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RESEARCH SERIES**

**The 1951 Refugee Convention and the Protection  
of People Fleeing Armed Conflict and Other  
Situations of Violence**

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# I INTRODUCTION

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Armed conflicts and other situations of violence have long been major reasons for forced displacement across borders. Conflicts are often fought for ethnic, political or religious reasons<sup>1</sup> and they have shaped the development of international refugee law in the early and mid-twentieth century. Many recent conflicts have seen mass exoduses triggered by widespread violence and by a variety of political, psychological and economic measures aimed at intimidating certain groups. Often, violence is deliberately directed against civilians<sup>2</sup> and more specifically, sexual violence has frequently been employed as a weapon of warfare.<sup>3</sup> There is nothing in the wording of the refugee definition, contained in Article 1A(2) of the 1951 Convention relating to the Status of Refugees ('1951 refugee definition'),<sup>4</sup> or in the remainder of the Convention itself, that would hinder its application to situations of conflict and violence.<sup>5</sup>

Nonetheless, armed conflicts and other situations of violence pose a challenge for the interpretation and application of the 1951 Convention, a central instrument for refugee protection, and its 1967 Protocol.<sup>6</sup> This paper explores the meaning and scope of the 1951 refugee definition in regards to refugee protection claims of individuals who have fled armed conflict and other situations of violence and identifies conflicting trends in international refugee law and practice concerning such claims. On the one hand, it has been generally accepted by a number of States,<sup>7</sup> the Office of the United Nations High Commissioner for Refugees (UNHCR)<sup>8</sup>, and

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<sup>1</sup> See M. Kaldor, *New & Old Wars* (Cambridge: Polity Press, 2nd edn., 2006), 7. For a comprehensive analysis that scrutinizes Kaldor's and other arguments, see T. Farrell and O. Schmitt, 'The Causes, Character and Conduct of Armed Conflict, and the Effects of on Civilian Populations, 1990-2010', *Legal and Protection Policy Research Series*, 2012, available online at: <http://www.unhcr.org/4f8d606d9.html> (last accessed 22 April 2012).

<sup>2</sup> See UN Secretary General, 'Report of the Secretary General to the Security Council on the Protection of Civilians in Armed Conflict', 8 September 1999, UN Doc. S/1999/957, para. 12.

<sup>3</sup> See UNHCR ExCom, 'Conclusion No. 73 (XLIV), 1993, UN Doc. A/47/12/Add.1, available online at: <http://www.unhcr.org/41b041534.html> (last accessed 3 December 2011), first preambular recital; see also e.g. Human Rights Watch, 'Democratic Republic of Congo: Civilians Attacked in Northern Kivu', 2005, available online at: <http://www.hrw.org/en/reports/2005/07/12/democratic-republic-congo-civilians-attacked-north-kivu-0> (last accessed 31 January 2011), 21-24.

<sup>4</sup> Article 1A(2) of the 1951 Convention defines a refugee as a person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

<sup>5</sup> See UNHCR, 'Information Note on Article 1 of the 1951 Convention', 1995, available online at: <http://www.unhcr.org/refworld/topic/4565c2251d,4565c25f245,3ae6b32c8,0.html> (last accessed 23 August 2011).

<sup>6</sup> Convention relating to the Status of Refugees (entered into force 22 April 1954) 189 UNTS 137. Throughout this paper, references to the 1951 Convention relate to this Convention as modified by its Protocol relating to the Status of Refugees (entered into force 4 October 1967) 606 UNTS 267 (Protocol) or to only the Protocol with respect to States who ratified the Protocol but not the 1951 Convention.

<sup>7</sup> See e.g. Immigration and Refugee Board of Canada, 'Civilian Non-Combatants Fearing Persecution in Civil War Situations. Guidelines Issued by the Chairperson Pursuant to Section s65(3) of the Immigration Act', 1996, available online at: <http://www.irb.gc.ca/eng/brdcom/references/pol/guidir/Pages/civil.aspx> (last accessed 23 May 2011); UK Border Agency, 'Considering the Protection (Asylum) Claim and Assessing Credibility', 2011, available online at: <http://www.ukba.homeoffice.gov.uk> (last accessed 13 November 2011), 25; *Minister for Immigration and*

scholars<sup>9</sup>, that people fleeing armed conflict and other situations of violence may qualify as 1951 Convention refugees, though the mere fact of having fled from conflict and violence does not *per se* suffice.

On the other hand, a situation of armed conflict and violence in the country of origin often prompts national decision-makers to apply a more restrictive interpretation of the 1951 refugee definition.<sup>10</sup> Some decision-makers have even understood such a situation as precluding the finding of a well-founded fear of being persecuted for any of the five Convention grounds.<sup>11</sup> The stark variations in refugee recognition rates at first instance for Afghan, Somali and Iraqi claimants in various European States indicate significant divergences in the interpretation of the refugee definition with regard to refugee claims based on situations of conflict and violence.<sup>12</sup>

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*Multicultural Affairs v. Haji Ibrahim* [2000] HCA 55, para. 141 per Gummow J; BVerwG 1 C 21.04 (1 November 2005), para. 24; Council of the European Union, 'Joint Position Defined by the Council on the basis of Article K.3 of the Treaty on European Union on the Harmonized Application of the Definition of the Term "Refugee" in Article 1 of the Geneva Convention of 28 July 1951 Relating to the Status of Refugees (Annex 1)', 1996, available online at: <http://www.unhcr.org/refworld/docid/3ae6b37f44.html> (last accessed 1 December 2011), para. 6; *Refugee Appeal No 76551* [2010] NZRSAA 103 (21 September 2010), para. 66; *Refugee Appeal No. 75653*, [2006] NZRSAA 59 (23 March 2006), para. 77; *Mohamed v. Ashcroft*, 396 F.3d 999, 1006 (8th Cir. 2005).

<sup>8</sup> See UNHCR, 'Note on International Protection', 1 September 1995, UN Doc. A/AC.96/850, available online at: <http://www.unhcr.org/refworld/docid/3ae68d404.html> (last accessed 26 August 2012), para. 11; UNHCR, 'Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees', 2001, available online at: <http://www.unhcr.org/refworld/docid/3b20a3914.html> (last accessed 15 July 2012). Various UNHCR Eligibility Guidelines confirm this view. Suffice it to point as an example to UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan', 2009, available online at: <http://www.unhcr.org/refworld/docid/4a6477ef2.html> (last accessed 10 November 2011), 12-13.

<sup>9</sup> There are various refugee law scholars expressing this view. Suffice it to point by way of example to. W. Kälin, 'Refugees and Civil Wars: Only a Matter of Interpretation?', (1991) *IJRL* 3 (3), 435-451; M.R.v. Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law. Canadian and United States Case Law Compared*, 5 (The Hague/London/New York: Martinus Nijhoff Publishers, 2002); H. Storey and R. Wallace, 'War and Peace in Refugee Law Jurisprudence', (2001) *AJIL* 95, 353; R. Marx, 'Zur Rechtserheblichkeit des Bürgerkrieges bei der Auslegung und Anwendung der Genfer Flüchtlingskonvention', (1997) *Informationsbrief Ausländerrecht* 9, 372-379; N. Markard, *Kriegsflüchtlinge. Gewalt gegen Zivilpersonen in bewaffneten Konflikten als Herausforderung für das Flüchtlingsrecht und den subsidiären Schutz* (Tübingen: Mohr Siebeck, 2012).

<sup>10</sup> See e.g. *Adan v. Secretary of State for the Home Department* [1998] 2 WLR 702, per Lord Slynn of Hadley.

<sup>11</sup> See G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 3rd edn., 2007), 126. See also UNHCR and International Criminal Tribunal for Rwanda, Summary Conclusions, Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law. Arusha, Tanzania, 11-13 April 2011, available online at: <http://www.unhcr.org/4e16d0a59.pdf> (last accessed 20 August 2012), para. 25. UNHCR noted in 1994 that while some States agree with its views that the 1951 Convention applies to 'refugees from civil wars who have a good reason to fear being victimized because of their religion, ethnic origin, clan or imputed political opinions', the authorities in other States adopt restrictive interpretations of the 1951 refugee definition that reduce its scope in the context of conflict and violence. See UNHCR, 'Note on International Protection', 7 September 1994, A/AC.96/830, available online at: <http://www.unhcr.org/refworld/docid/3ae68d404.html> (last accessed 22 April 2012), para. 22.

<sup>12</sup> See UNHCR, 'Safe at Last? Law and Practice in Selected Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence', 2011, available online at: <http://www.unhcr.org/refworld/docid/4e2ee0022.html> (last accessed 19 November 2011), 17.

This paper argues that the 1951 Convention is a relevant tool for the protection of people who have fled armed conflict and other situations of violence in their country of origin. Though the mere fact of having fled from such situations does not substantiate a claim to refugee status under the 1951 Convention, the wording of the 1951 refugee definition, the object and purpose of the 1951 Convention and its historical background warrant an inclusive interpretation regarding refugee protection claims arising out of armed conflict and other situations of violence.

The paper proceeds in four steps. First, this introduction clarifies its scope and methodology as well as the terminology and concepts used. Second, the paper scrutinizes the historical evolution of international refugee law in light of forced displacement caused by armed conflict and other situations of violence. Third, the interpretation of the refugee definition in the context of armed conflict and other situations of violence is examined through its constituent elements. Finally, the paper ends with concluding observations.

## **1 METHODOLOGY AND SCOPE**

This paper examines the interpretation of the 1951 refugee definition by looking at the practices of a limited number of States Parties to the 1951 Convention and/or its 1967 Protocol, and by the views of UNHCR and scholars. Rather than comprehensively analyzing all aspects of the 1951 refugee definition, it focuses on the elements that are most contentious with regard to refugee protection claims based on armed conflict and other situations of violence.

The paper draws on practice from the following countries which receive a significant number of asylum-seekers: the United States of America (US), Canada, Australia, New Zealand, Belgium, France, the Netherlands, Germany, Sweden and the United Kingdom (UK).<sup>13</sup> The specific European States were selected because in 2010 alone, they collectively received three quarters of asylum applications in the European Union (EU). More specifically, they received 70 per cent of all asylum applications by Afghans, 80 per cent of all applications by Iraqis, and 90 per cent of all applications by Somalis in the EU.<sup>14</sup>

The paper does not draw on practice from Africa and Latin America because of the application of regional refugee law instruments, with the exception of Costa Rica and Venezuela which exclusively employed the 1951 refugee definition.<sup>15</sup> Given the absence of widespread ratification of the 1951 Convention and/or its 1967 Protocol in Asia, the paper does not analyze State practice from this region either.

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<sup>13</sup> The paper does not purport to show how each of the examined State interpret each of the elements of the refugee definition. Rather, it concentrates on selected elements of the definition and examines the most insightful State practice in this respect.

<sup>14</sup> The same European States were examined by the UNCHR for its analysis of the interpretation and application of Article 15(c) Qualification Directive. See UNHCR, note 12, 8.

<sup>15</sup> The analysis of practice in Costa Rica and Venezuela is exclusively based on information provided by UNHCR.

The examined jurisprudence primarily concerns refugee claimants from the following countries of origin: Afghanistan, the Democratic Republic of Congo (DRC), Somalia, Iraq, Sri Lanka, Mexico and Colombia. Between 2001 and 2011, these States experienced armed conflict or other situations of violence<sup>16</sup> and since 2001, they have also been amongst the main countries of origin of asylum-seekers in the examined receiving States.<sup>17</sup>

Although this paper focuses on practice post 11 September 2001, given the caesura that this event marks for asylum law and for the policies of many States, prior significant legal developments are also considered. The paper analyses the 1951 Convention's inclusion clause of Article 1A(2). It does not examine exclusion from or cessation of refugee status. It does not scrutinize temporary or complementary protection, or the broader refugee definitions at the regional level.

## 2 TERMINOLOGY AND CONCEPTS

When determining refugee status in the context of armed conflict and other situations of violence, national decision-makers have used the terms 'fighting between clans engaged in civil war'<sup>18</sup>, 'civil unrest in the form of an armed conflict'<sup>19</sup>, 'internal armed conflict'<sup>20</sup>, 'a tragic situation of war or armed conflict'<sup>21</sup>, 'a very high level of widespread violence'<sup>22</sup> and 'civil war'<sup>23</sup>, to name but a few. The terms used to describe the factual circumstances in a country of origin are crucial because they convey an understanding of the situation and its consequences for the affected persons, and may determine whether to use the 1951 refugee definition, broader refugee definitions, or complementary protection.<sup>24</sup>

Examining a situation of clan-based fighting in Somalia, Lord Lloyd found in *Adan* that the drafters of the 1951 Convention did not consider situations of civil war when they settled on

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<sup>16</sup> Where significant legal developments relate to other countries of origin, they were nonetheless considered. The paper does not focus on gang-related violence. See UNHCR, 'Guidance Note on Refugee Claims relating to Victims of Organized Gangs', 2010, available online at: <http://www.unhcr.org/refworld/docid/4bb21fa02.html> (last accessed 10 October 2011); M. Boulton, 'Living in a World of Violence: An Introduction to the Gang Phenomenon', *Legal and Protection Policy Reserach Series*, 2011, available online at: <http://www.unhcr.org/4e3269629.html> (last accessed 17 December 2011).

<sup>17</sup> Based on the UNHCR statistics 'Asylum Trends and Levels in Industrialized Countries' between 2000 and 2010, available online at: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=home&cid=49aea93aba&comid=4148094d4&skip=0&querysi=industrialized&searchin=title&display=10&sort=date> (last accessed 10 November 2011).

<sup>18</sup> *Adan v. Secretary of State for the Home Department* [1998] 2 WLR 702, per Lord Lloyd of Berwick regarding the situation in Somalia.

<sup>19</sup> *In re S-P*, 21 I. & N. Dec. 486, Interim Decision 3287, 1996 WL 422990 (BIA), 493 concerning the situation in Sri Lanka.

<sup>20</sup> *Refugee Appeal No. 76289* (8 May 2009), para. 36 regarding the situation in Colombia.

<sup>21</sup> *Sheriff v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 8 as regards the situation in Sierra Leone.

<sup>22</sup> X (Re) 2002 CanLII 52651 (IRB) concerning the situation in Colombia.

<sup>23</sup> Immigration and Refugee Board of Canada, note 7 (this reference is not country-specific); *Assy Diouf v. Holder*, 388 F. Appx. 525 (6th Cir. 2010) (concerning the situation in the DRC), 1, *Refugee Appeal No 76551* [2010] NZRSAA 103 (21 September 2010), para. 62 (regarding the situation in Somalia).

<sup>24</sup> See *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim* [2000] HCA 55, para. 12, per Gummow J.

persecution as the main element in the new post-Second World War definition of a refugee.<sup>25</sup> In *Haji Ibrahim*, Judge Gummow, referring to *Adan's* classification of the situation in Somalia as a civil war, had argued that the 'widespread disorder' in Somalia cannot be considered a civil war without 'a risk that there will be a blurring of the distinction between the persecutory acts which the asylum-seeker must show and the broader circumstances to those acts.'<sup>26</sup> Judge Gummow further observed 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.'<sup>27</sup> Thus, the way in which a situation in a country of origin is framed may affect the interpretation of the 1951 refugee definition and may even mislead decision-makers. It is therefore advisable to use non-judgmental terms when referring to a situation of conflict and violence in a country of origin.

The frequent juxtaposition between 'generalized violence' and a well-founded fear of persecution for a 1951 Convention ground is also a manifestation of this problem.<sup>28</sup> The term 'generalized violence' seems to have its origins in the broader refugee definition of the Cartagena Declaration.<sup>29</sup> Both the terms 'generalized violence' and 'indiscriminate violence' connote that violence is untargeted, widespread, random, and affects all alike and in turn suggests that people fleeing from such violence are not refugees under the 1951 Convention. However, these concepts may fall short of a careful analysis warranted by the complex situation in the country of origin.<sup>30</sup> In fact, violence can be widespread *and* targeted<sup>31</sup> and a large number of people can be affected by violence for a 1951 Convention ground; for instance in a conflict fought along sectarian lines. This is why this paper will employ the broad terms 'conflict' and 'violence' rather than 'generalized violence'.

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<sup>25</sup> See *Adan v. Secretary of State for the Home Department* [1998] 2 WLR 702, per Lord Lloyd of Berwick

<sup>26</sup> *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim* [2000] HCA 55, para. 145, per Gummow J.

<sup>27</sup> *Ibid.*, para. 147, per Gummow J.

<sup>28</sup> For example, the 1996 Joint Position of the Council of Europe noted: 'Reference to a civil war or internal or generalized armed conflict and the dangers which it entails is not in itself sufficient to warrant the grant of refugee status.' See Council of the European Union, note 7, para. 6.

<sup>29</sup> See Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 - 22 November 1984, para. 3. Article 15(c) of 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 ('Qualification Directive') refers to 'indiscriminate violence' in the definition of serious harm in the context of subsidiary protection. The refugee definition in the Convention Governing the Specific Aspects of Refugee Problems in Africa (1001 UNTS 45, entered into force 20 June 1974) does not use the term 'generalized violence'.

