

WHAT CONSTITUTES PERSECUTION: Towards a working definition of persecution by Hugo Storey¹,

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Article 1 of Refugee Convention - Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

...

(2) 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, 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.

..." [PPT 2]

The puzzle

When first we light upon the 1951 Convention we quickly learn that its crux is Article 1A (2) [PPT 2] and that the keystone of 1A (2) is the concept of persecution. The precise wording of course refers to 'being persecuted' - *d'être persécutée* in the French text - and the use of the present passive tense/gerund is critical because it demonstrates that we are concerned with current fear (rather than historic fear) and with the interaction between persecutor and persecuted². But I will refer to the abstract noun because that is how we name things.

¹ This paper is based on a much longer article *H. Storey, "Persecution: Towards a Working Definition", in V. Chetail & C. Bauloz (eds.), Research Handbook on Migration and International Law, Cheltenham: Edward Elgar Publishing, 2013 (forthcoming)*. The views expressed herein do not necessarily reflect those of either the United Kingdom Upper Tribunal or the International Association of Refugee Law Judges.

² As the Australian Federal Court put it in *Minister for Immigration, Multicultural and Indigenous Affairs v. Kord* (2002) 125 FCR 68, the "use of the passive voice conveys a compound notion, concerned both with the conduct of the persecutor and the effect of that conduct has on the person being persecuted". Hathaway and Pobjoy observe that because the Convention is concerned with "protection against a condition or predicament – *being* persecuted – consideration must be given to both the nature of the risk *and* the nature of the State response (if any), since it is the combination of the two that gives rise to the predicament of "being persecuted".

We are perhaps apprehensive to find no definition of either persecution or the other key term in Article 1A(2) - protection - but we quickly move on, confident of learning that legal experts have long ago set everyone straight about this.

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Once first we begin reading the legal experts and their textbooks we quickly learn that when seeking to interpret the Convention's key terms - persecution and protection in particular - we must strive, in accordance with the Vienna Convention on the Law of Treaties (VCLT) 1969, to achieve a universal definition. We all readily understand that when it comes to an international treaty of this kind it would undermine its purpose if persecution were given one definition in one country, a completely different definition in another and so on and so on³.

Yet as we become adjusted to this Convention's specific legal regime and absorb the specific learning which has accrued around it, we find our anxieties unassuaged and that in fact we are met with a real puzzle. Not only do we *not* find a definition of persecution in the treaty itself, not only do we *not* find a definition universally agreed by legal experts, but we are met by a Greek chorus of commentators telling us in hushed and reverent tones that to define persecution would be sacrilegious. The drafters, we are swiftly reminded, deliberately chose not to define the term for fear of being too restrictive. In the oft quoted words of Grahl-Madsen⁴, "...[the drafters] capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men." **[PPT3]**

A similar admonition is expressed, for example, by Goodwin-Gill in his seminal work, *Refugee in International Law*:

"There being no limits to the perverse side of human imagination, little purpose is served by attempting to list all known measures of persecution. Assessments must be made from case to case by taking account, on the one hand, of the notion of individual integrity and human dignity and, on the other hand, of the manner and degree to which they stand to be injured. (G Goodwin-Gill, *The Refugee in International Law*, 2nd edition, p.69.) **[PPT4]**

Volker Türk and Frances Nicholson have likewise warned that attempts to define persecution "...could limit a phenomenon that has unfortunately shown itself all too adaptable in the history of humankind". (V. Türk & F. Nicholson, "Refugee protection in international law: an overall perspective", in E. Feller, V. Türk & F. Nicholson (eds.), *Refugee Protection in International Law*, Cambridge, Cambridge University Press, 2003 at 39). **[PPT 5]**

The underlying concern voiced here is about a "closed list" approach formulated in absolute terms which it is felt cannot grapple with the changeability of the subject matter.

³ As noted by Laws LJ in *Sepet and Bulbul v. Secretary of State for Home Department* [2001] EWCA Civ 681 at 49 "the Convention's possession of an autonomous meaning of each term entails the conclusion that what may count as persecution in one State may in like circumstances count as persecution in any other".

⁴ A. Grahl-Madsen, *the Status of Refugees in International Law, Volume I – Refugee Character*, Leiden: Sitjhoff, 1966.

