpose of assessing their gravity', and ultimately concluding that 'hate speeches and calls for violence against the Tutsi made after 6 April 1994 (thus after the beginning of a systematic and widespread attack against the Tutsi) themselves constituted underlying acts of persecution'); and *Prosecutor v Šešelj*, MICT-19-99-A (11 Apr. 2018) paras. 159, 163 (noting the Tribunal's approach in *Nahimana* and finding that 'Šešelj's speech rises to a level of gravity amounting to the *actus reus* of persecution as a crime against humanity'). On exclusion generally, see further Ch. 4, s. 5.

153 *Prosecutor v Milorad Krnojelac*, IT-97–25 (17 Sep. 2003) Appeals Chamber, paras. 220–2. In *Brđanin*, the Trial Chamber was careful to distinguish in its use of terms between 'deportation', which it considered to require crossing an international border; and 'forcible transfer', which did not: *Prosecutor v Radoslav Brđanin* (n 147) paras. 541–4. It appears generally agreed that the illegality of deportation or transfer does not depend on removal to a particular destination: *Krnojelac*, ibid., para. 218; *Prosecutor v Milomir Stakić*, IT-97–24-T (31 Jul. 2003) Trial Chamber II, para. 677.

154 *Prosecutor v Simić and Others*, IT-95–9 (17 October 2003) Trial Chamber I, para. 125 (internal citations and emphasis omitted). The Trial Chamber further observed that, 'what matters is the personal consent or wish of an individual, as opposed to collective consent as a group, or a consent expressed by official authorities, in relation to an individual person, or a group of persons': ibid., para. 128.

155 Ibid., para. 126.

156 Türk, V., 'Non-State Agents of Persecution', in Chetail, V. & Gowlland-Debbas, V., eds., *Switzerland and the International Protection of Refugees* (2002) 95; Kälin, W., 'Non-State Agents of Persecution and the Inability of the State to Protect' (2001) 15 *Georgetown Immigration Law Journal* 415; Anker (n 4) §§ 4:8–11; Wilsher, D., 'Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?' (2003) 15 *IJRL* 68; Yeo, C., 'Agents of the State: When is an Official of the State an Agent of the State?' (2002) 14 *IJRL* 509; Moore, J., 'From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents' (1999) 31 *Columbia Human Rights Law Review* 81; Zimmermann & Mahler (n 101) 362 ff.; Hathaway & Foster (n 4) 303–7; UNHCR, 'Guidance Note on Refugee Claims relating to Victims of Organized Gangs' (Mar. 2010). See also the definition of 'actors of persecution' in the recast Qualification Directive, art. 6. Persecution for reasons of race or religion will often spring from hostile sections of the populace, while that for reasons of political opinion will more commonly derive from direct, official action. See Cons. d'Etat, *Dankha* (27 mai 1983) 42,074; CRR, *Duman* (3 avr. 1979) 9,744, cited in Tiberghien (n 4) 247, 394, respectively;

also CRR, Section réunies (8 juin 1999) 315.503, *M. L.*—refugee status recognized where authorities tolerated threats and attacks on Christians by Islamic extremists.

157 See *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14, (2002) 210 CLR 1, 12–13, paras. 27–9, Gleeson CJ noting that the Convention does not refer to any particular type of persecutor, but to persecution, that is, conduct of a certain character which may include the actions of non-State agents. The Convention also does not specify *where* the threat or persecution must take place. Tiberghien, F., 'Le lieu d'exercise des persecutions': *Doc. réf.* no. 67 (6/15 mars 1989) 1–5—notes acceptance of the idea that a threat or other act committed in France can be equated with persecution in the country of origin, for example, (1) where the authorities of the country of origin undertake their activities abroad through groups which they control or manipulate; (2) where the persecutor is the country of residence, and the country of origin does not protect. Cf. Conseil d'Etat (4 dec. 1987) 61.376, *Urtiaga Martinez*, ibid., 3— Basque threatened in France by group tolerated or encouraged by Spanish authorities, and name found on list in possession of suspected counter-terrorist group member; refugee status upheld.

158 In the view of the *Ad hoc* Committee in 1950, ' "[u]nable" refers primarily to stateless refugees but includes also refugees possessing a nationality who are refused passports or *other* protection by their own government': Report of the *Ad hoc* Committee: UN doc. E/1618, para. 39.

159 These categories expressly include international organizations: see recast Qualification Directive, art. 6(c).

160 Recast Qualification Directive, art. 7(1); see also recital (26). Protection can only be provided where the actor is 'willing and able to offer protection in accordance with [art. 7(2)]', which further provides that protection must be 'effective and of a non-temporary nature' and is 'generally provided' when the responsible authorities 'take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection'. See further s. 3.1, and s. 4.3.1. See also Ch. 1, s. 4.

161 Grahl-Madsen (n 3) 189; see also Hathaway & Foster (n 4) 288–332.

162 Grahl-Madsen (n 3) 192. For a brief discussion of earlier French doctrine on the source of persecution, see the second edition of this work, 72–3. The law has now been changed; see the Loi no. 2003–1176 (10 déc. 2003; Code de l'entrée et de séjour des étrangers et du droit d'asile http://www.legifrance.gouv.fr/.

163 By 'State responsibility' is understood the body of principles which determines when and how one State may be liable to another for breach of an international obligation deriving either from treaty or from customary law. See also, in particular, Clapham, A., *Human Rights Obligations of Non-State Actors* (2006), generally and at 335–41.

164 See the International Law Commission, 'Articles on the Responsibility of States for Internationally Wrongful Acts', annexed to UNGA res. 56/83 (12 Dec. 2001); also, Crawford, J., *State Responsibility: The General Part* (2013); Brownlie, I., *System of the Law of Nations: State Responsibility, Part I* (1983) 159–79.

165 In *R (Bagdanavicius) v Secretary of State for the Home Department* [2005] UKHL 38, [2005] 2 AC 668, the Court held that in an appeal against removal on art. 3 ECHR 50 grounds it had to assess whether there was a 'real risk' of harm on return, and whether that harm amounted to prohibited ill-treatment. It held further that where non-State agents

were the source of harm, it would not constitute art. 3 ill-treatment *unless* the State in addition failed to provide 'a reasonable level of protection': 676–7, paras. 22–4.

166 Note, however, that a successful insurrectional movement is liable for its activities *before* its assumption of power; see 'Articles on the Responsibility of States for Internationally Wrongful Acts' (n 164) art. 10(1); Borchard, E. M., *The Diplomatic Protection of Citizens Abroad* (1915) 241; *Bolivár Railway Co. Case (Great Britain v Venezuela)* Ralston's *Report*, 388, 394 (Umpire Plumley).

167 Recast Qualification Directive, art. 7(1)–(2). The original Qualification Directive also accepted that 'parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State' could be actors of protection, but did not include the provisos that such entities must be 'willing and able to offer protection in accordance with [art. 7(2)]' and that such protection must be 'effective and of a non-temporary nature': compare original Qualification Directive, art. 7.

168 Joined Cases C-175/08, C-176/08, C-178/08, and C-179/08 *Abdulla v Bundesrepublik Deutschland* (CJEU, Grand Chamber, 2 Mar. 2010) para. 101, see also paras. 75–6; Errera, R., 'Cessation and Assessment of New Circumstances: a Comment on *Abdulla*, CJEU, 2 March 2010' (2011) 23 *IJRL* 521; Costello (n 57) 206–9.

169 See references in n 60 above. See also Hathaway & Foster (n 4) 289–92, 329; O'Sullivan, M., 'Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?' (2012) 24 *IJRL* 85 (arguing that the relationship between the individual and the State entails that 'only states and state-like bodies can provide "protection' " under refugee law': at 109); 'Response (James Hathaway)', in Hathaway, J. C. & Storey, H., 'What is the Meaning of State Protection in Refugee Law? A Debate' (2016) 28 *IJRL* 480, 485–6 (arguing that '[i]t is completely at odds with the object and purpose of the [CSR 51] to require an individual to entrust his or her welfare to the efforts of some entity that, whatever its past record or *de facto* authority or power, bears no ongoing legal duty to protect anyone'), and 'Surrebuttal (James Hathaway)', at 491. But compare 'Argument (Hugo Storey)', at 482–4 (noting, inter alia, that 'it remains an important axiom that protection is not to be defined so that it can only be afforded by a liberal democratic State') and 'Rebuttal (Hugo Storey)', at 489.

170 Recast Qualification Directive, recital (3). See also recitals (4), (22)–(24). Recital (22) also provides that '[c]onsultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention'. See further s. 3.1 above.

171 UNHCR comments on the Regulation Proposal (n 80) 14. Recent experience in Kosovo and elsewhere illustrates the difficulty of holding international organizations and even UN-authorized entities and operations to account for violations of human rights: Nowicki, M., Chinkin, C., & Tulkens, F., 'Final Report of the Human Rights Advisory Panel' (2017) 28 *Criminal Law Forum* 77; Nowak M., 'Enforced Disappearance in Kosovo. Human Rights: Advisory Panel Holds UNMIK Accountable' (2013) 18 *EHRLR* 275; Ryngaert C., 'The Accountability of International Organizations for Human Rights Violations: The Cases of the UN Mission in Kosovo (UNMIK) and the UN "Terrorism Blacklists" ', in Fitzmaurice, M. & Markouris, P., eds., *The Interpretation and Application of the European Convention on Human Rights: Legal and Practical Implications* (2012) 73.

172 The 'drafting history' includes, in particular, debates in the United Nations Economic and Social Council (ECOSOC) in 1950, the two sessions of the *Ad hoc* Committee on Statelessness and Related Problems (in January–February and August 1950; the Committee

was renamed the *Ad hoc* Committee on Refugees and Stateless Persons), and the Conference of Plenipotentiaries which settled the final text of the Convention in July 1951.

173 See UN doc. E/AC.32/L.6/Rev.1 (30 Jan. 1950).

174 See UN doc. E/AC.32/SR.18, para. 10 (31 Jan. 1950)—Mr Robinson (emphasis added).

175 See UN doc. E/1618 (17 Feb. 1950) Annex.

176 For reasons that are not clear, US law employs 'on account of' in preference to 'for reasons of' in its statement of the refugee definition: 8 USC § 1101(a)(42). This harkens back to one of the first US contributions to the definitions debate in 1950; see United States of America, '*Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons)*': UN doc. E/AC.32/L.4 (18 Jan. 1950).

177 This is the sense of *Acosta* (n 33) and accompanying text, in which the BIA emphasized the relevance of 'a belief or characteristic a persecutor seeks to overcome', and of the persecutor having 'the inclination to punish' the claimant. Referring to persecution for reasons of political opinion in the *Ward* case, the Supreme Court of Canada noted that the 'examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution': see n 122 at 740 f. See also, Kälin, W., Comment on Bundesverfassungsgericht (BRD) v. 10.7.1989—2 BvR 502/86 u.a. (EuGRZ 1989, S.444–455): *Asyl*, 1990/4, 13; *INS v Elias-Zacarias*, 502 US 478 (1992); 908 F.2d 1452 (9th Cir., 1990); Case Abstract No. *IJRL/0114* (1992) 4 *IJRL* 263; Anker, D., Blum, C. P., & Johnson, K. R., '*INS v. Zacarias:* Is There Anyone Out There?' (1992) 4 *IJRL* 266; von Sternberg, M. R., 'Emerging Bases of "Persecution" in American Refugee Law: Political Opinion and the Dilemma of Neutrality' (1989) 13 *Suffolk Transnational Law Journal* 1; Storey, 'What Constitutes Persecution?' (n 103) 285 (proposing that 'whether there is a well-founded fear of being persecuted is a matter to be approached from the perspective of the persecutor').

178 See the United States draft: UN doc. E/AC.32/L.4, para. B. Cf. the views of the United Kingdom: UN docs. E/AC.32/SR.6, para. 5; E/AC.32/L.2/Rev.1.

179 See UN doc. E/AC.32/SR.18, paras. 10–16 (Mr Robinson); art. 1C(5), (6) CSR 51; and further Ch. 4, s. 3.4.

180 Strictly speaking, the refugee must also be without the protection of any other nationality which he or she may possess, or be able to 'activate'; see further s. 5.1.2; also, Taylor, S., 'Protection Elsewhere/Nowhere' (2006) 18 *IJRL* 283.

181 See United States law: 8 USC §1101(a)(42)(B). UK immigration rules on asylum have been held not to apply to a refugee in a third country (*Secretary of State v Two citizens of Chile* [1977] Imm AR 36) or to a would-be refugee in his or her country of origin (*Secretary of State v X (a Chilean citizen)* [1978] Imm AR 73). On the lawfulness of immigration controls applied by UK officials in a foreign country with a view to preventing potential asylum seekers travelling to the UK, see *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (UNHCR Intervening)* [2005] 2 AC 1, and further Ch. 8, s. 4.3.2. Even if the Immigration Rules do not apply, the requirements of procedural fairness may provide a basis on which to challenge decisions under particular policies or programmes intended to benefit refugees and asylum seekers outside the UK; see, with particular reference to children located in the 'Jungle' in Calais, *R (MK) v Secretary of State for the Home Department* [2019] EWHC 3573 (Admin); *R (Help Refugees Limited) v Secretary of State for the Home Department* [2018] EWCA Civ 2098; *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812; *R (AM and Others) v Secretary of State for the Home Department* [2018] EWCA Civ 1815. On 'in-country' processing, see Higgins, C., 'Safe Journeys and Sound Policy: Expanding protected entry for

refugees' (Kaldor Centre for International Refugee Law, Policy Brief 8, Nov. 2019) 10–14. See also Ch. 10, s. 2.4, on protected entry procedures.

182 On the question of *non-refoulement* and the rejection of refugees at the frontier, see further Ch. 5, s. 2; Ch. 6, s. 1.1.

183 While recognizing the 'extraordinary weight of authority' on this point, Hathaway and Foster argue that a bipartite approach to well-founded fear 'is neither desirable as a matter of principle, nor defensible as a matter of international law' and that 'the concept of well-founded fear is rather inherently objective. It denies protection to persons unable to demonstrate a real chance of present or prospective persecution, but does not in any sense condition refugee status on the ability to show subjective fear': 92 (citations omitted). This argument, and the not unreasonable view that what is meant is not so much 'fear' as 'apprehension' or 'anticipation' regarding future events (at 105–6) is also developed at some considerable length in Hathaway, J. C. & Hicks, W. S., 'Is there a Subjective Element in the Refugee Convention's Requirement of "Well-founded Fear"?' (2005) 26 *Michigan Journal of International Law* 505; in practice, however, decision-makers do not tend to make much of the subjective issue. See also, in the context of disability, Crock, M., Ernst, C., & McCallum, R., 'Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities' (2013) 24 *IJRL* 735, 743; Motz, S., *The Refugee Status of Persons with Disabilities* (2020).

184 The relevance or value of such an exercise is highly questionable in cases involving minority or mental disturbance. On children, see further s. 6.3.

185 UNHCR *Handbook* (n 3) paras. 37–41.

186 As others also have done, Hathaway & Foster (n 4) 91–181, note that any premise that applicants 'found not to be credible necessarily lack subjective fear is fundamentally illogical' and while 'the testimony of a non-credible applicant cannot be relied upon to establish an actual risk of being persecuted, the required evidence of risk frequently exists separately from, and apart from, the applicant's testimony': at 101–2.

187 On the assessment of claims, see further Ch. 11, s. 4.

188 The *Ad hoc* Committee referred to a refugee as a person who 'has either actually been a victim of persecution or can show good reasons why he fears persecution': UN doc. E/1618, 39. Evidence of past persecution alone has been considered sufficient in some circumstances; for example, in *Chen*, 20 I&N Dec. 16 (BIA, 1989), the Board of Immigration Appeals held that past persecution established a rebuttable presumption of reason to fear future persecution. This position is now part of US asylum regulations; see 8 CFR §208.13(b), which provides that an applicant 'may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution', and that an 'applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim': 8 CFR § 208.13(b)(1). The presumption is rebuttable if the Service shows, by a preponderance of the evidence, that a fundamental change of circumstances has occurred, or that the applicant could relocate to another part of the country: 8 CFR §§ 208.13(b)(1)(i)(A)–(B), 208.13(b)(1)(ii). See further Anker (n 4) §§ 2:17–25. Cf. *Fernandopulle v Minister of Citizenship and Immigration* (2005) FCA 91, (2005) 253 DLR (4th) 425—no presumption that past persecution establishes well-founded fear as to the future.

189 Art. 4(3) of the recast EU Qualification Directive emphasizes that an application for protection is to be carried out on an individual basis, with account taken of, among others, relevant country of origin information and the applicant's position and personal circumstances, as it were, in context. Previous persecution or threats of harm are 'a serious indication' of well-founded fear, 'unless there are good reasons to consider' that they will

not be repeated: art. 4(4). See also art. 4(5), on the benefit of the doubt. The UNHCR *Handbook* suggests that '[d]etermination of refugee status will … primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin' (paras. 37, 42). This apparent attempt to 'depoliticize' the process in no way reflects the practical reality of refugee determination, however, which is precisely an essay in the assessment and evaluation of the situation prevailing in the country of origin. On the sources and uses of documentary information, see further Ch. 11, s. 4.2.

190 [1999] EWCA Civ 3000; see also *YB (Eritrea) v Secretary of State for the Home Department* [2008] EWCA Civ 360; Goodwin-Gill, G. S., 'Comment: Refugee Status and "Good Faith" ' (2000) 12 *IJRL* 663; Hathaway & Foster (n 4) 80–90; Mathew, P., 'Limiting Good Faith: "Bootstrapping" asylum seekers and exclusion from refugee protection' (2010) 29 *Australian Year Book of International Law* 13; Hely, B., 'A lack of good faith: Australia's approach to bootstrap refugee claims' (2008) 4 *Journal of Migration and Refugee Issues* 66. On political activity, see also s. 5.2.5.

191 For this reason, relying on the fact that an applicant has not sought asylum at the earliest possible moment as a justification for rejection where there may nonetheless be objective reasons for considering that he or she has a well-founded fear of being persecuted is also suspect. In *Bula v Minister of Home Affairs* [2011] ZASCA 209, the Supreme Court of Appeal of South Africa rejected the argument that an application could be considered to be lacking in good faith 'upfront' (i.e., before consideration of the merits), simply because the appellants 'had not used the first available opportunity to indicate their intention to apply for asylum': see para. 75–7. The Court's finding was based on the principle of legality, as 'once an intention to apply for asylum is evinced the protective provisions of the Act and the associated regulations come into play': paras. 79–80.

192 UNHCR *Handbook* (n 3) para. 96.

193 The various appeals are summarized in *Danian v Secretary of State for the Home Department* [1999] EWCA Civ 3000.

194 See, for example, *Refugee Appeal: 2254/94 Re HB* (21 Sep. 1994). In 2010 the RSAA was replaced by the Immigration and Protection Tribunal.

195 As recognized by the RSAA in *Refugee Appeal: 70720/97* (30 Jul. 1998).

196 Grahl-Madsen (n 3) 248, 251–2.

197 Hathaway (n 104) 35, 38, 59 (for discussion of *Danian* (n 193) in the second edition of that work, see Hathaway & Foster (n 4) 87–8); for more detailed analysis, see Goodwin-Gill (n 190). See also US practice: Anker (n 4) § 2:7 (noting that while in 'early years … *sur place* claims were more highly scrutinized than other claims', with adjudicators 'often finding (or assuming) that applicants engaged in activities … within the United States for the sole purpose of gaining asylum', '[c]urrent jurisprudence treats *sur place* claims as relatively uncontroversial': citations omitted).

198 See, for example, *Refugee Appeal No. 70100/96* (28 Nov. 1997); see also *Refugee Appeal No. 2226/94* (16 Oct. 1996). But see now Immigration Act 2009 (NZ), ss. 134(3), 140, 197, and 200, discussed below.

199 See *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100.

200 [1999] FCA 868, especially paras. 27–8, 31; *Minister for Immigration and Multicultural Affairs v Mohammed* (2000) 98 FCR 405, [2000] FCA 576-FCA FC; *Minister for Immigration and Multicultural Affairs v Farahanipour* (2001) 105 FCR 277, [2001] FCA 82—FCA FC. However, as discussed below and at n 207, Australian legislation now reflects the approach taken in *Somaghi* (n 199). Cf., in Ireland, in the context of subsidiary protection, *H.M. v Minister for Justice and Law Reform* [2012] IEHC 176, para. 39. The Court noted that 'the

question to be considered is not whether the applicant converted in good faith but whether this conversion will be viewed from the eyes of an Afghani religious judge and if so what would count as conversion in their eyes.' The Court concluded that while a genuine convert could not be expected to conceal their faith, an 'opportunistic converter' was unlikely to come to the attention of the authorities.

201 [1996] 1 WLR 507.

202 Ibid., 513.

203 Ibid. See also the judgment of Ward LJ at 516–17; *H.M. v Minister for Justice and Law Reform* [2012] IEHC 176, para. 59; *F.V. v Refugee Appeals Tribunal* [2009] IEHC 268.

204 See Hathaway & Foster (n 4) 80–5; Mathew (n 190) 140–41 (on the recast Qualification Directive) and 146–54 (on former s. 91R(3) of the Australian Migration Act 1958, now contained in s. 5J(6) of the Act, and discussed further at n 207).

205 Immigration Act 2009 (NZ), s. 134(3). See also s. 140 (providing that an officer must not consider a subsequent claim unless the officer is satisfied that the change in one or more of the circumstances was not brought about by the claimant 'acting otherwise than in good faith … for a purpose of creating grounds for recognition'); ss. 197 and 200 (with respect to appeals).

206 Migration Act 1958 (Aust.), s. 5J(6) (emphasis added). Before amendments to the Migration Act in December 2014, this principle was included in s. 91R(3) of the Act. The background to the enactment of s. 91R(3) is set out in *Minister for Immigration and Citizenship v SZJGV* (n 121) 661–3 (Crennan and Kiefel JJ), who note that '[t]here can be little doubt that s 91R(3) was inserted into the Act to quell the controversy which had arisen by reason of decisions of the Federal Court and that the view expressed in *Somaghi* was to prevail': at 664. See further Hathaway & Foster (n 4) 85, n 408; Migration and Refugee Division Legal Services, Administrative Appeals Tribunal (n 118) Ch. 3 (updated Nov. 2020) 17–23, 34–5; Mathew (n 190) 146–54.

207 Recast Qualification Directive, art. 4(3)(d).

208 Ibid., art. 5(3). Compare the UK Immigration Rules, para. 339P, intended to transpose the original Qualification Directive, which states: 'A person may have a well-founded fear of being persecuted or a real risk of suffering serious harm based on … activities which have been engaged in by a person since they left the country of origin … in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin'. In *YB (Eritrea)* (n 190), the Court found that the Qualification Directive does not 'simply shut[] out purely opportunistic claims … and it could probably not have adopted such a rule consistently with the governing definition of a refugee in art. 1A of the Convention': at para. 14 (Sedley LJ, with whom Wilson LJ and Tuckey LJ agreed). It recognized, however, that art. 5(3) 'perhaps oddly' allowed for ' "subsequent"—that is, presumably, repeat—applications to be excluded if these are based on activity *sur place*, whether opportunistic or not': ibid. The Court concluded that under art. 5(2), 'activities other than bona fide political protest can create refugee status *sur place*': para. 15. See also discussion in Mathew (n 190) 141–2; and s. 5.2.5.

209 See further, Ch. 13.

210 See report of the *Ad hoc* Committee: UN doc. E/1618, 39: 'The Committee agreed that for the purposes [of this provision], and therefore the draft Convention as a whole, "unable" refers primarily to stateless refugees but includes also refugees possessing a nationality who are refused passports or other protection by their own government. "Unwilling" refers to refugees who refuse to accept the protection of the government of their nationality.' A number of decisions, particularly in Canada, have recognized that 'inability' also describes the situation of claimants who cannot obtain protection, for example, because the

government or authorities of their country are non-existent, ineffective, or in active or passive collusion with the persecutors; see *Zalzali* (n 122); *Garcia v Minister of Citizenship & Immigration* 2007 FC 79.