<sup>30</sup> See C. Wouters, 'Protecting People fleeing Conflict and Generalized Violence. UNHCR's Perspective', (2011), available online at: [http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/civil%20society/UNHCR\\_CoE\\_Colloquium.pdf](http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/civil%20society/UNHCR_CoE_Colloquium.pdf) (last accessed at 1 March 2012), 67.

<sup>31</sup> See V. Türk, 'Protection Gaps in Europe? Persons Fleeing the Indiscriminate Effects of Generalized Violence', 2011, available online at: <http://www.unhcr.org/4d3703839.html> (last accessed 18 January 2012), 4-5.



It is important to examine the relevance of the term 'armed conflict' as used in international humanitarian law (IHL). The application of IHL is predicated on the existence of an international or non-international armed conflict. Amongst the many definitions of non-international armed conflict offered in the jurisprudence and literature,<sup>32</sup> the definition given by the International Criminal Tribunal for the Former Yugoslavia stands out the most: a non-international armed conflict exists 'whenever there is (...) protracted armed violence between government authorities and organized armed groups or between such groups within a State.'<sup>33</sup> It focuses on the type of violence, its duration and the degree of organization of the parties to the conflict. While these insights are helpful for the understanding of 'conflict' and 'violence', it is important to acknowledge that the definitions of international and non-international armed conflict developed under IHL are intended to delineate the material scope of IHL. The scope of the present paper is not limited to such armed conflicts.<sup>34</sup>

Guidance is also found in the jurisprudence of the European Court of Human Rights (ECtHR) on *non-refoulement* contained in the prohibition of torture, inhuman or degrading treatment or punishment under Article 3 of the European Convention on Human Rights (ECHR). On several occasions, the ECtHR addressed situations of expulsion to countries experiencing conflict and violence.

For instance, in *Vilvarajah v. the United Kingdom*, while referring to the situation in Sri Lanka as a 'civil disturbance'<sup>35</sup>, the ECtHR had observed that 'occasional fighting still took place in the north and east of Sri Lanka between units of IPKF [Indian Peace Keeping Forces] and Tamil militants (...) In these areas there was a persistent threat of violence and a risk that civilians might become caught up in the fighting'.<sup>36</sup> The Court concluded that there were no substantial grounds for finding that the applicants would face a real risk of being subjected to violations of Article 3 ECHR upon return to Sri Lanka.<sup>37</sup> Additionally, in *NA v. the United Kingdom*, the ECtHR stated that it 'has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention (...) only in the most extreme cases of general violence.'<sup>38</sup> Yet in the landmark case of *Sufi and Elmi v. the United Kingdom* in 2011, the ECtHR had considered for the very first time, that a situation of violence, in this case in Mogadishu entailed such a level of intensity to pose a real risk for everyone in Mogadishu of treatment

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<sup>32</sup> For an overview of the debate, see A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge: Cambridge University Press, 2010).

<sup>33</sup> *Prosecutor v. Dusko Tadić, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* ICTY: Case No. IT-94-1-A (2 October 1995), para. 70.

<sup>34</sup> See also UNHCR and International Criminal Tribunal for Rwanda, note 11, para. 22.

<sup>35</sup> *Vilvarajah and others v. the United Kingdom*, Application No. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 (30 October 1991), para. 110.

<sup>36</sup> *Vilvarajah and others v. the United Kingdom*, Application No. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 (30 October 1991), para. 109.

<sup>37</sup> See *Ibid.*, para. 115.

<sup>38</sup> *NA v. the United Kingdom*, Application No. 25904/07 (17 July 2008), para. 115.

reaching the Article 3 threshold.<sup>39</sup> This jurisprudence demonstrates that violence is a means by which a conflict is brought to bear which may vary in terms of duration, geographic scope and intensity.

Further insights may be obtained from research projects that empirically examine and classify situations in numerous countries. Different projects employ different concepts.<sup>40</sup> For example, the definitions of conflict and violence used by the Heidelberg Institute for International Conflict Research are thoroughly comprehensive. They define conflict as 'the clashing of interests (positional differences) over national values of some duration and magnitude between at least two parties (organized groups, States, groups of States, organizations) that are determined to pursue their interests and achieve their goals'<sup>41</sup>, distinguishing between different types of conflict according to the intensity of the violence used.<sup>42</sup>

A general classification of a situation in a country of origin might distort the interpretation and application of the 1951 refugee definition by incorrectly insinuating a certain level, type, impact or scope of the conflict or violence. Such a classification ought not to be relevant for the interpretation of the 1951 refugee definition. For the purpose of applying the 1951 refugee definition, it is important to describe the situation in the country of origin in clear and non-judgmental terms, and to understand it in its proper context.

## II THE HISTORICAL EVOLUTION OF INTERNATIONAL REFUGEE LAW IN LIGHT OF ARMED CONFLICT AND OTHER SITUATIONS OF VIOLENCE

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Conflict and violence underpin much of the development of international refugee law. During the inter-war period and after the Second World War, international refugee law has evolved against the backdrop of armed conflict and other situations of violence, as well as other contextual factors such as economic depression and political oppression.

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<sup>39</sup> See *Sufi and Elmi v United Kingdom*, Application Nos. 8319/07 and 11449/07 (28 June 2011), para. 248.

<sup>40</sup> See e.g. Project Ploughshares, 'Defining Armed Conflict', available online at: <http://www.ploughshares.ca/content/defining-armed-conflict> (last accessed 6 September 2011); Uppsala Conflict Data Programme 'Definition of Armed Conflict', available online at: [http://www.pcr.uu.se/research/ucdp/definitions/definition\\_of\\_armed\\_conflict/](http://www.pcr.uu.se/research/ucdp/definitions/definition_of_armed_conflict/) (last accessed 6 September 2011); Heidelberg I.N.S.titute for International Conflict Research, 'Conflict Barometer 2010. Crises - Wars - Coups d'État - Negotiations - Mediations - Peace Settlements', 2010, 19 available online at: [http://www.hiik.de/de/konfliktbarometer/pdf/ConflictBarometer\\_2010.pdf](http://www.hiik.de/de/konfliktbarometer/pdf/ConflictBarometer_2010.pdf) (last accessed 11 January 2012), 88.

<sup>41</sup> Heidelberg Institute for International Conflict Research, note 40, 88.

<sup>42</sup> It employs a sliding scale of intensity from latent conflict over manifest conflict and crisis to severe crisis and war. See *Ibid.*

The first group of refugees addressed by the League of Nations were Russians fleeing the civil war, the Bolshevik Revolution and the famine.<sup>43</sup> The loss of protection from their country of origin prompted their need for international protection,<sup>44</sup> with the League of Nations regularizing their status in 1922.<sup>45</sup> The fact of having fled from armed conflict or other situations of violence was irrelevant for refugee status under this arrangement as well as under the 1924 extension to Armenian refugees.<sup>46</sup> However, subsequent arrangements did include two definitional criteria such that refugees must: lack protection from the State of origin and be of a specific ethnic or territorial origin.<sup>47</sup> While having fled from a situation of conflict and violence was not a legally relevant criterion for refugee status it did not rule out a finding of refugee status either.

In 1926, the League of Nations Council discussed the expansion of existing arrangements for the protection of refugees in analogous situations.<sup>48</sup> Three criteria were used in identifying additional refugee groups: (1) *de jure* lack of protection by the country of origin; (2) flight from events connected to the First World War; and (3) territorial or ethnic origin.<sup>49</sup> The extension of refugee protection was thus meant to include people who fled from conflict and violence in the context of the First World War when protection by the country of origin was absent. Other refugee instruments adopted during this time do not shed any further light on the definition of who is a refugee in the context of armed conflict and other situations of violence.

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<sup>43</sup> For a detailed analysis of the Russian refugee see J.H. Simpson, *The Refugee Problem. Report of a Survey* (London/New York/Toronto: Oxford University Press, 1939), 62-63; L.W. Holborn, *The International Refugee Organization. A Specialized Agency of the United Nations. Its History and Work 1946-1952* (London et. al.: Oxford University Press, 1956), 3.

<sup>44</sup> See J.C. Hathaway (1984), 'The Evolution of Refugee Status in International Law: 1920-1950', *International and Comparative Law Quarterly*, 33, 348-380, 351. Similarly: C.M. Skran, 'Historical Development of International Refugee Law', in A. Zimmermann et al., *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford: Oxford University Press, 2011), 3-36, mn. 4-5, 7.

<sup>45</sup> Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees of 5 July 1922, 355 LNTS 238. See also Hathaway, note 44, 350-352; W.v. Glahn, *Der Kompetenzwandel Internationaler Flüchtlingsorganisationen - vom Völkerbund bis zu den Vereinten Nationen* (Baden-Baden: Nomos, 1992), 16-17.

<sup>46</sup> For the text of the 1924 arrangement, see (1924) League of Nations Official Journal 7-10, 969-970.

<sup>47</sup> See Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, Supplementing and Amending the Previous Arrangements Dated July 5<sup>th</sup>, 1922, and May 31<sup>st</sup>, 1924 (2004 LNTS 249) and Arrangement relating to the Legal Status of Russian and Armenian Refugees of 30 June 1928 (2005 LNTS 55). The origin requirements were designed so as to restrict eligibility for refugee protection precisely to those persons who *de jure* lacked protection by their State of origin. Since the Russian refugees comprised persons from several ethnic, religious and social groups, the broad criterion of territorial origin was necessary. Only certain Turks lacked legal protection by their State of origin (namely those of Armenian ethnic origin), hence the more narrow ethnic criterion. See Hathaway, note 44, 360.

<sup>48</sup> See (1927) League of Nations Official Journal 2, 155 and (1927) League of Nations Official Journal 10, 1336. See also Jackson, *The Refugee Concept in Group Situations* (The Hague et. al.: Martinus Nijhoff Publishers, 1999), 15-18 and J.C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005), 87-88.

<sup>49</sup> See (1927) League of Nations Official Journal 10, 1138; Arrangement concerning the Extension to Other Categories of Refugees of Certain Measures Taken in Favour of Russian and Armenian Refugees of 30 June 1928 (2006 LNTS 64). See also Hathaway, note 44, 360-361.

In the inter-war period, the fact of having fled from conflict or violence did not pre-empt a finding of refugee status. In some cases it was even decisive in bringing groups of people within the mandate of the League of Nations. The crucial legal criteria —lack of protection by the country of origin —applied irrespective of whether a country was experiencing situations of conflict and violence.

The forced displacement of at least 40 million people as a result of the Second World War,<sup>50</sup> together with subsequent further displacement, provided the impetus for the establishment of the International Refugee Organisation (IRO), as well as UNHCR and the adoption of the 1951 Convention.

Established in 1946,<sup>51</sup> the IRO's Constitution alludes to the Second World War in defining several, but not all, categories of refugees and displaced persons.<sup>52</sup> There were certain conditions under which distinct individuals would become of concern to the IRO.<sup>53</sup> 'Persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions'<sup>54</sup> was such a condition. Thus, a situation of conflict or violence in the country of origin was not a decisive criterion for opposing return.<sup>55</sup> Yet such a situation did not preclude a person from coming within the personal scope of the IRO mandate either.

After the dissolution of the IRO,<sup>56</sup> UNHCR was originally established in 1950 as a temporary organisation 'with the sole responsibility of addressing the needs of refugees in Europe who had been displaced by the Second World War.'<sup>57</sup> Paragraph 6 lit. (ii) of the UNHCR Statute confers competence on UNHCR with regard to persons who have been considered refugees under several inter-war refugee instruments as well as persons with a well-founded fear of persecution on account of several proscribed grounds.<sup>58</sup> UNHCR's competence *ratione personae* has since

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<sup>50</sup> See T. Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol', in A. Zimmermann et al., *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford: Oxford University Press, 2011), mn. 12, 45, acknowledging that others have estimated different numbers. See e.g. A.R. Zolberg et al., *Escape from Violence. Conflict and the Refugee Crisis in the Developing World* (Oxford/New York: Oxford University Press, 1989) 21 who speak of approximately 11 million forcibly displaced persons.

<sup>51</sup> See Preamble of the IRO Constitution, second recital. See also Holborn, note 43, 47.

<sup>52</sup> Part I, section A I (1) (b)-(c) and (3) of Annex 1 and Part I, section B of Annex 1 to the IRO Constitution. See also the reference to 'war orphans' in Part I, section A (4) of Annex 1 to the IRO Constitution. See further the individualized definition in Part I, section A (2) of Annex 1 to the IRO Constitution.

<sup>53</sup> See Part I Section C of Annex 1 to the IRO Constitution.

<sup>54</sup> Part I, section C (1) (a) (i) of Annex 1 to the IRO Constitution.

<sup>55</sup> Similarly: Einarsen, note 50, mn. 33, 56.

<sup>56</sup> See V. Türk, *Das Flüchtlingshochkommissariat der Vereinten Nationen (UNHCR)* (Berlin: Duncker & Humblot, 1992), 20 and Hathaway, note 48, 91.

<sup>57</sup> G. Loescher et al., *The United Nations High Commissioner for Refugees (UNHCR). The politics and practice of refugee protection into the twenty-first century* (London/New York: Routledge, 2008), 1, who at 10-22 also notes that UNHCR's establishment must further be seen in the context of the Cold War. See also L.W. Holborn, *Refugees: A Problem of Our Time. The Work of the United Nations High Commissioner for Refugees, 1951-1972*, I (Metuchen, NJ: The Scarecrow Press, 1975), 37 and 57.

<sup>58</sup> Para 6A(i) and (ii) of the UNHCR Statute refers to 'any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or

evolved to cover people fleeing from 'serious (including indiscriminate) threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order'.<sup>59</sup>

The drafters of the 1951 Convention generally understood the substance of the refugee definition to be broad and applicable to almost all known categories or groups of refugees.<sup>60</sup> Rather than being substantially influenced by the Cold War, they developed the refugee definition against the backdrop of thirty years of experience with refugees.<sup>61</sup>

Originally, the refugee definition was temporarily and geographically limited because the negotiating States hesitated to commit to protecting an unforeseeable population of future refugees, with the US representative arguing, for example, that '[t]oo vague a definition, which would amount (...) to a blank check, would not be sufficient.'<sup>62</sup> The drafters were thus concerned with limiting the personal scope of the 1951 Convention.

The Israeli representative observed that the refugee definition

obviously did not refer to refugees from natural disasters, for it was difficult to imagine that fires, floods, earthquakes or volcanic eruptions, for instance, differentiated between their victims on the grounds of race, religion, or political opinion. Nor did the text cover all man-made events. There was no provision, for example, for refugees fleeing from hostilities unless they were otherwise covered by article 1 of the Convention.<sup>63</sup>

The key element of this statement is the differentiation required for victims of hostilities to be considered refugees, acknowledging that if situations of violence in some way differentiate between victims, the victims may fall within the 1951 refugee definition. This statement demonstrates the understanding that persons who flee from situations of conflict and violence could fall within the scope of Article 1A(2) of the 1951 Convention if they fulfilled the criteria therein. The drafters knew that persecution during armed conflict had created large numbers of *bona fide* refugees in the past.<sup>64</sup>

The statement of the Israeli delegate indicates that the drafters of the 1951 Convention's definition did not intend for its scope *ratione personae* to cover persons who 'merely' fled from

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political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country'.

<sup>59</sup> UNHCR, 'UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence', 2008, available online at: <http://www.unhcr.org/refworld/docid/479df7472.html> (last accessed on 17 August 2011), 2.

<sup>60</sup> See Einarsen, note 50, 66, mn. 64.

<sup>61</sup> See *Ibid.*, 67, mn. 64.

<sup>62</sup> Ad Hoc Committee on Statelessness and Related Problems, Summary Record of the Third Meeting, 26 January 1950, UN Doc. E/AC.32/SR.3, para. 37. See also P. Weis (1953), 'Legal Aspects of the Convention of 21 July 1951 Relating to the Status of Refugees', *British Yearbook of International Law*, 30, 479.

<sup>63</sup> Conference of the Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-Second Meeting, 26 November 1951, UN Doc. A/CONF.2/SR.22, 6.

<sup>64</sup> See Einarsen, note 50, 67, mn. 65. See also Edwards and Hurwitz, Introductory Note to the Arusha Summary Conclusions on Complementarities between International Refugee Law, International Criminal Law, and International Human Rights Law, (2011) 23 IJRL 856, 858.

general dangers arising from events such as armed conflicts. The drafters' rejection of a proposal by the International Committee of the Red Cross (ICRC) reaffirms this position. The ICRC had suggested that '[e]very person forced by grave events to seek refuge outside his country of ordinary residence is entitled to be received'<sup>65</sup>. Armed conflicts and other situations of violence surely would have constituted such grave events.

Thus, it is argued that the preparatory works of the 1951 Convention illustrate the drafters' understanding that armed conflicts and other situations of violence may give rise to a well-founded fear of being persecuted for a 1951 Convention ground.