Added to these siren voices there are also the pragmatists who say in more secular terms, 'What's all the fuss about? We don't need a definition of persecution. We know it when we see it. Persecution is self-identifying. In the aftermath of WWII everyone knew who was a refugee⁵ and it should be no different today.'

Page | 3 I have not been alone in finding this culture of naysaying and denial unsatisfactory. One could understand if we were philosophers or theologians talking about the definition of, say Evil, with all its entanglements within metaphysics, deontology, ethics etc. But most of us here are judges and, like other refugee decision makers, we are practical people. We have to apply and interpret the legal instruments before us as best we can in order to decide who is a refugee. We are all legal positivists by necessity. And, to advert briefly to my earlier comment, we have to be guided by the approach to interpretation enjoined by the VCLT which exhorts a quest for universal definition.

And on closer analysis I would suggest the main objections voiced to defining persecution are not valid objections to the task *per se* but only to two specific (and obviously flawed) approaches to interpretation. Thus to say that persecution is too protean to try and 'freeze-frame' into a definition is an objection only to an approach which seeks to define persecution exhaustively or in absolutist terms. It is not an argument against a non exhaustive approach or an approach that seeks to define its material scope defeasibly.

Past attempts to define persecution

Before venturing further, let us take stock of attempts that have been made in the past 60 odd years to define persecution – for, despite the siren voices, a significant numbers of commentators have felt this is a legitimate task and decision makers of course have always needed to give content to it in practice.

National law definitions

The absence of any definition of persecution in the Refugee Convention, coupled with the choice of its drafters in Article 38 to restrict access to the International Court of Justice (ICJ) to resolve disputes over interpretation to an inter-state procedure, gave individual State parties free rein to develop their own definitions of persecution. The response of some governments has been to impose a national law definition. One of the most controversial attempts to decree a national definition has been that under section 91R of Australia's Migration Act 1958 (Cth).⁶ [PPT6] To lay down such a definition could be said

⁵ See Einarsen, "Drafting History of the 1951 Convention and the 1967 Protocol", in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, Oxford, Oxford University Press, 2011 at 57; para 16, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, UNHCR, 1 April 2001.

⁶ Section 91R of the Migration Act 1958 (as amended) states: **Persecution**

(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the [Refugees Convention](#) as amended by the [Refugees Protocol](#) does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and

to promote the principle of legal certainty, but its fatal flaw is self-evident. It seeks to fix on a definition of persecution without regard to whether it reflects this term's universal definition. Indeed its aim would seem to be to prevent judges from trying to achieve a universal definition⁷.

Page | 4 Much more commonly the definition of persecution is left for the national courts and tribunals and their case law.

'Dictionary definitions'

For courts and tribunals, one approach that enjoyed prominence until the last decade - and even resurfaces from time to time today - is what has been called the 'dictionary definition' approach. In the first few decades after the Convention was ratified national judges clearly found defining persecution a daunting task (it must be recalled that between the 1960s and 1990s, judges and policy makers were from a generation who typically had little or no background in international law or even public law) and so reached for ready-made answers in the form of dictionary definitions. Judges, especially those from common law countries, were wont to remind themselves that the word persecution derives from the Latin "*persequi*" meaning 'to follow with hostile intent'. To give two Anglo-Saxon examples of the penchant for dictionary definitions, in England, in *R v Immigration Appeal*

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- (b) the persecution involves serious harm to the person; and
 - (c) the persecution involves systematic and discriminatory conduct.

(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of *serious harm* for the purposes of that paragraph:

- (a) a threat to the person's life or liberty;
- (b) significant physical harassment of the person;
- (c) significant physical ill-treatment of the person;
- (d) significant economic hardship that threatens the person's capacity to subsist;
- (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
- (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

(3) For the purposes of the application of this Act and the regulations to a particular person:

(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the [Refugees Convention](#) as amended by the [Refugees Protocol](#);

disregard any conduct engaged in by the person in Australia unless:

(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the [Refugees Convention](#) as amended by the [Refugees Protocol](#)."

⁷ See A. Edwards, "Tampering with Refugee Protection: The Case of Australia", *International Journal of Refugee Law*, 15(2), 2003, 192–211 at 203.