211 See also, UNHCR *Handbook* (n 3) paras. 107–8 (describing the provision as 'largely self-explanatory'); Zimmermann & Mahler (n 101) 281, 442–3, paras. 583–8.

212 See also ss. 91N(6), 91P, 91Q. By contrast with many other States party to the 1951 Convention, the question whether a person is a dual national and has effective protection in consequence is left to the unreviewable discretion of the Minister. The background to the legislation is discussed in *NBLC v Minister for Immigration & Multicultural Affairs* [2005] FCAFC 272, paras. 51–9.

213 *MZXLT & Anor v Minister for Immigration & Anor* [2007] FMCA 799, paras. 89–99, 102; see also, Kirby J in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161, 190–193, paras. 94–9.

214 *Jong Kim Koe v Minister for Immigration and Ethnic Affairs* (1997) 74 FCR 508, [1997] FCA 306.

215 *SRPP v Minister of Immigration and Ethnic Affairs* [2000] AATA 878, paras. 108–9.

216 *Williams v Canada (Minister of Citizenship and Immigration)* [2005] 3 FCR 429 (FCA), 2005 FCA 126, para. 22.

217 Compare two 'Law of Return' cases, *Grygorian v Canada (Minister of Citizenship and Immigration)* (1995) 33 Imm LR (2d) 52 (FCTD) and *Katkova v Canada (Minister of Citizenship and Immigration)* (1997) 40 Imm LR (2d) 216 (FCTD). In the first case, protection was denied even though the claimant had never expressed an intention to immigrate to Israel and had never lived there, but in the second case, the Court accepted that the desire to settle in Israel was a prerequisite to immigration and that the Israeli Minister of the Interior had a discretionary power to deny citizenship.

218 *FER17 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] FCAFC 106. The Court considered s. 5 of the Migration Act, which defines 'receiving country' for the purpose of delimiting Australia's protection obligations and refers to 'a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country'.

219 Ibid., paras. 39–57, 61–4.

220 This interpretation may appear to be confirmed indirectly by Article 1E of the 1951 Convention and by Article 1(1)(ii) of the 1954 Convention, both of which provide that the relevant treaty shall not apply to one who has taken residence in another country and who, although not formally a citizen, nonetheless is 'recognized' by the competent authorities as having the rights and obligations of a national of that country. Article 12(1)(b), recast Qualification Directive incorporates very similar wording.

221 Cf. Art. 15 UDHR 48: '1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.'

222 *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289. On the facts, the Court clearly considered the appellant to be an Ethiopian citizen of Eritrean ethnic origin, who was not at risk of persecution in Ethiopia but was trying to turn herself into a refugee by not seeking the protection of her embassy and applying for the documents which would enable her to return.

223 Ibid., para. 52.

224 Ibid., para. 83.

225 Ibid., para. 50 (Elias LJ).

226 In the simplest of terms, the well-founded fear of persecution is the primary consideration, from which unwillingness or inability to avail oneself of the protection of one's country follows, not the other way around.

227 See, generally, Kim, S., 'Lack of State Protection or Fear of Persecution? Determining the Refugee Status of North Koreans in Canada' (2016) 28 *IJRL* 85; Wolman, A. & Li, G., 'Saeteomin Asylum Seekers: The Law and Policy Response' (2015) 27 *IJRL* 327; Wolman, A., 'North Korean Asylum Seekers and Dual Nationality' (2013) 24 *IJRL* 93; Chan, E. & Schloenhardt, A., 'North Korean Refugees and International Refugee Law' (2007) 19 *IJRL* 215.

228 The legal situation in fact is rather more complex; see *KK and Others (Nationality: North Korea) Korea CG* [2011] UKUT 92, paras. 21–31.

229 *NBLC v Minister for Immigration & Multicultural & Indigenous Affairs* (n 212) para. 45.

230 *KK and Others* (n 228) para. 82.

231 Ibid., paras. 78–9, 83–4.

232 Ibid., para. 91. This decision was upheld in *Secretary of State for the Home Department v SP (North Korea) & Others* [2012] EWCA Civ 114, in which the Court of Appeal took note also of evidence that, in practice, South Korean policy when deciding citizenship and support questions is to ascertain whether the person in question actually wants to live there: para. 18.

233 Afdeling Bestuursrechtspraak van de Raad van State/Dutch Council of State, Administrative Jurisdiction Division, Case 201404877/1/V2 (18 Jul. 2014). The United States has legislated to avoid these issues, and provides expressly that North Koreans are eligible for asylum and resettlement in the United States, and that they 'are not barred from eligibility for refugee status or asylum in the United States on account of any legal right to citizenship they may enjoy under the Constitution of the Republic of Korea': North Korean Human Rights Act of 2004, Pub. L. No. 108–333, 118 Stat. 1287. Eligibility for resettlement in the United States does not apply, however, to North Koreans who have in fact availed themselves of the right to citizenship in South Korea; see *In re K-R-Y and K-C-S, Respondents*, 24 I&N Dec. 133 (BIA, 2007) Interim Decision # 3560.

234 See Ch. 13, s. 1.2.

235 *MK v Secretary of State for the Home Department* [2017] EWHC 1365 (Admin) para. 34. In the context of statelessness, where the evidence indicates the existence of a 'realistic prospect' of protection being available through the acquisition or reacquisition of nationality, UNHCR acknowledges that 'transitional' arrangements may be appropriate: UNHCR, *Handbook on the Protection of Stateless Persons* (2014) paras. 154–7.

236 A stateless person has been defined as 'a person who is not considered as a national by any State under the operation of its law' in art. 1, 1954 Convention relating to the Status of Stateless Persons: 360 *UNTS* 117. See further Ch. 13. There is no historical, textual or commonsensical basis for the view that because a stateless person is not 'returnable' to his or her country of former habitual residence, so he or she is not in danger of being *refouled* and therefore cannot be a refugee. Indeed, the first decades of refugee law and organization were premised precisely on the 'returnability' of the stateless, hence the inclusion of a return clause in the Nansen passports with which they were issued. Art. 1(1)(b) of the 1938 Convention concerning the Status of Refugees coming from Germany, for example, expressly took account of the fact that stateless persons previously resident in that country were also among those persecuted by the Third Reich. See also the third edition of this work; *Desai v Canada (Minister of Citizenship and Immigration)* [1994] FCJ

No. 2032; also, New Zealand, RSAA, *Refugee Appeal No. 73861* (30 Jun. 2005); Foster, M. & Lambert, H., *International Refugee Law and the Protection of Stateless Persons* (2019) 99.

237 Fischer Williams, J., 'Denationalization' (1927) 8 *BYIL* 45; *Religious Minorities in the Soviet Union* (Minority Rights Group, Report No. 1, rev. edn., 1977) 18–20.

238 [1997] 77 FCR 421, 428 (Federal Court of Australia). For recognition of a similar anomaly during the 1951 Conference and an amendment to ensure equality of treatment by reference to the relevant causal events, namely, 'events occurring before 1 January 1951', see UN doc. A/CONF.2/SR.34, 12 (Mr Hoare); the British amendment was adopted by 17 votes to none, with three abstentions.

239 See, for example, Decision of the Austrian Administrative Appeals Court in *A. v Ministry of Internal Affairs*, Verwaltungsgerichtshof (29 Jan. 1986) 84/ 01/0106, SlgNF 12.005(A) 47–50. Also, Decision of the Administrative Court of Berlin (3 Nov. 1989) No. VG 10 A 4.88.

240 Immigration and Refugee Protection Act 2001, s. 96(b).

241 *Thabet v Canada (Minister of Citizenship and Immigration)* [1998] 4 FC 21, para. 17. See also *Al-Anezi v Minister for Immigration & Multicultural Affairs* [1999] FCA 355, (1999) 92 FCR 283 (Federal Court of Australia).

242 *Revenko v Secretary of State for the Home Department* [2001] QB 601, [2000] 3 WLR 1519, paras. 1–75 (Pill LJ). No consideration of the interpretation of art. 1A(2) with regard to stateless persons would be complete without a reading of the judgment of Katz J in *Minister for Immigration and Ethnic Affairs v Savvin* [2000] FCA 478, [2000] 171 ALR 483. See now also art. 2(d), recast Qualification Directive.

243 In *AL (Myanmar)* [2018] NZIPT 801255, the New Zealand Immigration and Protection Tribunal suggested that, 'the interpretation of "nationality" in Article 1A(2) of the Refugee Convention should mirror the approach under Article 1 of the 1954 Stateless Persons Convention': para. 135. For the reasons set out below, this is neither necessary nor persuasive. See generally, Lambert, H., 'Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status' (2015) 64 *ICLQ* 1. See also, *B.D. (Bhutan and Nepal) v Minister for Justice and Equality* [2018] IEHC 461, para. 15.

244 Power, S., 'Introduction' in Arendt, H., *The Origins of Totalitarianism* (republished 2004) xix.

245 Arendt (n 244) 375: 'The calamity of the rightless is … that they no longer belong to any community whatsoever.'

246 Kesby, A., *The Right to have Rights: Citizenship, Humanity and International Law* (2012) 52; *Case of the Yean and Bosico Children*, Inter-American Court of Human Rights (8 Sep. 2005) Ser. C, No. 130. See also, Weil, P., 'From conditional to secured and sovereign: The new strategic link between the citizen and the nation-state in a globalized world' (2011) 9 *International Journal of Constitutional Law* 615, 622.

247 Cf. Hathaway & Foster (n 4) 251–2. For a contextual appreciation of 'erasure' from the register of permanent residents as a violation having a continuous character, see the Third Section judgment in *Kurić v Slovenia*, App. No. 26828/06 (13 Jul. 2010) paras. 305–6, 358; and the Grand Chamber's judgment (26 Jun. 2012) para. 240; BVerwG 10 C 50.07 (26 Feb. 2007) para. 25 (statelessness as 'continuing persecution'/'fortdauernde Verfolgung').

248 See Foster & Lambert (n 236) 30–1, 144–93.

249 BverwG 10 C 50.07 (26 Feb. 2007) paras. 18, 22–5: ('a continuing significant impairment of the person concerned'/'*eine fortdauernde erhebliche Beeinträchtigung des Betroffenen*').

250 *EB (Ethiopia) v Secretary of State for the Home Department* [2007] EWCA Civ 809; referring to Article 9(2)(b) of the Qualification Directive, the Court also recognized that persecution may take the form of administrative or other measures which are discriminatory or are implemented in a discriminatory manner: paras. 51, 52, 54 (Pill LJ).

251 Ibid., para. 75; see also paras. 66–71 (Longmore LJ).

252 Fripp, E., *Nationality and Statelessness in the International Law of Refugee Status* (2016) 208: 'Is an unlawful and arbitrary deprivation of nationality, based in discrimination on the basis of race or some other Convention reason, and effective under domestic law, to be recognised so that the denationalising State ceases to be the country of reference for the purposes of article 1A(2) CSR51?' See also, *AL (Myanmar)* (n 243) where the tribunal, in an instance of discriminatory denial/deprivation of citizenship, declined to treat the State in question as the 'country of reference': para. 138.

253 See *B.D. (Bhutan and Nepal)* (n 243) para. 24: 'The only question is whether the discriminatory and persecutory nature of a law depriving persons of nationality is relevant to the determination of citizenship for the purposes of refugee status or statelessness. It is not.'

254 This does not exclude the possibility that an individual made stateless might *subsequently* establish their habitual residence in another State; such residence does not have to be lawful and no particular duration is required, but the individual needs to have made that country the focus of their life without the authorities having taken steps to bring such residence to an end: BverwG 10 C 50.07 (26 Feb. 2009) paras. 31–3 (for English summary see https://www.bverwg.de/260209U10C50.07.0); *Maarouf v Canada* [1994] 1 FC 723. See also, *B.D. (Bhutan and Nepal)* (n 243).

255 See generally, UNHCR *Handbook* (n 3) paras. 66–86; Grahl-Madsen (n 3) 217–53; Hathaway & Foster (n 4) 390–1 (noting that the five Convention grounds 'embody multiple manifestations of a single idea: fundamental socio-political disenfranchisement defined by reference to core norms of non-discrimination law'); Hathaway (n 104) 135–88. The substantive linkage to non-discrimination was recognized by the Canadian Supreme Court in *Ward* (n 122). On the specific issue, see also Vierdag, E. W., *The Concept of Discrimination in International Law* (1973); McKean, W. A., 'The Meaning of Discrimination in International and Municipal Law' (1970) 44 *BYIL* 177; Goodwin-Gill (n 125) 75–87; Dowd, R., 'Dissecting Discrimination in Refugee Law: an Analysis of its Meaning and its Cumulative Effect' (2011) 23 *IJRL* 28.

256 See further s. 4; s. 6.2.3.

257 See, for example, Dauvergne, C., 'Women in Refugee Jurisprudence' in Costello, Foster, & McAdam (n 12) 737, 739; Millbank, J., 'Sexual Orientation and Gender Identity in Refugee Claims' in Costello, Foster, & McAdam (n 12) 763–5. The Committee on the Elimination of Discrimination against Women considers that States parties to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 have an obligation to ensure that a gender-sensitive interpretation is given to all five grounds of persecution: Committee on the Elimination of Discrimination against Women, 'General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women': UN doc. CEDAW/C/GC/32 (14 Nov. 2014) para. 30; see also para. 13.

258 At 30 April 2021, 182 States were parties to the 1966 Convention. 'Descent-based communities' encompass 'caste and analogous systems of inherited status': Committee on the Elimination of Racial Discrimination, 'General recommendation XXIX on article 1, paragraph 1, of the Convention (Descent)' (61st sess., 2002). See also art. 10(1)(a), recast Qualification Directive (noting that 'the concept of race shall, in particular, include considerations of colour, descent, or membership of a particular ethnic group'); Hathaway & Foster (n 4) 394, 396–7.

259 Achiume, E.T., 'Race, Refugees, and International Law' in Costello, Foster, & McAdam (n 12) 44, citing Haney López, I., *White by Law: The Legal Construction of Race* (10th edn., 2006) 10.

260 See Verdirame, G., 'The Genocide Definition in the Jurisprudence of the Ad Hoc *Tribunals*' (2000) 49 *ICLQ* 578, 592–4.

See also, Lingaas, C., *The Concept of Race in International Criminal Law* (2020) 6, proposing that the 'changed understanding' of race since 1945 'necessitates an evolutive interpretation of race for the crime of genocide, apartheid, and persecution to embrace socially constructed identities and the perception of an individual's belonging to a distinct racial group … [T]he concept of othering is crucial not only to understand genocide, apartheid, and persecution, but essential to correctly identify and define race in international criminal law.' While a subjective interpretation of race will lead to greater protection, 'such an expansion remains within the ambits of the principle of legality if the perpetrator perceives the victims to be members of a different group, to which he assigns racial characteristics' (232).

261 See discussion in Zimmermann & Mahler (n 101) 378–9, and also Lingaas (n 260) 139–41, 185–6, 229–30, 232, advocating in the international criminal law context for a 'subjective perpetrator-based approach' to race.

262 In this sense, we disagree with Zimmermann and Mahler's note that the persecutor's perception may be critical to deciding whether the claimant '*belongs* to a "race" ': (n 100) 379 (emphasis added). Under art. 1A(2) CSR 51, the core question is whether the claimant has a well-founded fear of persecution '*for reasons of*' race. For a general application of this principle, see CESEDA (France) (n 6), art. 711–2 : 'Lorsque l'autorité compétente évalue si un demandeur craint avec *raison d'être* persécuté, il est indifférent que celui-ci possède effectivement les caractéristiques liées au motif de persécution ou que ces caractéristiques lui soient seulement attribuées par l'auteur des persecutions.' See CNDA 20 mars 2019 M. M. n° 17044999 C *Recueil* 2019 46–8: refugee status recognized in the case of a Somali, orphaned at birth, at risk of persecution because of a lack of clan membership.

263 For example, Ugandan citizens of Asian origin were persecuted and expelled in 1972: see Goodwin-Gill (n 125) 212–16. The same year, large numbers of Burundi citizens of the Hutu tribe were massacred, while many others fled into neighbouring countries: *Selective Genocide in Burundi* (Minority Rights Group, Report No. 20, 1974); cf., 'Transition in Burundi: The Context for a Homecoming' (US Committee for Refugees, Sep. 1993). The combination of genocidal massacres in Rwanda in 1994 and successful military resistance caused the internal and external displacement of many thousands of both Hutu and Tutsi citizens: Prunier, G., 'La crise rwandaise: structures et déroulement' (1994) 13(2–3) *RSQ* 13; Degni-Ségui, R., 'Rapports sur la situation des droits de l'homme au Rwanda du 28 juin 1994 et du 12 août 1994', ibid., 116. After 1975 thousands of Vietnamese citizens of Chinese ethnic origin felt compelled, along with many others, to seek protection in the countries of South East Asia: see Ch. 2, n 64, and sources cited. In apartheid South Africa, institutionalized discrimination and its politics of repression likewise contributed to large-

scale exodus: ‘Human Rights, War and Mass Exodus’ *Transnational Perspectives* (1982) 11, 14. See also Tiberghien (n 4) 87 f., 329–35.

264 See s. 4.2. In the view of the European Commission on Human Rights, discrimination on racial grounds could, in certain circumstances, constitute degrading treatment within the meaning of art. 3 ECHR 50: Decision on Admissibility, *East African Asians v United Kingdom*, App. No. 4403/70 (Oct. 1970) 30; (1981) EHRR 76. In *Cyprus v Turkey*, App. No. 25781/94 (ECtHR, Grand Chamber, 10 May 2001) paras. 309–11, the European Court of Human Rights found that the discriminatory treatment of the Karpas Greek-Cypriot community, which could ‘only be explained in terms of the features which distinguish them from the Turkish-Cypriot population, namely their ethnic origin, race and religion’, had attained a level of severity amounting to degrading treatment under art. 3 ECHR 50. Cf. *Ali v Secretary of State* [1978] Imm AR 126 (discrimination likely to be faced by Kenyan citizen of Asian origin did not amount to persecution). In *Škorjanec v Croatia*, App. No. 25536/14 (28 Mar. 2017) para. 53, the European Court of Human Rights noted that ‘[t]reating racially motivated violence and brutality on an equal footing with cases lacking any racist overtones would be tantamount to turning a blind eye to the specific nature of acts which are particularly destructive of fundamental human rights.’

265 For summary accounts of the treatment of religious minorities in different States, see the Country Reports on Human Rights Practices, submitted annually by the US Department of State to the US Congress: https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/. See also Forum 18, an NGO based in Oslo, Norway, which promotes the implementation of art. 18 UDHR 48 and art. 18 ICCPR 66, primarily in Central Asia, Russia, the South Caucasus, and Belarus: http://www.forum18.org/; and UNHCR Eligibility Guidelines, for example, ‘UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan’ (30 Aug. 2018) 58–65; ‘Eligibility Guidelines for Assessing the International Protection Needs of Members of Religious Minorities from Pakistan’ (Jan. 2017).

266 Art. 9, ECHR 50 likewise recognizes the freedom ‘to hold or not to hold religious beliefs and to practise or not to practise a religion’, which also implies a freedom to manifest one’s religion: *Case of Ibragim Ibragimov v Russia*, App. Nos. 1413/08 and 28621/11 (ECtHR, 28 Aug. 2018) paras. 88–9; see also *Kokkinakis v Greece* (1994) 17 EHRR 397, para. 31. A distinction may however be drawn between the freedom to practise religious belief and ‘improper’ proselytism; see *Kokkinakis v Greece* (1994) 17 EHRR 397, paras. 33, 44, 48–9; *Larissis v Greece*, App. Nos. 140/1996/759/958–60 (ECtHR, 24 Feb. 1998) para. 45. For a studied critique of the Court’s jurisprudence, see Evans, C., *Freedom of Religion under the European Convention on Human Rights* (2001); also, Temperman, J., Jeremy Gunn, T., & Evans, M., eds., *The European Court of Human Rights and the Freedom of Religion or Belief: The 25 Years since Kokkinakis* (2019); European Court of Human Rights, ‘Guide on Article 9 of the European Convention on Human Rights: Freedom of thought, conscience and religion’ (updated 30 Apr. 2020); Janis, M. & Evans, C., eds., *Religion and International Law* (2004). On interference with the manifestation of religion, see, for example, *Ranjit Singh v France*, App. No. 27561/08 (ECtHR, 30 Jun. 2009); *Eweida v United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10, and 36516/10 (ECtHR, 15 Jan. 2013); *S.A.S. v France*, App. No. 43835/11 (ECtHR, Grand Chamber, 1 Jul. 2014), discussed and compared with Human Rights Committee views by Lady Hale, President of the Supreme Court, in ‘Religious Dress’, Woolf Institute, Cambridge (28 Feb. 2019).

267 Human Rights Committee, ‘General Comment No. 22 (48): (art. 18)’: UN doc. CCPR/C/21/Rev.1/Add.4 (adopted at 48th sess., 20 Jul. 1993) para. 2.

268 In *NABD v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1142, the High Court of Australia noted that the right legal question to ask was not whether it was possible for the claimant to live in Iran in such a way as to avoid adverse consequences, but whether the claimant had a well-founded fear of persecution in Iran on the ground of religion. See also *Wang v Minister for Immigration and Multicultural Affairs* (2000) [2000] FCA 1599, 105 FCR 548, in which the Full Court of the Federal Court of Australia held that 'religion' includes the practice of a religious faith in community with others, and that a law regulating such practice, or applying only to those practising religion, is not a law of general application. Fear of prosecution or punishment for breach of such laws can therefore give rise to a well-founded fear of persecution for a Convention reason. The fact that an applicant has brought or intends to bring into existence circumstances that give rise to a fear of persecution by an unnecessary or unreasonable voluntary act (such as worshipping at a non-registered church) may be relevant to assessing the genuineness of the claim but is not determinative of whether the fear is well-founded. The Migration Act 1958 (Aust.), s. 5J(3) now provides that a person does not have a well-founded fear of persecution if he or she 'could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country'. However, exceptions are provided for modifications that would conflict with 'a characteristic that is fundamental to the person's identity or conscience', 'conceal an innate or immutable characteristic', or, inter alia and without limiting the above two categories, require the person to 'alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith'.

269 UNGA res. 1781(XVII) (7 Dec. 1962).

270 UNGA res. 2295(XXII) (11 Dec. 1967).

271 Article reproduced in '*Elimination of All Forms of Religious Intolerance, Note by the Secretary-General*': UN doc. A/8330, 8. This article, which includes definitions of discrimination on religious grounds and of religious intolerance, was adopted by 91 votes in favour, 2 against, with 6 abstentions. See also art. 10(1)(b), recast Qualification Directive.

272 Declaration adopted without vote by UNGA res. 36/55 (25 Nov. 1981); text in Brownlie & Goodwin-Gill (n 112) 74.

273 See the annual reports of the Special Rapporteur on freedom of religion or belief, for example, UN docs. A/HRC/34/50 (17 Jan. 2017) paras. 22–33, 63; A/HRC/40/58 (5 Mar. 2019); and A/HRC/37/49 (28 Feb. 2018). On developments in relation to the content of the law of freedom of thought, conscience and religion in relation to conscientious objection, see discussion in s. 6.1.1 below.

274 See Akram, S. M., 'Orientalism Revisited in Asylum and Refugee Claims' (2000) 12 *IJRL* 7; Good, A., 'Persecution for Reasons of Religion under the 1951 Refugee Convention: An Anthropological Approach', 2006 Elizabeth Colson Lecture, Refugee Studies Centre, Oxford; UNHCR, Guidelines on International Protection: 'Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees': HCR/GIP/04/06 (28 Apr. 2004); Helton, A. C. & Münker, J., 'Religion and Persecution: Should the United States Provide Refuge to German Scientologists?' (1999) 11 *IJRL* 310; Musalo, K., 'Claims for Protection based on Religion or Belief' (2004) 16 *IJRL* 165; Berlit, U., Dörig, H., & Storey, H., 'Credibility Assessment in Claims based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach' (2015) 27 *IJRL* 649. On the particular issues raised by *sur place* claims, see s. 5.1.1. See further

discussion of the ‘religion’ ground in Zimmermann & Mahler (n 101) 379–87; Hathaway & Foster (n 4) 399–405.