### III INTERPRETATION OF THE 1951 REFUGEE DEFINITION IN THE CONTEXT OF ARMED CONFLICT AND OTHER SITUATIONS OF VIOLENCE

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While certain States and UNHCR have reaffirmed the relevance of the 1951 Convention for the protection of people fleeing from armed conflict and other situations of violence, restrictive interpretative trends in other State practice threaten to undermine this relevance.

#### 1 REAFFIRMED RELEVANCE OF THE 1951 CONVENTION

The evolution of some State practice as well as the views and refugee status determination (RSD) practice of UNHCR reaffirm the relevance of the 1951 Convention for the protection of people fleeing armed conflict and other situations violence in their country of origin.

In 1997, the French Council of State (*Conseil d'État*) found that the existence of an armed conflict could give rise to a well-founded fear of persecution in the sense of the 1951 Convention.<sup>66</sup> This decision put an end to the jurisprudence of the Refugee Appeals Board (*Commission des recours des réfugiés*) according to which the dangers arising from a situation of conflict did not pose a risk of persecution within the meaning of the 1951 Convention.<sup>67</sup> Nonetheless, the Refugee Appeals Board still seems to frequently deny refugee status because the general situation in the country of origin does not give rise to a clearly individualized risk of persecution.<sup>68</sup>

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<sup>65</sup> Aide Memoire on the Refugee Question. Statement submitted by the International Committee on the Red Cross, 4 July 1951, UN Doc. A/CONF./NGO.2, 1.

<sup>66</sup> See Conseil d'État, 12 May 1997, no. 154321, Mlle STRBO.

<sup>67</sup> See e.g. Commission des recours des réfugiés, *Zein El Abiddine*, 13 June 1985; *Taha*, 30 October 1989 (within the context of the Lebanese civil war. With *In re H-*, 21 I. & N. Dec. 337, Interim Decision 3276, 1996 WL 291910 (BIA), the jurisprudence in the United States has also begun to reject the view that persons having fled from clan warfare or civil strife cannot qualify as refugees under the 1967 Protocol. See also Sternberg, note 9.

<sup>68</sup> See V. Chetail, 'The Implementation of the Qualification Directive in France: One Step Forward and Two Steps Backwards', in K. Zwaan, *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Nijmegen: Wolf Legal Publishers, 2007), 94.

Costa Rica has recently begun to recognize persons from Central America who have escaped situations of violence as 1951 Convention refugees, having previously denied them refugee status because they were considered to have merely escaped from generalized violence.<sup>69</sup> Venezuela has also been gradually adopting an interpretation of the 1951 refugee definition that accommodates people having fled situations of violence.<sup>70</sup> Pre-2001 jurisprudence in the US and Canada also exhibits a more restrictive approach to refugee claimants fleeing armed conflict and other situations of violence than more current jurisprudence.<sup>71</sup>

UNHCR's position on protecting people fleeing armed conflict and other situations of violence has also evolved. The pivot of UNHCR's views on extending refugee protection to such individuals can be found in the UNHCR Handbook:

Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or Protocol.

However, foreign invasion or occupation of all or part of a country can result – and occasionally has resulted – in persecution for one or more of the reasons enumerated in the 1951 Convention.<sup>72</sup>

This statement suggests that people fleeing from armed conflict are only refugees in exceptional circumstances.<sup>73</sup> UNHCR has since clarified that in many situations, persons fleeing conflict may have a well-founded fear of persecution for a 1951 Convention ground.<sup>74</sup>

While conducting individual RSD, UNHCR's experiences indicate, with regard to people currently fleeing countries experiencing armed conflict and other situations of violence, that the majority of successful claimants are now found to be refugees under the 1951 refugee definition rather than under broader refugee definitions contained in regional refugee law instruments. This focus on the 1951 Convention, as opposed to the broader refugee definitions regarding people fleeing armed conflict and other situations of violence in UNHCR's mandate-led RSD

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<sup>69</sup> Based on information provided by UNHCR.

<sup>70</sup> Based on information provided by UNHCR.

<sup>71</sup> As argued by Markard, note 9, 130 by referring to *Salibian v. Canada (Minister of Employment and Immigration)* 1990 3 FC 250, 258 and *Zavala Bonilla v. I.N.S.*, 730 F.2d 562 (9th Cir 1984). Both judgments ended the previously more restrictive approaches that required particularized evidence (Canada) or being singled out for persecution (US).

<sup>72</sup> UNHCR, 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', December 2011, HCR/1P/4/Eng/REV.3, available online at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html> (last accessed 31 August 2012), paras. 164 and 165 respectively (footnotes omitted).

<sup>73</sup> Storey and Wallace, note 9, 350.

<sup>74</sup> See UNHCR, 'Note on International Protection', note 8, para. 11.

operations, stems from the nature of internal armed conflicts, which are increasingly rooted in religious, ethnic and/or political disputes and where groups with specific profiles are targeted.<sup>75</sup>

These developments reaffirm the relevance of the 1951 Convention for the protection of people fleeing armed conflict and other situations of violence. At the same time, there remain a number of restrictive trends in the interpretation of the 1951 Convention definition, which are examined in the following sections.

## 2 WELL-FOUNDED FEAR

During armed conflict and other situations of violence, a large number of people may be at risk of serious harm. To qualify for refugee status under the 1951 Convention, a person needs to demonstrate a well-founded fear of being persecuted, with the notion of 'fear' indicating a 'forward-looking expectation of risk'.<sup>76</sup> But what degree of risk necessary for a finding of a well-founded fear needs to be established? This leads to two further contentious questions: (1) who has to prove the risk and (2) how individualized must the risk be?

The burden of proof in most States rests on the refugee claimant<sup>77</sup>, while UNHCR argues that the obligation to ascertain and analyse all relevant facts is shared by the applicant and the decision-maker.<sup>78</sup> This shared obligation may be particularly important if the country of origin is experiencing armed conflict or another situation of violence as such context make obtaining documentation more difficult for the refugee claimant.<sup>79</sup>

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<sup>75</sup> Based on information provided by UNHCR.

<sup>76</sup> A. Zimmermann and C. Mahler, 'Article 1A, Paragraph 2', in A. Zimmermann et al., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (Oxford: Oxford University Press, 2011), 341, mn. 199.

<sup>77</sup> See *Minister of Citizenship and Immigration v. Flores Carrillo* 2008 FCA 94; *BK (Failed asylum seekers) DRC CG* [2007] UKAIT 00098 para. 187. In the US, the burden of proof is in principle on the claimant. But in past persecution cases, the regulations create a presumption of well-founded fear and shift the burden of proof. See D. Anker, *Law of Asylum in the United States* (Thomson West, 2011), § 2:22. In Germany, the refugee claimant merely incurs a burden to present the facts underlying his or her claim (*Darlegungslast*). See K. Hailbronner, *Asyl- und Ausländerrecht* (Stuttgart: W. Kohlhammer, 2nd edn., 2008), 323, mn. 659. In Belgium, the burden of proof is shared between the asylum applicant and the asylum authorities. See European Migration Network, 'EU and Non-EU Harmonised Protection Statuses in Belgium', 2011, available online at: [http://www.emnbelgium.be/sites/default/files/publications/eu\\_and\\_non-eu\\_harmonised\\_protection\\_statuses\\_in\\_belgium\\_0.pdf](http://www.emnbelgium.be/sites/default/files/publications/eu_and_non-eu_harmonised_protection_statuses_in_belgium_0.pdf) (last accessed 20 November 2011), 29 citing RvS 19 April 2006 no. 157.749, RvV 4 December 2007 no. 4460 and other decisions.

<sup>78</sup> See UNHCR, note 8, para. 197.

<sup>79</sup> See Storey and Wallace, note 9, 365; *Refugee Appeal No. 71462* [1999] NZRSAA (27 September 1999).



To prove a well-founded fear of persecution, the standard of 'reasonable possibility or chance' is widely accepted in State practice<sup>80</sup> and supported by UNHCR and the literature.<sup>81</sup> However, in a few States, a higher standard of proof sometimes seems to be implicitly required regarding refugee claims arising out of armed conflict and other situations of violence.<sup>82</sup> This disregards the wording of the 1951 refugee definition which does not distinguish between peacetime and armed

A claimant's risk of being persecuted in the country of origin must be assessed in the context of the situation there, taking into consideration aspects of the individual's profile, experiences and activities.<sup>83</sup> To establish a well-founded fear of persecution, a claimant would need to show a relationship between the general circumstances in the country of origin on the one hand and

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<sup>80</sup> See *I.N.S. v. Cardoza-Fonseca*, 480 US 421, 440 (1987); *R v. Secretary of State for the Home Department, ex parte Sivakumaran* [1988] Imm AR 147, 150 per Lord Keith; *Chan v. Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, per Mason CJ ('real chance'); *Refugee Appeal No. 1/91 and 2/91 Re TLY and LAB*, [1991] NZRSAA 1 (11 July 1991 *Refugee Appeal No. 71404/99* [1999] NZRSAA (29 October 1999); *Adjei v. Canada (Minister of Employment and Immigration)* 1989 2 FC 680. Note that there may be some differences between the 'reasonable chance' and the 'real chance' standard. See D. Tennent (2007), 'The Contribution of the New Zealand Refugee Status Appeals Authority to International Refugee Jurisprudence: A Submission to Both Acknowledge the Contribution of the Authority and to Advocate for its Retention', *Waikato Law Review*, 15, 165, though it may vary according to the importance of the right threatened. The German term is '*beachtliche Wahrscheinlichkeit*' (substantial likelihood). See BVerwG of 7 October 1975, BVerwGE 49, 202, 205; BVerwG of 17 January 1980, all cited by Hailbronner, note 77, 327-382, mn. 671. This standard of proof may be met in situations where the degree of probability is less than 50%, though a merely theoretical possibility does not suffice, see BVerwGE 89, 162 (5 November 1991).

<sup>81</sup> UNCHR considers that persecution 'must prove to be reasonably possible'. UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims', 1998, available online at: <http://www.unhcr.org/refworld/docid/3ae6b3338.html> (last accessed 10 September 2011), para. 17. See also J.C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), 75-80; J.-Y. Carlier, 'The Geneva Refugee Definition and the "Theory of the Three Scales"', in F. Nicholson and P. Twomey, *Refugee Rights and Realities. Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press 1999), 41-43; Anker, note 78, § 2.2; T. Löhr, *Die kinderspezifische Auslegung des völkerrechtlichen Flüchtlingsbegriffs* (Baden-Baden: Nomos, 2009), 86.

<sup>82</sup> With regard to claims to asylum by people fleeing conflict and violence in El Salvador in the 1980s, the US Board of Immigration Appeals has been criticized for subjecting evidence to a higher standard of proof than the 'reasonable possibility' standard. See P. Butcher (1991), 'Assessing Fear of Persecution in a War Zone', *Georgetown Immigration Law Journal*, 5, 435-473 For a more recent judgment concerning a Colombian refugee applicant whose evidence of death threats was not considered by the majority to prove a well-founded fear, see *Silva v. US Attorney General*, 448 F.3d 1299 (11<sup>th</sup> Cir. 2006), at 1233. In some of the French decisions reviewed, a higher standard proof was required in order to establish an individual fear of persecution. See CNDA (Court Nationale d'Asile, National Court of Asylum Law) decision no. 090008783, SASIKUMAR, 18 June 2010.

<sup>83</sup> See UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka', 2009, available online at: <http://www.unhcr.org/refworld/docid/49de0b6b2.html> (last accessed 8 October 2011), at 29; UNHCR, 'UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers', August 2007, available online at: <http://www.unhcr.org/refworld/docid/46deb05557.html> (last accessed 1 September 2011), 134; UNHCR, 'UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers', 2007, available online at: <http://www.unhcr.org/refworld/docid/477ce70a2.html> (last accessed 8 October 2011), para. 63.

individualized facts on the other.<sup>84</sup> In respect of the degree of individualization and the level of risk recognized, State practice can be broadly divided into a restrictive approach (also known as 'differential risk analysis')<sup>85</sup> and a liberal approach.

The judgment of the UK House of Lords in *Adan* epitomizes the restrictive position. Lord Slynn of Hadley considered the situation in Somalia at a time when 'law and order have broken down and where (...) every group seems to be fighting some other group or groups in an endeavor to gain power.' In such a context, he found that the claimant 'must be able to show fear of persecution for Convention grounds over and above the risk to life and liberty inherent in the civil war.'<sup>86</sup> The high level of violence in Somalia and its group-based and widespread nature affected the risk assessment, thus leading the Law Lords to require a higher level of risk than that which is normally required in times of peace. In this view, an individualised risk of persecution results when a higher risk of persecution, compared with the rest of the population or other members of the group, is present.<sup>87</sup> This approach neglects the wording of the 1951 refugee definition which does not require any additional criteria for refugee claimants fleeing armed conflict and other situations of violence than it does for those fleeing in times of peace. What it does require is the establishment of a well-founded fear of being persecuted for one or more of the Convention grounds.

In the US, the Court of Appeals for the Eighth Circuit also expressed a restrictive view: '[T]he harm suffered must be particularized to the individual. (...) Harm arising from general conditions such as anarchy, civil war, or mob violence will not ordinarily support a claim of persecution.'<sup>88</sup> This position requires a high level of individualization of the threat irrespective of the characteristics of the underlying conflict and fails to acknowledge that the general situation in the country of origin forms part of the risk assessment. It appears to also conflate the risk element with the requirement of a well-founded fear of being persecuted for a 1951 Convention ground.<sup>89</sup>

An example of an approach opposing the differential risk requirement can be found in *Prophète v Canada*, in which Justice Tremblay-Lamer considered that there can be situations in which 'an individual who may have a personalized risk, but one that is shared by many other

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<sup>84</sup> See M. R. v. Sternberg, 'Outline of United States Asylum Law: Substantive Criteria and Procedural Concerns', in Practising Law Institute, *Practice Skills Course Handbook Series. Defending Immigration Removal Proceedings* (New York, 2011), 33.

<sup>85</sup> See e.g. H. Storey, 'Armed Conflict in Asylum Law: The "War Flaw"', (2012) *RSQ*, 31, 2, 11.

<sup>86</sup> *Adan v. Secretary of State for the Home Department* [1998] 2 WLR 702, per Lord Slynn of Hadley. The UKIAT subsequently applied the requirement of a higher risk in *NM and Others (Lone Women – Ashraf) Somalia v. Secretary of State for the Home Department* CG [2005] UKIAT 00076, paras. 118 and 135.

<sup>87</sup> See Markard, note 9, 133.

<sup>88</sup> *Mohamed v. Ashcroft*, 396 F.3d 999, 1006 (8th Cir. 2005)

<sup>89</sup> The problem of such conflation was addressed by *Refugee Appeal No. 71462* [1999] NZRSAA (27 September 1999), para. 52. See *infra*, section 3.4.

individuals.<sup>90</sup> In other words, the experiences of similarly situated persons can support a claim of being at risk of persecution. In the US, for example, the Ninth Circuit Court of Appeal expressly acknowledged that the group of persons subjected to the same risk as the applicant is not limited in terms of size or categorization.<sup>91</sup>

The jurisprudence in Australia and New Zealand also rejects the differential risk requirement.<sup>92</sup> In *Haji Ibrahim*, Judge McHugh of the Australian High Court considered:

I see no basis in the text of the Convention or otherwise for holding that, in conditions of civil war or unrest, a person can prove persecution only when he or she can establish a risk of harm over and above that of others caught up in those conditions. (...) It is not the degree or differentiation of risk that determines whether a person caught in a civil war is a refugee under the Convention definition. It is a complex of factors that is determinative – the motivation of the oppressor; the degree and repetition of harm to the rights, interests or dignity of the individual; the justification, if any, for the infliction of that harm and the proportionality of the means used to achieve the justification.<sup>93</sup>

In New Zealand, the Refugee Status Appeals Authority (RSSA) rejected the proposition that an armed conflict or a situation of violence warrants a higher level of risk than a situation of peace. It held that ‘the claimant must only establish the “ordinary” real chance of being persecuted and not some increased level of risk or that he/she has been singled out for persecution’.<sup>94</sup> In other cases, it deduced from the general level and targeted nature of violence in North Iraq that Christians face a real chance of being persecuted.<sup>95</sup>

In UNHCR’s view, the refugee definition does not require a differential risk or impact. It also does not require that a refugee claimant show that he or she would be singled out or individually targeted. In noting that the size of the affected group is irrelevant, UNHCR has stated that: ‘Whole communities may risk or suffer persecution for Convention reasons. The fact

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<sup>90</sup> *Prophète v. Canada (Minister of Citizenship and Immigration)* 2008 FC 331, para 18.

<sup>91</sup> See *Gonzales-Neyra v. I.N.S.*, 122 F.3d 1293, 1295 (9th Cir. 1997), as amended on denial of rehearing, 133 F.3d 726 (9th Cir, 1998).