Tribunal, ex parte Jonah [1985] Imm AR 7, Nolan J sought to define persecution as “to pursue with malignancy or injurious intent especially to oppress for holding a heretical opinion or belief”. This was widely cited in subsequent cases. In Australia, in *Applicant A v. Minister for Immigration and Ethnic Affairs* (1987) 190 CLR 225 at 284, Gummow J cited the Oxford English Dictionary definition: “The action of persecuting or pursuing with enmity and malignity; especially the infliction of death, torture or penalties for adherence to a religious belief or an opinion, with a view to the repression or extirpation of it...”.
[PPT 7]

Again, dictionary definitions could be said to further the cause of legal certainty, but at root they founders on the same reef as do national law definitions – by flouting the need for a universal definition. As noted by Zimmerman and Mahler⁸, “such a purely linguistic approach is to be criticised since any given dictionary might give a different meaning...This jeopardises the understanding of this keystone concept since the result would merely depend on which dictionary best fits the case or the interests of the respective court” . Zimmerman and Mahler, “Article 1A paragraph 2”, Zimmerman (ed) supra,n.3,346⁹.

Hermeneutical definitions

Another approach is to attempt what I shall call a 'hermeneutical' definition, by which I mean attempts to elicit a definition of persecution from materials within the same treaty. Thus several commentators¹⁰ have said that by reference to Article 33, persecution can be defined as a 'threat' to 'life or freedom'. **[PPT8]** Whilst such an approach has the virtue of ensuring Article 1A2 and 33 are defined interchangeably (thus avoiding the absurdity implicit in at least some versions of it of contemplating refoulement of refugees), they simply offer three of five words instead of one: ['threats'] to 'life or freedom, are no less amorphous terms than persecution.

Enumerative definitions

Perhaps the most common way textbooks seek to convey what persecution means is by enumerating examples drawn from the *travaux preparatoires*, case law, UNHCR materials etc. The examples taken together are seen comprise a set of *indiciae* or indicators of what persecution is. A good example of this approach can be found in Deborah Anker's textbook on *Law of Asylum in the United States*¹¹. One perceived advantage of this perspective is that whenever decision-makers encounter a case similar to any of the examples, then, applying the principle, like cases should be treated alike, we are likely to follow suit. From the quotation cited earlier, Goodwin-Gill regards any such enterprise as doomed because it can never be complete, but, as indicated earlier, that does not provide a reason as such for not attempting a non-exhaustive list which can be added to as new

⁸ “A.Zimmerman and Mahler, Article 1A paragraph 2”, in Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, Oxford, Oxford University Press, 2011 n.3,346

⁹ See also *Refugee Appeal No.71427/99*, RSAA, 16 August 2000 in which Rodger Haines QC said such an approach lent itself to “an unseemly ransacking of dictionaries for the *mot juste* appropriate to the case in hand” cited by M. Foster, *International Refugee Law and Socio-Economic Rights*, Cambridge, Cambridge University Press, 2007 at 48.

¹⁰ E.g. Zink, K.F., *Zur Bestimmung des Begriffs ‚Verfolgung‘ im Sinne des Abkommens vom 28.Juli 1951 uber die Rechtsstellung der Fluchtlinge* (1956).

¹¹ D Anker, *Law of Asylum in the United States*, D. Anker, *Law of Asylum in the United States*, Thomson West, 2011..

forms of persecution arise. But there is a more telling disadvantage, which is that on its own it does not tell us the criteria for inclusion.

Approaches to definition

Page | 6 This last comment leads me on to the next point.

When we delve further it becomes clear that the difficulties besetting the quest for definition are not so much difficulties in identifying indicia of persecution as *logically prior* difficulties about approaches to the definition of the term. To essay a definition we need to be able to conceptualise what its underlying criteria should be or should look like.

When we stand back and consider approaches it becomes clear that there are presently, only two contenders: the human rights approach and 'circumstantial approach'.

The *locus classicus* of the human rights approach is Hathaway's Law of Refugee Status and it is this approach that has become the dominant one in refugee law¹². At root its strength is that it aligns refugee law to international law and in particular to international human rights law (IHRL). Thereby it aids judges and other decision-makers in (a) avoiding or minimising subjective decision-making and (b) avoiding parochial *renvoi* to national or regional law or to each country's unique 'dictionary definition'.