275 See general discussion of *sur place* claims in s. 5.1.1; *FG v Sweden*, App. No. 43611/11 (ECtHR, 23 Mar. 2016) para. 123; ‘Interim report of the Special Rapporteur on freedom of religion or belief’: UN doc. A/64/159 (2009) para. 24; UNHCR Guidelines on International Protection: Religion-Based Refugee Claims (n 274) paras. 34–6; Berlit, Dörig, & Storey (n 274) 553–660 (noting, however, that claims of conversion in the country of origin involve a similar approach by decision-makers: at 655).

276 See UNHCR Guidelines on International Protection: Religion-Based Refugee Claims (n 274) 13. See further discussion on other grounds in ss. 5.2.4.5 (particular social group—sexual orientation and gender identity claims) and 5.2.5 (political opinion).

277 *Germany v Y & Z* (n 113) para. 73. See further Lehmann, J. M., ‘Persecution, Concealment and the Limits of a Human Rights Approach in (European) Asylum Law—The Case of *Germany v. Y and Z* in the Court of Justice of the European Union’ (2014) 26 *IJRL* 65; Costello (n 57) 203–4. The Court was considering the refugee definition in art. 2(c) of the original Qualification Directive, which reflects art. 1A(2) CSR 51.

278 *Germany v Y & Z* (n 113) para. 79, see also para. 81. See the Court’s subsequent judgment on sexual orientation, discussed further in s. 5.2.4.5, finding that a decision-maker ‘cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country or origin or to exercise reserve in the expression of his sexual orientation’: *Minister voor Immigratie en Asiel v X, Y, & Z* (n 113) para. 79. See also European Commission, ‘Evaluation of the application of the recast Qualification Directive (2011/95/EU): Final Report’ (2019) 92ff, noting that most Member States ‘confirmed that the assessment of the reasons for persecution could not be influenced by considerations of the possibility for the applicant to behave discreetly in the country of origin in order to avoid persecution’.

279 See *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, 489–91, paras. 40–7 (McHugh and Kirby JJ); *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596, 647–8, para. 82 (Lord Rodger): ‘If … the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so … If … a material reason … would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted’. Concurring with this proposed approach, see Lord Walker (para. 98), Lord Collins (para. 100), Lord Dyson (para. 132), and, setting out the test in his own words, Lord Hope (para. 35). See also *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38; [2013] 1 AC 152, 166–7, paras. 17–20. In its Regulation Proposal, the European Commission proposes amending art. 10 of the recast Qualification Directive to note that a decision-maker ‘cannot reasonably expect an applicant to behave discreetly or abstain from certain practices, where such behaviour or practices are inherent to his or her identity, to avoid the risk of persecution in his or her country of origin’: see (n 54) 13, 35; see UNHCR’s comments on the Commission Regulation Proposal: (n 80) 17 (recommending the deletion of the phrase ‘where such behaviour or practices are inherent to his or her identity’). For further discussion see Hathaway & Foster (n 4) 168–9, 260–1; Zimmermann & Mahler (n 101) 343–5.

280 For a recent application of the principle in *HJ (Iran)* (n 108) to the ‘religion’ ground under art. 1A(2) CSR 51, see *WA (Pakistan) v Secretary of State for the Home Department* [2019] EWCA Civ 302, para. 60 (Lord Justice Irwin); paras. 66–8 (Lord Justice Singh).

281 Such denial of protection could easily arise through the haphazard workings of citizenship and immigration laws; cf. the situation of citizens of the United Kingdom and Colonies resident in East Africa, discussed in Goodwin-Gill (n 125) 101–3, 164–7. See also the following decisions of the Commission des recours des réfugiés: *Huang*, 12,935 and 13,451 (26 janv. 1982), cited by Tiberghien (n 4) 318.

282 See art. 10(1)(c), recast Qualification Directive, which adds 'common geographical or political origins or [a group's] relationship with the population of another State'. Cf. *London Borough of Ealing v Race Relations Board* [1972] AC 342, in which the Court *excluded* nationality from the generic term 'national origin'. See UNHCR *Handbook*, para. 74 ('The term "nationality" in this context is not to be understood only as "citizenship". It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term "race" '); Hathaway & Foster (n 4) 399; Zimmermann & Mahler (n 101) 389; Grahl-Madsen (n 3) 218–19; Report of the independent expert on minority issues, McDougall, G., UN doc. E/CN.4/2006/74 (6 Jan. 2006); Capotorti, F., *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (1978): UN doc. E/CN/4/Sub. 2/384/Rev. 1, 5–15, 95–6; Rights of Persons belonging to National and Ethnic, Religious and Linguistic Minorities: UN doc. E/CN.4/1994/72 (13 Dec. 1993); Pejic, J., 'Minority Rights in International Law' (1997) 19 *HRQ* 666; Pentassuglia, G., *Minorities in International Law* (2002). Cf. Martinez Cobo, J. R., *Study of the Problem of Discrimination against Indigenous Populations* (1979): UN doc. E/CN.4/Sub. 2/L. 707; Elles, Baroness D., *International Provisions Protecting the Human Rights of Non-Citizens* (1980): UN doc. E/CN.4/Sub. 2/392/Rev. 1, 25 f. Note art. 27 ICCPR 66: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

283 *Selective Genocide in Burundi* (n 263); see also the analysis in *The Two Irelands—the Double Minority* (Minority Rights Group, Report No. 2, rev. edn., 1979).

284 Grahl-Madsen notes that persecution for reasons of nationality is also understood to include persecution for lack of nationality, that is, by reason of statelessness: (n 3) 219. See also Hathaway & Foster (n 4) 397–9. See further on the particular situation of Palestinians Ch. 4, s. 4.2.

285 See UNHCR, 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees': HCR/GIP/09/08 (22 Dec. 2009) para. 41, noting that 'race' may also be a relevant ground in such cases.

286 See UNHCR, 'Guidelines on International Protection: "Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees': HCR/GIP/02/02 (7 May 2002); Aleinikoff, T. A., 'Protected characteristics and social perceptions: An analysis of the meaning of "membership of a particular social group" ', in Feller, E., Türk, V., & Nicholson, F., eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 263; 'Summary Conclusions: membership of a particular social group', in Feller, Türk, & Nicholson, ibid., 312; Hathaway & Foster (n 4) 423–61; Zimmermann & Mahler (n 101) 390–8; Anker (n 4) §§ 5:40–67.

287 During debate on the Universal Declaration, the USSR stressed the importance of abolishing 'differences based on social conditions as well as the privileges enjoyed by certain groups in the economic and legal fields'.

288 UN docs. A/CONF.2/SR.3, 14—Mr Petren (Sweden): ‘experience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included’; also SR.19, 14; SR.23, 8—Swedish amendment adopted by 14–0-8; A/CONF.2/9 (text of amendments).

289 See *Islam v Secretary of State for the Home Department* (n 107) 651 (Lord Hoffmann): ‘the concept of a social group is a general one and its meaning cannot be confined to those social groups which the framers of the Convention may have had in mind. In choosing to use the general term “particular social group” rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.’ See also Lord Hope at 657.

290 Women have been recognized as a particular social group in certain circumstances: see further s. 5.2.4.4 below.

291 See further s. 5.2.4.5 below.

292 See, for example, Motz (n 183); Crock, M. and others, *The Legal Protection of Refugees with Disabilities: Forgotten and Invisible?* (2017) 153–4; Crock, M., ‘Protecting Refugees with Disabilities’, in Costello, Foster, & McAdam (n 12); Crock, Ernst, & McCallum (n 183) 750–3; Hathaway & Foster (n 4) 451–2; Foster, M., ‘The “Ground with the Least Clarity”: A Comparative Study of Jurisprudential Developments relating to ‘Membership of a Particular Social Group’ UNHCR, Legal and Protection Policy Research Series, PPLA/2012/02 (Aug. 2012) 61–3; Anker (n 4) § 5:66. For more general protection issues related to those with disabilities, see also Executive Committee Conclusion No. 110 (2010). Claims based on disability are an archetypal example of the importance of examining the circumstances of the *individual* asylum seeker once membership of a group is determined. Crock, Ernst, & McCallum argue that ‘the fact that acts that might, for some persons, be “merely” discriminatory might, for persons with disabilities, amount to persecution’, considering that ‘[t]here is no reason why, in theory, denial of appropriate modification and adjustments cannot amount to persecution’: see 748–9. Careful attention must be given to the individual’s circumstances in their social context.

293 See, for example, Anker (n 4) § 5:67; Foster (n 292) 63; Foster (n 106) 321–3; Tazfil, R., ‘HIV-Based Claims for Protection in the U.S. and U.K.’ (2010) 33 *Hastings International and Comparative Law Review* 501.

294 See generally Hathaway & Foster (n 4) 436–61 (covering, in addition to gender, sexual orientation and gender identity, and disability, discussion of family, age, economic or social class, and voluntary associations, and former status or association); Zimmermann & Mahler (n 101) 396–8 (on ‘classes and castes’ as particular social groups); UNHCR, ‘Guidance Note on Refugee Claims Relating to Victims of Organized Gangs’ (n 156) paras. 34–44; Anker (n 4) §§ 5:44–67 (covering, inter alia, gang-based claims and family and clan claims).

295 Cf. *Prosecutor v Jelisić*, Case No. ICTY-I-95-10 (14 Dec. 1999) Trial Chamber, para. 70: ‘[i]t is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single out that group from the rest of the community … It is the stigmatisation of a group as a distinct national, ethnical or racial unity by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.’ Quoted in Verdirame (n 260) 593–4. In the context of race in international criminal law, see also Lingaas (n 260) 139–41, 185–6, 229–30, 232, arguing for a ‘subjective perpetrator-based approach’.

296 The US Board of Immigration Appeals adopted very similar language in *Acosta* (n 33); applying the *ejusdem generis* rule, the BIA limited its understanding of the term 'social group' to reflect a common, immutable characteristic, that is, one which it is either beyond the power of an individual to change, or which is so fundamental to individual identity or conscience that changing it should not be required. This might include sex, class, kinship or even shared past experience, but membership of a taxi-drivers' co-operative, or a particular manner of wage-earning, did not fall within such a class of characteristics. For an alternative view on the inappropriateness of the *ejusdem generis* rule in this context, see Goodwin-Gill, G. S., 'Judicial Reasoning and "Social Group" after *Islam* and *Shah*' (1999) 11 *IJRL* 537; see also McHugh J, in *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4, (1997) 190 CLR 225, 263.

297 Many commentators have favoured a broad approach; cf. Grahl-Madsen (n 3) 219—'the notion … is of broader application than the combined notions of racial, ethnic and religious groups'; Helton, A. C., 'Persecution on Account of Membership in a Social Group as a Basis for Refugee Status' (1983) 15 *Columbia Human Rights Law Review* 39. It is not, however, a 'catch-all' provision: Hathaway & Foster (n 4) 424. Cf. Council of Europe Committee of Ministers Recommendation Rec(2004)9 on the concept of 'membership of a particular social group' (30 Jun. 2004), which recommends that the concept 'should be interpreted in a broad and inclusive manner in the light of the object and purpose of the 1951 Convention', although not so as to 'extend the scope of the Convention to impose upon states obligations to which they have not consented'.

298 For earlier cases, cf. Grahl-Madsen (n 3) 219–20; *Lai v Minister of Employment and Immigration* [1989] FCJ No. 826—capitalist background in China resulted in persecution due to family's social position; *De Valle v INS* 901 F.2d 787 (9th Cir., 1990)—family members of deserters manifest diverse and different life-styles and varying interests and therefore do not constitute a social group; *Ramirez-Rivas v INS* 899 F.2d 864 (9th Cir., 1990)—name association with family subject to persecution sufficient to support social group claim.

299 801 F.2d 1571 (9th Cir., 1986).

300 UNHCR *Handbook* (n 3) para. 77; see also discussion of this terminology in *K v Secretary of State for the Home Department*; *Fornah v Secretary of State for the Home Department* [2006] UKHL 46, [2007] 1 AC 412, 462–3, para. 98 (Lady Hale) (cases decided jointly).

301 Cf. Helton (n 297).

302 See, among others, *Cheung v MEI* [1993] 2 FC 314 (Federal Court of Appeal); *Ward* (n 122); and *Chan v MEI* [1993] 3 FC 675 (Federal Court of Appeal), *Chan v Canada (MEI)* (n 47) (Supreme Court of Canada). See also Daley, K. & Kelley, N., 'Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence' (2000) 12 *IJRL* 148; Kelley, N., 'The Convention Refugee Definition and Gender-Based Persecution: A Decade's Progress' (2001) 13 *IJRL* 559.

303 [1993] 2 FC 314, 320; the Court in *Chan v Canada (MEI)* (n 47) considered that the bracketed words 'more than' had been omitted accidentally.

304 See *Chan v MEI* (n 302) 692–3 and *Chan v Canada (MEI)* (n 47). See McHugh J's review of case law from different jurisdictions in *Applicant A* (n 296) 259–63. See also, US Board of Immigration Appeals, *Chang*, 20 I&N Dec. 38 (BIA, 1989), finding the birth control policy not persecutory on its face, but a matter for case-by-case evaluation. The ruling in practice was significantly modified by policy instructions and later by legislation locating the issue in 'political opinion', not social group. In 1996, the refugee definition section of the Immigration and Nationality Act was amended to insert at the end: '[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': 8 USC § 1101(a)(42)(B). Dauvergne, C., 'Chinese Fleeing Sterilisation: Australia's Response against a Canadian Background' (1998) 10 *IJRL* 77.

305 Why the refugee claim was based on social group was never clear. The claimant's fear was not based on membership, but on his actions in a political context, motivated by conscience; political opinion was first raised by UNHCR in its intervenor brief; see *Ward*, [1993] 2 SCR 689, 740. Also, Bagambiire, D., 'Terrorism and Convention Refugee Status in Canadian Immigration Law: The Social Group Category according to *Ward v. Canada*' (1993) 5 *IJRL* 183, which considers the earlier Federal Court of Appeal decision.

306 In *Cheung*, particular weight was attached to a woman's reproductive liberty as a basic right fundamental to human dignity. Women in China who have more than one child were 'united or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it': [1993] 2 FC 314, 322.

307 *Ward* (n 122) 739.

308 Thus, in the sense of the text, the government of the Socialist Republic of Vietnam announced its intention to 'restructure' society and abolish the 'bourgeoisie': Foreign Language Press, *The Hoa in Vietnam* (1978).

309 *Ward* (n 122) 731 (emphasis added).

310 In one sense, the 'grouping' will often be independent of will, so that the requirement of voluntary associational relationship, if adopted in all cases, not only introduces an unjustified, additional evidential burden on the claimant (under the guise of interpretation), but also departs from the jurisprudence of earlier years, admittedly sparse, which nonetheless recognized the existence of a social group among individuals, who displayed little if any *voluntary* association relationship with others similarly situated. See, however, La Forest J, dissenting, in *Chan* (n 47) para. 87, also quoting Macklin, A., '*Canada (Attorney-General) v Ward*: A Review Essay' (1994) 6 *IJRL* 362, 375.

311 'Foreign governments should be accorded leeway in their definition of what constitutes antisocial behaviour of their nationals. Canada should not overstep its role in the international sphere by having its responsibility engaged whenever any group is targeted': *Ward* (n 122) 738–9. See also *Chan* (n 47) (La Forest J, dissenting) para. 65.

312 *Ward* (n 122) 739.

313 On the 'family', see also, in the United Kingdom, the judgment of Lord Hope in *Fornah* (n 300) 443–8, paras. 39–52 (Lord Hope); 451–4, paras. 61–8 (Lord Rodger); 464–6, paras. 104–7 (Lady Hale). In the United States, the Attorney General has challenged the long-standing recognition that 'family' may constitute a particular social group: see *Matter of L-E-A*, 27 I&N Dec. 581 (AG, 2019) (noting that 'in the ordinary case, a nuclear family will not, without more, constitute a "particular social group" because most nuclear families are not inherently socially distinct'); and discussion in Anker (n 4) § 5:44. The tests of 'social distinction' and 'particularity', are recent innovations of the BIA that 'have not been universally accepted by the circuit courts': ibid., § 5:42. In *C-A-*, 23 I&N Dec. 951 (BIA, 2006), the Board of Immigration Appeals affirmed that 'sex' and 'family membership' were obvious examples of characteristics which define a social group, and that 'social visibility' can help to define other particular social groups. In *W-G-R, Respondent*, 26 I. & N. Dec. 208 (BIA, 2014), the BIA renamed 'social visibility' as 'social distinction', in order to clarify that the element did not require 'ocular' or 'on-sight' visibility, a construction that was found to be reasonable and accorded *Chevron* deference in *Reyes v Lynch*, 842 F.3d 1125, 1131,

1136 (USCA, 9th Cir., 2016). The 9th Circuit also found the BIA's construction of 'particularity' to be reasonable, namely 'whether the group is discrete or is, instead, amorphous': at 1135–6, 1132, citing *W-G-R, Respondent*, 214. See also *Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA, 2014); and discussion and critique in Anker (n 4) § 5:41–3, particularly her view that '[s]ocial distinction should be read as another way of stating the basic *Acosta* test' (§ 5:43). For a recent application of these tests in the context of landownership, see *Matter of E-R-A-L-, Respondent*, 27 I&N Dec. 767 (BIA, 2020).

314 In which case it is irrelevant that economic activity is not a matter of fundamental human rights; what counts is that the activity 'links' people who then, on the basis of perceptions among the ruling class or society at large, are subject to treatment amounting to persecution.

315 *Ward* (n 122) 729; also *Chan* [1993] 3 FC 675 (FCA).

316 See *Islam v Secretary of State for the Home Department* (n 107) 634 (Lord Steyn), 656 (Lord Hope); cf. the different formulations adopted in *Applicant A* (n 296) 263 (McHugh J), 242 (Dawson J), 286 (Gummow J).

317 See Macklin (n 310) 371–8.

318 As McHugh J remarked in *Applicant A* (n 296) 264, 'while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society'. For that reason also, 'To identify a social group, one must first identify the society of which it forms a part': *Islam v Secretary of State for the Home Department* (n 107) 652 (Lord Hoffmann). Lord Hope said: 'The word "social" means that we are being asked to identify a group of people which is recognised as a particular group by society. As social customs and social attitudes differ from one country to another, the context for this inquiry is the country of the person's nationality. The phrase can thus accommodate particular social groups which may be recognisable as such in one country but not in others or which, in any given country, have not previously been recognised': ibid., 657.

319 See s. 6.1.1, on conscientious objection to military service.

320 See UNHCR, 'Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees': HCR/GIP/02/01 (7 May 2002). See also Hathaway & Foster (n 4) 436–42; Anker (n 4) §§ 5:45–52.

321 Neither sex nor gender is mentioned in art. 3, which refers only to the Contracting States' obligations to 'apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin'. At the Conference of Plenipotentiaries, France (Mr Rochefort) opposed a proposal to specifically mention 'sex' made by the Yugoslavian delegate, Mr Makeido, since it 'would imply that certain countries at present practised discrimination on the grounds of sex' which 'was not the case'. Several delegates challenged the Yugoslav proposal by raising purportedly unproblematic examples of discrimination under national legislation. The UK (Mr Hoare), for example, 'wondered whether, supposing a woman refugee obtained employment in the government of a State where the salaries of women were smaller than those of men, it would be possible to allege that discrimination was being practised against that refugee'. The President also commented that he 'doubted strongly whether there would be any cases of persecution on the grounds of sex': See A/CONF.2/SR.5 (19 Nov. 1951) 9–11; and also A/CONF.2/SR.33 (30 Nov. 1951) 7. Needless to say, both social attitudes and discrimination law have changed considerably since 1951.

322 See, for example, Anderson, A. & Foster, M., 'A Feminist Appraisal of International Refugee Law', in Costello, Foster, & McAdam (n 12) 66, noting concerns that 'gender gains have not been adequately implemented in jurisprudence and that ongoing theoretical gaps and misconceptions about gender exist which affect decision-making'; Foster (n 292) 48, concluding that while gender-based groups were now generally accepted across jurisdictions, 'difficulties remain in application'; Edwards, A., 'Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950–2010' (2010) 29(2) *RSQ* 21; Haines, R., 'Gender-related persecution', in Feller, Türk, & Nicholson (n 286) 319; Anker, D. E., 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal* 133; and the cautious view expressed in Crawley, H., '[En]gendering International Refugee Protection: Are We There Yet?', in Burson, B. & Cantor, D. J., eds., *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (2016) 322. See also, generally Arbel, E., Dauvergne, C., & Millbank, J., eds., *Gender in Refugee Law: From the Margins to the Centre* (2014); Dauvergne (n 257).

323 UNHCR Guidelines on Gender-Related Persecution (n 320) para. 3. Sex, conversely, is considered a 'biological determination'. See further discussion in Anderson & Foster (n 322) 60–3; Edwards 2010 (n 322) 37.

324 LaViolette, N., 'Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines' (2007) 19 *IJRL* 169, 182.

325 See UNHCR Guidelines on Gender-Related Persecution (n 320) para. 3; Edwards 2010 (n 322) 40–4; Anderson & Foster (n 322) 61–2, 68–9.

326 Edwards takes a somewhat rueful view of the UNHCR 'Gender-Related Persecution Guidelines', to which she herself contributed, noting their 'overemphasis on particular facets of women's lives' at the expense of those facets that women share with men—'the guidelines do not, for example, draw attention to women as opposition politicians, rebel leaders, or combat soldiers': Edwards (n 322) 27–8.

327 See, for example, Crawley (n 322) 329–33; Anker (n 322). On the particular issue of FGM, see *Fornah* (n 300); UNHCR, 'Guidance Note on Refugee Claims relating to Female Genital Mutilation' (May 2009); Middleburg, A., & Balta, A., 'Female Genital Mutilation/ Cutting as a Ground for Asylum in Europe' (2016) 28 *IJRL* 416; Hathaway & Foster (n 4) 214–16, 219, 312; Anker (n 4) §§ 5:46–8; UNGA, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak': UN doc. A/HRC/7/3 (2008) paras. 50–5.

328 For a recent example of this analytic approach, see the US Attorney General's decision in *Matter of A-B-, Respondent*, 27 I&N Dec. 316, 339 (AG, 2018), discussed further below, noting that '[t]he Board cited no evidence that [the respondent's] ex-husband attacked her because he was aware of, and hostile to, "married women in Guatemala who are unable to leave their relationship". Rather, he attacked her because of his preexisting personal relationship with the victim.' See generally, Crawley, H., *Refugees and Gender: Law and Process* (2001); Anker, D., Gilbert, L., & Kelly, N., 'Women whose governments are unable or unwilling to provide reasonable protection from domestic violence may qualify as refugees under United States asylum law' (1997) 11 *Georgetown Immigration Law Journal* 709. See also discussion in Hathaway & Foster (n 4) 375, 385, 422–3.

329 See generally, Castel, J. R., 'Rape, Sexual Assault and the Meaning of Persecution' (1992) 4 *IJRL* 39; Thomas, D. Q. & Beasley, M. E., 'Domestic Violence as a Human Rights Issue' (1993) 15 *HRQ* 36; *Prosecutor v Akayesu* (n 146) paras. 687–8; Anker, D., 'Rape in the Community as a Basis for Asylum: The Treatment of Women Refugees' Claims to Protection in Canada and the United States' (1997) 2(12) *Bender's Immigration Bulletin*, Part I— Canada, 476–84; (1997) 2(15) *Bender's Immigration Bulletin*, Part II—The United States, 608–22; Heyman, M. G., 'Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligations' (2005) 17 *IJRL* 729; Musalo, K., 'A tale of two

women: the claims for asylum of Fauziya Kassindja, who fled FGC, and Rody Alvarado, a survivor of partner (domestic) violence', in Arbel, E., Dauvergne, C., & Millbank, J., eds., *Gender in Refugee Law: From the Margins to the Centre* (2014).