<sup>92</sup> See *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim* [2000] HCA 55, para. 70 per McHugh J, para. 147, per Gummow J. See also *Refugee Appeal No. 71462* [1999] NZRSAA (27 September 1999), para. 77. See also *Minister for Immigration and Multicultural Affairs v. Abdi* [1999] FCA 299, per O’Connor, Tamberlin and Mansfield JJ. See further M. Kagan and W.P. Johnson, ‘Persecution in the Fog of War: The House of Lords’ Decision in *Adan*’, (2001-2002) *Michigan Journal of International Law*, 23, 247-264; Kälin, note 9; Storey and Wallace, note 9, Butcher, note 83.

<sup>93</sup> See *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim* [2000] HCA 55, para. 70.

<sup>94</sup> *Refugee Appeal No 76551* [2010] NZRSAA 103 (21 September 2010), para. 66.

<sup>95</sup> See *Refugee Appeal No. 74686* [2004] NZRSAA (29 November 2004); *Refugee Appeal No. 75023* [2004] NZRSAA (20 December 2004); *Refugee Appeal No. 741019* [2005] NZRSAA (21 February 2005); and *Refugee Appeal No. 75879* [2007] NZRSAA 6 (12 February 2007).

that all members of the community are equally affected does not in any way undermine the legitimacy of any particular individual claim.<sup>96</sup>

The underlying rationale of requiring a higher level of risk may well be found in the political realm rather than in the legal sphere. Concerns have been voiced that unless a higher level of risk is required, individuals on either side of a conflict could qualify for refugee protection,<sup>97</sup> thus potentially leading to large numbers of refugee claimants. Moreover, the differential risk requirement in British jurisprudence seems rooted in preconceptions based on the classification of the situation in the country of origin: where a civil war devolves into a situation of general lawlessness, a refugee claimant would have to meet additional requirements in terms of the level of risk.<sup>98</sup> There is nothing in the wording of the 1951 refugee definition to suggest that a refugee has to be singled out for persecution, either generally or over and above other persecuted persons. Requiring otherwise ignores the potentially evidentiary value of the experiences of similarly situated people, and goes against the object and purpose of the 1951 Convention, as the result would be to deny refugee protection in situations when a large number of people would require it.

### 3 PERSECUTION

Whether or not conduct constitutes persecution must be determined in light of all the circumstances, taking into consideration the individual's profile, experiences, activities, age and gender.<sup>99</sup> An act can constitute persecution irrespective of whether it occurs during peacetime, armed conflict or other situations of violence. This is the view of Australian, German and US (Board of Immigration Appeals or BIA) jurisprudence.<sup>100</sup> Contrastingly, the US' Eleventh Circuit Court of Appeals has indicated an understanding that in situations where serious violence is widespread, a higher level of severity is considered necessary for an act to constitute persecution.<sup>101</sup> It considered death threats by a guerrilla group in Colombia, in a 'place where the

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<sup>96</sup> UNHCR; Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers, August 2007, note 84, 129.

<sup>97</sup> See *Isa v Canada (Secretary of State)* [1995] FCJ No. 354, 72. As noted by Storey and Wallace, note 9, 351.

<sup>98</sup> See Markard, note 9, 134-135.

<sup>99</sup> See UNHCR, note 72, para. 52; UNHCR; Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, 2009, note 8, 17.

<sup>100</sup> *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim* [2000] HCA 55, para. 18 per Gaudron J. In German jurisprudence, there is no tendency discernible of distinguishing between the notion of persecution during conflict and violence on the one hand and persecution in times of peace on the other. For the US, see *In re H-*, 21 I. & N. Dec. 337, Interim Decision 3276, 1996 WL 291910 (BIA), 343: '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 (...); and, persecution may occur irrespective of whether or not a national government exists.' *Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990) (finding that persecution can and often does occur in the context of civil war).

<sup>101</sup> Carnes J in dissent argued that '[t]he fact that there is also indiscriminate violence is no reason for refusing to recognize violence and persecution on grounds that are specifically listed in our immigration laws.' See Carnes J dissenting in *Silva v. US Attorney General*, 448 F.3d 1299 (11<sup>th</sup> Cir. 2006), 1248. Note that German courts have

awful is ordinary',<sup>102</sup> of insufficient severity to constitute persecution.<sup>103</sup> Yet, the threshold of severity for persecution must be assessed irrespective of the number of people affected. UNHCR exemplifies this by considering 'the threat of more indiscriminate forms of violence such as suicide attacks and improvised explosive devices' as persecution.<sup>104</sup>

Criteria used by a number of States to determine whether a form of harm constitutes persecution in the context of armed conflict and situations of violence include repetition, repeatability, duration, and severity of the infringement.<sup>105</sup> It is important to take into account the cumulative effect of harmful acts, as the example of the US Court of Appeals for the Third Circuit shows. The Court held that having been detained three times by a Colombian guerrilla group for short periods of time did not amount to persecution, whilst an eight-day abduction did.<sup>106</sup> The Court failed to consider the cumulative effects of these incidents, which can be particularly severe in armed conflict and other situations of violence. As UNHCR stresses: 'Regular exposure to measures such as security checks, raids, interrogation, personal and property searches, and restrictions on freedom of movement may, in some cases, result in undue hardship for the persons affected and cumulatively amount to persecution.'<sup>107</sup>

### 3.1 Persecution and Conduct under International Humanitarian Law

IHL is the branch of international law specifically designed for situations of armed conflict. International refugee law and IHL are distinct but interrelated bodies of international law.<sup>108</sup> IHL

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considered death threats experienced by claimants from Iraq and Afghanistan to substantiate a well-founded fear of persecution. See VG Aachen 17 January 2011 – 4 K 1344/09.A; VG Trier 13 September 2011, 1 K 1314/10.TR.

<sup>102</sup> *Silva v. US Attorney General*, 448 F.3d 1299 (11<sup>th</sup> Cir. 2006), 1242.

<sup>103</sup> See *Sepulveda v. US Attorney General*, 401 F.3d 1226, (11<sup>th</sup> Cir. 2004), 1231; *Silva v. US Attorney General*, 448 F.3d 1299 (11<sup>th</sup> Cir. 2006), 1233. The understanding by German authorities of persecution in Iraq also seems to have been affected by a situation of conflict and violence. See UNHCR, 'UNHCR Statement on the 'Ceased Circumstances' Clause of the EC Qualification Directive', 2008, available online at: <http://www.unhcr.org/refworld/docid/48a2f0782.html> (last accessed 18 November 2011), 10. This practice subsequently changed with regard to non-Muslim minorities in Iraq. Swedish authorities have been criticized for requiring a level of severity for persecutory acts that is too high, though this requirement is not limited to situations of conflict and violence. See UNHCR, 'Quality in the Swedish Asylum Procedure: A Study of the Swedish Migration Board's Examination of and Decision on Applications for International Protection', 2011, 6-7 (on file with author).

<sup>104</sup> See UNHCR, 'UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers', available online at: <http://www.unhcr.org/refworld/docid/477ce70a2.html> (last accessed 8 October 2011, para. 63).

<sup>105</sup> For criteria relating to the significance of the human right at issue and the severity of the infringement as well as repetition and relentlessness in Canadian jurisprudence, see e.g. *Valentin v. Canada (Minister of Employment and Immigration)* [1991] 3 FC 390; *Canada (Attorney General) v. Ward* [1993] 2 SCR 689 p. 734. For an analysis of such criteria regarding peacetime claims, see Löhr, note 81, 90-92.

<sup>106</sup> See *Gomez Zuluaga v. US Attorney General*, 527 F.3d 330 (3rd Cir. 2008), 24.

<sup>107</sup> UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, 2009, note 8, 17.

<sup>108</sup> See A. Edwards, 'Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the 'International Protection' of Refugees', in R. Arnold and N. Quéniévet, *International Humanitarian Law and Human Rights Law. Towards a New Merger in International Law* (Boston et. al.: Martinus

regulates the conduct of hostilities, striking a balance between military necessity and humanitarian considerations. IHL may be relevant for the interpretation of persecution in the context of armed conflict. On the one hand, IHL can assist in identifying conduct as persecutory when it is in breach of IHL. On the other, IHL may legitimize conduct during armed conflict.

IHL complements international refugee law in that breaches of IHL may inform the interpretation of persecution. UNHCR acknowledges that: 'If someone is forced to flee armed conflict in their country because of human rights violations and breaches of humanitarian law, these factors will be part of what determines that person's refugee status'.<sup>109</sup> Storey and Wallace have even argued that in times of armed conflict, IHL together with international human rights law helps elucidate which feared harms are sufficiently serious in order to constitute persecution. Both help map out the dividing line between forms of conduct that are persecutory and those that are not, by reference to internationally permissible and impermissible acts. However, only IHL delineates these dividing lines in detail in relation to armed conflicts.<sup>110</sup>

Other scholars have made similar arguments<sup>111</sup> and a few States have drawn on IHL for the interpretation of persecution in the context of armed conflict. For example, the 'Basic Law Manual' of the US acknowledges that violations of the 1949 Geneva Conventions may constitute the basis for an asylum claim.<sup>112</sup> Further, the US BIA expressly referred to IHL, noting that 'the evidence must [*inter alia*] be evaluated in the context of the ongoing civil conflict [in Sri Lanka] to

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Nijhoff Publishers, 2008), 421. See also S. Jaquemet, 'The Cross-Fertilization of International Humanitarian Law and International Refugee Law', (2001) *International Review of the Red Cross*, 83 (843), 652, 664-665, 669-672; B. Rutinwa, 'Refugee Claims Based On Violation of International Humanitarian Law: The "Victim's" Perspective', (2000-2001) *Georgetown Immigration Law Journal*, 15, 497. See further UNHCR and ICTR Expert meeting, note 11, paras. 1-5 (on the relationship between international refugee law, international humanitarian law and international human rights law) and paras. 13-21 (on persecution under international criminal law and under international refugee law). See also G. Acquaviva, *Forced Displacement and International Crimes*, (2011) 21 *Legal and Protection Policy Research Series*, available online at: <http://www.unhcr.org/4e0344b344.pdf> (last accessed 20 August 2012).

<sup>109</sup> UNHCR (2003), 'Note on International Protection', A/AC.96/975, available online at: <http://www.unhcr.org/refworld/type.UNHCRNOTES,,,3f1feb6d4,0.html> (last accessed 2 July), para. 53. See also UNHCR ExCom, note 3, first preambular recital; UNHCR, note 72, para. 164. See further UNHCR Executive Committee (2000), 'Conclusion No. 89 (LI) on International Protection', available online at: <http://www.unhcr.org/refworld/pdfid/4b28bf1f2.pdf> (last accessed 12 April 2012), para. 32, and UNHCR, note 2.

<sup>110</sup> See Storey and Wallace, note 9, 359. More recently: Storey, note 9, 19-21.

<sup>111</sup> See S. Jaquemet, note 108, 667; Sternberg, note 9, 186-187; ; V. Holzer, 'The Relevance of the 1951 Refugee Convention for the Protection of Individuals Forced to Flee Armed Conflicts', in J. Hertwig et al., *Global Risks. Constructing World Order through Law, Politics and Economics* (Frankfurt am Main: Peter Lang, 2010), 104-111; Zimmermann and Mahler, note 76, 371, mn. 319-320; Brandl, U. Brandl, 'Die Anwendbarkeit des Flüchtlingsbegriffs der Genfer Flüchtlingskonvention auf Bürgerkriegsflüchtlinge', in H. Tretter, *Temporary Protection für Flüchtlinge in Europa. Analysen und Schlussfolgerungen* (Wien: Verlag Österreich, 2005), 192, Markard, note 9, 158-168.

<sup>112</sup> See U.S. Immigration and Naturalization Service, *The Basic Law Manual: U.S. Law and I.N.S. Refugee/Asylum Adjudications* 22 (1995), cited by Sternberg, note 36, 37. See also *Montecino v. Immigration and Naturalization Service*, 915 F.2d 518 (9<sup>th</sup> Cir.1990), 520.

determine whether the motive for the abuse in the particular case (...) was part of the violence inherent in an armed conflict (i.e. lawful acts of war).<sup>113</sup>

However, there are also other approaches which question whether IHL violations should guide the meaning of persecution. Discussing in *Adan* what ‘distinguishes persecution from the ordinary incidents of civil war’, Lord Lloyd rejected the proposition that a reference to IHL would be helpful.<sup>114</sup> Yet in 2008, the UK Asylum and Immigration Tribunal (AIT) found that subsequent legal developments warranted a renewed look at the guidance in *Adan* and had considered that ordinary incidents of civil war are to be determined according to whether or not they comply with IHL. The AIT further suggested that ‘serious violations of peremptory norms of IHL and human rights’ do indeed constitute persecution.<sup>115</sup>

IHL violations pinpoint serious harm during armed conflict and thus aid in interpreting the scope of persecution. There are also instances in State practice where conduct is not considered persecution because it complies with IHL. The 1996 guidelines by the Canadian Immigration and Refugee Board (IRB) provide that in addition to international human rights law, the Fourth Geneva Convention, in particular Common Article 3, and the 1977 Additional Protocol II may assist in determining what constitutes permissible conduct.<sup>116</sup> Yet, since September 2001, the few references that do exist in jurisprudence regarding the guidelines have omitted to specifically refer to their provisions on IHL.<sup>117</sup>

The 1996 Joint Position of the Council of the EU suggested that conduct is not persecution by a State’s armed forces if it complies with IHL: ‘[T]he use of the armed forces does not constitute persecution where it is in accordance with international rules of war’.<sup>118</sup> Because the notion of persecution in armed conflict should not be strictly tied to violations of IHL, this view should therefore be further qualified. Use of force can be lawful under IHL, but may for other reasons constitute persecution, for example because the overall purpose of the conflict is to expel or destroy a certain group.

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<sup>113</sup> *In re S-P*, 21 I. & N. Dec. 486, Interim Decision 3287, 1996 WL 422990 (BIA), 493-494.

<sup>114</sup> See *Adan v. Secretary of State for the Home Department* [1998] 2 WLR 702, per Lord Lloyd of Berwick. Judge McHugh seemed to disregard the relevance of IHL in delimiting the conduct of hostilities when he noted that pillage and destruction of civilian objects could be justified by the objective of unifying the country, thus not constituting persecution. See *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim* [2000] HCA 55, para. 67 per McHugh J.

<sup>115</sup> See *AM & AM v. Secretary of State for the Home Department* (armed conflict: risk categories) Somalia CG [2008] UKAIT 00091, para. 76. German courts have also referred to IHL. See Zimmermann and Mahler, note 76, 371-372, mn. 320, basing their argument BVerwG 10 C 43.07 – VGH 13 a B 05.30833 (24 June 2008).

<sup>116</sup> See Immigration and Refugee Board of Canada, note 7.

<sup>117</sup> See e.g. *Sheriff v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 8; *Fi v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1125; *Kanagaratnam v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1205; *Navaratnam v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 523; *Innocent v. Canada (Citizenship and Immigration)* 2009 FC 1019; *Kanagasabapathy v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 78.

<sup>118</sup> Council of the European Union, note 7, para. 6.

International refugee law, international criminal law and international human rights law are interconnected, in particular as regards the prohibition on arbitrary displacement, as the expert meeting convened by UNHCR and the ICTR emphasized. The meeting also noted that although international refugee law and international criminal law consider many of the same acts as amounting to persecution and have resorted to human rights as an interpretative aid, differences remain between the respective concepts.<sup>119</sup> The complementarities and differences of these bodies of international law must be taken into account in the interpretation of persecution.

### 3.2 Persecution and the Restoration or Maintenance of Law and Order

Within armed conflict and situations of violence, measures taken to restore or maintain law and order can raise questions of determining whether or not they are persecutory. The two specific issues at play are whether the measures were undertaken for a legitimate purpose, and second, whether the measures were proportionate to the pursuit of that objective.

Some State practice appears to be open to justifications of violence carried out to maintain law and order that would preclude a finding of persecution. In a case before the High Court of Australia, McHugh J. found that 'not all harm inflicted by the government of a country in the course of a civil war or unrest is necessarily persecution for the purpose of the [1951] Convention. That is because the harm may be justifiable as a measure carried out to achieve a legitimate object of the country.'<sup>120</sup> McHugh J. referred to the unification of the country as a potentially legitimate object and noted that conduct must be 'appropriate and adapted' to the object.<sup>121</sup> Confronted with a similar situation regarding a refugee claim by a Tamil from Sri Lanka, the Dutch Council of State (*Raad van State*) found that measures by a State to ensure a country's unity against persons threatening this unity cannot be persecution,<sup>122</sup> thus apparently failing to take proportionality into account. The Council of State subsequently however departed from this doctrine.<sup>123</sup>

However, the purpose of conduct does not necessarily justify the means. The use of violence during conflict is subject to clear delimitations in international law, be it under international human rights law or IHL.<sup>124</sup> References to potential justifications for conduct do not necessarily remove such conduct from the scope of persecution. State measures are not always legitimate attempts to maintain law and order if they are disproportionate or affect persons who do not or

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<sup>119</sup> See UNHCR and International Criminal Tribunal for Rwanda, note 11. See also Acquaviva, note 108.

<sup>120</sup> *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim* [2000] HCA 55, para. 67 per McHugh J.