The other contender, what I shall term the 'circumstantial approach' has as its *locus classicus* in the 1979 UNHCR Handbook¹³. Some have argued that the Handbook prefigures a human rights approach and that is true. But it does so in a way that entails the conclusion that a human rights approach is unduly restrictive. Paragraphs 51-52 underline this by stating that:

51...From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of (Convention grounds) is always persecution. Other serious violations of Human rights - for the same reasons - would also constitute persecution.

52. Whether other prejudicial actions or threats would amount to persecution will *depend on the circumstances of each case*, including the subjective element to which reference has been made in the preceding paragraph ...“ **[PPTP 9]**

¹² M. Symes & P. Jorro, *Asylum Law and Practice*, LexisNexis, UK, 2003, ch.3. See also M. Foster, *supra* n. 24 at 31. Foster notes, *inter alia*, the analysis conducted by a team of researchers at the Faculties of Law of the Universities of Namur and Antwerp of the judicial interpretation of the refugee definition in 13 European States, Canada and the US. The study (see n.51), which looked at over 5,000 cases, found that in relation to the meaning of persecution 'the only essential criterion applied, either expressly or implicitly, by the courts appears to be the disproportional or discriminatory violation of basic human rights for one of the reasons mentioned in the Geneva Convention'. See also G.S. Goodwin-Gill & J. McAdam, , *The Refugee in International Law*, 2nd ed., Cambridge, University Press, 2007, n. 10 at 67; IARLJ Human Rights Nexus Working Party, 1998 Human Rights Conference Report.

¹³ ¹³ *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, 1979.

Down the years since, UNHCR spokespersons have likewise been at pains to differentiate themselves from a human rights approach as such. Thus in 2002 Erika Feller, UNHCR's then Director of International Protection wrote:

“Persecution cannot and should not be defined solely on the basis of serious human rights violations. Severe discrimination or the cumulative effect of various measures not in themselves alone amounting to persecution, as well as their combination with other adverse factors, can give rise to a well-founded fear of persecution or, otherwise said: make life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of this predicament is to leave the country of origin”.¹⁴ **[PPT 10]**

In 2003 Alice Edwards wrote supportively that “[a]s there is no internationally accepted definition of what constitutes ‘persecution’; it would be unwise to limit its application to serious human rights abuses. It is possible that all forms of persecution have not yet been identified or codified in international human rights law” in A. Edwards, “Age and gender dimensions in international refugee law” (in E. Feller, V. Türk & F. Nicholson (eds.), in E. Feller, V. Türk & F. Nicholson (eds.), *Refugee Protection in International Law*, Cambridge, Cambridge University Press, 2003, *supra* n.11 at 50 and 80.) **[PPT 11]**

The reason deployed here clearly harks back to the admonition of scholars such as Grahl Madsen that persecution must not be fenced in by any definition.

I say in my longer article that it is time to abandon the circumstantial approach.

Its central criticism of the human rights approach is and always has been based on a misconception - that it would be unduly restrictive. That is a misconception because human rights law by its very nature is evolutive and dynamic, as emphasised by both the European Court of Human Rights and the American Court of Human Rights, who both recognise that its key concepts, e.g. torture, inhuman and degrading treatment, take their place within a living instrument and require an autonomous definition which can evolve. By insisting that there is a residual content to persecution uncaptured by the human rights approach, the circumstantial approach encourages subjective decision-making and divergent national law-based jurisprudence. If proponents of the circumstantial approach sought to articulate it by reference to criteria derived from other areas of international law (i.e. areas other than human rights), one might discern some justification for it, for then there would still be reliance on objective indicators, but this has not been done.

A human rights definition

So having established that the human rights approach is the only act in town, it is time for us to move from examining approaches to definition to examining attempts at actual definition.

¹⁴ Cited in J. McAdam, *Complementary Protection in International Refugee Law*, Oxford, Oxford University Press, 2007 at 62).