330 *Report* of the 36th Session: UN doc. A/AC.96/673, para. 115(4). The first edition of this work in 1983 suggested that it *may* be the case that the discrimination suffered by women in many countries on account of their sex alone, though severe, is not yet sufficient to justify the conclusion that they, as a group, have a fear of persecution within the meaning of the Convention. Times have changed, though the need for protection is no less.

331 UNGA res. 48/104 (20 Dec. 1993). See also 1995 Beijing Declaration and Platform for Action; 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women: (1994) 33 *ILM* 1534; all texts in Brownlie & Goodwin-Gill (n 112) 196, 211, 991.

332 See UNHCR Guidelines on Gender-Related Persecution (n 320) paras. 22–34.

333 Art. 1 of the 1993 UN Declaration interprets violence against women widely: 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life'. Such violence is seen not so much in terms of individual behaviour, but as a 'manifestation of historically unequal power relationships between men and women', which may occur in the family, in the general community, or be perpetrated or condoned by the State.

334 See *Prosecutor v Akayesu* (n 146) paras. 687–88: 'Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. See also Haines (n 322) 319, 336: 'Women are particularly vulnerable to persecution by sexual violence as a weapon of war', and citing also Crawley (n 328) 89–90; UNHCR Guidelines on Gender-Related Persecution (n 320) para. 24.

335 See Musalo, K., 'Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence' (2003) 52 *De Paul Law Review* 777; Kelly, N., 'Guidelines for Women's Asylum Claims' (1994) 6 *IJRL* 517; Mawani, N., 'Introduction to the Immigration and Refugee Board of Canada Guidelines on Gender-Related Persecution' (1993) 5 *IJRL* 240; 'IRB: Guidelines on Gender-Related Persecution' (1993) 5 *IJRL* 278; Oosterveld, V. L., 'The Canadian Guidelines on Gender-Related Persecution: An Evaluation' (1996) 8 *IJRL* 569.

336 Dauvergne, C., 'Toward a New Framework for Understanding Political Opinion' (2016) 37 *Michigan Journal of International Law* 243, 286. See also Edwards' comment: 'Why is it so difficult to recognize the acts of a woman in transgressing social customs as political? Why are certain acts … considered to be non-religious in a society where there is no separation between the State and religious institutions? Why are young girls who refuse to undergo female genital mutilation not political dissidents, breaking one of the fundamental customs of their society? Why has rape during ethnically motivated armed conflict been seen as only criminal and not also racial in character?': Edwards, A., 'Age and gender dimensions in international refugee law', in Feller, Türk, & Nicholson (n 286) 46, 68 (citations omitted); Hathaway & Foster (n 4) 421–3; Haines (n 322) 347–9; UNHCR Guidelines on Gender-Related Persecution (n 320) paras. 22–7, 32–4; and discussion of the Guidelines in Edwards 2010 (n 322) 27–8.

337 The Proposal for the recast Directive noted that '[t]he ambiguous wording of the last phrase of Article 10(1)(d) [of the original Qualification Directive] allows for protection gaps and for very divergent interpretations', and that the amendment was intended to 'provide clear and useful guidance and ensure consistency': Recast Directive Proposal (n 557) 8. This addition was welcomed by UNHCR, which nonetheless called for the Directive to take an alternative, rather than a cumulative, approach in art. 10(1)(d): see UNHCR comments on the recast Directive Proposal (n 60) 7–8. See also the similar views expressed in ECRE, Comments on the recast Qualification Proposal (n 60) 10.

338 Original Qualification Directive, art. 10(1)(d) ('Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article'). The European Commission's 2019 report on the application of the recast Directive notes that while '[m]ost Member States' have updated their legislation in accordance with the new language, and all report that 'gender-related claims are taken into consideration as part of the assessment of the application', there remain some gaps in law and also, according to certain NGOs and legal representatives, in practice: (n 278) 96–7.

339 See *Fornah* (n 300); *Khawar* (n 157).

340 *Islam v Secretary of State for the Home Department* (n 107) 643–4 (Lord Steyn); 652–3 (Lord Hoffmann); see also *Fornah* (n 300) 439–42, paras. 27–31 (Lord Bingham); 448–50, paras. 53–8 (Lord Hope); 456–8, paras. 75–81 (Lord Rodger); 466–7, paras. 111–14 (Lady Hale).

341 For comment, see Vidal, M., ' "Membership of a particular social group" and the effect of *Islam* and *Shah*' (1999) 11 *IJRL* 528; Goodwin-Gill (n 296). In a number of recent cases, the CNDA has recognized women facing forced marriage as members of a particular social group; see CNDA 4 septembre 2020 Mme K. n° 19046460 C *Recueil* 2020 45—Burkina Faso ('groupe social des femmes de l'ethnie nankana qui refusent de se soumettre à un mariage forcé'); CNDA 23 juin 2020 Mme R. épouse H. n° 17037584 C *Recueil* 2020 47—Iraq; CNDA 14 septembre 2020 Mme A. n° 19055889 C+ *Recueil* 2020 122—Palestinian woman from Gaza facing 'un état personnel d'insécurité grave' obliging her to leave UNRWA's zone of operations.

342 Laws of general application can operate similarly. The refugee sub-group, that is, the group within the larger group of those conforming or reluctantly conforming, is identified by the fact of prosecution and/or liability to sanction, considered together with the assertion by the sub-group of certain fundamental rights, such as those relating to conscience or belief. See *Wang* (n 268).

343 In *Applicant A* (n 296) 262, n 148, McHugh J referred to the Canadian Court's finding in *Mayers* 97 DLR (4th) 729 (1992), that a Trinidadian woman who had been abused by her husband for many years was a refugee because she was a member of a particular social group. He noted that it seemed to have been common ground between the parties that the relevant group was 'Trinidadian women subject to wife abuse', but it did not follow 'that the applicant was abused because of her *membership* of that group' (emphasis in original). Macklin (n 310) 377, however, identifies the 'risk factor' in both *Mayers* and *Cheung* (a forcible sterilization case; above n 302) as one's identity as a woman. Cf. Lord Millett, dissenting, in *Islam v Secretary of State for the Home Department* (n 107) 653–4.

344 *Matter of A-B-* 27 I&N Dec. 316 (A.G. 2018) (n 328). For detailed analysis, see Jastram, K. & Maitra, S., 'Matter of A-B- One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation', (2020) *18 Santa Clara Journal of International Law* 48; Anker (n 4), particularly § 5:40; § 5:49; also 'Recent Adjudication' (2018) 132 *Harvard Law Review* 803; Schoenholtz, A. I., Ramji-Nogales, J., & Schrag, P. G., *The End of Asylum* (2021) 33–6. Unusually, a second decision in *Matter of A-B-* was issued by the Attorney General in

2021, affirming the first decision and setting down 'additional guidance': 28 I&N 199 (A.G. 2021) 200.

345 On the Attorney General's power to review BIA decisions, see generally Pierce, S., *Obscure but Powerful: Shaping Immigration Policy through Attorney General Referral and Review* (Migration Policy Institute, 2021).

346 The Attorney General's decision in *Matter of A-B-* overruled the BIA's decision in *Matter of A-R-C-G*, 26 I&N Dec. 388 (BIA, 2014). It found *A-R-C-G* to have incorrectly applied the BIA's 2014 decisions on the meaning of particular social group in *Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA, 2014) and *W-G-R, Respondent*, 26 I&N Dec. 208 (BIA, 2014): see *Matter of A-B-* (n 319). It also noted that *A-R-C-G* should not have been issued as a precedential decision, 'because [the Department of Homeland Security] conceded most of the relevant legal questions': *Matter of A-B-* (n 333). For an account of the background to the decision in *A-R-C-G* see Musalo, K., 'Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law' (2014–2015) *36 Harvard International Review* 45.

347 *Matter of A-B-* (n 328) 320. The reference to gang violence was obiter, as there was no gang issue presented in Ms. A-B-'s case. The Attorney General also noted that demonstrating a government's unwillingness or inability to control the harm feared by private actors required the claimant to show that the government either 'condoned the private actions "or at least demonstrated a complete helplessness to protect the victims" ': at 337, citing *Galina v INS*, 213 F.3d 955, 958 (7th Cir., 2000). But see *Grace v Barr*, 965 F. 3d 883 (D.C. Cir. 2020) 900 (Tatel J), finding this standard to be distinct from the 'unwilling and unable standard', and, given that the government did not defend the new standard on the merits, arbitrary and capricious.

348 See Anker (n 4) § 5:40 and cases cited therein.

349 Ibid., § 5:49.

350 Ibid., § 5:49, § 5:45 and cases discussed therein, particularly *De Pena-Paniagua v Barr*, 957 F.3d 88 (1st Cir., 2020).

351 See Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border (2 Feb. 2021), s. 4(c)(i).

352 Ibid, s. 4(c)(ii).

353 For the most current information on gender-based claims and on particular social group jurisprudence generally, see the Center for Gender & Refugee Studies: https://cgrs.uchastings.edu/. We are grateful to Kate Jastram, CGRS's Director of Policy & Advocacy, for advice on the current law.

354 See Türk, V., 'Opinion: Ensuring Protection to LGBTI Persons of Concern' (2013) 25 *IJRL* 120, 121.

355 See ibid., 122–3, citing the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Mar. 2007), which were drafted by a group of human rights experts. Principle 23 sets out the right to seek and enjoy asylum from persecution related to sexual orientation and gender identity, and States' responsibility to ensure that these are legally recognized bases for claiming asylum. In 2017, a set of additional principles was adopted, which now also include the bases of 'gender expression' or 'sex characteristics': 'Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human

Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' (24 Nov. 2007) 22–3.

356 Although UNHCR notes that 'the application of the refugee definition remains inconsistent in this area': see UNHCR, 'Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees': HCR/GIP/12/09 (23 Oct. 2012) paras. 1, 41. The UNHCR Guidelines on Claims based on Sexual Orientation and/or Gender Identity supplement UNHCR's Guidelines on Gender-Related Persecution (n 320), and replace UNHCR's 'Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity' (Nov. 2008). In the EU, see recast Qualification Directive, recital (30), art. 10(1)(d) ('Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation … Gender related aspects, including gender identity, shall be given due consideration'). See also, generally, Spijkerboer, T., ed., *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (2013); Hathaway & Foster (n 4) 442–5; Anker (n 4) §§ 5:53–4, also, on the political opinion ground, § 5.29; Foster (n 292) 48–54; Güler, A., Shevtsova, M., & Venturi, D., eds., *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration* (2019); *FMR*, Issue 42: 'Sexual orientation and gender identity and the protection of forced migrants' (Apr. 2013); Ferreira, N., & Danisi, C, 'Queering International Refugee Law' in Costello, Foster, & McAdam (n 12); Millbank (n 257).

357 *HJ (Iran) v Secretary of State for the Home Department* (n 279). The following section is adapted and updated from Goodwin-Gill, G. S., 'The Dynamic of International Refugee Law' (2014) 25 *IJRL* 651, 661–4.

358 *HJ (Iran)* (n 279) 621, para. 11.

359 See *RT (Zimbabwe) v Secretary of State for the Home Department* (n 279), discussed further in s. 5.2.5.

360 *Germany v Y & Z* (n 113), involving persecution for reasons of religion and prohibitions on the manifestation of religion in public: see further s. 5.2.2.

361 *Minister voor Immigratie en Asiel v X, Y, & Z* (n 113). Most Member States now confirm that 'assessment of the reasons for persecution could not be influenced by considerations of the possibility for the applicant to behave discreetly in the country of origin in order to avoid persecution': European Commission (n 278) 92 ff.

362 See, on sexual orientation, the decision in *IK v Switzerland* (dec.), App. No. 21417/17 (ECtHR, 18 Jan. 2018) para. 24; accepted by the parties in *B & C v Switzerland*, App. Nos. 889/19 and 43987/16 (ECtHR, 17 Nov. 2020) para. 57. On the Court's jurisprudence in this area, see further Ferreira, N., 'An exercise in detachment: the Council of Europe and sexual minority asylum claims' in Mole, R. C. M., ed., *Queer Migration and Asylum in Europe* (2021).

363 See, for example, in Australia, *Appellant S395/2002* (n 279) and Migration Act 1958, s. 5J(3)(c)(vi), discussed in Migration and Refugee Division Legal Services, Administrative Appeals Tribunal (n 118) Ch. 3 (updated Nov. 2020) 28–34; in Finland, KHO: 2012:1 (Finland Supreme Administrative Court, 13 Jan. 2012), English summary available at www.refworld.org; in Canada, *Okoli v Canada (Citizenship and Immigration)*, 2009 FC 332, paras. 36–7; *Akpojiyovwi v Minister of Citizenship and Immigration*, 2018 FC 745, para. 9; *Nwabueze v Canada (Citizenship and Immigration)*, 2019 FC 1577, para. 20. See further references in Spijkerboer, T., 'Sexual identity, normativity and asylum', in Spijkerboer (n

356) 232, n 7, and the UNHCR Guidelines on Claims based on Sexual Orientation and/or Gender Identity (n 364) paras. 30–3.

364 See, for example, Millbank, J., 'From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom' (2009) 13 *The International Journal of Human Rights* 391, 399; Spijkerboer, T., 'Foreword', in Güler, Shevtsova, & Venturi, eds., (n 364) viii. On the assessment of credibility see further Ch. 11, s. 4.4.

365 *HJ (Iran)* (n 279) 647, para. 82 (Lord Rodger); see also 625, para. 22, and 630–1, para. 35 (Lord Hope); 653, para. 98 (Lord Walker); 653, para. 100 (Lord Collins); 661, para. 132 (Lord Dyson).

366 *YD (Algeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1683, paras. 4–6.

367 Ibid., para. 10, citing para. 29 of the First-tier Tribunal decision.

368 *OO (Gay Men)* Algeria CG [2016] UKUT 00065 (IAC) para. 183, cited in *YD (Algeria)* (n 366) para. 40. The Court of Appeal 'accepted that [it] must accept the factual findings made by the Upper Tribunal' in that decision (para. 41). Cf. CNDA 29 mai 2020 M. C. n° 19053522 C *Recueil* 2020 52-7—refugee status recognized of homosexual man from Lebanon, 'où il ne peut vivre pleinement son homosexualité compte tenu de son environnement familial et géographique homophobe et où il risque d'être exposé à des violences et à des discriminations émanant tant de la société libanaise que d'agents travaillant pour des institutions gouvernementales'.

369 *YD (Algeria)* (n 366) para. 52.

370 *OO (Gay Men)* (n 368) para. 185, cited in ibid., para. 40.

371 For the Upper Tribunal's solution to the 'conundrum', see *OO (Gay Men)* (n368) para. 186, cited in *YD (Algeria)* (n 366) para. 40.

372 For the Court of Appeal's approach to criminalization, see below n 392.

373 For discussion of changes to art. 10(1)(d) in the recast Qualification Directive, see s. 5.2.4.4 above.

374 See *Minister voor Immigratie en Asiel v X, Y, & Z* (n 113) para. 37. Art. 9(1)(a) provides that acts of persecution must be 'sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights', while article 9(2)(c) notes that an act of persecution can consist of 'prosecution or punishment, which is disproportionate or discriminatory'.

375 Emphasis added. See *Minister voor Immigratie en Asiel v X, Y, & Z* (n 113) para. 61. This critique is made in 'X, Y and Z: a glass half full for "rainbow refugees"? The International Commission of Jurists' observations on the judgment of the Court of Justice of the European Union in *X, Y, & Z v Minister voor Immigratie en Asiel*' (3 Jun. 2014) paras. 42, 62. The International Commission of Jurists also noted that the referred question precluded consideration of criminalization in its 'broader societal context', that is, whether criminalization may constitute an act of persecution as part of an 'accumulation of various measures' under art. 9(1)(b): ibid., paras. 41–3, 52. See also Costello (n 57) 204–5 (noting that the Court's decision 'did not rule on whether [the criminalization and threat of imprisonment] could set up an accumulation of discriminatory "legal measures" under Article 9(2)(b)').

376 *Minister voor Immigratie en Asiel v X, Y, & Z* (n 113) paras. 46, 48, 51–3, 55–6.

377 Ibid., para. 70. In her Opinion, Advocate General Sharpston acutely noted that the problem with the restraint argument is that it invites an essentially subjective assessment and that, in any event, 'discretion is not a sure protection': Opinion of Advocate General Sharpston (11 Jul. 2013) in Joined Cases C-199/12 to C-201/12, *X, Y, & Z v Minister voor Immigratie, Integratie en Asiel*, paras. 67–9.

378 *Germany v Y & Z* (n 113) para. 78. See also Opinion of Advocate General Sharpston (n 377) paras. 71–2; *RT (Zimbabwe) v Secretary of State for the Home Department* (n 279) 175, para. 46: 'Where is the core/marginal line to be drawn? … we should guard against introducing fine and difficult distinctions of this kind'); UNHCR Guidelines on Claims based on Sexual Orientation and/or Gender Identity (n 364) para. 19 ('[t]he distinction between forms of expression that relate to a "core area" of sexual orientation and those that do not, is … irrelevant for the purposes of the assessment of the existence of a well-founded fear of persecution').

379 See, in relation to *Minister voor Immigratie en Asiel v X, Y, & Z*, Amnesty International, 'EU Court ruling a setback for refugees' Press release (7 Nov. 2013) and Amnesty International and the International Commission of Jurists, 'Observations on the Case, issued following the written procedure, and hearings on 11 April and 11 July 2013' (2 Oct. 2013), discussed in Goodwin-Gill (n 367) 663–5; International Commission of Jurists (n 379). In relation to *HJ (Iran*) (n 279), see, for example, Hathaway J. & Pobjoy, J., 'Queer Cases Make Bad Law' (2012) 44 *NYU Journal of International Law and Politics* 315, arguing that the UK Supreme Court in *HJ (Iran)* 'departed in critical ways from accepted refugee law doctrine': at 331. The authors also critique the judgment of the High Court of Australia in *Appellant S395/2002* (n 279). See discussion of Hathaway and Pobjoy's approach in Goodwin-Gill 2014 (n 367) 664–6; and other contributions engaging with Hathaway & Pobjoy's argument in the journal issue: (2012) 44 *NYU Journal of International Law and Politics*.

380 See discussion in Goodwin-Gill (n 367) 663.

381 See n 379 above.

382 *YD (Algeria)* (n 366) para. 54. See also para. 50, referring to *X, Y, & Z* (n 113).

383 *B & C* (n 362) para. 59, citing, inter alia, *X, Y, & Z* (n 112).

384 Ibid.

385 UNHCR Guidelines on Claims based on Sexual Orientation and/or Gender Identity recognize the need for a 'fact-based' analysis of both 'the individual and contextual circumstances': see n 364, para. 28. In its view, '[e]ven if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament … rising to the level of persecution' (para. 27). Whether that threshold is met will depend on a careful analysis of the specific facts of the case in its context. The Yogyakarta Principles Plus 10 (n 355) 22: States must '[e]nsure that a well-founded fear of persecution on the basis of sexual orientation, gender identity, gender expression or sex characteristics is accepted as a ground for the recognition of refugee status, including where [these elements] are criminalised and such laws, directly or indirectly, create or contribute to an oppressive environment of intolerance and a climate of discrimination and violence'.

386 See *B & C* (n 362) paras. 62–3, referring inter alia to UNHCR's view in its Guidelines on Claims based on Sexual Orientation and/or Gender Identity (n 364) para. 36 that 'laws criminalizing same sex relations are normally a sign that protection of LGB individuals is not available', and finding that the Swiss courts 'did not sufficiently assess the risks of ill-treatment … and the availability of State protection against ill-treatment emanating from

non-State actors'. See also discussion in *Appellant S395/2002* (n 279) 491, paras. 46–7 (McHugh and Kirby JJ).

387 See s. 5.2.4.3.

388 Compare the approach taken in the cases cited above to that taken by the Human Rights Committee in *Toonen v Australia*, UN doc. CCPR/C/50/D/488/1992 (4 Apr. 1994) paras. 8.2, 8.6, finding that Tasmanian laws criminalizing homosexuality which had not been enforced in a decade interfered with the author's privacy under art. 17 ICCPR.

389 UNHCR Guidelines on Membership of a Particular Social Group (n 286). These Guidelines were expressly approved by the House of Lords in *Fornah* (n 300) 431–2, para. 15 (Lord Bingham), 464, para. 103 (Lady Hale), 468, para. 118 (Lord Brown).

390 Cf. Council of Europe Committee of Ministers Recommendation Rec(2004)9 on the concept of 'membership of a particular social group' in the context of the 1951 Convention relating to the status of refugees (30 Jun. 2004), for the position that 'a "particular social group" is a group of persons who have, or are attributed with, a common characteristic other than the risk of being persecuted and who are perceived as a group by society or identified as such by the state or the persecutors. Persecutory action towards a group may however be a relevant factor in determining the visibility of a group in a particular society'. Cf. CE 16 octobre 2019 Mme A. n° 418328 A *Recueil* 2019 53–4, in which the Court recognized as a social group women from a particular region in Nigeria, victims of trafficking for sex; '[elles] partagent une histoire commune et une identité propre, perçues comme spécifiques par la société environnante dans leur pays, où elles sont frappées d'ostracisme pour avoir rompu leur serment sans s'acquitter de leur dette'.

391 'Cohesiveness', however, is not required: *Islam v Secretary of State for the Home Department* (n 107) 632, 640–3 (Lord Steyn); 651 (Lord Hoffmann); 657 (Lord Hope); 662 (Lord Millett).

392 See n 320.

393 Cf. art. 10(1)(d), recast EU Qualification Directive, which prescribes in part that, 'a group shall be considered to form a particular social group where in particular:—members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, *and*—that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society' (the same language was used in the original Directive). The axiomatic linkage of innate characteristics *and* social perception is somewhat dogmatic and out of touch with much of the doctrine described above, and has also been criticized by UNHCR and ECRE: see UNHCR comments on the recast Directive Proposal (n 60) 7–8; ECRE Information Note on Directive 2011/95/EU (n 60) 10; UNHCR comments on the Regulation Proposal (n 80) 17. In *Fornah* (n 300), Lord Bingham emphasized that art. 10(1)(d) of the original Qualification Directive must be interpreted as if the criteria were *alternatives*, and that the Directive should be applied accordingly; 432–3, para. 16. This approach draws on UNHCR's formulation, set out in the UNHCR Guidelines on Membership of a Particular Social Group (n 286) para. 11, which defines 'particular social group' as satisfied *either* by a finding that a group shares 'a common characteristic other than their risk of being persecuted' (which will often be 'innate, unchangeable, or … otherwise fundamental to identity, conscience or the exercise of one's human rights'), *or* that the group is 'perceived as a group by society'. The European Commission's 2019 report (n 278) on the application of the recast Qualification Directive notes that most member States apply the two approaches covered in Article 10(1)(d) cumulatively, and that only five apply them alternatively (Greece, Ireland, Italy, Latvia, and Lithuania): 11, 94–6. The United Kingdom is omitted from this list, in apparent disregard of the judgment in *Fornah*; see also Foster (n 292) 39, n 221;

Zimmermann & Mahler (n 101) 392–4; Costello (n 57) 202; and Hathaway & Foster (n 4) 429–32.

394 Note, however, the caveat sounded by McHugh J in *Applicant A* (n 296) 264–5, concluding that the simple fact of opposition to policy or law is not itself sufficient to link individuals and that there is nothing external in the way of social attribute or characteristic to allow them to be perceived as a social group.

395 Cf. art. 4 ICERD 66; art. 10 ECHR 50; *Handyside v United Kingdom* (1976) 1 EHRR 737; *Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Arrowsmith v United Kingdom* (1978) 3 EHRR 218. See also Bychawska-Siniarska, D., 'Protecting the Right to Freedom of Expression under the European Convention on Human Rights: A Handbook for Legal Practitioners' (Council of Europe, 2017). In contrast, the right to hold opinions without interference (art. 19(1) ICCPR 66) 'is a right to which the Covenant permits no exception or restriction': Human Rights Committee, General Comment No. 34 'Article 19: Freedoms of opinion and expression': UN doc. CCPR/C/GC/34 (12 Sep. 2011) para. 9.