<sup>121</sup> See *Ibid.*, para. 67 per McHugh J.

<sup>122</sup> See ARRvS 24 February 1988, RV 1988 nr. 4, cited by K. K. Bem, *Defining the Refugee. American and Dutch Asylum Case-Law 1975-2005*, Academisch Proefschrift (Amsterdam: Vrije Universiteit Amsterdam, 2007), 145.

<sup>123</sup> See Bem, note 122, 145 citing ARRvS 14 September 1988, RV 1988 nr. 6.

<sup>124</sup> On the use of deadly force under human rights and IHL, see generally C. Garraway (2009), 'To Kill or Not to Kill? Dilemmas on the Use of Force', *Journal of Conflict & Security Law* 14 (3), 499-510.



no longer take part in the violence<sup>125</sup> and measures allegedly maintaining law and order may even constitute persecution. The German Constitutional Court acknowledged this, holding that military measures that would normally be legitimate can constitute persecution if their intensity is not justified by the legitimate purpose or if their impact goes beyond the persons who may be legitimately targeted.<sup>126</sup>

#### 4 THE NEXUS TO THE 1951 CONVENTION GROUNDS

A refugee must have a well-founded fear of persecution *for reasons of* race, religion, nationality, membership of a particular social group or political opinion. This nexus (or 'causal link') requirement refers to the applicant's predicament rather than the persecutor's mind-set.<sup>127</sup> The nexus requirement is one of the main issues that courts grapple with in a context of armed conflict and other situations of violence. During armed conflict and other situations of violence, harm can be indiscriminate in nature, for instance if it results from stray bullets, being caught in the crossfire, or landmines. But often, harm is discriminate; for example if a group is particularly affected. In the context of non-State violence, the lack of protection by the country of origin could also be discriminate. A refugee's predicament may be affected by the causes, character and impact of the conflict or violence in the country of origin, making these elements relevant for the interpretation of the nexus requirement. The present section explores this and the frequent conflation, in the context of armed conflict and situations of violence, of the risk assessment which is part of the 'well-founded fear' analysis, and the nexus requirement.

First, the argument that violence is 'indiscriminate' in nature is often erroneously used against finding a nexus to a 1951 Convention ground. However, it is important to consider the context of such violence, as the UNHCR position illustrates:

[M]any ordinary civilians may be at risk of harm from bombs, shelling, suicide attacks, and improvised explosive devices. (...) [T]hese methods of violence may be used against targets or in areas where civilians of specific ethnic or political profiles predominantly reside or gather, and for this reason, may be linked to a 1951 Convention ground.<sup>128</sup>

Some jurisprudence shows awareness of the different ways in which an armed conflict or a situation of violence may reveal a nexus between the refugee claimant's predicament and a 1951

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<sup>125</sup> See Kälin, note 9, 441.

<sup>126</sup> See BVerfG, 2 BvR 752/97 (15 February 2000); see also BVerwG 9 C 33/85 (3 December 1986), as pointed out by Markard, note 9, 167-168.

<sup>127</sup> See UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity', 2008, available online at: <http://www.unhcr.org/refworld/docid/48abd5660.html> (last accessed 13 January 2010), para. 28.

<sup>128</sup> UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, note 84, 32. See also UNHCR Executive Committee (1998), 'Conclusion No. 85 (XLIX)', available online at: <http://www.unhcr.org/refworld/pdfid/4b28bf1f2.pdf> (last accessed 12 April 2012), para. c.

Convention ground. The German Constitutional Court found that when a State takes action in the face of terrorist acts during a guerrilla war without a convincing justification, a nexus to a 1951 Convention ground can be deduced.<sup>129</sup> The UK AIT held that ‘when (...) [the] attack [experienced by the appellant] is looked at in the context of violence in Ituri [DRC], the appellant was not simply a victim of civil war but the attack was motivated by the ethnic conflicts in that region.’<sup>130</sup> In this case the causes of the conflict, identified by considering the broader context of a single attack, revealed a nexus between the claimant’s predicament and a 1951 Convention ground.<sup>131</sup> In New Zealand, the RSAA stressed the various ways in which a nexus between the refugee claimant’s predicament and a 1951 Convention ground may be manifest: ‘Cases from civil war countries raise complex factual issues and are highly context dependent, turning on the particular characteristics, attributes, and background of the claimant viewed against the underlying drivers of the civil war and the resulting human rights landscape.’<sup>132</sup>

These ‘conflict-sensitive’ approaches to the nexus requirement contrast with other approaches to this issue. Dutch jurisprudence rarely examines the nexus requirement in detail and usually does not specify the 1951 Convention ground.<sup>133</sup> The Australian High Court rejected the proposition that a decision-maker would be required, in a case involving a situation of armed conflict, to determine whether the objective of a war is directed against persons because of a 1951 Convention ground.<sup>134</sup> Nevertheless, the Australian Refugee Review Tribunal did examine the nature of the conflict in a certain Afghan province, concluding that ‘the violence continues to manifest itself (...) on ethnic, political and or religious lines; and thus comes well within the grounds provided for by the Refugee Convention.’<sup>135</sup>

Some causes of conflict, such as economic gains, are unrelated to a 1951 Convention ground, as Markard points out.<sup>136</sup> Yet, economic gain is rarely the only factor underlying a particular conflict.<sup>137</sup> As the UN Special Representative on Sexual Violence in Conflict noted in 2010:

The mass rapes in Walikale [DRC] demonstrate a nexus between illicit exploitation of national resources by armed elements and patterns of sexual violence. It is evident that

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<sup>129</sup> See Markard, note 9, 285 and BVerfGE 80, 315 (10 July 1989), at 319-320; BVerfG-K – 2 BvR 752/97 (15 February 2000), para. 30.

<sup>130</sup> *NA (Risk Categories – Hema) Democratic Republic of Congo v. Secretary of State for the Home Department* CG [2008] UKAIT 00071, para. 37. The House of Lords found that a nexus to a Convention ground in the context of clan-based warfare cannot be established by looking at the overall context of the conflict alone. See *Adan v. Secretary of State for the Home Department* [1998] 2 WLR 702, per Lord Lloyd of Berwick.

<sup>131</sup> A similar view is expressed by the Immigration and Refugee Board of Canada, note 7.

<sup>132</sup> Refugee Appeal No 76551 [2010] NZRSAA 103 (21 September 2010), para. 62.

<sup>133</sup> See Bem, note 122, 175 and 184.

<sup>134</sup> See *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim* [2000] HCA 55, para. 102 per McHugh J, para. 146 per Gummow J, Gleeson CJ and Hayne J agreeing.

<sup>135</sup> 071329032 [2007] RRTA 82 (23 April 2007).

<sup>136</sup> See Markard, note 9, 271.

<sup>137</sup> See Farrell and Schmitt, note 1, 28.

communities in lucrative mining areas are at particularly high risk. (...) [T]he mass rapes that occurred in Walikale should *also* be investigated from the angle of the competition over mining interests as one of the root causes of conflict and sexual violence.<sup>138</sup>

It is widely acknowledged that a 1951 Convention ground need not be the sole or even the dominant cause of the refugee's predicament, but merely a contributing factor.<sup>139</sup> The examples illustrate well the multiplicity of causes and consequences of armed conflict and situations of violence, and their bearing on the refugee definition.<sup>140</sup> In other words, the presence of economic motivations in an armed conflict and other situations violence ought not to preclude further investigation into whether other causes, or the conflict's impact or characteristics, reveal a nexus between the claimant's predicament and a 1951 Convention ground. It is also important to acknowledge that 'if the war or conflict are non-specific in impact', a refugee claimant's fear may be based on 'specific forms of disenfranchisement within the society of origin.'<sup>141</sup>

The nexus requirement, in the context of armed conflict and other situations of violence, is often conflated with the risk assessment which forms part of the notion of a 'well-founded fear'. This may result in additional requirements for the protection of people fleeing armed conflict and other situations of violence. The RSSA of New Zealand summarized this problem:

One must not confuse equality of *risk* of harm with the equality of *reason* for that harm. The well-foundedness element (ie, the risk issue) is a separate inquiry to that of the "for reason of" element (ie, the nexus issue). So while it is convenient to speak in the shorthand of a differential risk in order to emphasize the specific focus of the "for reason of" element, the very phrasing of the shorthand expression can, unfortunately, lead to a conflation of the risk element with the "for reason of" or nexus requirement. If this happens, a person at real risk of serious harm for reason of his or her religion will be required to establish that he or she is *more* at risk of serious harm for reason of his or her religion than others who are equally at real risk of serious harm for reason of their religion. This is a requirement to establish a double-differential risk. Such approach, we believe, amounts to a misdirection in law.<sup>142</sup>

In some US jurisprudence, the nexus requirement in its entirety is equated with the necessity that the refugee claimant be singled out for a 1951 Convention ground. For example, in *Trujillo Jabba and others*, the Court of Appeal for the Eleventh Circuit found that the applicants 'failed to show that, upon return to Colombia, they will be "singled out" for persecution on account of a

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<sup>138</sup> UNSC, 6400<sup>th</sup> meeting on the situation concerning the Democratic Republic of Congo, 14 October 2010, UN Doc. S/PV.6400, available online at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/PV.6400](http://www.un.org/ga/search/view_doc.asp?symbol=S/PV.6400) (last accessed 27 August 2012), 4 (emphasis by author). Markard highlights this report: Markard, note 9, 271.

<sup>139</sup> See UNHCR, note 127, para. 28.

<sup>140</sup> See generally Farrell and Schmitt, note 1.

<sup>141</sup> Hathaway, note 82, 188. See also Kagan and Johnson, note 9392, 259-260 and Kälin, note 9, 642-643.

<sup>142</sup> Refugee Appeal No. 71462 [1999] NZRSAA (27 September 1999), para. 52 (emphasis in original).

protected ground.<sup>143</sup> The phrase 'singled out' continues to be used as a shorthand for the nexus requirement even though *Matter of H* already established in 1996 that the refugee claimant need not show individualized persecution, but merely a causal link to a refugee ground.<sup>144</sup> This standard has since been further developed in US regulations. A refugee claimant need not show that he or she would be singled out for persecution if a nexus to a 1951 Convention ground can be established through a pattern or practice in the country of origin that shows that a group to which the applicant belongs is being persecuted for a 1951 Convention ground.<sup>145</sup>

Moreover, the US Court of Appeals for the Sixth Circuit held that the petitioner 'must establish that he is at particular risk as a Christian and that his predicament is appreciably different from the dangers faced by other non-Christian Iraqis'.<sup>146</sup> However, the fact that the petitioner's predicament is linked to his or her religion will also suffice in order to fulfil the nexus requirement. The predicament of other groups in Iraq is irrelevant for the interpretation of the nexus requirement. Otherwise, refugee claimants from countries in which various groups are being persecuted would be disadvantaged. Such a comparative approach would result in a more stringent interpretation of the nexus requirement in the context of armed conflict and other situations of violence than in times of peace.<sup>147</sup>

As already stated, there is nothing in the wording of the refugee definition that supports the proposition that in the context of armed conflict and other situations of violence, a refugee claimant must be singled out for persecution for a 1951 Convention ground. Rather, the 1951 Convention grounds refer to characteristics or beliefs typically shared by groups of people.<sup>148</sup> An understanding that there is no nexus to a 1951 Convention ground where a large number of people face persecution would thus go against the object and purpose of the 1951 Convention.<sup>149</sup> The requirement of individually experienced persecution does not mean that a person has been or will be persecuted because of his or her individual activities as opposed to his or her membership of a persecuted group. Being part of a persecuted group should be individual enough.<sup>150</sup> For instance, membership in a persecuted group may suffice in fulfilling the nexus

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<sup>143</sup> *Jabba and others v. US Attorney General*, 195 F. Appx. 883 (11th Cir. 2006), 7. See also *Sepulveda v. US Attorney General*, 401 F.3d 1226, (11<sup>th</sup> Cir. 2004), 1231.

<sup>144</sup> See *In re H-*, 21 I. & N. Dec. 337, Interim Decision 3276, 1996 WL 291910 (BIA), 345-346. The 'singled out' doctrine is also prevalent in Dutch jurisprudence. See Bem, note 122, 170.

<sup>145</sup> See 8 CFR § 208.13(b)(2)(iii).

<sup>146</sup> *Elias v. Gonzales*, 212 F. Appx 441, 448 (6th Cir. 2007). See also *Hanona v. Gonzales*, 243 F. Appx 158, 163 (6th Cir. 2007); *Shasha v. Gonzales*, 227 F. Appx 436, 440 (6th Cir. 2007); *Aoraha v. Gonzales*, 209 F. Appx 473, 476 (6th Cir. 2006); *Toma v. Gonzales*, 179 F. Appx 320, 324 (6th Cir. 2006).

<sup>147</sup> See Second Colloquium on Challenges to International Refugee Law (2001-2002), 'The Michigan Guidelines on Nexus to a Convention Ground', *Michigan Journal of International Law*, 23, 211-221 para. 17, 218.

<sup>148</sup> See Kälin, note 9, 438, footnote 6.

<sup>149</sup> See Storey and Wallace, note 9, 353.

<sup>150</sup> See C.W. Wouters, *International Legal Standards for the Protection from Refoulement* (Antwerp: Intersentia, 2009), 87. See also Kälin, note 9, 437-438 and Jaquemet, note 108, 668.

requirement in Germany<sup>151</sup> and this is often the case when there is a general pattern of persecution putting all members of the targeted group in danger. As a result, the individual applicant does not have to show that he or she is individually targeted but only that he or she is a member of the targeted group. Being personally at risk of persecution should merely mean that the person is purposefully, rather than accidentally, at risk of being harmed.<sup>152</sup> For a finding of a nexus to a 1951 Convention ground, UNHCR notes that it is not necessary that the asylum-seeker be known to, and sought or targeted personally, by the persecutor(s).<sup>153</sup>

In light of the above, the non-comparative approach to the nexus requirement, enunciated by the Canadian Federal Court of Appeal, is to be preferred in the context of armed conflict and other situations of violence:

[A] situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, 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 in the definition.<sup>154</sup>

## 5 THE 1951 CONVENTION GROUNDS

Armed conflicts and other situations of violence are often rooted in political, ethnic or religious differences with different groups facing heightened risks of harm,<sup>155</sup> thus suggesting the applicability of the 1951 Convention grounds. The 1951 Convention grounds are not mutually exclusive;<sup>156</sup> they may overlap. Refugee claimants often have a well-founded fear of being persecuted because of more than one ground.<sup>157</sup>

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<sup>151</sup> See e.g. German Federal Constitutional Court (Bundesverwaltungsgericht), judgment of 21.04.2009 - 10 C 11.08. See also VGH BW, RSpDienst 1991, Beilage 8, B4. The German concept of 'group persecution' (*Gruppenverfolgung*) is only exceptionally applied. Country-wide or regional group persecution of Tamils in Sri Lanka has been widely rejected in German jurisprudence (See Hess. VGH 24 July 2001 - 5 UE 4097/96.A; OVG Bremen 19 December 2001 - 2 A 41701; VGH BW 20 March 1998 - 6 S 60/97; OVG Berlin 23 August 2000 - 3 B 74.95; Bayrischer VGH 20 B 00.30382 (14 December 2000) (all cited by Hailbronner, note 77, 331, 676, footnote 88.)

<sup>152</sup> See Kälin, note 9, 437-438.

<sup>153</sup> See UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, note 84, 31-32.

<sup>154</sup> *Salibian v. Canada (Minister of Employment and Immigration)* 1990 3 FC 250, 259.

<sup>155</sup> See UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka', note 84, 31-32 (noting that individuals may be at risk on various grounds because the armed conflict is rooted in ethnic and political differences). Farrell and Schmitt emphasize that in most cases, conflicts are driven by a mix of factors, and not only ethnic difference. See Farrell and Schmitt, note 1, 2.

<sup>156</sup> See UNHCR, note 74, para. 67.