396 *RT (Zimbabwe) v Secretary of State for the Home Department* (n 279) 170–1, para. 32: 'Under both international and European human rights law, the right to freedom of thought, opinion and expression protects non-believers as well as believers and extends to the freedom *not* to hold and *not* to have to express opinions.')

397 Human Rights Committee, General Comment No. 34 (n 395) para. 9.

398 Ibid., para. 10; *RT (Zimbabwe) v Secretary of State for the Home Department* (n 279) 170–1, para. 32.

399 This wording, which appeared in the first edition of this work, at 30, was adopted and endorsed by the Supreme Court of Canada in *Ward* (n 122); see also *Klinko v Minister of Citizenship and Immigration* [2000] 3 FC 327, (2000), 184 DLR (4th) 14, para. 33, further approving the above interpretation. It has also been accepted by UNHCR: see UNHCR, 'Guidance Note on Refugee Claims Relating to Victims of Organized Gangs' (n 156) para. 45; UNHCR Guidelines on Gender-Related Persecution (n 320) para. 32. See *Navarro v Canada*, 2011 FC 768, paras. 21–2 (distinguishing *Klinko* and finding that 'the act of filing a police report alone or resisting criminality generally' does not constitute 'an opinion about a matter that engages the machinery of the state'). See also Zimmermann & Mahler (n 101) 399; Hathaway & Foster (n 4) 406.

400 The approach to political opinion in art. 10(1)(e) of the recast Qualification Directive is tied to the potential 'actors of persecution' identified in art. 6, not just to State and government, while art. 10(2) recalls that it is immaterial whether the applicant for protection actually possesses the relevant characteristic, provided it is attributed to him or her by the persecutor. For discussion of the particular case of conscientious objection to military service, see s. 6.1.1.

401 *RT (Zimbabwe) v Secretary of State for the Home Department* (n 279) 173–4, paras. 42–5. The context of the case was a 'quite astonishingly brutal wave of violence' which put at risk 'not simply those who are seen to be supporters of the MDC [Movement for Democratic Change] but *anyone who cannot demonstrate positive support* for Zanu-PF or alignment with the regime': *RN (Zimbabwe) v Secretary of State for the Home Department* [2008] UKAIT 00083, para. 216 (emphasis added), cited in *RT (Zimbabwe*) (n 279) 162, para. 2 (Lord Dyson). The statement in the Michigan Guidelines on Risk for Reasons of Political Opinion (2015) that 'an "opinion" is a conscious choice or stance' (para. 4) should be read in light of the Court's approach to the 'indifferent non-believer'.

402 In *Ward*, the Supreme Court of Canada held that circumstances should be examined from the perspective of the persecutor, since this perspective is determinative in inciting the persecution: [1993] 2 SCR 689, 747. Cf. *S-P-*, 21 I&N Dec. 486, 487 (BIA, 1996), discussing and reaffirming *B-*, 21 I&N Dec. 66 (BIA, 1995), and noting that in the latter, the Board 'did not become entangled in the impossible task of determining whether harm was inflicted because of the applicant's acts or because of his beliefs underlying those acts'. See also Hathaway & Foster (n 4) 407–23; Zimmermann & Mahler (n 101) 400–1.

403 It may not always be appropriate to view the (objective) political act as equivalent to the (subjective) notion of political opinion, for the asylum seeker's actual motivation can make such an approximation pure fiction. The same applies in the case of the individual who is likely to be persecuted for political opinions *wrongly* attributed to him or her, and the humanitarian aspects of such cases may be better accommodated in a liberal asylum practice, than in a forced interpretation of refugee status criteria. However, see Belgium, Conseil d'Etat, no. 135.838, *x c/ CGRA* (8 oct. 2004): *RDDE* (2004) No. 130, 591—the claimant's activities considered as political by his persecutors, though he himself had no significant political opinion. See also Musalo, K., 'Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms' (1994) 15 *Michigan Journal of International Law* 1179.

404 See, for example, *Weinong Lin v Holder* 763 F.3d 244 (2nd Cir., 2014), in which the Court of Appeal noted that 'claims of latter-day political awakening resemble those of newfound religious conscience, which can be "easy to manufacture" ', but recalled the view expressed in *Ehlert v United States*, 402 US 99, 103 (1971) that ' "those whose views are late in crystallizing" cannot be "deprived of a full and fair opportunity to present the merits of their conscientious objector claims" ': at 250. The case centred on whether the applicant's political activities in the United States constituted 'changed circumstances' which would allow him to file what would otherwise be an untimely claim for asylum. The Court found that while the applicant's 'reasons for action stem from beliefs that have persisted over years, his actions themselves were new': at 250. In Australia, the claimant bears the onus of showing that any conduct engaged in within Australia was 'otherwise than for the purpose of strengthening the … claim to be a refugee'. If the claimant fails to so satisfy the Minister, the conduct is to be disregarded: Migration Act 1958, s. 5J(6). See further s. 5.1.1.

405 Tiberghien (n 4) 389–92 ('Activités politiques entreprises durant le séjour en France'); see also Carlier, J.-Y. and others, eds., *Who is a Refugee? A Comparative Case Law Study* (1997) 384–5; also 70–1 (Belgium), 311–12 (Denmark).

406 Loi sur l'asile (26 Jun. 1998) art. 54—Motifs subjectifs survenus après la fuite. 'L'asile n'est pas accordé à la personne qui n'est devenue un réfugié au sens de l'article 3 qu'en quittant son Etat d'origine … ou en raison de son comportement ultérieur.'

407 'Nul ne peut être contrainte, de quelque manière que ce soit, à se rendre dans un pays'/'No one may be compelled, in any manner whatsoever, to return to a country' in which life or liberty may be at risk for a refugee-related reason: art. 5, loi sur l'asile. This article extends protection to include non-return to a country from which in turn the person may be sent to a country in which he or she would be at risk for the reasons mentioned in the refugee definition set out in art. 3.

408 Hullman, K., 'Switzerland', in Carlier and others (n 405) 135–6; see also *Canada (Minister of Citizenship and Immigration) v Asaolu* (1998) 45 Imm LR (2d) 190 (FCTD): Citizenship and Immigration Canada sent claimant's story and photograph to visa officer in Lagos, Nigeria to facilitate investigation of claim to refugee status; determination in favour

of respondent as refugee *sur place* upheld, based on knowledge of human rights conditions in Nigeria and failure to explain how investigation conducted there.

409 See Peers, S. and others, eds., *EU Immigration and Asylum Law (Text and Commentary)* (2nd rev. edn., 2015) 94, arguing that art. 5(3) 'should be confined to governing the situation in which an applicant creates the relevant circumstances *after* the initial application has been rejected', although 'available reports show confusion in the practice of the Member States'. This interpretation was cited with approval by the European Commission, which also noted that '[s]everal Member States … apply a higher level of scrutiny for first-time applications *sur place*': European Commission (n 278) 53–4. See also Mathew (n 190) 140–41; *YB (Eritrea)* (n 190) para. 14.

410 The drafting reflects German practice in particular, and the doctrine of *Nachfluchtgründe*; the equivocation flows perhaps from the practice of other States, such as the United Kingdom, which do not consider the Convention refugee definition to include any requirement that the applicant act in 'good faith': see also UK Immigration Rules, para. 339P, intended to transpose the relevant provisions of the original Qualification Directive, as interpreted in *YB (Eritrea) v Secretary of State for the Home Department* (n 190). Somewhat unsurprisingly, the European Commission's Regulation Proposal notes 'significant differences' across Member States in the assessment of *sur place* applications, amongst other issues: (n 56) 9. See further European Commission (n 278) 53–7 (detailing different approaches and recommending the deletion of art. 5(3) of the recast Qualification Directive); UNHCR comments on the Regulation Proposal (n 80) 12 (recalling that *sur place* claims call for the same analytic approach as all other claims and that a person objectively at risk is entitled to protection 'notwithstanding his or her motivations', and also recommending the deletion of art. 5(3)). See above, s. 5.1.1.

411 Cf. *Nejad v Minister of Citizenship and Immigration* [1997] F.C.J. No. 1168: 'The new panel … should consider … whether the applicants became refugees *sur place* and whether it would be safe for them … to return to Iran. They may not be very intelligent in their attending of the political rally in Canada; they are obviously not brave, but … the law is not addressed only to save the brave, but also the weak, the timid and even the imprudent.'

412 See further Ch. 11, s. 4.4.

413 See New Zealand, RSAA, *Refugee Appeal No. 74665/03* (7 Jul. 2004); *Appellant S395/2002* (n 279) 489, para. 40, McHugh and Kirby JJ. holding that 'persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality'. In *RT (Zimbabwe) v Secretary of State for the Home Department* (n 279), the UK Supreme Court held that 'the Convention affords no less protection to the right to express political opinion openly than it does to the right to live openly as a homosexual. The Convention reasons reflect characteristics or statuses which either the individual cannot change or cannot be expected to change because they are so closely linked to his identity or are an expression of fundamental rights': 169, para. 25.

414 Recent jurisprudential developments depart from the position in Zimmermann and Mahler that 'the critical question … is *whether it seems probable that a claimant will either express the respective opinion or act in such manner* and whether he or she therefore will have reason to fear repressions in his or her home State': Zimmermann & Mahler (n 101) at 403 (emphasis added, citations omitted). In *HJ (Iran) v Secretary of State for the Home Department* (n 279) the Court found that a homosexual applicant who would behave 'discreetly' in the country of origin due, at the least in part, to a well-founded fear of persecution was entitled to refugee protection under CSR 51: see further s. 5.2.4.5. In *RT (Zimbabwe) v Secretary of State for the Home Department* (n 279), the Court found that the *HJ (Iran)* principle applied to asylum applicants claiming to fear persecution 'on the grounds of lack of political belief regardless of how important their lack of belief is to them':

176, para. 52. Lord Dyson noted that '[n]obody should be forced to have or express a political opinion in which he does not believe. He should not be required to dissemble on pain of persecution': 173, para. 42. See also Hathaway & Foster (n 4) 407–9.

415 On freedom of thought, religion and opinion as lying at the 'core' of ICCPR 66, see Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev. edn., 2005) 408. See Human Rights Committee, General Comment No. 34 (n 395) para. 2 (freedom of opinion and expression 'constitute the foundation stone for every free and democratic society') and para. 21 (the imposition of restrictions on the freedom of expression under art. 19(3) ICCPR 66 'may not put in jeopardy the right itself'); and discussion in *RT (Zimbabwe) v Secretary of State for the Home Department* (n 279) 173–6, paras. 40–52; *HJ (Iran) v Secretary of State for the Home Department* (n 279) 657–8, paras. 114–15.

416 With regard to art. 19 ICCPR 66, the Human Rights Committee has noted that para. 1 requires 'protection of the right to hold opinions without interference', to which the Covenant permits no exception or restriction; and that para. 2 requires States parties to guarantee, 'even expression that may be regarded as deeply offensive'. Paragraph 2 protects 'all forms of expression', which can be disseminated, inter alia, via books, posters, dress, legal submissions, or electronic means, and includes 'spoken, written and sign language and such non-verbal expression as images and objects of art': Human Rights Committee, General Comment No. 34 (n 395) paras. 9–12.

417 See, on art. 25 ICCPR 66, Human Rights Committee, 'General Comment No. 25': UN doc. CCPR/C/21/Rev.1/Add.7 (27 Aug. 1996).

418 UNHCR *Handbook* (n 3) para. 82 (emphasis added).

419 *Zolfagharkhani v Minister for Employment and Immigration* [1993] 3 FC 540, paras. 20–3. See also *S's Case* (n 137)—High Court of Australia: whether what results from the discriminatory implementation of a law of general application is persecution depends on whether the treatment is appropriate and adapted to achieving a legitimate national objective, namely whether it is consistent with the standards of civil societies which seek to meet the calls of common humanity; *Minister for Immigration and Citizenship v SZNWC and Another* [2010] FCAFC 157—Tribunal failed to consider whether the law criminalizing desertion by merchant seamen with a sentence of up to five years imprisonment was appropriate and adapted to achieving the identified objective of securing Bangladesh's reputation as a source of merchant seamen; *SZVYD v Minister for Immigration and Border Protection* [2019] FCA 648—it was open to the Tribunal to find that a law prohibiting consumption of alcohol by Muslims in an overwhelmingly Muslim country was a law of general application. It did not discriminate against a social group, and even if Muslims in Bangladesh were a particular social group, the question of whether it was reasonably appropriate and adapted had been properly considered: paras. 12, 15–16.

420 On Chinese asylum claims in relation to coercive population control in the United States, Canada and Australia respectively, see Hamlin, R., *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada and Australia* (2014) Ch. 8.

421 *Chang* (n 304). See also Hamlin (n 420) 148. *Chang's* case was later superseded by legislation deeming those forced to abort a pregnancy or to undergo involuntary sterilization, or those persecuted for resisting such a procedure, to have been persecuted on account of political opinion (and also providing that no more than 1000 refugees could be admitted under the sub-section in a financial year): See *Matter of X-P-T, Applicant*, 21 I&N Dec. 634, applying s. 601(a)(1) of the Illegal Immigration Reform and Immigrant

Responsibility Act (IIRIRA); discussion in *Wong v Holder,* 633 F.3d 64 (2nd Cir., 2011); and Hamlin, ibid., 150.

422 *Cheung v Canada (Minister of Employment and Immigration)* [1993] 2 FC 314—the Federal Court allowed an appeal against a decision which had accepted that the applicant would be sterilized if forced to return and might also face imprisonment, but that this would be under a law of general application having the objective of population control, not persecution. The Court held that 'women in China who have one child and are faced with forced sterilization' constitute a particular social group, and forced sterilization in that context constituted persecution. The Canadian Supreme Court 'assumed (without deciding)' that *Cheung* was correctly decided in *Chan v Canada (MEI)* (n 47) 658, when it denied protection on the basis that the appellant had failed to demonstrate a well-founded fear of forced sterilization: 672. See also Hamlin (n 420) 152–5; Hathaway & Foster (n 4) 216–18.

423 *Cheung* (n 422) 323. The Court instead characterized forced sterilization as 'a practice that affects a limited and well-defined group of people … mainly conducted by local authorities, not the central government'.

424 The Recast Qualification Directive, art. 9(2)(b) provides that acts of persecution can take the form of 'legal, administrative, police, and/or judicial measures … which are implemented in a discriminatory manner'. See also Hathaway & Foster (n 4) 297. Cf. CRR (26 juillet 1990) *Gambini*, 93.031, Doc. réf. no. 145 (28 avr./7 mai 1991) Supp., JC, 4—lack of legislative provision for transsexuals in Argentina a situation of a general character and not discriminatory; CRR (23 mai 1988); *Gungor*, 74.537—flight because of homosexuality did not fall within the Convention, for in Tiberghien's view (n 4): 'un vide législatif n'est pas assimilable à une persécution, sauf si ce vide législatif est délibérément maintenu par un Etat pour persécuter une fraction de la population qu'il prive ainsi de protection.' Cf. *Toboso-Alfonso*, 20 I&N Dec. 819 (BIA, 1990), in which the BIA found that a Cuban homosexual was persecuted as a result of the government's desire that all homosexuals be forced to leave their homeland.

425 The issue is less relevant today, although it remains an issue in some States. In Sri Lanka, penalties for leaving the country illegally can include up to five years' imprisonment and a fine: see 1948 No. 20 *Immigrants and Emigrants Act*, s. 45(b) and *Immigrants and Emigrants (Amendment) Act*, No.31 of 2006. In *SZTFR v Minister for Immigration and Border Protection* [2015] FCA 545, paras. 53–4, 58–9, the Federal Court of Australia upheld a finding that the Sri Lankan law criminalizing illegal departure was a law of general application which was not applied in a discriminatory manner. However, in *Jeyakumar v Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness* 2019 FC 87, the Canadian Federal Court found that the Sri Lankan applicant would 'likely attract the attention of the authorities as soon as he arrives at the airport in Sri Lanka because he left Sri Lanka illegally without an internally-issued valid Sri Lankan passport', and the assumption that he would come to no harm could not be justified on the available evidence (paras. 42–55). In Sweden, the Migration Court of Appeal upheld the grant of refugee status to an Eritrean applicant who had left Eritrea illegally to avoid military service; it took account of the *travaux* to the *Aliens Act* which stated that a person facing severe punishment for illegally leaving the country should be considered a refugee on the grounds of political opinion: *A v The Swedish Migration Agency*, UM7734-16 (21 Jun. 2017); English summary available at www.refworld.org. For other examples of laws, see the first edition of this work. In certain circumstances, illegal exit coupled with a failed asylum application abroad may give rise to imputed political opinion: Hathaway & Foster (n 4) 77–8, 414 n 335; see also 248. With reference to US practice, Anker (n 4) § 5:27 notes that courts 'generally are unwilling' to find that State authorities attribute anti-government political opinions to those violating departure laws, 'especially in the absence of evidence

that the violator would be targeted for prosecution and be punished more severely than others' (citations omitted).

426 Cf. the proposition that 'prosecution only becomes persecution if likely failures in the fair trial process go beyond shortcomings and pose a threat to the very existence of the right to a fair trial': Storey, 'Persecution: Towards a working definition' (n 103) 518. In our view, this calls for a measure of nuance, as he also seems to recognize: ibid., 501–4. See further below, and for practice in the United States, see Anker (n 4) § 4:6: 'Distinguishing persecution from prosecution'.

427 UNHCR, 'Guidance Note on Refugee Claims Relating to Crimes of *Lèse Majesté* and Similar Criminal Offences' (Sep. 2015). See also Human Rights Committee, General Comment No. 34 (n 395) para. 38, expressing concern with regard to lèse majesté laws (cited in the Guidance Note). See also Hathaway & Foster (n 4) 280–1.

428 UNHCR notes that '[t]he existence of lèse majesté or similar criminal offences in the country of origin does not in and of itself establish a risk of harm in the event of return. Consideration needs to be given to the content of such laws, the penalties attached thereto and whether and how such laws are applied and enforced in practice. Depending on the country context, the existence of lèse majesté and similar criminal offences, even if not systematically or regularly applied and enforced, can, nevertheless, create or contribute to an atmosphere of intolerance to political dissent or debate and generate a threat of harm for persons holding political opinions, or perceived to hold political opinions, critical of the State, the ruler or other government officials': 'Guidance Note on Refugee Claims Relating to Crimes of *Lèse Majesté* and Similar Criminal Offences' (n 427) para. 17. See also paras. 27–30, and discussion of discriminatory application in para. 25.

429 Ibid., para. 23, citing UNHCR *Handbook* (n 3) para. 52.

430 See, on art. 18 ICCPR 66 (freedom of thought, conscience and religion), Human Rights Committee, 'General Comment No. 22 (48): (art. 18)' (n 267). The Committee considers that a right of conscientious objection, 'can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs': para. 11.

431 UNHCR *Handbook* (n 3) paras. 167–74; Grahl-Madsen (n 3) 231–8; Hathaway & Foster (n 4) 270–4.

432 Reviewing jurisprudence of the French *Commission des recours* in 1993, Tiberghien concluded that if desertion or conscientious objection were not linked to a Convention reason, refugee status would not be upheld: Tiberghien, F., 'La crise yougoslave devant la Commission des recours', Doc. réf., no. 223 (17/30 août 1993, Supp., CJ, 1–10. What is required is either 'un motif politique ou de conscience qui soit personnel au requérant': cf. CRR, Sections réunies (29 janv. 1993) 217.894, *Sporea*, ibid., 7—member of Romanian minority in Voivodina, opposed to ethnic and cultural hegemony and unwilling to serve for political reasons; appeal against refusal of refugee status upheld. An unwillingness to fight Croats ('fellow compatriots') is not enough, despite the fact that the UN has condemned the conflict: CRR, Sections réunies (29 janv. 1993) 229.937, *Djukic*, ibid., 6. But the possibility of sanctions on family members in another State may support refugee status on the basis of a 'conscientious' objection to service; see CRR, Sections réunies (29 janv. 1993) 229.956, *Dabetic*, ibid., 6: Claimant's family members resided in different States (Croatia and Montenegro); he left Croatia to avoid conscription, and if returned to Yugoslavia, was likely to be conscripted into the *federal* army with resulting sanctions on relations in Zagreb.

433 See the third edition of this work, 105 and references.

434 A careful reading of the supporting material, such as the resolutions adopted by the Human Rights Council and the Commission on Human Rights, suggests that a number of States continue to have reservations with regard to the right itself and the modalities of alternative service; see, for example, Human Rights Council resolutions 24/17 and 20/2, and Commission on Human Rights resolutions 2004/35, 2002/45, 2000/34, 1998/77, 1995/83, 1993/84, 1991/65, 1989/59, and 1987/46.

435 See Human Rights Council, Resolution 24/17, 'Conscientious objection to military service' (24th sess., 27 Sep. 2013) para. 1 ('Recognizes that the right to conscientious objection to military service can be derived from the right to freedom of thought, conscience and religion or belief').

436 Human Rights Council, 'Conscientious objection to military service: Analytical report of the Office of the United Nations High Commissioner for Human Rights': UN doc. A/HRC/35/4 (35th sess., 6–23 Jun. 2017) para. 60.

437 EUCFR, art. 10(2) ('Freedom of thought, conscience and religion').

438 *Sepet and Bulbul v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856, 870–1, para. 20 (referring specifically to Waller LJ's conclusions on the existence of such a right in the Court of Appeal's judgment in that case). See also the finding of the Inter-American Commission on Human Rights in *Cristián Daniel Sahli Vera and Others v Chile*, Case 12.219, Report No. 43/05, OEA/Ser.L/V/II.124 doc. 5 (2005) para. 100.

439 See 'Conscientious objection to military service: Analytical report of the Office of the United Nations High Commissioner for Human Rights': UN doc. A/HRC/35/4 (n 436) para. 9 (noting that '[s]ome States that have not ratified the Covenant do not recognize the universal applicability of the right to conscientious objection to military service'; and Human Rights Council, 'Approaches and challenges with regard to application procedures for obtaining the status of conscientious objector to military service in accordance with human rights standards: Report of the Office of the United Nations High Commissioner for Human Rights': UN doc. A/HRC/41/23 (41st sess., 24 Jun.–12 Jul. 2019) para. 4 (noting that 'those seeking to exercise [the right to conscientious objection to military service] continue to face challenges' and that '[a] number of States still do not recognize such a right, and as a result do not have in place provisions for conscientious objection to military service'). For recent national court decisions recognizing a right to conscientious objection, see discussion in the latter report at paras. 7–8, referring in particular to a 'landmark decision' of the Supreme Court of the Republic of Korea (Supreme Court en banc Decision 2016Do10912 (1 Nov. 2018), finding that conscientious objection constituted 'justifiable grounds' for failing to respond to a conscription call under art. 88(1) of the Military Service Act). For analysis of the Supreme Court's decision, see Kim, J.H., (Justice), 'The Judicial Responsibility to Guarantee Fundamental Rights: Reviewing the Decision of the Supreme Court of Korea on Conscientious Objection to Military Service' (2020) 22 *Asia-Pacific Law & Policy Journal* 1. See also CNDA 18 décembre 2020 M. I. n° 19013796 C *Recueil* 2020 28, rejecting refugee status by a South Korean on the basis of legal developments, including an amnesty and the possibility of civil service.

440 See UNHCR, 'Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees': HCR/GIP/13/10/Corr.1 (12 Nov. 2014). Cf. Goodwin-Gill (n 367) 657–61.

441 *Bayatyan v Armenia*, App. No. 23459/03 (ECtHR, Grand Chamber, 7 Jul. 2011).