<sup>157</sup> See e.g. Refugee Appeal No. 76006 NZRSAA (16 July 2007) (Sri Lanka; ethnicity and imputed political opinion); Refugee Appeal No. 74686 NZRSAA (29 November 2004) (Iraq; religion and imputed political opinion); Refugee Appeal No. 76457 NZRSAA (15 March 2010) (Iraq; religion and membership of a particular social group)

## 5.1. Race, religion, nationality

The 1951 Convention grounds of race, religion and nationality are particularly relevant in contemporary armed conflicts and other situations of violence. Parties to a conflict are often ethnically or religiously defined; conflicts over resources are frequently increased by ethnic tensions. Civilians who belong to an ethnic or religious group are often considered to be affiliated with 'their' party to the conflict and are forcibly recruited, compelled to provide material or financial support, or attacked by the adversary.<sup>158</sup>

The 1951 Convention grounds of race and nationality are closely intertwined; they both encompass ethnicity. Race is to be understood broadly so as to include ethnic groups and persons of common descent usually constituting a minority within a given population.<sup>159</sup> Nationality must also be given a broad interpretation and includes membership of a group determined by cultural, ethnic or linguistic identity.<sup>160</sup> Examples of cases that concern persecution for the sole reason of ethnicity relate to the Hazara in Afghanistan,<sup>161</sup> the Tamils in Sri Lanka<sup>162</sup> and minority clans in southern and central Somalia.<sup>163</sup> Refugee claims concerning solely the 1951 Convention ground of race are rare partly because many racial or ethnic claims to refugee status are framed and decided on other grounds such as particular social group or political opinion. Ethnic groups are often associated with movements seeking power, equality or

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(women)). In France, the CNDA seems to consider in cases concerning refugee claimants from Afghanistan that an ethnic background of such claims alone is insufficient for establishing a 1951 Convention ground; often, refugee status is granted for reasons of ethnicity and political opinion. See e.g. CNDA, decision no. 08000815, M. Hussein, 25 June 2010; CNDA decision no. 0915005, M. Yusefi, 1 September 2010; CNDA, decision no. 09012012, M. Hussaini, 2 November 2010; CNDA, decision no. 08010018, M. Yaguby, 2 November 2010). See also UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka', note 84, 31 (Sri Lankans fleeing the civil war which is rooted in ethnic and political differences); UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia', 27 May 2010, available online at: <http://www.unhcr.org/refworld/docid/4bfe3d712.html> (last accessed 25 May 2012), 20.

<sup>158</sup> See Markard, note 9, 233-234; Farrell and Schmitt, note 1, 3-5. On ethnically and religiously motivated conflicts, see also UNHCR, 'Note on International Protection', 3 July 1998, A/AC.96/898, available online at: <http://www.unhcr.org/refworld/docid/3ae68d3d24.html> (last accessed 26 August 2012).

<sup>159</sup> See UNHCR, note 72, para. 68. See also Article 10(1)(a) Qualification Directive.

<sup>160</sup> See UNHCR, note 72, para. 74. See also Article 10(1)(c) Qualification Directive.

<sup>161</sup> See Refugee Appeal Nos. 76294 and 76295 NZRSAA (30 June 2009). The UKAIT considered that members of their Hema tribe may be at risk because of their ethnicity, though membership in this tribe alone is insufficient. See *NA (risk categories – Hema) Democratic Republic of Congo CG* [2008] UKAIT 00071.

<sup>162</sup> In Refugee Appeal Nos. 76294 and 76295 NZRSAA (30 June 2009), a Tamil was found to be at risk of persecution because of his ethnicity.

<sup>163</sup> See UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia', 2010, available online at: <http://www.unhcr.org/refworld/docid/4be3b9142.html> (last accessed 13 September 2011), 16. UNHCR also notes that in Afghanistan, members of ethnic groups such as the Pashtuns are at risk of persecution because of their ethnicity in areas where they constitute a minority. On the Pashtuns, see UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan', note 8, 20.

independence, and thus refugee claims of members of such groups are also considered under the ground of political opinion.<sup>164</sup> The UNHCR Handbook notes:

The co-existence within the boundaries of a State of two or more national (ethnic, linguistic) groups may create situations of conflict and also situations of persecution or danger of persecution. It may not always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific 'nationality'.<sup>165</sup>

This position has been affirmed by guidance for refugee status decision-makers adopted in the UK<sup>166</sup> and the US.<sup>167</sup> For example, in the context of the armed conflict in Sri Lanka, a number of claims by Tamil asylum-seekers have been found to have a well-founded fear of persecution for reasons of their ethnicity and their imputed political opinion.<sup>168</sup>

In a context of armed conflict and other situations of violence, a refugee claimant may be at risk of being persecuted for reasons of their ethnicity although they themselves are not directly involved in the conflict. Based on their ethnicity, the agent of persecution may identify them with a group involved in the conflict.<sup>169</sup> Affiliation or perceived affiliation with a State that is supporting an armed group may also give rise to a fear of persecution based on nationality. For example, the UK AIT found that nationality or perceived nationality of a State regarded as hostile to the DRC, in particular individuals perceived to have Rwandan connections or to be of Rwandan origin, constituted a risk category.<sup>170</sup>

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<sup>164</sup> See Anker, note 78, § 5:83-§ 5:86. In France, recognition of refugee status for Afghans is usually not based on ethnicity alone, but also on the ground of political opinion. See e.g. CNDA, decision no 08000815, M. Hussein, 25 June 2010; CNDA decision no. 09015005, M. Yusefi, 1 September 2010; CNDA decision no. 09012012, M. Hussaini, 2 November 2010; CNDA, decision no. 08010018, M. Yagbuby, 2 November 2010.

<sup>165</sup> UNHCR, note 72, para. 75.

<sup>166</sup> UK Border Agency, note 7, 27.

<sup>167</sup> U.S. Citizenship and Immigration Services, Asylum Officer Basic Training Course, Asylum Eligibility Part III: Nexus and the Five Protected Characteristics 17 (21 March 2009), available online at <http://www.uscis.gov/portal/site/uscis> (last accessed 24 August 2012), 17.

<sup>168</sup> See Refugee Appeal No. 76006 NZRSAA (16 July 2007); Refugee Appeal No. 76199 NZRSAA (11 November 2008); BVerfGE 80, 315. See also UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka', note 84, 31-32.

<sup>169</sup> See U.S. Citizenship and Immigration Services, note 168, 17. The U.S. Court of Appeal for the Third Circuit indicated that a female member of the Bemba tribe who was found to be at risk of being arbitrarily detained and raped during detention feared persecution on account of her tribal identity. The Court referred to information on the DRC according to which the government consider members of the Bemba tribe as its enemies and that members of this tribe have been targeted by armed groups supporting the government. See *Zubeda v. Ashcroft*, 333F.3d 462 (3<sup>rd</sup> Cir. 2003), para. 102.

<sup>170</sup> See *AB and DM (Risk categories reviewed, Tutsis added) Democratic Republic of Congo CG* [2005] UKIAT 00118, para. 51, though whether the nexus requirement is fulfilled depends on the circumstances of the case.

In situations where all or most nationals of a State are at risk of serious harm during an armed conflict, the question of whether they would be at risk of being persecuted for reasons of their nationality arises. In *Sheriff v. Canada*, the Federal Court of Canada considered a refugee claim by a national of Sierra Leone based on his fear of the parties to the armed conflict in Sierra Leone and the government's inability to provide protection. He contended that the relevant 1951 Convention ground was that of nationality, namely nationals of Sierra Leone. The Court held that the applicant was not targeted in a way different from the general population of Sierra Leone and that although all individuals of Sierra Leone might face more than a mere possibility of persecution, such fear was not for reasons of their nationality. The Court concluded that 'the appellant's fear of persecution was not based on the fact that he was a citizen of Sierra Leone.'<sup>171</sup> It is conceivable that an armed conflict reaches such high levels of intensity that all individuals within a country are at risk of serious harm. Nonetheless, subsuming all nationals of a country of origin within the 1951 Convention ground of nationality could be an overly broad interpretation that would defeat the purpose of the nexus requirement in the 1951 Refugee Convention. The appellant in *Sheriff* referred to the above quoted test set out by the Canadian Federal Court of Appeal in *Salibian* according to which 'a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt (...) by all citizens on account of a risk of persecution based on one of the reasons stated in the definition'.<sup>172</sup> Although the Federal Court in *Sheriff* did not consider this test, the case highlights that the precise application of this aspect of the test remains unclear.

The 1951 Convention ground of religion is also relevant, as many conflicts are fought along sectarian lines. Race and nationality also often overlap the ground of religion. Broadly construed, religion refers to a belief or non-belief, an identity and/or a way of life.<sup>173</sup> For example, in cases concerning Christians in Iraq, a well-founded fear of being persecuted has often been found to be for reasons of religion.<sup>174</sup> In armed conflicts and other situations of violence involving groups with different religious identities, such groups usually pursue a political agenda and the corresponding political opinions may be imputed to members of such groups.<sup>175</sup> In Iraq, violence

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<sup>171</sup> See *Sheriff v. Canada* (Minister of Citizenship and Immigration), 2000 FCT 8, paras. 15-16.

<sup>172</sup> *Salibian v. Canada* (Minister of Employment and Immigration) 1990 3 FC 250, 258. See also *Sheriff v Canada* (Minister of Citizenship and Immigration), 2000 FCT 8, para. 19.

<sup>173</sup> See 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', 28 April 2004, available online at: <http://www.unhcr.org/refworld/docid/4090f9794.htm>, paras. 4-5. See also Article 10(1)(b) Qualification Directive.

<sup>174</sup> See e.g. Refugee Appeal No. 76457 NZRSAA (15 March 2010); *Refugee Appeal No. 75879 NZRSAA* (12 February 2007). There are few cases in Dutch jurisprudence that acknowledge refugee status based on religious persecution. See Bem, note 122, 172.

<sup>175</sup> See e.g. *Youkhana v Gonzalez*, 460 F.3d 927 (7th Cir. 2006), remanding the case of an Assyrian Christian from Iraq who claimed persecution by the ruling Ba'ath Party on account of political opinions imputed to his ethno-religious group. See also Anker, note 78, §5:79.



against Christians in some cases has been informed by their perceived association with the occupying forces, thus giving rise to a well-founded fear of being persecuted for reasons of religion and imputed political opinion.<sup>176</sup> Moreover, non-State actors may impose religious norms in the area that they control, perceiving deviation from such norms as manifesting religious (non-)belief and/or a political opinion.<sup>177</sup>

## 5.2 Membership of a particular social group

Apart from the widely acknowledged political, ethnic and religious dimensions of many modern conflicts, discussed above, a specific area that is under-explored is the application of the ground of membership of a particular social group, in particular as regards civilians and groups pursuing a certain profession. For the purpose of the refugee definition, it is generally agreed that a group does not have to be homogeneous or internally coherent in order to constitute a particular social group;<sup>178</sup> the size of the group is thus irrelevant.<sup>179</sup> For the existence of a particular social group, it is also not necessary to establish that all members of that particular social group are at risk<sup>180</sup> and neither should the group be exclusively defined by a shared fear of being persecuted.<sup>181</sup> According to the 'protected characteristics approach', membership of a particular social group means that 'an individual who is a member of a group of persons all of whom share a common, immutable characteristic.'<sup>182</sup> This immutable characteristic may be innate or unalterable for other reasons. The Supreme Court of Canada clarified that 'what is excluded by this definition are groups defined by a characteristic which is changeable or from which disassociation is possible, so long as neither option requires renunciation of basic human rights.'<sup>183</sup> On the other hand, the 'social perception approach' provides that '[a] particular social group (...) is a collection of persons who share a certain characteristic or element which unites

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<sup>176</sup> See Refugee Appeal No. 74686 [2004] NZRSAA (29 November 2004), paras. 38 and 41.

<sup>177</sup> See e.g. UNHCR, note 164, 13 regarding Somalia. Regarding Afghanistan, see UNHCR, note 8, 35. Non-conformity with religious norms may also give rise to a well-founded fear of being persecuted for reasons of political opinion, for example if it is perceived as opposition to traditional power structures in a given society. This often affects women. Such cases are not specific to a context of armed conflict or other situations of violence and are therefore not discussed in detail here. See Markard, note 9, 237.

<sup>178</sup> See *Minister for Immigration and Cultural Affairs v. Khawar* [2002] HCA 14 per Gleeson CJ.

<sup>179</sup> See *Applicant A and Anor v. Minister for Immigration and Cultural Affairs* (1997) 190 CLR 225 per Dawson J.

<sup>180</sup> See *Khawar* [2002] HCA 14. See also UNHCR, 'Guidelines on International Protection. 'Membership of a Particular Social Group' within the Context of Article 1A(2) of the 1951 Refugee Convention and/or its 1967 Protocol relating to the Status of Refugees', 2002, UN Doc. HRC/GIP/02/02, available online at <http://www.unhcr.org/3f28d5cd4.html> (last accessed 7 May 2011), at 18.

<sup>181</sup> See *Applicant A v. Minister for Immigration and Ethnic Affairs* [1997] HCA 4, 242 per Dawson J.

<sup>182</sup> *In re Acosta* (1985) 191 I&N Dec. 211, para. 10.

<sup>183</sup> *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689, 737.

them and enables them to be set apart from society at large.<sup>184</sup> UNHCR's definition of particular social group reconciles both approaches in a non-cumulative way.<sup>185</sup>

### 5.2.1 Civilians

In the context of armed conflicts, in which civilians are often directly targeted and bear the brunt of hostilities, the question arises whether civilians can constitute a particular social group for the purposes of the 1951 refugee definition. No State practice has been identified that addresses this question specifically. In Canada, while its Civil War Guidelines refer to 'civilian non-combatants fearing persecution in civil war situations',<sup>186</sup> they do not discuss this issue directly.

As a term of art in IHL, the term 'civilians' only comes to bear in situations of armed conflict as opposed to internal disturbances or riots. Customary IHL defines 'civilian' as a person who is not a member of the armed forces. It remains unsettled in customary IHL whether, in situations of internal armed conflicts, members of armed opposition groups are considered as members of armed forces or as civilians.<sup>187</sup>

The group comprising of civilians, in a country that is experiencing an armed conflict, is potentially large and heterogeneous but not all civilians are necessarily at risk during situations of armed conflict. As discussed above, this does not mean that civilians cannot constitute a particular social group. Under the protected characteristics approach, it must be examined whether civilians share a common characteristic other than their risk of being persecuted which is innate, unchangeable, or so fundamental to their identity, conscience or exercise of human rights that they cannot be required to change it.

A civilian is a person who is not a member of the armed forces, a characteristic that could change. Some individuals who object to recruitment into the armed forces of a State or into armed groups or individuals who desert might fall into a narrower social group than 'civilians' and the notion of 'civilian' would not necessarily be relevant for the group's definition. Under the protected characteristics approach, it seems that civilians would therefore not constitute a particular social group.

According to the social perceptions approach, in order for civilians to constitute a social group, they need to be perceived as such by society. Civilians are negatively defined as people who are

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<sup>184</sup> *Applicant A v. Minister for Immigration and Ethnic Affairs* [1997] HCA 4, per Dawson J. See also UNHCR, 'Guidelines on International Protection. 'Membership of a Particular Social Group' within the Context of Article 1A(2) of the 1951 Refugee Convention and/or its 1967 Protocol relating to the Status of Refugees', 2002, HRC/GIP/02/02, available online at <http://www.unhcr.org/3f28d5cd4.html> (last accessed 7 May 2011), para. 14.

<sup>185</sup> See UNHCR, note 185, para. 14.

<sup>186</sup> Immigration and Refugee Board of Canada, note 7.

<sup>187</sup> See J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I, Rules* (Cambridge: Cambridge University Press, 2005), 17.

not members of the armed forces. In Belgium, the armed forces have been considered to constitute a particular social group clearly distinguished from the rest of society because they have an exclusive and specific function, their own set of rules and way of life, and confer upon their members a particular social status, demonstrated by wearing uniforms and living in barracks.<sup>188</sup> This begs the question of whether 'the rest of society', i.e. civilians, would conversely constitute a different particular social group. This seems difficult to establish, given that a social group must be distinguished from the relevant society at large. For civilians to be perceived as a social group, the society in question would appear to have to be highly militarized, with a fairly prevalent membership in the armed forces so as to make the lack of such membership objectively cognisable.<sup>189</sup>

In the context of non-international armed conflict, where at least one party to such an armed conflict is an armed opposition group<sup>190</sup>, the status of its members can be difficult to determine – as a matter of law as well as in reality. If its members are considered to be civilians, they would nonetheless lose the protection afforded to civilians for the period of time in which they participate in the hostilities.<sup>191</sup> It would, therefore, be impossible for society to perceive civilians as a particular social group because this group would comprise both members of armed opposition groups involved in the hostilities and of civilians who are not or who have never taken part in the hostilities. However, if members of armed opposition groups are considered to be 'functional combatants'<sup>192</sup> rather than civilians, then it is more likely that civilians can be perceived as a distinct social group.

It is hence conceivable that civilians in a particular context could constitute a particular social group pursuant to the social perceptions approach. This would depend on the precise constellations of the armed conflict and the circumstances in the country of origin. At the same

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<sup>188</sup> See e.g. *Decision No. 01-1019/F1369/cd (Russe)*, *Commission Permanente de Recours des Réfugiés (CPRR)*, 15 March 2002, available online at: <http://www.unhcr.org/refworld/docid/440455f54.html> (last accessed 20 August 2012), recognising Russian conscripts as a particular social group.

<sup>189</sup> On the requirement that a group be objectively cognisable, see Applicant S (2004) 217 CLR 387, 410-411 (69) per McHugh J and M. Foster, 'The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'', *Legal and Protection Policy Research Series*, 2012, 25 available online at: <http://www.unhcr.org/4f7d8d189.html> (last accessed 12 April 2012),9.

<sup>190</sup> See definition of armed conflict above in section 1.2.

<sup>191</sup> On the loss of protection of civilians under customary international humanitarian law, see generally International Committee of the Red Cross, 'Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law', 2009, available online at: [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report\\_res/\\$File/direct-participation-guidance-2009-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf) (last accessed 24 January 2011). The UNHCR and ICTR expert meeting on complementarities between international refugee law, international criminal law, and international human rights law noted that the 'determination of who is a "civilian" under humanitarian law provided (...) a good example where international refugee law may usefully borrow from another field of law to assess whether an individual has permanently and genuinely renounced military activities to come within the purview of the 1951 Convention.' Edwards and Hurwitz, note 64, 858.

<sup>192</sup> N. Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008) 311-328.

time, it is likely that the group would have to be defined by more criteria than simply 'civilian' for it to constitute a particular social group in the sense of the 1951 refugee definition. That said, civilians may have a well-founded fear of being persecuted on other 1951 Convention grounds, in particular political opinion. In many conflicts, civilians are obliged to become involved in the conflict. For example, in Colombia, the parties to the conflict actively seek the support of the civilian population.<sup>193</sup> In Afghanistan, civilians suspected of cooperating with or supporting armed anti-government groups may be subjected to arbitrary detention and ill-treatment and may thus be at risk of persecution because of (imputed) political opinion.<sup>194</sup>

### 5.2.2 Groups pursuing certain professions

Groups of persons pursuing certain professions may particularly be at risk in situations of conflict and violence, partly because of their status or role within their community. In Iraq, for example, armed groups seem to endeavour to rid the country of its intellectual elite in order to subvert efforts to establish a functioning democratic society and to erode the country's institutions.<sup>195</sup> The UN Assistance Mission for Iraq observed:

a worrying increase in targeted attacks and assassinations of professionals such as teachers, religious figures, barbers, police officers, artists, lawyers, ex-military officers, and politicians across Iraq (...) These attacks are typically perpetrated by extremists practising conformist ideology and by militant/terror groups intent on spreading fear and intimidation.<sup>196</sup>

Individuals pursuing such professions may have a well-founded fear of being persecuted for reasons of ethnicity, religion or political opinion.<sup>197</sup> Such cases also pose the question of whether groups pursuing certain professions are particular social groups, in particular if a nexus to other 1951 Convention grounds cannot be established.

Much of the examined jurisprudence does not consider that certain professional associations constitute particular social groups. The Swedish Migration Court of Appeal held, for example, that a person who exercised a certain profession, such as a physician, academic or musician could not be considered to form part of a particular social group because members of that group do not share an innate characteristic or a common background that cannot be changed. A

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<sup>193</sup> See UNHCR, 'International Protection Considerations Regarding Colombian Asylum-Seekers and Refugees', 2005, available online at: <http://www.unhcr.org/refworld/docid/422c832e4.html> (last accessed 1 September 2011), para. 89.

<sup>194</sup> See UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan', 17 December 2010, available online at: <http://www.unhcr.org/refworld/docid/4d0b55c92.html> (last accessed 24 August 2012), 16-17.

<sup>195</sup> See UNHCR, note 84, 111.

<sup>196</sup> Quoted by UNHCR, note 84, 110.

<sup>197</sup> In Iraq, journalists, academics, judges, lawyers, doctors, NGO workers, and rights activists have been targeted by armed groups for complex reasons, including their (imputed) political opinion, religious identity, ethnicity, and membership of a particular social group as well as for criminal purposes. See UNHCR, note 84, 20.

profession was, therefore, determined not to be an immutable characteristic.<sup>198</sup> The Court of Appeal for England and Wales held in a case in which the appellant was a landowner who faced extortion from a guerrilla group that ‘rich land-owners in Colombia’ do not constitute a particular social group because they do not share an immutable characteristic.<sup>199</sup> In addition, Canadian jurisprudence also considers that businessmen or -women do not constitute a particular social group.<sup>200</sup>

In contrast, the US Court of Appeal for the Third Circuit has held that a profession can be a distinguishing feature within a given society that cannot easily be changed or hidden. This court identified that a particular social group is not determined by profession alone, but also by ownership of land, social position, and education.<sup>201</sup> A German administrative court recognised high level representatives of government and their close relatives in Afghanistan as a particular social group.<sup>202</sup> Such persons can also have a well-founded fear of being persecuted because of their actual or imputed political opinion.<sup>203</sup> Carrying out a certain occupation may bring an individual to the attention of a party to the conflict and may render this individual of use to this party. This was the case for a Colombian truck driver who had been compelled by the Revolutionary Armed Forces of Colombia- *Fuerzas Armadas Revolucionarias de Colombia* (FARC) to transport goods for them. He was also affiliated with a political party and was thus found to have a well-founded fear on account of his political opinion.<sup>204</sup> For UNHCR, ‘[a] particular social group based on the applicant’s occupation may in certain circumstances (...) be recognized where disassociation from the profession is not possible or this would entail a renunciation of basic human rights.’<sup>205</sup> However, whether the infringement of the human right(s) is serious enough depends on the circumstances of the case. In respect of the ‘social perception’ approach, it is clear that not all professions are necessarily perceived in society as a social group. Whether or not persons belonging to a certain profession constitute a particular social group thus hinges on the overall context.

### 5.3 Political opinion

Many, if not all, armed conflicts and situations of violence have a political dimension with most, though not necessarily all, non-State actors pursuing political goals. The application of the 1951 Convention ground of political opinion in such contexts must therefore be examined, in

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<sup>198</sup> See MIG 2009/36, 22 December 2009.

<sup>199</sup> See *Montoya v. Secretary of State for the Home Department*, [2002] EWCA Civ 620, para. 8.

<sup>200</sup> See *Lozano Navarro v. Canada* (Citizenship and Immigration) 2011 FC 768, para. 35.

<sup>201</sup> See *Orejuela v. Gonzalez* (Attorney General), 423 F.3d 666, (7th Cir. 2005) 13.

<sup>202</sup> See VG Frankfurt 7 K 1517/00 (2 March 2004). Cited by Foster, note 190, 71.

<sup>203</sup> UNHCR, note 198, 9.

<sup>204</sup> See *Escobar v Holder* 2011 U.S. App. LEXIS 18538 (7th Cir. 2011).

<sup>205</sup> UNHCR, note 16, para. 39. Similarly: Foster, note 190, 72.

particular as regards two matters: (1) the meaning of political opinion where the persecutor is a non-State actor and (2) the potential bases for imputing political opinion.

The notion of political opinion is context-specific; it must 'reflect the reality of the geographical, historical, political, legal, judicial and socio-cultural context of the country of origin'.<sup>206</sup> In UNHCR's view, political opinion includes 'any opinion on any matter in which the machinery of the State, government, society, or policy may be engaged.'<sup>207</sup> Cases concerning refusals to join or support a party to a conflict or to take sides may relate to expressions of political neutrality, which has been considered a political opinion in certain circumstances.<sup>208</sup> Acts which might at first sight appear to be solely private may also have a political dimension. For examples, rebels may compel women and girls to provide shelter and food or to act as messengers, taking advantage of the fact that they are less likely to be perceived as members of a rebel group.<sup>209</sup>

A person with a well-founded fear of being persecuted for reasons of political opinion need not expressly articulate such opinion. Political opinion may be attributed to the victim by the persecutor; it is irrelevant whether this opinion actually corresponds to the victim's views.<sup>210</sup> In such cases, it is the persecutor's perception of the victim's political opinion that is relevant rather than the persecutor's own political opinions.<sup>211</sup> Non-State actors may also impute political opinions to their victims.<sup>212</sup>

Political opinion is to be interpreted broadly,<sup>213</sup> but not so broadly that it encompasses any opinion which a non-State agent of persecution may impute on its victim.<sup>214</sup> Whether an opinion

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<sup>206</sup> UNHCR, note 16, para. 46. See also *Starred Gomez (Non-State Actors: Acero-Garces Disapproved) (Colombia)*, [2000] UKIAT 00007, paras. 40-41; *Jerez-Spring v. Canada* [1981] 2 F.C. 527 [F.C.A.].

<sup>207</sup> UNHCR, note 16, 32. See also Goodwin-Gill and McAdam, note 12, 87.

<sup>208</sup> In *Sangha v I.N.S.*, 103 F.3d 1482, 1488 (9th Cir. 1997); the U.S. Court of Appeals for the Ninth Circuit held that 'an applicant can establish a "political opinion" (...) [by] show[ing] political neutrality in an environment in which political neutrality is fraught with hazard, from governmental or uncontrolled anti-governmental forces.' See also *Elias-Zacarias v. I.N.S.* 112 S.Ct 812 (1992). See also *Rivera-Moreno v I.N.S.* (No 98-71463) (9th Cir. 2000), *Maldonado-Cruz v. I.N.S.*, 883 F.2d 788, 791 (9th Cir. 1989) and Sternberg, note 9, 82-122. UK jurisprudence seems to adopt a broader approach. In the case of *Noune v. Secretary of State for the Home Department* before the Court of Appeal (Civil Division) [2000 WL 1791543, 6 December 2000], Schiemann LJ stated at para. 8 that 'in order to show persecution on account of political opinion it is not necessary to show political action or activity by the victim: in some circumstances, mere inactivity and unwillingness to co-operate can be taken as an expression of political opinion.' See also *Secretary of State for the Home Department (Appellant) v. RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener) - Case for the Intervener*, 25 May 2012, 2011/0011, available online at: <http://www.unhcr.org/refworld/docid/4fc369022.html> (accessed 27 August 2012), para. 10.

<sup>209</sup> See Markard, note 9, 267.

<sup>210</sup> See e.g. *Noune v. Secretary of State for the Home Department* before the Court of Appeal (Civil Division) [2000 WL 1791543, 6 December 2000], para. 8.

<sup>211</sup> See also *Starred Gomez (Non-State Actors: Acero-Garces Disapproved) (Colombia)*, [2000] UKIAT 00007, para. 37; *Sangha v. I.N.S.*, 103 F.3d 1482, 1488 (9th Cir. 1997).

<sup>212</sup> See M. Symes and P. Jorro, *Asylum Law and Practice* (Haywards Heath: Bloomsbury Professional, 2<sup>nd</sup> edn. 2010), 222.

<sup>213</sup> See UNHCR, note 16, 32. See also Goodwin-Gill and McAdam, note 12, 87.

imputed by a non-State persecutor on its victims is political depends at least in part on the context and particular features of the conflict and the characteristics of the non-State actor in question. In Colombia, the highly polarized situation<sup>215</sup> and the powerful guerrilla groups such as the FARC or the National Liberation Army – *Ejército de Liberación Nacional* (ELN) which at times carry out State-like functions<sup>216</sup> have been relevant factors in finding that an opinion attributed to a victim by a non-State actor is a political one. The Canadian IRB found a Colombian refugee claimant to fear persecution for reasons of his pro-government/anti-ELN political opinion,<sup>217</sup> noting in a different case that the political nature of the ELN is well established in documentary evidence.<sup>218</sup> This case illustrates that non-State actors frequently threaten their victims because ‘if you are not with us, you’re against us’, raising the question of whether the victim’s opposition to non-State actor is a political opinion. While this has been accepted as imputing a political opinion in some cases,<sup>219</sup> others have considered this approach to imputed political opinion as too sweeping.<sup>220</sup> The UK AIT clarified that ‘[t]o qualify as political the opinion in question must relate to the major power transactions taking place in that particular society. It is difficult to see how a political opinion can be imputed by a non-State actor who (or which) is not itself a political entity.’<sup>221</sup>

In another cases concerning Colombia, the RSAA held:

[T]he FARC is an extreme left-wing political movement which categorizes its victims as enemies of the working class. Its actions are confused, often contradictory and usually criminal, but the underlying political current is sufficient to satisfy the Authority that any harm to the appellant would be for reasons, at least in part, of political opinion.<sup>222</sup>

This case illustrates that claims involving imputed political opinion frequently require a careful assessment of the political goals of a non-State party to a conflict and their connection, if any,

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<sup>214</sup> See *Starred Gomez (Non-State Actors: Acero-Garces Disapproved) (Colombia)*, [2000] UKIAT 00007, para. 73(VI).

<sup>215</sup> See UNHCR, ‘International Protection Considerations regarding Colombian Asylum-Seekers and Refugees’, 1 September 2002, available online at: <http://www.unhcr.org/refworld/docid/3d92d4204.html> (last accessed 24 August 2012), para. 22.

<sup>216</sup> See *Starred Gomez (Non-State Actors: Acero-Garces Disapproved) (Colombia)*, [2000] UKIAT 00007, para. 21.

<sup>217</sup> X (Re), 2004 CanLII 56786 (IRB).

<sup>218</sup> X (Re) 2004 CanLII 56786 (IRB).

<sup>219</sup> See Refugee Appeal No. 1452/93 Re JLSL NZRSAA (8 February 1993). The refugee claimant in this case had been a bodyguard to a prominent individual who was openly in conflict with the Shining Path and who had been assassinated by them. See also *Noune v. Secretary of State for the Home Department* before the Court of Appeal (Civil Division) [2000 WL 1791543, 6 December 2000].

<sup>220</sup> See Refugee Appeal No. 2507/95 Re JEAH NZRSAA (22 April 1996).

<sup>221</sup> *Starred Gomez (Non-State Actors: Acero-Garces Disapproved) (Colombia)*, [2000] UKIAT 00007, para. 73(VII).

<sup>222</sup> Refugee Appeal No. 76289 [2009] NZRSAA 36 (8 May 2009), para. 43. On the FARC, ELN and imputed political opinion, see also *Starred Gomez (Non-State Actors: Acero-Garces Disapproved) (Colombia)*, [2000] UKIAT 00007, para. 66. In *Guerrero-Gomez and others v. Attorney General*, 218 Fed. Appx. 921 (11th Cir. 2007), in which the Court held that the FARC’s harassment of the petitioner was merely extortion rather than based on political views imputed on him. In *Espinosa-Cortez and others v. Attorney General* 607 F.3d 101 (3rd Cir. 2010), the Court found that the petitioners’ fear of persecution was at least partially based political opinion attributed to them by the FARC since one petitioner had made his anti-FARC views known.

with individual attacks by members of this party against specific persons. It may be difficult to ascertain whether a non-State party to a conflict seeks to achieve its political goals without regard to the political views of those harmed or whether it attributes a political opinion to them.<sup>223</sup> Moreover, economic or criminal motives may also be involved; though as stated above, such multiple motives do not negate a finding of a nexus to the 1951 Convention ground of political opinion.<sup>224</sup> As regards political opinion, the challenge is to take into account the political dimension of a conflict and its impact on the individual refugee claimant. The general objectives of the agent of persecution alone do not suffice to demonstrate imputed political opinion.<sup>225</sup> In the UK Border Agency's view, '[e]ven if a rebel group has a broad political aim (e.g. overthrowing the Government), individual attacks on particular individuals might simply be retaliatory or criminal and not necessarily linked to an overriding political aim.'<sup>226</sup> Whilst it is true that not every act of such a group is related to its political objectives, retaliation may be criminal *or* political and warrants a careful analysis of the circumstances of the case.<sup>227</sup>

Thus, in cases concerning non-State actors, the assessment of whether the opinion attributed to the refugee claimant is a political one requires a careful analysis of the characteristics of the non-State actor, its political objectives, if any, and how they relate to individual acts that affect the victim, the broader context of the conflict, and the individual circumstances of the claimant.

The jurisprudence provides some guidance regarding the bases on which a political opinion may be attributed to an individual in contexts of armed conflict and other situations of violence. As stated above, this includes a person's ethnicity or religion. Regarding Tamils in Sri Lanka, for example, UNHCR highlights that in addition to ethnicity and religion, political opinion can also be attributed to a person based on their gender or age.<sup>228</sup> Someone's profession also often demonstrates or is perceived to demonstrate an affiliation with a party to the conflict.<sup>229</sup> Civilians

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<sup>223</sup> See Anker, note 78, § 5:55.

<sup>224</sup> Schiemann LJ held that '[t]he motives of the persecutor may be mixed and they can include non-Convention reasons: it is not necessary to show that they are purely political'. *Noune v. Secretary of State for the Home Department* before the Court of Appeal (Civil Division) [2000 WL 1791543, 6 December 2000], para. 8.

<sup>225</sup> See *Starred Gomez (Non-State Actors: Acero-Garces Disapproved) (Colombia)*, [2000] UKIAT 00007, para. 73(XI); see also para. 67 regarding the FARC in Colombia.

<sup>226</sup> UK Border Agency, note 7, 31.

<sup>227</sup> In *Dalit Sing v. Minister for Immigration and Multicultural Affairs* [1999] FCA 1599, Mansfield J noted at para. 35 that '[r]evenge may be personal or it may be political.' The U.S. Court of Appeal for the Second Circuit held that 'the conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of the persecution.' *Osorio v. I.N.S.* 18 F.3d 1017, 1028 (2nd Cir. 1994). See also *Starred Gomez (Non-State Actors: Acero-Garces Disapproved) (Colombia)*, [2000] UKIAT 00007, para. 42.

<sup>228</sup> See UNCHR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka', note 84, 31.