[442] See discussion and the case cited ibid., paras. 93–6; 99. The Commission had considered art. 9 ECHR 50 to be qualified by art. 4(3)(b), which provides that 'forced or compulsory labour' does not include 'any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service'. In *Bayatyan*, the Court adopted the HRC's argument in *Yoon and Choi v Republic of Korea* (see further n 455 below), finding that art. 4(3)(b) ECHR 50 'neither recognises nor excludes a right to conscientious objection and should therefore not have a delimiting effect on the rights guaranteed by [art. 9]': ibid., para. 100.

[443] See *Bayatyan* (n 441) paras. 102–7.

[444] Ibid., para. 110.

[445] ECHR 50, art. 9(2). See also Goodwin-Gill (n 367) 659, referring to comments in the third edition of this work.

[446] *Bayatyan* (n 441) para. 122.

[447] Ibid., paras. 123, 128. See also, for a similar approach, *DS (Iran)* (n 108) para. 264.

[448] *Savda v Turkey*, App. No. 42730/05 (ECtHR, 12 Jun. 2012), in which a violation was found with regards to a 'secular' conscientious objector.

[449] Ibid., paras. 94, 96.

[450] *Adyan and Others v Armenia*, App. No. 75604/11 (ECtHR, 12 Oct. 2017).

[451] Ibid., para. 67.

[452] Ibid., paras. 68–9. The Court concluded that 'the alternative labour service was not sufficiently separated hierarchically and institutionally from the military system at the material time.'

[453] Ibid., 70.

[454] ICCPR 66, art. 8(3)(c)(ii).

[455] Human Rights Committee, *Yoon and Choi v Republic of Korea*, UN doc. CCPR/C/88/D/1321-1322/2004 (3 Nov. 2006). In its 1993 General Comment No. 22, the Human Rights Committee took a more cautious approach, noting its belief that a right of conscientious objection 'can be derived from article 18', but stating that '*[w]hen this right is recognized by law or practice*, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service': 'General Comment No. 22 (48) (art. 18)' (n 267) para. 11 (emphasis added). In her dissenting opinion in *Yoon*, Wedgwood noted that 'in the interval of more than a decade since [General Comment No. 22 was adopted], the Committee has never suggested in its jurisprudence under the Optional Protocol that such a "derivation" is in fact required by the Covenant' (citation omitted). For previous communications on this issue, see *Yoon*, para. 8.3, n 3.

[456] *Yoon* (n 455) para. 8.2.

[457] Ibid., para. 8.3.

[458] Ibid., para. 8.4. A similar approach was taken in *Jung and Others v Republic of Korea*, UN doc. CCPR/C/98/D/1593-1603/2007 (23 Mar. 2010) paras. 7.2–7.4.

[459] See, amongst others, Human Rights Committee, *Jeong and Others v Republic of Korea*, UN doc. CCPR/C/101/D/1642-1741/2007 (24 Mar. 2011) para. 7.3; *Atasoy and Sarkut v Turkey*, UN doc. CCPR/C/104/D/1853-1854/2008 (29 Mar. 2012) para. 10.4; *Kim and Others v Republic of Korea*, UN doc. CCPR/C/106/D/1786/2008 (25 Oct. 2012) para. 7.4; *Abdullayev v Turkmenistan*, UN doc. CCPR/C/113/D/2218/2012 (25 Mar. 2015); *Uchetov v Turkmenistan*, UN doc. CCPR/C/117/D/2226/2012 (15 Jul. 2016) para. 7.6; *Durdyyev v*

Turkmenistan, UN doc. CCPR/C/124/D/2268/2013 (17 Oct. 2018) para. 7.3; *Bae and Others v Republic of Korea*, UN doc. CCPR/C/128/D/2846/2016 (13 Mar. 2020) paras. 7.3, 7.5; *Nazarov and Others v Turkmenistan*, UN doc. CCPR/C/126/D/2302/2013 (25 Jul. 2019) para. 7.3. These views are discussed in Human Rights Council, 'Conscientious objection to military service: Analytical report of the United Nations High Commissioner for Human Rights' (35th sess., 2017) paras. 5–8 and Mathew, P., 'Draft dodger/deserter or dissenter? Conscientious Objection as grounds for refugee status', in Juss, S. S. & Harvey, C., eds., *Contemporary Issues in Refugee Law* (2013) 178–81.

460 *Atasoy* (n 459) paras. 12–13 (emphasis added). Art. 18(3) ICCPR 66 states that '[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

461 See Goodwin-Gill (n 367) 660–1 (arguing that the views in *Atasoy* (n 459) need careful consideration given their summary form, inconsistency with prior views, lack of reference to State practice, and lack of consideration of limitations to which the manifestation of religion or belief may be lawfully subject).

462 See, for example, *Jeong* (n 459) Appendix (Individual opinion by Committee members Mr Yuji Iwasawa, Mr Gerald L. Neuman, and Mr Michael O'Flaherty (concurring)); *Atasoy* (n 459) Appendix (I. Individual opinion of Committee member Mr Gerald L. Neuman, jointly with members Mr Yuji Iwasawa, Mr Michael O'Flaherty, and Mr Walter Kälin (concurring)); *Kim* (n 459) Appendix II (Individual opinion of Committee member Mr Michael O'Flaherty (concurring)); Appendix III (Individual opinion of Committee member Mr Walter Kälin (concurring)); Appendix IV (Individual opinion of Committee members Mr Gerald L. Neuman and Mr Yuji Iwasawa (concurring)); *Abdullayev* (n 459) Appendix I (Joint opinion of Committee members Yuji Iwasawa, Anja Seibert-Fohr, Yuval Shany, and Konstantine Vardzelashvili (concurring)); *Uchetov* (n 459) Annex (Joint opinion of Committee members Yuji Iwasawa and Yuval Shany (concurring)). At the time of writing, a minority opinion was appended in all but four of the Committee's views addressing conscientious objection to military service, those being *Durdyyev* (n 459); *Yegendurdyyew v Turkmenistan*, UN doc. CCPR/C/117/D/2227/2012 (14 Jul. 2016); *Bae* (n 459); and *Nazarov* (n 459).

463 *Atasoy* (n 459) Appendix (I. Individual opinion of Committee member Mr Gerald L. Neuman, jointly with members Mr Yuji Iwasawa, Mr Michael O'Flaherty, and Mr Walter Kälin (concurring)) 13. See also *Kim* (n 459) Appendix III (Individual opinion of Committee member Mr Walter Kälin (concurring)) 16–17.

464 *Atasoy* (n 459). See also *Kim* (n 459) Appendix IV (Individual opinion of Committee members Mr Gerald L. Neuman and Mr Yuji Iwasawa (concurring)) 18.

465 See, for example, *Atasoy* (n 459) Appendix (II. Individual opinion of Committee member Sir Nigel Rodley, jointly with members Mr Krister Thelin and Mr Cornelis Flinterman (concurring)), arguing that 'it is precisely in time of armed conflict, when the community interests in question are most likely to be under greatest threat, that the right to conscientious objection is most in need of protection, most likely to be invoked and most likely to fail to be respected in practice': at 15–16; *Atasoy* (n 459) Appendix (III. Individual opinion by Committee member Mr Fabían Omar Salvioli (concurring)); *Kim* (n 459) Appendix V (Individual opinion of Committee member Mr Fabián Salvioli (concurring)).

466 See *Durdyyev* (n 459) para. 7.3 and cases cited therein.

467 *Kim and Others v Republic of Korea*, UN doc. CCPR/C/112/D/2179/2012 (15 Oct. 2014) para. 7.3 (citation omitted).

468 See, for example, *DS (Iran)* (n 108) paras. 253–7, critiquing the majority's view and preferring the views of the minority. The Tribunal's characterization of refusal to serve as 'externalising' one's internal belief 'by associated conduct'—the 'external projection of a freely chosen but otherwise internally confined belief by way of associated activity or symbolism' seems a logical and sensible approach: at paras. 255–6.

469 UNHCR Guidelines on Claims to Refugee Status related to Military Service (n 440), replacing UNHCR's Position on Certain Types of Draft Evasion (1991). Cf. Goodwin-Gill (n 367) 657–61.

470 See Human Rights Council, 'Conscientious objection to military service: Analytical report of the Office of the United Nations High Commissioner for Human Rights': UN doc. A/HRC/35/4 (n 436) para. 60 ('Under international law, the right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion or belief'). In contrast, the Human Rights Council has followed the more equivocal language in the Committee's General Comment No. 22 (see discussion in n 455 above): Human Rights Council, Resolution 24/17, 'Conscientious objection to military service' (24th sess., 27 Sep. 2013) para. 1 ('Recognizes that the right to conscientious objection to military service can be derived from the right to freedom of thought, conscience and religion or belief').

471 Namely, that there was no 'core human right' called conscientious objection to military service which could be shown to be violated; and Lord Hoffmann's argument that freedom of conscience ends where manifestation of conscience begins. See further discussion of *Sepet & Bulbul* (n 438) in the third edition of this work, 112–16. In that edition, we argued that these two approaches sat uneasily with the finding that refugee status can indeed be accorded to one who refuses military service, if such service might require him or her to commit atrocities or gross human rights abuses, or where refusal to serve would earn grossly excessive or disproportionate punishment. As a matter of logic, grossly excessive or disproportionate punishment cannot turn non-Convention persecution into Convention persecution. Even if 'disproportionate punishment' is presumed to be discriminatory, still the question remains, on what Convention ground? The degree of punishment may be evidence of persecution, but the link to the Convention must lie somewhere else; and in our view, that can only be through the political opinion that is reflected in the exercise of freedom of conscience.

472 In which we argued that the Court's approach to causation is insufficient as it did not take adequate account of relevant difference, a point cogently made 60 years ago: 'Since each religion or belief makes different demands on its followers, a mechanical approach of the principle of equality which does not take into account the various demands will often lead to injustice and in some cases even to discrimination': United Nations, 'Study of Discrimination in the Matter of Religious Rights and Practices': UN doc. E/CN.4/Sub.2/300/Rev.1 (1960) 15. In the matter of human rights, matters of conscience (beliefs sincerely held in the exercise of this freedom) are matters of relevant difference, which is why freedom of conscience is a fundamental human right not subject to derogation, even in time of national emergency.

473 The UN and OHCHR Guide 'Conscientious Objection to Military Service' (2012) 20–1 cites UNGA res. 33/165 (20 Dec. 1978) as 'implicitly' recognizing 'one type of selective [conscientious] objection'. The resolution recognizes 'the right of all persons to refuse service in military or police forces which are used to enforce *apartheid*' and urges Member States to 'consider favorably the granting to such persons of all the rights and benefits accorded to refugees'.

474 See UNHCR *Handbook* (n 3) para. 171.

475 Cf. *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1107, 1127 (Hutchison LJ).

476 *Sepet & Bulbul* (n 438) 863, para. 8. In *PK (Ukraine) v Secretary of State for the Home Department* [2019] EWCA Civ 1756, the England and Wales Court of Appeal remitted the case to the Upper Tribunal to determine whether 'a draft evader facing a non-custodial punishment for failing to serve in an army which regularly commits acts contrary to IHL is entitled to refugee status': paras. 31–3. See also *Krotov v Secretary of State for the Home Department* [2004] EWCA Civ 69, [2004] 1 WLR 1825; *Zolfagharkhani v Minister of Employment and Immigration* (n 419); *Ciric v Minister of Employment and Immigration* [1994] 2 FC 65. Cf. *Hinzman v Minister of Citizenship and Immigration*, 2006 FC 420 (US conscientious objector in Canada, and whether in the case of 'mere foot soldier', the lawfulness of the military conflict in question is relevant to the question of refugee status); and *Hinzman v Minister of Citizenship and Immigration*, 2007 FCA 171, (declining to answer 'whether evidence of the illegality of a military action is relevant to an analysis governed by paragraph 171 of the [UNHCR] Handbook', since the applicants had failed to demonstrate that they had sought and were unable to obtain State protection: at paras. 37, 62).

477 Art. 9(2)(e), recast Qualification Directive. This does not exhaust the category of persecution by reason of conscientious objection. It is also considerably narrower than the Commission's original proposal for the 2004 Qualification Directive: see European Commission, 'Proposed draft for the Qualification Directive (2002/C 51 E/17) COM(2001) 510 final--2001/0207(CNS): *Official Journal* of the European Communities C 51 E/325 (26.2.2002. ECRE's recommendation to broaden art. 9(2)(e) in the recast Qualification Directive by including persecution arising from conscientious objection to military service was not taken up: see ECRE 2010 (n 60) 10.

478 Case C-472/13 (CJEU, Second Chamber, 26 Feb. 2015). For analysis see Gärditz, K. F., '*Shepherd v Germany*', in International Decisions, (2015) 109 *AJIL* 623.

479 As summarized by the Court in *Shepherd v Germany* (n 478) para. 17.

480 Ibid.

481 Ibid., para. 30.

482 Ibid., para. 46. See also paras. 36–8.

483 Ibid., para. 46. See also paras. 39–40. On this issue see also earlier discussion by the New Zealand RSAA, stressing that there is, 'no need for the particular conflict to have been the subject of a formal condemnation by resolution of a supranational body, although plainly the existence of such condemnation would be relevant to the inquiry. Rather, what is happening on the ground as to observance of the laws of war by parties to the conflict is key': New Zealand, RSAA, *Refugee Appeal No. 73578* (19 Oct. 2005) para. 87; the Tribunal, recognizing refugee status, held that there was indeed a risk of violation of the laws of war, and that the applicant's position was 'political'. See also *Krotov* (n 477).

484 *Shepherd v Germany* (n 478) para. 41 ('an armed intervention engaged upon on the basis of a resolution adopted by that Security Council offers, in principle, every guarantee that no war crimes will be committed and that the same applies, in principle, to an operation which gives rise to an international consensus … although the possibility can never be excluded that acts contrary to the very principles of the Charter of the United Nations will be committed in war operations, the fact that the armed intervention takes place in such a context must be taken into account.') This presumption is critiqued by Gärditz in light of the Court's prior jurisprudence: (n 478) 629. Moreover, well-documented

concerns regarding the conduct of certain peace-keeping forces are reason also for treating any presumption with caution.

485 *Shepherd v Germany* (n 478) para. 44.

486 Art. 9(2) provides in relevant part that acts of persecution can take the form of 'legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner', or 'prosecution or punishment which is disproportionate or discriminatory'.

487 *Shepherd v Germany* (n 478) para. 52.

488 See also Gärditz (n 478) 627–8 (arguing that 'caution should be taken in transferring elements of the ECJ's interpretation into international refugee law': at 627).

489 See Grief, N., 'British Quakers, the Peace Tax and International Law', in Janis, M. W. & Evans, C., eds., *Religion and International Law* (1999) 339, referring to the campaign for a conscientious objector status for taxpayers.

490 In *Prior v Canada* [1988] FCJ No. 107, a claim by a taxpayer who objected on grounds of conscience to contributing to military expenditure, was struck out, the Court finding no 'offence to conscience', no being 'forced to act in a way contrary to … beliefs'. The Canadian Constitution does not guarantee that the State will not act inimically to a citizen's standards of proper conduct, but merely that a citizen will not be required to do something contrary to those standards, subject to the reasonable limitations recognized by s. 1 of the *Canadian Charter of Rights and Freedoms*.

491 See *R* v. *Big M Drug Mart* [1985] 1 SCR 295; *Edwards Books and Art Limited v The Queen and Others* [1986] 2 SCR 713. In *Jones v The Queen* [1986] 2 SCR 284, the issue of compulsory school attendance was examined, in a context closer to the experience of the conscientious objector. The legislation in question was held to be a reasonable limitation on a parent's religious convictions regarding the education of children. The authorities did not purport to exercise absolute control, and there was no absolute obligation to attend public schools. Instruction could be given elsewhere, including at home, provided it was certified as efficient; the appellant objected, again on religious grounds, to seeking such certification, but the Court found this to be demonstrably justifiable under Canadian law.

492 This point was recognized by the Human Rights Committee in *Kim v Republic of Korea* (n 459) para. 7.3 (citation omitted), discussed above.

493 'Compelling' here being used in the sense of 'impossible to resist': Council of Europe, 'Conscientious Objection to Military Service, Explanatory Report', CE doc. 88.C55 (1988) paras. 15–17.

494 See, for example, *BE (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 540, in which the Court considered it to be 'common ground that, once it is established that the individual concerned has deserted rather than commit a sufficiently grave abuse of human rights, whatever punishment or reprisal consequently faces him will establish a well-founded fear of persecution for reasons of political opinion': at paras. 35, 40. See also *DS (Iran)* (n 108) paras. 281–2; and UNHCR Guidelines on Claims to Refugee Status related to Military Service (n 440) paras. 3, 11. However, the OHCHR considers that 'very few' States currently recognize selective conscientious objection: see 'Report of the Office of the United Nations High Commissioner for Human Rights': UN doc. A/HRC/41/23 (n 439) para. 26, citing OHCHR, 'Conscientious Objection to Military Service' (2012) 58.

495 'Conscientious Objection to Military Service': UN doc. E/CN.4/Sub.2/1983/30/Rev.1 (the Eide/Mubanga-Chipoya Report) 3–4.

496 See UNHCR Guidelines on Claims to Refugee Status related to Military Service (n 440) para. 23 (in relation to an unlawful armed conflict); 'Report of the Office of the United Nations High Commissioner for Human Rights': UN doc. A/HRC/41/23 (n 439) paras. 22 ff., citing Council of Europe, Recommendation CM/Rec(2010)4 of the Committee of Ministers to Member States on Human Rights of Members of the Armed Forces, paras. 40–46 (noting in particular that '[p]rofessional members of the armed forces should be able to leave the armed forces for reasons of conscience': para. 42; Mathew (n 459) 185–6, 195.

497 See also UNHCR Guidelines on Religion-Based Refugee Claims (n 274) paras. 25–6; UNHCR Guidelines on Claims to Refugee Status related to Military Service (n 440) paras. 47–59.

498 This approach was cited with approval by the Canadian Federal Court of Appeal in *Zolfagharkhani* (n 419) para. 36; see also *Erduran v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 150; [2002] FCA 814 (Federal Court of Australia); *SZMFJ v Minister for Immigration and Citizenship (No.2)* [2009] FCA 95, para. 6 (noting that while the Full Court of the Federal Court reversed the decision in *Erduran* based on a Tribunal transcript not available to the lower court, it 'did not disagree with the statements of principle in *Erduran* and those statements have been applied subsequently'). Cf. *Mehenni v Minister for Immigration and Multicultural Affairs* (1999) [1999] FCA 789, 164 ALR 192, in which the Court had no doubt that both full and partial objectors could be a particular social group, but considered that a law of general application applied in a non-discriminatory way would not amount to persecution 'for reasons of' such membership. In our view, analysis along the spectrum of political opinion, which 'necessarily' opposes the individual to the authority of the State, is capable of bridging that gap.

499 Cf. Hill J in *Applicant N 403 v Minister for Immigration and Multicultural Affairs* [2000] FCA 1088 (23 Aug. 2000) para. 23, referring to Australia's draft laws during the Vietnam War, which allowed those with 'real conscientious objections' to serve in non-combatant roles: 'Without that limitation a conscientious objector could have been imprisoned. The suggested reason for their imprisonment would have been their failure to comply with the draft law, a law of universal application. But if the reason they did not wish to comply with the draft was their conscientious objection, one may ask what the real cause of their imprisonment would be. It is not difficult … to argue that in such a case the cause … would be the conscientious belief, which could be a political opinion, not merely the failure to comply with a law of general application. It is, however, essential, that an applicant have a real, not a simulated belief.'

500 The converse is that no State has the right to wage a war of aggression, or to employ unlimited choice of weapons. In *Zolfagharkhani* (n 419) the Court found that, 'The probable use of chemical weapons … is clearly judged by the international community to be contrary to basic rules of human conduct, and consequently the ordinary Iranian conscription law of general application, as applied to a conflict in which Iran intended to use chemical weapons, amounts to persecution for political opinion': para. 34.

501 Cf. *Akar v Attorney General of Sierra Leone* [1970] AC 853, in which the Privy Council declined to accept that a law dealing with citizenship was *by that fact alone* 'reasonably necessary in a democratic society' so as to avoid constitutional limitations, including provisions on discrimination. The European Court of Human Rights interprets the phrase 'necessary in a democratic society' to mean 'justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued'; see *Moustaquim v Belgium* (1991) 13 EHRR 802, para. 43; *Beldjoudi v France* (1992) 14 EHRR 801; *Berrehab v The*

Netherlands (1989) 11 EHRR 322, paras. 25, 29; *Bistieva v Poland*, App. No. 75157/14 (ECtHR, 10 Apr. 2018) para. 77.

502 In the United Kingdom, throughout the Second World War, conscientious objectors were permitted the alternative of civilian service. Exemption from that was also permitted if reasons of religion or conscience demanded, while the criterion for exemption was the honesty or sincerity, rather than the 'validity' of the views held. See Barker, R., *Conscience, Government and War* (1982); Hayes, D., *Challenge of Conscience. The Story of the Conscientious Objectors of 1939–1949* (1949). Some 60,000 conscientious objectors were registered in the United Kingdom during the Second World War, that is, some 1.2 per cent of the total conscripted: Barker, ibid., 115.

503 Although States may of course resolve the situation by simply exempting conscientious objectors from service altogether: see 'Conscientious objection to military service: Analytical report of the Office of the United Nations High Commissioner for Human Rights': UN doc. A/HRC/35/4 (n 436) para. 20.

504 On alternative service, see ECtHR case law and Human Rights Committee views cited above; 'Report of the Office of the United Nations High Commissioner for Human Rights': UN doc. A/HRC/41/23 (n 439) paras. 56–8; Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Conscientious Objection to Military Service*: UN doc. E/CN.4/Sub.2/1983/ 30/Rev.1, paras. 104–15, 150–3.

505 Cf. Human Rights Council res. 24/17, 'Conscientious objection to military service': UN doc. A/HRC/RES/24/17 (27 Sep. 2013) para. 13; 'Conscientious objection to military service: Analytical report of the Office of the United Nations High Commissioner for Human Rights': UN doc. A/HRC/35/4 (n 436) paras. 24–6.

506 See, for example, *Ali Manto v Minister of Immigration, Citizenship and Refugees, Minister of Public Safety and Emergency Preparedness* 2018 FC 335 (25 Mar. 2018) para. 19 and cases cited.

507 See art. 18 UDHR 48; art. 18 ICCPR 66; art. 12 ACHR 69; art. 9 ECHR 50.

508 Para. 7(d) and art. 1F, respectively. See further Ch. 4.

509 O'Connell, D. P., *International Law* (2nd edn., 1970) 720; *Asylum* case [1950] ICJ Rep. 266, at 274; Lauterpacht, H., 'The Law of Nations and the Punishment of War Crimes' (1944) 21 *BYIL* 58; Bassiouni, M. C., *Crimes against Humanity in International Criminal Law* (1992).

510 Goodwin-Gill (n 125) 143 ff., 226–8; Corey, J. M., 'INS v Doherty: The Politics of Extradition, Deportation and Asylum' (1992) 16 *Maryland Journal of International. Law & Trade* 83.

511 See Shearer, I. A., *Extradition in International Law* (1971) 65–6; Epps, V., 'The Validity of the Political Offence Exception in Extradition Treaties in Anglo-American Jurisprudence' (1979) 20 *HarvILJ* 61, 86; Gold, M. E., 'Non-extradition for political offences: the Communist perspective' (1970) 11 *HarvILJ* 191.

512 See the provisions listed in *A Selected Bibliography on Territorial Asylum* (1977): UN doc. ST/GENEVA/LIB.SER.B/Ref.9, 68–74.

513 See, in particular, the Swiss cases: *Pavan*, Ann. Dig., 1927–8, 347 (in which the theory of predominance is advanced); *Ficorilli* (1951) 18 ILR 345; *Kavic* (1952) 19 ILR 371; also, Whiteman, M., *Digest of International Law*, vol. 6, 799 ff.

514 In *Giovanni Gatti*, Ann. Dig. 1947 case no. 70: Kiss, *Répertoire de la pratique française en matière de droit international public* (1966) vol. 2, 213–14, the Court of Appeal of Grenoble took the view that motive alone does not give a common crime the character of a political offence; such offence springs from the nature of the rights of the State which are injured. Cf. *Public Prosecutor v Zind*, (5 Apr. 1961) 40 ILR 214.

515 Kiss (n 514) 210, 212, 216–17; cf. art. 3, 1957 European Convention on Extradition, as amended by its Fourth Protocol CETS No. 212. See also, art. 4(2)(b), 2003 United Kingdom–United States of America Extradition Treaty: *Treaty Series* No. 13 (2007); art. IV(1), Australia–Chile Extradition Treaty [1996] *ATS* 7.

516 See *VerwRspr*, Bd. 20, S. 332 (OVG Münster, 1968). A Belgian was sentenced to 12 years' imprisonment for having served in the *Wehrmacht* during the Second World War. Released on parole, he was subsequently sentenced to serve the remainder of his sentence. He fled to the Federal Republic of Germany where the Court upheld his appeal against expulsion and noted that he would in any event be immune from extradition by reason of the political character of his offence. Cf. *In re Pohle*, 46 BVerfGE, 214, noted (1979) 73 *AJIL* 305, where the Federal Constitutional Court, in an appeal by a convicted member of the Baader-Meinhof group subsequently extradited from Greece, maintained the traditional rule that extradition treaties confer no rights on individuals, save if expressly mentioned. It construed the treaty with Greece as neither conferring rights on political offenders nor as barring a request for surrender of an offender who might be covered by an exception clause. It further held that membership in a 'criminal organization', even if politically motivated, did not constitute a political offence from the perspective of the German legal system.

517 See, for example, debates in the United Kingdom, summarized in 6 *British Digest of International Law*, 661 ff.

518 In the leading cases, *Re Castioni* [1891] 1 QB 149 and *Re Meunier* [1894] 2 QB 415, the Court emphasized that, to qualify for non-extradition, the offences in question must be 'incidental to and … part of political disturbances', involving two or more parties. In *R v Governor of Brixton Prison, ex p. Schtraks* [1964] AC 556, it was suggested that the word 'political', 'indicate[s] … that the requesting State is after [the fugitive] for reasons other than the enforcement of the criminal law in its ordinary, … common or international aspect'. In each case, the fundamental requirement was that of political disturbance and opposition. See also *Cheng v Governor of Pentonville Prison* [1973] 2 All ER 204, at 209; Lord Diplock said that an offence could not be considered political 'unless the only purpose sought to be achieved by the offender … were to change the government of the *state in which it was committed*' (emphasis added); and *T v Secretary of State for the Home Department* (n 26), discussed in Ch. 4, s. 5.3.1.2.

519 Provided that the person is being pursued for these crimes or has been sentenced. See s. 6, *Gesetz über die internationale Rechtshilfe in Strafsachen (IRG)* 1994, as amended in 2017 (provisions of international treaties only take precedence over the law if transposed as directly applicable national law: see s. 1(3)).

520 Code de procédure pénale, art. 696–4. The same wording was found in the now abrogated loi du 10 mars 1927, art. 5(2).

521 *Gardai*, 2.800 (7 fév. 1958), cited in Tiberghien (n 4) 104.468. See also Conseil D'Etat, N° 254882 (9 Nov. 2005), affirming the exclusion of the applicant under art. 1F(b) of the Refugee Convention due to his leadership role in the PKK, given its practice of attacks against civilian populations. In CE 13 novembre 2020 M. V. n° 428582 B *Recueil* 2020 148, the Conseil d'Etat ruled that the CNDA was not bound by the qualifications in the penal

code, and that ‘un délit selon ce code peut être qualifié de « crime grave » au sens des dispositions de l’article L. 712-2 b) du CESEDA’.

522 Cf. *McMullen v INS* 788 F.2d 591, 597 (9th Cir., 1986): ‘There is a meaningful distinction between terrorist acts directed at the military or official agencies of the State, and random acts of violence against ordinary citizens that are intended only “to promote social chaos”.’ *McMullen* was overruled on other grounds by *Barapind v Enomoto*, 400 F.3d 744, 751 n 7 (9th Cir., 2005). The finding in *McMullen* that ‘random acts of violence’ against ‘ordinary citizens’ were insufficiently linked to political objectives was affirmed in *Singh v Holder* 533 Fed. Appx. 712 (11 Jul. 2013). See also, *T v Secretary of State for the Home Department* (n 26) 120–2; *Ordinola v Hackman*, 478 F.3d 588 (4th Cir., 2007).

523 Cf. *Giovanni Gatti* (n 514).

524 *McMullen* (n 522) 597.

525 At 60–1; see now Ch. 4, s. 5.3.1.2.

526 *McMullen* (n 522) was overruled on other grounds by *Barapind* (n 522), as noted above. *Guan v Barr* 925 F.3d 1022, 1031 (9th Cir., 2019) cites *McMullen* for the proposition that a ‘ “serious non-political crime” is a crime that was not committed out of “genuine political motives,” was not directed toward the “modification of the political organization or … structure of the state,” and in which there is no direct, “causal link between the crime committed and its alleged political purpose and object.” ’.

527 See, for example, *Nezirovic v Holt* 779 F.3d 233 (4th Cir., 2015), affirming that the political offence exception did not apply to the alleged actions of a prison guard in beating, degrading, and humiliating unarmed civilian prisoners. The conclusion in *Eain v Wilkes*, 641 F.2d 504, 521 (7th Cir., 1981) that ‘the indiscriminate bombing of a civilian population is not recognized as a protected political act’ was not taken up *Quinn v Robinson*, 783 F.2d 776, 810 (9th Cir., 1986), which found that ‘there is no justification for distinguishing … between attacks on military and civilian targets’. *Quinn*’s findings on this point were in turn disputed by *Ordinola* (n 522) 602–3 (see discussion below).

528 *Ordinola* (n 522).

529 The incidence test asks ‘whether (1) there was a violent political disturbance or uprising in the requesting country at the time of the alleged offense, and if so, (2) whether the alleged offense was incidental to or in the furtherance of the uprising’: ibid., 597, citing *Vo v Benov*, 445 F.3d 1235 (9th Cir., 2006) 1241.

530 *Ordinola* (n 522) 604, disagreeing with the conclusion in *Quinn* (n 527) that ‘there is no justification for distinguishing … between attacks on military and civilian targets’: see *Ordinola*, 602–3.

531 The facts are set out in full in 658 F.2d 1312 (1981).

532 In a 1989 extradition case, the Court ruled that an act properly punishable even in the context of declared war, or in the heat of open military conflict, cannot fall within the political offence exception: *Mahmoud Abed Atta*, 706 F. Supp. 1032 (D. Ct., EDNY, 1989). The case involved an attack in Israel on a bus, in which the driver was killed and a passenger wounded. The Court opted for a qualitative standard, that takes account of ‘our own notions of civilised strife’. It also ruled that, even if one or more of the passengers might have been a non-civilian, this did not make the bus a military vehicle at the time of the attack, so exposing it to indiscriminate attack. Cf. *Gonzalez v Minister of Employment and Immigration* [1994] FCJ No. 765; *McGlinchey v Wren* [1982] IR 154; *Shannon v Fanning*

[1984] IR 569; Connelly, A., ‘Ireland and the Political Offence: Exception to Extradition’ (1985) 12 *Journal of Law and Society* 153.

533 *T v Secretary of State for the Home Department* (n 26) 769.

534 Ibid., 770.

535 Ibid., 762, 773.

536 Ibid., 786–7.

537 The 1977 European Convention on the Suppression of Terrorism (ETS No. 090), for example, provides that the following offences, inter alia, shall not be considered as political offences: offences against internationally protected persons; kidnapping; hostage-taking; the use of explosives or automatic firearms, if such use endangers persons; and attempts to commit any of the above. Other offences may also be excluded if they involve collective danger to the life, physical integrity, or liberty of persons; if those affected are foreign to the motives of those responsible; and if cruel or vicious means are employed. At 30 April 2021, 46 States were party to the 1977 Convention. A 2003 Protocol amending the European Convention on the Suppression of Terrorism (ETS No. 190) adds three new terrorism-related offences; at 30 April 2021, 35 States were party. See also 2005 European Convention on the Prevention of Terrorism: CETS No. 196, which creates three new offences which may be ‘preparatory’ to the terrorist offences defined in existing conventions; see ‘Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism’ (16 May 2005) paras. 32–3 and Convention arts. 5 (public provocation to commit a terrorist offence); 6 (recruitment); and 7 (training): at 30 April 2021, 41 States and the European Union were parties to the 2005 Convention.

538 The recent cases of Julian Assange and Edward Snowden provide some insight into the issues involved; see Kielsgard, M., ‘The Political Offense Exception: Punishing Whistleblowers Abroad’ (14 Nov. 2013): https://www.ejiltalk.org/; https://whistleblowingnetwork.org; https://blueprintforfreespeech.net; and on aspects of the general question, see Khoday, A., ‘Resisting Criminal Organizations: Reconceptualizing the “Political” in International Refugee Law’ (2016) 61 *McGill Law Journal* 461; also, Dauvergne, C., ‘Toward a New Framework for Understanding Political Opinion’ (2016) 37 *Michigan Journal of International Law* 243, 271–7 (citing recent ECtHR cases on whistleblowers and European Parliament Resolution 1729 on the protection of whistleblowers (2010)).

539 Many earlier treaties, however, were intended precisely to ensure the survival of rulers. See examples in the third edition of this work, 123.

540 Cf. Goodwin-Gill, G. S., ‘Crimes in International Law: Obligations Erga Omnes and the Duty to Prosecute’, in Goodwin-Gill, G. S. & Talmon, S., eds., *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999) 199.

541 The political offence to extradition may be on the way out, as developments described above suggest. This may be balanced by the wider acceptance of the principle of protection against discrimination and prejudice in the conduct of criminal proceedings; see, for example, s. 81 of the 2003 UK Extradition Act, which bars surrender in the case of ‘extraneous considerations’, such as prosecution or punishment on account of race, religion, nationality, gender, sexual orientation or political opinions, or if the person concerned might be prejudiced at trial or punished, detained or restricted in their personal liberty by reason of race, religion, nationality, gender, sexual orientation or political opinions. Nevertheless, whether loss of the ‘political offence’ is a good thing is debatable.

542 In *Acosta* (n 33), however, the US Board of Immigration Appeals saw the requirement of international protection as inherent in the refugee concept, because the claimant's country of origin was no longer safe. The criterion of inability or unwillingness to return to a particular 'country' implied further that the claimant 'must do more than show a well-founded fear of persecution in a particular place … within a country; he must show that the threat of persecution exists for him country-wide'.

543 Cf. art. I(2) OAU 69; see generally UNHCR *Handbook* (n 3) para. 91; Hathaway & Foster (n 4) 332–61; Schultz, J., *The Internal Protection Alternative in Refugee Law: Treaty Basis and Scope of Application under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol* (2019); Schultz, J. & Einarsen, T., 'The Right to Refugee Status and the Internal Protection Alternative: What Does the Law Say?', in Burson, B. & Cantor, D. J., *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (2016) 274; Ní Ghráinne, B., 'The Internal Protection Alternative Inquiry and Human Rights Considerations—Irrelevant or Indispensable?' (2015) 27 *IJRL* 29; Mathew, P., 'The Shifting Boundaries and Content of Protection: The Internal Protection Alternative Revisited', in Juss, S. S., ed., *The Ashgate Research Companion to Migration Law, Theory and Policy* (2013) 189; Kelley, N., 'Internal Flight/Relocation/Protection Alternative: Is it Reasonable?' (2002) 14 *IJRL* 4; Marx, R., 'The Criteria of Applying the "Internal Flight Alternative" Test in National Refugee Status Determination Procedures' (2002) 14 *IJRL* 179; Storey, H., 'The Internal Flight Alternative Test: The Jurisprudence Re-examined' (1998) 10 *IJRL* 499; Marx, *Kommentar zum Asylverfahrensgesetz* (n 4); Köfner, G. & Nicolaus, P., *Grundlagen des Asylrechts in der Bundesrepublik Deutschland* (1986) 360–84.

544 For early examples, see the third edition of this work, 123–6. The United States Asylum Regulations provide: 'An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country … if under all the circumstances it would be reasonable to expect the applicant to do so': 8 CFR § 208.13(b)(2)(ii). See further Anker (n 4) §§ 2:13–15.

545 UNHCR uses the term 'internal flight or relocation alternative': see UNHCR, 'Guidelines on International Protection No. 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions': HCR/GIP/16/12 (2 Dec. 2016); UNHCR, 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees': HCR/GIP/03/04 (23 Jul. 2003). Hathaway and Foster prefer 'internal protection': (n 4) 334–5. See also Schultz's discussion of terminology: (n 543) 15–17.

546 For an early decision, see Bundesverfassungsgericht (Federal Constitutional Court) (10 Jul. 1989) *BVerfGE* 2 BvR 502/86, 2 BvR 1000/86, 2 BvR 961/86, noting that an internal flight alternative presupposes that the territory in question offers the asylum seeker reasonable protection against persecution: Case Abstract No. *IJRL/0084* (1991) 3 *IJRL* 343. See also Schultz's discussion of current approaches to the internal protection alternative, characterizing the various tests as Returnability ('Effective protection against persecution'); Reasonableness ('Relevant (safely accessible and safe) and reasonable'); Refugee rights ('Safely accessible and safe, plus affirmative protection inspired by Convention-based conception of refugee rights'); and Proportionality ('Impact of IPA application must be proportionate to the state interest in sustaining its protection capacities'): Schultz (n 543) 81, Table 2 and Ch. 3 generally.

547 According to art. 8 of the recast Qualification Directive, Member States may determine that there is no need for international protection if, in a part of his or her country of origin, the applicant (a) 'has no well-founded fear of being persecuted or is not at real risk of suffering serious harm' or (b) 'has access to protection against persecution or serious harm', *and* the applicant can safely and legally enter that part of the country and can reasonably be expected to stay there. Member States are to have regard to 'the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant', but questions of when a person may 'reasonably be expected' to stay in the particular location are left open. ECRE notes that the amendments to the recast Qualification Directive have the effect of 'further align[ing] this provision with ECtHR jurisprudence', notably *Salah Sheekh* (n 63): ECRE Information Note on Directive 2011/95/EU (n 60) 7. See also recast Qualification Directive, recital (27), which provides inter alia that '[w]here the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant'.

548 [1998] QB 929, [1997] 3 WLR 1162. See also Storey (n 543).

549 109 DLR (4th) 682, 687. In the particular circumstances of the appellant, a Sri Lankan Tamil, the Court found that Colombo did *not* constitute an internal flight alternative, and he was declared to be a Convention refugee: paras. 14–15. See also *Rasaratnam v Minister of Employment and Immigration* [1992] 1 FC 706; Case Abstract No. *IJRL/0099* (1992) 3 *IJRL* 95.

550 *ex parte Robinson* (n 548) 1169–70, 1172–3.

551 See recast Qualification Directive, art. 8(1), discussed in n 547 above; *Salah Sheekh* (n 63) para. 141; Eaton (n 63). Similar and no less difficult assessments can also be required when applying the criteria for complementary protection. In each case, the international law baseline is that no State should send or return an individual to another country in which he or she is at risk of serious harm.

552 8 CFR § 208.13(b)(3)—asylum: reasonableness of internal location. See also 8 CFR §208.16(b)(3)— withholding. The Regulations distinguish between harm caused by State and non-State actors in relation to the burden of proof. Where the applicant has not shown past persecution, then he or she has the burden of establishing that it would be unreasonable to relocate, unless the persecution is by a government or is government-sponsored; in the latter case, it is presumed that internal relocation would be unreasonable, 'unless [the Department of Homeland Security] establishes, by a preponderance of the evidence that, under all the circumstances' relocation would be reasonable. There is a presumption that internal relocation would be reasonable in all cases involving persecution by a private actor, regardless of whether past persecution has been established, 'unless the applicant establishes, by a preponderance of the evidence' that relocation would be unreasonable: 8 CFR § 208.13(b)(3)(i)–(iii). See further Anker (n 4) §§ 2:13–15.

553 [2006] UKHL 5, [2006] 2 AC 426.

554 Ibid., 457, para. 45 (Lord Hope), concurring with Lord Bingham, rejecting the 'Hathaway/New Zealand rule' (446–8, paras. 15 ff). The Court preferred the approach adopted by the Court of Appeal in *E v Secretary of State for the Home Department* [2004] QB 531.

555 *Januzi* (n 553) 440, para. 7 (Lord Bingham).

556 Ibid., 446–7, paras. 15–16.

557 Ibid., 447–8, paras. 17–19.

558 Ibid., 448–50, paras. 20–1; UNHCR Guidelines on Internal Flight or Relocation Alternative (n 545) paras. 7, 28–30.

559 *Januzi* (n 553) 457, para. 47. According to the Canadian Federal Court of Appeal in *Ranganathan v Minister of Citizenship and Immigration* [2001] 2 FC 164, para. 15, this is a 'very high threshold'; cited in *Januzi* (n 553) 444, para. 12 (Lord Bingham). Cf. the jurisprudence on expulsion and art. 3 ECHR 50, for example, *Sufi and Elmi v United Kingdom*, App. Nos. 8319/07 and 11449/07 (ECtHR, 28 Jun. 2011) paras. 282–3, 291–3 (finding, inter alia, 'the situation of general violence in Mogadishu … sufficiently intense to enable [the Court] to conclude that any returnee would be at real risk of Article 3 ill-treatment solely on account of his presence there, unless it could be demonstrated that he was sufficiently well connected to powerful actors in the city to enable him to obtain protection': at para. 293); *Salah Sheekh* (n 63) para. 141 (specifically considering the conditions necessary to avoid a possible breach of art. 3 when proposing an internal flight alternative); *SHH v United Kingdom* (2013) 57 EHRR (finding no violation of art. 3 in the return of a disabled man to Afghanistan who 'failed to adduce any additional substantive evidence to support his claim that disabled persons are per se at greater risk of violence, as opposed to other difficulties such as discrimination and poor humanitarian conditions, than the general Afghan population': at para. 86); *Bensaid v United Kingdom* (2001) 33 EHRR 205 paras. 37–40; *Arcila Henao v The Netherlands*, App. No. 13669/03 (ECtHR, 24 Jun. 2003); *MSS v Belgium and Greece*, App. No. 30696/09 (ECtHR, Grand Chamber, 21 Jan. 2011); *N v The United Kingdom* [2008] ECHR 453; *D v United Kingdom* (1997) 24 EHRR 423. See further discussion on article 3 jurisprudence in Ch. 12, s. 4.2.

560 *Januzi* (n 553) 459–60, para. 54.

561 *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678. The respondents in the case were three of the four appellants in *Januzi* (n 553). Their cases had been referred for reconsideration, the Tribunal upheld the Secretary of State's refusal of asylum, the Court of Appeal allowed their appeals, and the Secretary of State then appealed to the House of Lords: 681–2, para. 1 (Lord Bingham).

562 *AH (Sudan)* (n 561) 686, para. 9. See also 689, para. 22 (Lady Hale).

563 Ibid., 687, para. 13. See also Lord Brown, 693, para. 36.

564 Ibid., 683, para. 5.

565 *Refugee Appeal No. 76044* (11 Sep. 2008) paras. 141–62; 177–8; see Schultz (n 543) 110, n 112. Notwithstanding the search for one true meaning in the interpretation of treaties, individual States necessarily have some room for manoeuvre in applying their international obligations; there is no general rule preventing them from doing more than what they have formally committed to when ratifying the 1951 Convention/1967 Protocol; cf. art. 5, CSR 51.

566 *SZATV v Minister for Immigration and Citizenship and Another* [2007] HCA 40, (2007) 233 CLR 18, finding that '[w]hat is "reasonable", in the sense of "practicable", must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality': at 27, para. 24 (Gummow, Hayne, and Crennan JJ). The Court maintained its position that 'protection' in art. 1A(2) refers to diplomatic or consular protection abroad: at 24–5, para. 16 (per Gummow, Hayne, and Crennan JJ), though Kirby J called for reconsideration of this position: at 37, para. 60. See also *SZFDV v Minister for Immigration and Citizenship* [2007] HCA 41, (2007) 233 CLR 51. In *Minister for Immigration and Border Protection v SZSCA* [2004] HCA 45, (2014) 254 CLR 317, the High Court found that the *Januzi* approach (see n 553) applied, by analogy, to a situation in which an applicant would be safe in a place of previous residence, 'so long as he or she remains there': 326–7, paras. 20–5 (French CJ, Hayne, Kiefel, and Keane JJ)). See also *CRI026 v The Republic of Nauru* [2018] HCA 19,

(2018) 92 *AJLR* 529, 539–40, para. 39 (on appeal from the Supreme Court of Nauru), in which the High Court (Kiefel CJ, Gageler, and Nettle JJ) accepted the application of a 'reasonable internal relocation' test in complementary protection cases and recalled the earlier statement in *SZATV* at 27, para. 24 (cited above).

567 Migration Act 1958, s. 5J(1)(c) (emphasis added). The Explanatory Memorandum noted the Government's 'intention that this statutory implementation of the "internal relocation" principle not encompass a "reasonableness" test which assesses whether it is reasonable for an asylum seeker to relocate to another area of the receiving country': House of Representatives, 'Migration and Maritime Powers Legislation Amendment (Resolving the Legacy Caseload) Bill 2014: Explanatory Memorandum', 10–11, see also 171–2. The Explanatory Memorandum states that decision-makers should, in determining whether a person can relocate, 'take into account whether the person can safely and legally access the area upon returning to the receiving country', but no such language is included in the amendment itself: at 10; discussed in Schultz (n 543) 89–90.

568 See further Foster, M. & McAdam, J., 'Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Submission 167' (31 Oct. 2014) 15–16.

569 *FCS17 v Minister for Home Affairs* [2020] FCAFC 68, para. 80 (White and Colvin JJ). See also Allsop CJ, 'generally agree[ing]' with the reasons of White and Colvin JJ (at para. 1) while using the language 'inhabited or habitable, and safe areas to which the person can lawfully go': para. 21. Chief Justice Allsop considers that this construction derives from 'the notion of safety immanent within the core obligation of protection in the Refugees Convention as an humanitarian instrument concerned with the protection of the persecuted in a society': para. 20. See further discussion in Migration and Refugee Division Legal Services, Administrative Appeals Tribunal (n 118) Ch. 3 (updated Nov. 2020) 27.

570 See *FCS17* (n 569) para. 82 (White and Colvin JJ), referring to the ' "viable or realistic alternative" relocation requirement approved in *Januzi* and *CRI026*'.

571 For alternative approaches and a variety of emphases, see Hathaway & Foster (n 4) 332–61; Mathew (n 543) 196–204; Ní Ghráinne (n 543) 48, 50; Schultz (n 543) 104–6; Schultz & Einarsen (n 543) 288–98, 315–16.

572 See, generally, UNHCR *Handbook* (n 3) paras. 164–6; UNHCR Guidelines on Claims for Refugee Status related to Situations of Armed Conflict and Violence (n 545); also Hathaway & Foster (n 4) 177–81; Zimmermann & Mahler (n 101) 370–2; Holzer, V., 'The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence', in Türk, V., Edwards, A., & Wouters, C., eds., In Flight from Conflict and Violence: UNHCR's Consultations on Refugee Status and Other Forms of International Protection (2017); Cantor, D. J. & Durieux, J.-F., eds., *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (2014); Wouters, C., 'Conflict Refugees', in Costello, Foster, & McAdam (n 12); Lülf, C., *Conflict displacement and legal protection: understanding asylum, human rights and refugee law* (2019); Kälin, W., 'Flight in times of war' (2001) 83 *International Review of the Red Cross* 629; Bodart, S., 'Les réfugiés apolitiques: guerre civile et persécution de groupe au regard de la Convention de Genève' (1995) 7 *IJRL* 39; von Sternberg, M. R., *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law* (2002); von Sternberg, M. R., 'Political Asylum and the Law of Internal Armed Conflict: Refugee Status, Human Rights and Humanitarian Law Concerns,' (1993) 5 *IJRL* 153; Kälin, W., 'Refugees and Civil Wars: Only a Matter of Interpretation?' (1991) 3 *IJRL* 435. In the context of subsidiary protection, see Garlick, M., 'Protection in the European Union for People Fleeing Indiscriminate Violence in Armed Conflict: Article 15(c) of the EU Qualification Directive', in Türk, V., Edwards, A., &

Wouters, C., eds., *In Flight from Conflict and Violence: UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (2017).