<sup>229</sup> See VGH BWA 2 S 229/07, NVwZ 2008, 447 (8 August 2007) (noting that journalists and members of the intellectual elite such as academics, physician or artists), BVerwG, Judgment of 24 June 2008 – 10 C 43/07, NVwZ 2008, 1241 (1245), quoted by Markard, note 9, 268. See also A. Binder, *Frauenspezifische Verfolgung vor dem Hintergrund einer menschenrechtlichen Auslegung des Flüchtlingsbegriffs unter besonderer Berücksichtigung der*



working for the State, even in non-political roles, may be seen as sharing the government's political opinion.<sup>230</sup> In some cases, a regime may consider individuals as political enemies because they are associated with a hostile State; this was the case for some Iraqis after the US-led invasion and who had been airlifted by the US.<sup>231</sup> In the context of Afghanistan, support or perceived support for the government or the international community has founded a refugee claim based on imputed political opinion.<sup>232</sup> Yet, the UK AIT cautioned that 'it cannot be said as a universal proposition that those on the side of law and order and justice who face persecution from non-State actors (...) [such as] guerrilla organisations (...) will have a political opinion imputed on them.'<sup>233</sup>

Political opinion may also be attributed to a person based on their place of residence or origin. For example, in *Garcia-Martinez v. Ashcroft*, the applicant argued that a political opinion was imputed on her and her entire village by Guatemalan soldiers. The US Court of Appeal for the Ninth Circuit found that her rape 'was inextricably tied to the village's affiliation, in the minds of the Guatemalan military, with the guerrillas'.<sup>234</sup> UNHCR notes that in the context of the Colombian conflict, the mere place of residence often suffices to make parties to the conflict suspicious, not least because residents in areas controlled by an armed group are often compelled to provide support.<sup>235</sup> However, in a case concerning a claimant from Dafur who fled when rebels attacked his village which they considered as supporting government authorities, the French National Court of Asylum Law (*Cour Nationale du Droit d'Asile*) did not take into account imputed political opinion.<sup>236</sup>

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*schweizerischen, deutschen, kanadischen und amerikanischen Flüchtlings- und Asylpraxis* (Basel et al.: Helbing & Lichtenhahn, 2001), 225.

<sup>230</sup> See X (Re), 2004 CanLII 56786 (IRB) (concerning a Colombian who had been working for a government department and was found to be attributed a pro-government/anti-ELN opinion); VG Frankfurt, 7 K 3373/09.F.A. (16 September 2010) (concerning inter alia a female teacher in a girls school); UK Border Agency, note 7, 30; UNHCR, note 198, 20. But see *Tamara-Gomez v Gonzalez*, 447 F.3d 343, 15 (5<sup>th</sup> Cir. 2006) in which the claimant was found to be targeted because the guerrilla viewed him as a member of the Colombian police. The Court considered such risks to be part of a policeman's job and not related to political opinion (ignoring that the claimant was in fact not a policeman but a civilian helicopter mechanic).

<sup>231</sup> See *Al-Harbi v I.N.S.* 242 F.3d 882 (9<sup>th</sup> Cir. 2001).

<sup>232</sup> See Bayrisches Verwaltungsgericht (Bavarian Administrative Court), M 23 K 09.50296 (19 January 2011) in which an Afghan refugee claimant who had worked for international organizations in Afghanistan was found to have a well-founded fear of being persecuted for reasons of his imputed political opinion. See also UNHCR, 'Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers', note 84, 64.

<sup>233</sup> *Starred Gomez (Non-State Actors: Acero-Garces Disapproved) (Colombia)*, [2000] UKIAT 00007, para. 47.

<sup>234</sup> *Garcia-Martinez v Ashcroft*, 371 F.3d 1066, 1069-1070 (9<sup>th</sup> Circuit, 2004). See also

See further Anker, note 78, § 5:31.

<sup>235</sup> See UNHCR, note 216, 12. But see *Cediel and others v US Attorney General*, 170 Fed. Appx. 89 (11<sup>th</sup> Cir. 2006), in which the Court rejected the petitioners' argument that the paramilitaries imputed a pro-guerrilla opinion on one of the petitioners because of his home town which was known as a guerrilla stronghold, holding that the petitioner had not been singled out and that the paramilitaries generally harassed people.

<sup>236</sup> See CNDA, decision no. 09016633, M. Haroun Abbakar Mohammed, 1 September 2010.

## 6 INTERNAL FLIGHT OR RELOCATION ALTERNATIVE

Although a refugee claimant need not show that he or she has a well-founded fear of being persecuted in the entire country of origin,<sup>237</sup> cases where the fear of being persecuted is confined to a specific part of the country, for instance because the armed conflict or situation of violence is geographically limited,<sup>238</sup> may give rise to the question of whether the refugee claimant has an internal flight or relocation alternative (IFA) within the country of origin. This is normally only required where the persecutor is a non-State agent, as it is presumed that in State persecution cases, the State has control throughout the territory.<sup>239</sup>

A proposed area of relocation must be practically, safely and legally accessible.<sup>240</sup> For UNHCR, the security threats arising from a situation of conflict and violence 'such as mine fields, factional fighting, shifting war fronts, banditry and other forms of harassment or exploitation'<sup>241</sup> may render an IFA inaccessible and thus irrelevant. In regards to Afghanistan, the UK Border Agency notes that '[i]n many areas insurgent violence, banditry, land mines, and improvised explosive devices make travel extremely dangerous, especially at night.'<sup>242</sup> The Canadian Federal Court of Appeal held, concerning Sri Lanka, that '[t]he claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety.'<sup>243</sup> An armed conflict or a situation of violence in the country of origin may thus render a relocation area inaccessible. Importantly, this may be the case even if the armed conflict or situation of violence has ended, for example because of destroyed infrastructure or explosive remnants of war.

Moreover, the availability of State protection in the proposed area of relocation forms part of the analysis of whether this area is relevant. The UNHCR Handbook notes that 'a state of war, civil war or other grave disturbance' may prevent a country from granting protection or may render such protection ineffective.<sup>244</sup> For the Canadian IRB, the intensity of a conflict and the volume of threats to citizens may indicate a State's inability to provide protection to the claimant.<sup>245</sup> In

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<sup>237</sup> See Goodwin-Gill and McAdam, note 11, 123 and 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', 2003, UN Doc. HRC/GIP/03/04, available online at: <http://www.unhcr.org/3f28d5cd4.html> (last accessed 23 July 2011), para. 6.

<sup>238</sup> See UNHCR, note 72, para. 91.

<sup>239</sup> UNCHR, note 238, para. 13.

<sup>240</sup> See UNHCR, note 238, para. 7(i)(a).

<sup>241</sup> UNHCR, note 238, para. 10. On the practical, legal and safe accessibility of an IFA, see *ibid.*, para. 7.

<sup>242</sup> See UK Border Agency, note 7, para. 2.12.

<sup>243</sup> *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* [1994] 1 FC 589 (C.A.).

<sup>244</sup> See UNHCR, note 72, para. 98. See also UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers, August 2007, note 84, 9; UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia', note 164, 31.

<sup>245</sup> See X (Re) 2004 CanLII 56786.

Germany,<sup>246</sup> Canada<sup>247</sup> and the US,<sup>248</sup> territorial control has been considered a crucial factor in assessing the ability of the country of origin to provide protection. Although UNHCR has understood territorial control as a prerequisite for effective State protection,<sup>249</sup> it also noted that during situations of conflict and violence, State protection may be ineffective despite the State's territorial control over an area.<sup>250</sup> Territorial control is thus a necessary but not sufficient factor in determining the availability of State protection in a proposed area of relocation.

Canadian jurisprudence presumes State protection except in situations of complete breakdown of the State apparatus.<sup>251</sup> Although armed conflict and other situations of violence may lead to such a breakdown, limiting such circumstances to a complete breakdown of the State apparatus is too narrow a view. Even if the State is no longer in a position to provide meaningful protection, a State's armed forces may still be functioning and thus the State apparatus could be considered as not having completely broken down. A better approach could be to presume a lack of State protection if the conflict fulfils certain criteria, such as a high level of intensity and frequency of violence or a vast geographic scope of the violence employed, thus shifting the burden of proof from the refugee claimant to the authorities of the receiving State.

Other relevant factors in assessing whether a proposed area of relocation is relevant concern the reach of non-State agents of persecution and the extent to which they exercise territorial control over an area. When examining the existence of an IFA for a Somali claimant, the UK AIT held: 'Amongst the relevant general circumstances will be to what extent there are parts of central or southern Somalia which an applicant can access where there is not the prevalence of ongoing fighting (because for example one side has established or re-established territorial control).'<sup>252</sup> Yet, such territorial control must not be the sole relevant factor, as the most serious IHL violations are often committed in situations where one side has gained the upper hand.<sup>253</sup> Conversely, lack of territorial control by the non-State agent of persecution over the proposed area of relocation does not suffice to establish that the refugee claimant would be safe. Canadian

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<sup>246</sup> See BVerwG 10 C 43.07 – VGH 13 a B 05.30833 (24 June 2008), 25.

<sup>247</sup> See *Lara Deheza v. Canada (Citizenship and Immigration)* 2010 FC 521, para. 36; X (Re) 2004 CanLII 56786 (IRB); X (Re) 2009 CanLII 90052 (IRB); X (Re) 2003 CanLII 55250 (IRB).

<sup>248</sup> See U.S. Asylum Office notes that '[a] government in the midst of a civil war, or one that is unable to exercise its authority over portions of the country (e.g. Colombia, Indonesia, Somalia) will be unable to control the persecutor in areas of the country where its influence does not extend.' AOTBC, Asylum Eligibility Part I, cited by Anker, note 78, para. 2:14, footnote 23.

<sup>249</sup> See UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, note 84, 9.

<sup>250</sup> See *Ibid.*, 9. The question of whether and, if so, to what extent and under what conditions actors other than the State (such as clans or peace keeping troops) can provide effective protection for the purposes of the refugee definition is beyond this paper's scope.

<sup>251</sup> See *Canada (Attorney General) v. Ward* [1993] 2 SCR 689, 724-725; see also *Balasingam v. Canada (Minister for Employment and Immigration)* 2004 FC 1465, paras. 30 and 33.

<sup>252</sup> *AM & AM v. Secretary of State for the Home Department (armed conflict: risk categories) Somalia CG* [2008] UKAIT 00091, para. 190.

<sup>253</sup> See Storey and Wallace, note 9, 361.

jurisprudence shows that the lack of territorial control by a non-State agent of persecution in other parts of the country does not necessarily eliminate the risk of harm emanating from this agent. For example, the IRB found that although a guerrilla group was not physically present throughout all of Colombia, it was capable of locating targeted individuals anywhere in the country.<sup>254</sup> The UK Border Agency also notes that '[g]iven the wide geographic reach of some anti-Government groups [in Afghanistan], a viable internal relocation options may not be available to individuals at risk of being targeted by such groups.'<sup>255</sup>

There are further factors relevant for the IFA analysis in a context of armed conflict and other situations of violence. For example, the extent of forced displacement resulting from such violence has also been used as an indicator whether an IFA can be said to exist. The Belgian Council for Alien Law Litigation (*Conseil du Contentieux des Etranger/Raad voor Vreemdelingenbetwistingen*) found that no IFA is available in the DRC because hundreds of thousands of people have fled from the fighting in Kivu and have tried to cross the border into Uganda rather than fleeing to a different region within the DRC.<sup>256</sup>

A proposed area of relocation would need to be reasonable in all the circumstances. In particular, the impact of insecurity and the volatility of the conflict, which might render previously secure places unsafe, need to be considered. As UNHCR notes:

In most cases, countries in the grip of armed conflict would not be safe for relocation, especially in light of shifting armed fronts which could suddenly bring insecurity to an area hitherto considered safe. In situations where the proposed internal flight or relocation alternative is under the control of an armed group and/or State-like entity, careful examination must be made of the durability of the situation there and the ability of the controlling entity to provide protection and stability.<sup>257</sup>

In some State practice, the security implications of conflict and violence form part of the IFA analysis. According to US regulations, in assessing the reasonableness of a proposed internal protection alternative, the existence of an ongoing civil strife is to be considered.<sup>258</sup> The lack of adequate security is a primary reason why France's National Court of Asylum (*Cour Nationale du Droit d'Asile*) has often rejected the existence of an IFA.<sup>259</sup> German courts have also found that the

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<sup>254</sup> See *X (Re)* 2004 CanLII 56786 (IRB). See also *Rodriguez Gutierrez v. Canada* (Minister of Citizenship and Immigration) 2010 FC 1010, paras. 22 and 26.

<sup>255</sup> UK Border Agency, note 7, para. 2.13.

<sup>256</sup> See *No. 53151* Conseil du Contentieux des Étrangers / Raad voor Vreemdelingenbetwistingen (15 December 2010).

<sup>257</sup> UNHCR, note 238, para. 27.

<sup>258</sup> See 8 CFR § 208 31(3)(b).

<sup>259</sup> See CNDA No. 574495, *Mlle N.*, 2 April 2008; Commission des recours des réfugiés, No. 585846, *Mlle S.*, 15 March 2007; Commission des recours des réfugiés, SR, No. 573815, *T.*, 16 February 2007.

proposed area of internal protection must lie outside the territory of the internal armed conflict.<sup>260</sup>

The existence of a situation of conflict and violence in the country of origin should not mean that the viability of a proposed IFA is only assessed in terms of safety risks. When determining the existence of an IFA in Colombia, the IRB adopted a comprehensive approach by finding that relevant factors include 'the highly fluid and volatile nature of the conflict, the destruction of socio-economic infrastructure and widespread internal displacement'.<sup>261</sup> Not only did it look at the prevalence of violence, but it also considered the after-effects of conflict and violence. With regard to Sri Lanka, UNHCR also suggested a comprehensive approach to the reasonable analysis: 'the lack of basic infrastructure and inadequacy of essential services (...); the presence of landmines and unexploded ordnance; as well as continued economic and security restrictions (...) which prevent civilians from accessing locations used for agriculture, fishing and cattle grazing and other livelihood activities.'<sup>262</sup>

Thus, a situation of conflict and violence affects all aspects of the IFA analysis. Such a situation should not only be understood in terms of risks to life and limb, but more broadly in terms of the conflict's impact on the infrastructure and socio-economic conditions of the proposed IFA. The criteria used in the examined States to assess whether an IFA exists includes the exercise of territorial control or lack thereof, the capabilities of non-State agents of persecution to reach beyond the area under their control, the movements of large groups of forcefully displaced persons, and the geographic scope of the violence. These are useful, though not comprehensive, indicators of the relevance and reasonableness of a proposed IFA.

## IV CONCLUSIONS

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The relevance of the 1951 Convention for the protection of people who flee armed conflict and other situations of violence in their country of origin is widely accepted, yet there remain discrepancies in State practice. This study has documented both non-restrictive and restrictive interpretations. The restrictive tendencies evident in several States undermine the relevance of the 1951 Convention for the protection of people in these circumstances.

The question of how individualized a threat of persecution must be underpins many of these restrictive approaches. The notion of individualization is apparent in the interpretation of several elements of the refugee definition. In some States, it results in a higher standard of proof of persecution for people who have fled armed conflict and other situations of violence, while in

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<sup>260</sup> See BVerwG 27 June 2008 10 C 43.07 – VGH 13a B 05.20822 25.

<sup>261</sup> X (Re) 2004 CanLII 56786 (IRB).

<sup>262</sup> UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka', 2010, available online at: <http://www.unhcr.org/refworld/docid/4c31a5b82.html> (last accessed 15 November 2011), 10.

others, such situations require a differentiated risk. The individualization requirement is also apparent in the narrow interpretation of the nexus requirement evident in the jurisprudence of some States. According to this view, the plight of similarly situated people in the country of origin who fear harm for ethnic, political, religious or other reasons does not substantiate the finding of a nexus to a 1951 Convention ground. The assessment of whether a well-founded fear of being persecuted is *for reasons of* a 1951 Convention ground is probably the most crucial and the least clear aspect of refugee status determination in contexts of armed conflict and other situations of violence.

These restrictive tendencies stand in stark contrast to the historical evolution of refugee law, which was to a large extent triggered by waves of conflict-induced forced displacement. The refugee definitions in the predecessors to the 1951 Convention and the Convention itself were adopted against the backdrop of armed conflict and other situations of violence and granting refugee status to such people was understood not to be an exceptional process. The current restrictive interpretations exhibit not only disconnect to this historical background, but at times even an express misunderstanding of it.<sup>263</sup>

The wording of the 1951 refugee definition also does not support an interpretation that is more restrictive in armed conflict and other situations of violence than in peacetime. The 1951 Convention's object and purpose warrant an inclusive and dynamic interpretation that provides protection to people fleeing armed conflict and other situations of violence without confronting them with higher hurdles. Given the various inconsistencies in jurisprudence, the need for clear, authoritative guidance on the interpretation of the 1951 refugee definition in the context of armed conflict and other situations of violence has been demonstrated.

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<sup>263</sup> See *Adan v. Secretary of State for the Home Department* [1998] 2 WLR 702, per Lord Lloyd of Berwick.