573 For early references, see CRR (21 fev. 1984) *Waked*, 21.951, *doc. réf.*, no. 7, 15/24 juillet 1987, Supp., CJ., 2—'les faits ainsi allégués sont des conséquences de la guerre civile qui déchire le Liban depuis de longue années et ne constituent pas des persécutions émanant directement des autorités publiques ou exercées par des particuliers avec l'encouragement ou la tolérance volontaires de ces autorités' CRR (15 sept. 1986) *Chahine*, 33.958, *doc. réf.*, no. 7 (15/24 juillet 1987) Supp., CJ., 4—'la requérante décrit une situation générale d'insécurité et ne fait état d'aucun mauvais traitement dont elle aurait été victime personnellement'.

574 *Salibian v Minister for Employment and Immigration* (n 47) 258; also, Conseil d'Etat (26 mai 1993) No. 43.082 (3ème ch.) *Muric c/ Etat belge*; see (1993) 74 *RDDE* 336; Hathaway & Foster (n 4) 179–80; Shoyele, O., 'Armed Conflicts and Canadian Refugee Law and Policy' (2004) 16 *IJRL* 547.

575 UNHCR Guidelines on Claims for Refugee Status related to Situations of Armed Conflict and Violence (n 545) para. 17 (citations omitted, emphasis added). For UNHCR's definition of 'situations of armed conflict and violence', see para. 5.

576 Ibid., para. 12. See also para. 22.

577 Ibid., paras. 32–9 (on the causal link, noting inter alia that while intent may be a relevant factor, '[a] causal link may also be established by the strategies, tactics or means and methods of warfare of the persecutor, by the inability or unwillingness of the state to provide protection, or by the effect(s) of the situation of armed conflict and violence'). Care is required in assessing the causal link in such circumstances. 'Rarely are modern-day situations of armed conflict and violence characterised by violence that is not in one way or another aimed at particular populations, or which does not have a disproportionate effect on a particular population, establishing a causal link with one or more of the Convention grounds' (para. 33). See also *Isa v Canada (Secretary of State)* [1995] FCJ No. 254 (FC-TD); *Rizkallah v Minister of Employment and Immigration* [1992] FCJ No. 412 (FCA); *Zalzali* (n 122); *Ward* (n 122).

578 See for example, CRR (4 sept. 1991) *Freemans*; CRR (30 sept. 1991) *Togbah*, discussed in Tiberghien, F., 'Les situations de guerre civile et la reconnaissance de la qualité de réfugié', *doc. réf.*, no. 181 (21/30 avr. 1992) Supp., CJ, 4. See also *Ahmed v Austria* (1996) 24 EHRR 278, finding that because of the civil war and disintegration of State authority in Somalia, 'there was no indication that … any public authority would be able to protect' the claimant: para. 44.

579 CRR, Sections réunies (26 nov. 1993) *Ahmed Abdullah*, 229.619, *doc. réf.*, no. 237 (1er/14 mars 1994) Supp., CJ, 1. See also Hailbronner, K., 'Rechtsfragen der Aufnahme von "Gewaltflüchtlingen" in Westeuropa—am Beispiel Jugoslawien' (1993) *Asyl* 517, 527–9, citing decisions of the Federal Constitutional Court, and arguing that protection against violations of human rights in open civil war does not come within the scheme of protection of the 1951 Convention, unless a government responsible for the implementation of international obligations can still be identified.

580 [1999] 1 AC 293.

581 Ibid., 311.

582 Ibid., 312.

583 Lord Lloyd twice used the same word earlier in his judgment, first as a description in the passive voice: 'the local clans are engaged in civil war': ibid., 303; and secondly, in an adjectival phrase: 'fighting between clans engaged in civil war is not what the framers of the Convention had in mind by the word persecution': ibid., 308.

584 Presumably if the conflict had become genocidal, refugee status would also have been denied; which cannot be right. Compare the decision of the US Board of Immigration Appeals in *H-*, 21 I&N Dec. 337 (BIA, 1996), holding, first, that membership in a clan can constitute membership in a 'particular social group', and that the Marehan subclan of Somalia, the members of which share ties of kinship and linguistic commonalities, is such a group; and secondly, that while inter-clan violence may arise during the course of civil strife, such circumstances do not preclude the possibility that harm inflicted during the course of such strife may constitute persecution.

585 See Kagan, M. & Johnson, W. P., 'Persecution in the Fog of War: The House of Lords' Decision in *Adan*' (2002) 23 *Michigan Journal of International Law* 247—the authors' proposal for the alternative terminology of 'differential victimization' would seem to add little or anything to a common-sense assessment of the risk of harm. See also Shah, P., 'Rewriting the Refugee Convention: The *Adan* Case in the House of Lords' (1998) 12 *Immigration & Nationality Law & Practice* 100.

586 UNHCR Guidelines on Claims for Refugee Status related to Situations of Armed Conflict (n 545) para. 22 (noting that an applicant fleeing such situations 'is not required to establish a risk of harm over and above that of others similarly situated (sometimes called a "differential test")' (citations omitted)). See also, in the context of the European Court of Human Rights' jurisprudence on art. 3, *Salah Sheekh* (n 63) para. 148 (noting that 'the applicant cannot be required to establish the existence of further special distinguishing features concerning him personally [beyond the fact of his belonging to the Ashraf] in order to show that he was, and continues to be, personally at risk').

587 A point made succinctly by the Court in the Australian case, *Minister for Immigration and Multicultural Affairs v Abdi* [1999] FCA 299 (Full Court, 26 Mar. 1999) para. 37, adding at para. 39: 'It is difficult … to see the basis on which a superadded requirement of "greater risk", "differential risk" or "risk over and above that arising from clan warfare" can be derived as a criterion for application of the Convention definition where the war is based on race or religion rather than for example a quest for property, power or resources. … Given the purpose of the Convention and the well-settled principle that a broad, liberal and purposive interpretation must be given to the language, it is difficult to see the reason why a "second tier" of "differential" or superadded persecution should be imposed on an applicant for refugee status.' But see also *Ibrahim* (n 118), in which Gummow J stated that '[t]he notions of "civil war", "differential operation" and "object" or "motivation" of that "civil war" are distractions from applying the text of the Convention definition. In so far as *Adan* and the decision of the Full Court in *Abdi* and the present case expound or apply them, those decisions should not be followed' (51, para. 147); see also, Gleeson CJ: '[d]epending upon the factual issues raised for examination, it may be helpful to consider whether conduct of a certain kind is "systematic", or whether treatment of a certain kind is discriminatory, or "differential". In the end, however, it is the language of the Convention which has to be applied.' (4, para. 5); see also Hayne J (73, paras. 205–7).

588 Storey, H., 'Armed Conflict in Asylum Law: The "War Flaw" ' (2012) 31(2) *RSQ* 1, 15 (emphasis on '*starting point*' in original). See also Durieux, J.-F., 'Of War, Flows, Laws and Flaws: A Reply to Hugo Storey' (2012) 31(3) *RSQ* 161; Juss, S. S., 'Problematizing the Protection of "War Refugees": A Rejoinder to Hugo Storey and Jean-François

Durieux' (2013) 32(1) *RSQ* 122; and Storey, H., 'The War Flaw and Why it Matters', in Cantor & Durieux (n 572) 40, 45.

589 Zimmermann & Mahler (n 101) 371.

590 Durieux (n 588) 163.

591 Ibid., 164. See also Hathaway & Foster (n 4) 209, n 148. See further Fripp, E., 'International Humanitarian Law and the Interpretation of 'Persecution' in Article 1A(2) CSR51' (2014) 26 *IJRL* 382, 400–1, 403; Durieux, J.-F. & Cantor, D. J., 'Refuge from Inhumanity? Canvassing the Issues', in Cantor & Durieux (n 572) 3. On subsidiary protection, see also Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* (CJEU, Fourth Chamber, 30 Jan. 2014) para. 35—in the context of subsidiary protection and the meaning of 'internal armed conflict' in art. 15(c) of the original Qualification Directive, there is no requirement that a conflict 'be categorised as "armed conflict not of an international character" under international humanitarian law'); Garlick (n 572) 259–60; Bauloz, C., 'The (Mis)Use of International Humanitarian Law under Article 15(c) of the EU Qualification Directive', in Cantor, D. J. & Durieux, J.-F., eds., *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (2014) 247; Storey 2014 (n 588) 49–55; and Ch. 7, s. 6.

592 See Crawford, J. & Hyndman, P., 'Three Heresies in the Application of the Refugee Convention' (1989) 1 *IJRL* 152; Zimmermann & Mahler (n 101) 369–70; Hathaway & Foster (n 4) 174–81.

593 Grahl-Madsen (n 3) 213. In *R v Secretary of State for the Home Department, ex p. Jeyakumaran*, No. CO/290/84, QBD, unreported (28 Jun. 1985), Taylor J referred to the singling out requirement as a 'startling proposition. It can be little comfort to a Tamil family to know that they are being persecuted simply as Tamils rather than as individuals. How can this dismal distinction bear upon whether the applicant has a well-founded fear of persecution?' The Court held that 'the evidence clearly shows the reason for oppression to have been simply membership of the Tamil minority'.

594 Economic reasons or motivation alone will not entitle a person to refugee status; but a government's 'economic measures' may well be the cloak for action calculated to destroy the economic livelihood of specific groups; in such cases, a fear of persecution can be well founded. Cf. Palley, C., *Constitutional Law and Minorities* (Minority Rights Group, Report No. 36, 1978) on the subject of laws and administrative action designed to remedy economic imbalances, at 10: 'If the emphasis is on remedying disadvantage and lack of opportunity (such as special educational programmes, special technical assistance programmes, special loan programmes in setting up co-operatives) or is protective (protection of native land against sale to capitalist entrepreneurs) it can be more readily tolerated by non-recipients. If it becomes an instrument of economic attack on other communities by denial of the right to engage in their traditional occupations, then it is proper to describe the technique as one of domination.'

595 See 8 CFR § 208.13(b)(2)(iii)(A)–(B)—asylum (emphasis added); see also § 208.16(b)(2)(i)–(ii)—withholding.

596 See also Ch. 7, s. 5 (on best interests of the child); Ch. 9, s. 3.2 (on child refugees); Ch. 12, s. 4.2.1 (on children's claims for protection from inhuman or degrading treatment).

597 Executive Committee Conclusion No. 107 (2007) para. (g) recommends collaboration between States, UNHCR and other agencies to, inter alia, '[d]evelop child and gender-sensitive national asylum procedures, where feasible, and UNHCR status determination procedures with adapted procedures including … prioritized processing of unaccompanied and separated child asylum-seekers' and 'qualified free legal or other representation for unaccompanied and separated children'. Cf. art. 22(1), 1989 Convention on the Rights of the Child (CRC 89): 'States Parties shall take appropriate measures to ensure that a child

who is seeking refugee status … shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.' See generally, UNHCR, 'Children on the Move: Background Paper', High Commissioner's Dialogue on Protection Challenges (28 Nov. 2016); Lelliott, J., 'Smuggled and Trafficked Unaccompanied Minors: Towards a Coherent, Protection-Based Approach in International Law' (2017) 29 *IJRL* 238; Wilding, J., 'Unaccompanied Children Seeking Asylum in the UK: From Centres of Concentration to a Better Holding Environment' (2017) 29 *IJRL* 270; Touzenis, K., *Unaccompanied Minors: Rights and Protection* (2006); Bhabha, J., *Child Migration and Human Rights in a Global Age* (2014) Ch. 6; Bhabha, J. & Young, W., 'Not Adults in Miniature: Unaccompanied Child Asylum Seekers and The New U.S. Guidelines' (1999) 11 *IJRL* 84; Russell, S., 'Unaccompanied Refugee Children in the United Kingdom' (1999) 11 *IJRL* 126. See also, Smyth, C., *European Asylum Law and the Rights of the Child* (2014).

598 Provided, for example, that the dependant is not excludable, or a citizen having the protection of another country. Note, however, that a change in the relationship can amount to a change of circumstances leading to cessation of refugee status under art. 1F(c); see CE 29 novembre 2019 M. K. n° 421523 B *Recueil* 2019 164.

599 UNHCR *Handbook* (n 3) paras. 181–8, 184.

600 Ibid. The *Handbook* nevertheless leaves open the possibility of individual entitlement: 'the principle of family unity operates in favour of dependants, and *not against them*': ibid., para. 185 (emphasis added). See further Pobjoy, J., *The Child in International Refugee Law* (2017) 53–4. See also Executive Committee Conclusion No. 107 (2007) para. (h), recommending 'a flexible approach to family unity, including through consideration of concurrent processing of family members in different locations, as well as to the definition of family members in recognition of the preference to protect children within a family environment with both parents'.

601 UNHCR Guidelines on Child Asylum Claims (n 285) paras. 6–9. See further Pobjoy (n 600) 62–9.

602 UNHCR *Handbook* (n 3) para. 214. Cf. para. 215: 'It can be assumed that—in the absence of indications to the contrary—a person of 16 or over may be regarded as sufficiently mature to have a well-founded fear of persecution. Minors under 16 years of age may normally be assumed not to be sufficiently mature.'

603 For critique in the third edition of this work, see 130–1.

604 See n 285.

605 Ibid., para. 5. See also paras. 3–4.

606 Ibid., para. 11, citing UNHCR *Handbook* (n 3) paras. 40–43. Although the Guidelines cite paras. 217–19 of the *Handbook* in n 26, it is in the context of a decision-maker's obligation to make an objective assessment of a child's risk in cases where the child 'is unable to express fear when this would be expected or, conversely, exaggerates the fear': at para. 11. The Guidelines do note that a child's age and 'by implication, level of maturity, psychological development, and ability to articulate certain views or opinions will be an important factor in a decision maker's assessment' (para. 8), but the concept of 'mental development and maturity' is not specifically adverted to. See also Pobjoy (n 600) 83, n 23, supporting our critique of the *Handbook*'s 'maturity' analysis in the previous edition and

noting that '[t]he invocation of 16 years as a developmental sign-post has not been restated in any of the key material on refugee children subsequently published by UNHCR'.

607 UNHCR Guidelines on Child Asylum Claims (n 285) para. 65 (citation omitted). The Guidelines also note that '[a]longside age, factors such as rights specific to children, a child's stage of development, knowledge and/or memory of conditions in the country of origin, and vulnerability, also need to be considered to ensure an appropriate application of the eligibility criteria for refugee status': para. 4 (citations omitted). See further Pobjoy (n 600) 25–6.

608 See, for example, Hathaway & Foster (n 4) 103–4; and Pobjoy (n 600) 84–9. See further s. 5.1.

609 UNHCR *Handbook* (n 3) paras. 217–18. The UK Immigration Rules, para. 351, provide that 'account should be taken of the applicant's maturity and in assessing the claim of a child more weight should be given to objective indications of risk than to the child's state of mind and understanding of their situation. An asylum application made on behalf of a child should not be refused solely because the child is too young to understand their situation or to have formed a well founded fear of persecution. Close attention should be given to the welfare of the child at all times.' See also Hathaway & Foster (n 4) 103–4; Pobjoy (n 600) 84–9; UNHCR Guidelines on Child Asylum Claims (n 285) para. 11; UNHCR, 'Guidance Note on Refugee Claims relating to Female Genital Mutilation' (n 327) para. 10.

610 See discussion in Hathaway & Foster (n 4) 103–4; Pobjoy (n 600) 86–7.

611 UNHCR Guidelines on Child Asylum Claims (n 285) para. 10 (citations omitted).

612 CRC 89, art. 3(1); Goodwin-Gill, G. S., 'Unaccompanied refugee minors: The role and place of international law in the pursuit of durable solutions', (1995) 3 *International Journal of Children's Rights* 405; see also Pobjoy, J., 'Refugee Children', in Costello, Foster, & McAdam (n 12) 753–6. The New York Declaration for Refugees and Migrants, UNGA res. 71/1 (19 Sep. 2016), para. 32, provides that '[w]e will protect the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status, and giving primary consideration at all times to the best interests of the child.' See further the Global Compact on Refugees, paras. 13, 76; and further Ch. 7, s. 5.

613 See also Pobjoy's analysis of the CRC 89 as a 'procedural guarantee', arguing that '[i]n promoting a construction of the child as an independent social actor, the *CRC* provides a solid legal basis for developing a participatory framework to ensure that children are not rendered invisible in domestic asylum processes': Pobjoy (n 600) 28.

614 In the New York Declaration (n 612), States commit to referring unaccompanied children and those separated from their families 'to the relevant national child protection authorities and other relevant authorities': para. 32. See also Global Compact on Refugees, para. 60, citing UNGA res. 64/142 (18 Dec. 2009), to which is annexed the Guidelines for the Alternative Care of Children.

615 UK Immigration Rules, paras. 350–2. See also para. 352ZA, and paras. 352ZC–E, which provide that 'limited leave to remain' for 30 months or until the child is 17 ½ years old (whichever is shorter) should be granted to an unaccompanied child whose asylum application has been rejected, where there are 'no adequate reception arrangements in the country to which they would be returned', provided that certain other circumstances are met.

616 See Committee on the Rights of the Child, 'General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children outside their Country of Origin': UN doc. CRC/GC/2005/6 (adopted at 39th sess., 17 May–3 Jun. 2005) para. 84: 'Return to the country of origin shall in principle only be arranged if such return is in the best interests of the child', and related discussion in Pobjoy (n 600) 200–01. Some two-thirds of the 'best interests'

decisions by the Special Committees established under the CPA were for reunion with family members still in Vietnam; see UNHCR, 'Programming for the Benefit of Refugee Children', EC/1993/SC.2/CRP.15 (25 Aug. 1993) para. 15; cf. O'Donnell, D., 'Resettlement or Repatriation: Screened-out Vietnamese Child Asylum Seekers and the Convention on the Rights of the Child' (1994) 6 *IJRL* 382.

617 See further Ch. 8, s. 8. In a recent joint comment, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child noted that '[e]very child, at all times, has a fundamental right to liberty and freedom from immigration detention': 'Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the context of International Migration in Countries of Origin, Transit, Destination and Return': UN doc. CMW/C/GC/4-CRC/C/GC/23 (16 Nov. 2017) para. 5 (citations omitted).

618 For details of 'ethnic cleansing' and other events in former Yugoslavia, see the reports by Tadeusz Mazowiecki, Special Rapporteur of the UN Commission on Human Rights: UN docs. E/CN.4/1992/S-1/9 (28 Aug. 1992); E/CN.4/1992/S-1/10 (27 Oct. 1992). The following historical examples provide illustrations of persecution: the treatment accorded to those returned to the USSR after the Second World War: Bethell, N., *The Last Secret* (1974); Tolstoy, N., *Victims of Yalta* (rev. edn., 1979); relocation of national minorities in the USSR: *The Crimean Tatars, Volga Germans and Meskhetians* (Minority Rights Group, Report No. 6, rev. edn., 1980); mob and institutionalized attacks on members of the Baha'I faith in Iran: *The Baha'is in Iran* (Baha'i International Community, June 1981 and updates); measures taken against ethnic minorities: McCarthy, J., *Death and Exile: The Ethnic Cleansing of Ottoman Muslims, 1821–1922* (1995); *Selective Genocide in Burundi* (Minority Rights Group, Report No. 20, 1974); *What future for the Amerindians of South America?* (Minority Rights Group, Report No. 15, rev. edn., 1977); institutional and individual measures of repression against religious groups: *Religious Minorities in the Soviet Union* (Minority Rights Group, Report No. 1, rev. edn., 1977); *Jehovah's Witnesses in Central Africa* (Minority Rights Group, Report No. 29, 1976); economic measures affecting Asians in East and Central Africa: *The Asian Minorities of East and Central Africa* (Minority Rights Group, Report No. 4, 1971); *Problems of a Displaced Minority: The new position of East Africa's Asians* (Minority Rights Group, Report No. 16, rev. edn., 1978); the complex of measures aimed or calculated to deny self-determination: *The Kurds* (Minority Rights Group, Report No. 23, rev. edn., 1981); *The Namibians of South West Africa* (Minority Rights Group, Report No. 19, rev. edn., 1978); *The Palestinians* (Minority Rights Group, Report No. 24, rev. edn., 1979).

619 Adopted by UNGA res. 3068(XXVIII) (30 Nov. 1973); at 30 April 2021, 109 States were parties to the Convention. Text in Brownlie & Goodwin-Gill (n 112) 412. The crime of apartheid is also included as a crime against humanity under art. 7 of the Rome Statute of the International Criminal Court (n 101).

620 See UNHCR, 'Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status': HCR/GIP/15/11 (24 Jun. 2015), and generally, Batchelor, C. & Edwards, A., 'Introductory Note to UNHCR's Guidelines on International Protection on Prima Facie Recognition of Refugee Status' (2016) 28 *IJRL* 318; Durieux, J.-F., 'The Many Faces of "Prima Facie" ' (2008) 25(2) *Refuge* 151; Durieux, J.-F. & Hurwitz, A., 'How Many is Too Many? African and European Legal Responses to Mass Influxes of Refugees' (2005) 47 *German Yearbook of International Law* 105, 120; Albert, M., 'Governance and *Prima Facie* Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx' (2010) 29(1) *RSQ* 61; Albert, M., 'Prima facie determination of refugee status: An overview and its legal foundation' (Refugee Studies

Centre, Working Paper Series No. 55, 2010); Hyndman, J. & Nylund, B. V., 'UNHCR and the Status of Prima Facie Refugees in Kenya' (1998) 10 *IJRL* 21. See further Ch. 5, s. 7.

621 UNHCR Guidelines on Prima Facie Recognition of Refugee Status (n 620) para. 3. Prima facie approaches may only be applied to recognize refugee status, not to reject claims: para. 6.

622 Ibid., para. 7. The Guidelines note that '[r]efugee status may be recognized on a prima facie basis pursuant to any of the applicable refugee definitions'. Accordingly, the CSR 51, regional refugee instruments, and UNHCR's Statute and mandate can all be the basis for prima facie recognition: see para. 5.

623 Ibid., para. 10, giving the examples of 'ethnicity, place of former habitual residence, religion, gender, political background or age, or a combination thereof, which exposes them to risk'. See also paras. 12–17.

624 UNHCR's Guidelines note the relevance of country information in identifying 'readily apparent circumstances', as well as UNHCR's 'long established practice of recommending to governments the application of a prima facie approach to given situation': ibid., para. 17. On potential steps where information is uncertain, see ibid., paras. 17, 26–7.

625 See *Amare v Secretary of State for the Home Department* [2005] EWCA Civ 1600, paras. 28–31; also, Lord Justice Laws, 'Asylum—a Branch of Human Rights Law?' Paper presented at the Asylum and Immigration Tribunal Conference (June 2006); *Januzi* (n 553) paras. 4–6 (Lord Bingham).

626 Both the protection due to certain rights and the circumstances of permitted derogation are of course subject to development in international law. See, for example, the 1994 OAS Inter-American Convention on the Forced Disappearance of Persons: (1994) 22 *ILM* 1529; the preamble characterizes the act as a crime against humanity; art. II links the concept to 'agents of the State or … persons or groups of persons acting with the authorization, support, or acquiescence of the State', and art. X provides that exceptional circumstances do not justify forced disappearance, and that effective judicial procedures must be retained. Also, Inter-American Court of Human Rights, Advisory Opinion, *Habeas Corpus in Emergency Situations* (30 Jan. 1987) AO OC-8/87: (1988) 27 *ILM* 512, noting that 'essential judicial remedies' should remain in force: paras. 27–30.

627 For general discussion of socio-economic rights, see Foster (n 106).