Hathaway's classic formulation, which was adopted by the English Court of Appeal in *Sandralingham Ravichandran* [1996] Imm AR 97, and which continues to be employed widely,¹⁵ is that: “[i]n sum persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which have been recognised by the international community” or in another formulation it “requires there to be “sustained or systemic violation of basic human rights demonstrative of a failure of State protection.”¹⁶ **[PPT12]** Hathaway's theory posits that the notion of a violation of human rights must be understood by reference to the fact that IHRL through the Universal Declaration of Human Rights (UDHR) as carried through into the twin UN Covenants, the International Charter on Civil and Political Rights (ICCPR) and the International Charter of Economic, Social and Cultural Rights (ICESCR), applies a four-fold hierarchy of human rights (more precisely it is a theory about a ‘hierarchy of obligations’, viz. the obligations of states to secure human rights¹⁷):

- (i) non-derogable human rights as a set out in the ICCPR;
- (ii) derogable human rights as set out in the ICCPR;
- (iii) (progressive implementation) economic, cultural and cultural rights set out in the ICESCR;
- (iv) miscellaneous human rights found in the UDHR not codified in either of the covenants. **[PPT 13]**

The great strength of Hathaway's definition is that it simultaneously offers us (a) a shorthand definition and (b) a principled basis for further amplification.

As regards (a) (the virtue that his definition provides a shorthand), criticism has been made that his summary formulation quoted above wrongly posits a criteria of persistency. The requirement that violations of human rights must always be “sustained or systemic”

¹⁵ See for example R. Haines, J. Hathaway & M. Foster, “Claims to Refugee Status based on Voluntary but Protected Actions”, Discussion Paper No.1, Advanced Refugee Law Workshop, IARLJ, Auckland, New Zealand, October 2002, *International Journal of Refugee Law*, 15(3), 2003, at 431 state: “....a fear of “being persecuted” is logically measured by reference to whether the applicant is genuinely at risk of the sustained or systemic violation of basic human rights, demonstrative of a failure of state protection”; see *HJ (Iran)* [2010] UKSC 31 (per Lord Hope).

¹⁶ J. Hathaway, *The Law of Refugee Status*, *supra* n. 47 at 112. This approach was first endorsed by the Supreme Court of Canada in *Canada (Attorney General) v. Ward* (1993) 2 SCR 689. It has been formally embraced by the UK House of Lords: *R. v. Immigration Appeal Tribunal, ex parte Shah* [1999] 2 AC 629 at 653 (Lord Hoffmann); *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 489 at 495 (Lord Hope, for the majority), 512 (Lord Clyde); *Sepet v. Secretary of State for the Home Department* [2003] 1 WLR 856 at 862–863 (Lord Bingham); *R. v. Special Adjudicator, ex parte Ullah; Do v. Secretary of State for the Home Department* [2004] 2 AC 323 at 355 (Lord Steyn), and most recently by the Supreme Court in *HJ (Iran)* [2010] UKSC 31 at 13 (Lord Hope). As Hathaway and Pobjoy have noted, it is not uniformly embraced in Australia, although it has been endorsed expressly by Justice Kirby at 111 and implicitly by Chief Justice Gleeson (at 27–30) of the Australian High Court in *Minister of Immigration and Multicultural Affairs v. Khawar* [2002] HCA 14. Although the United States approach to the interpretation of “being persecuted” is not grounded in any particular framework, in a 2007 decision, *Stenaj et al v. Alberto Gonzalez* (2007) 227 Fed. Appx. 429 (26 Feb. 2007), the US Court of Appeals for the Sixth Circuit stated: “Whether the treatment feared by a claimant violates recognized standards of basic human rights can determine whether persecution exists [citing J. Hathaway, *The Law of Refugee Status*, Toronto, Butterworths, 1991 at 104–105 and its earlier precedent in *Abay* 368 F.3d 634]”: See D. Anker, LAUS, *supra* n.14 at 174–6.

¹⁷ See M. Foster, *op.cit.*

and must involve some level of persistency or repetition would, however, entail treating single acts of serious harm as non-persecutory even if they took the form of murder or torture.¹⁸ That is plainly too restrictive.

Page | 9 But assuming that criterion is read down then - except for one caveat which I shall save to the end - it is in my view as good a shorthand definition as it gets.

As regards (b), (a principled basis for further amplification), it has to be said that very few decision makers have applied Hathaway's four-fold hierarchy strictly; but, broadly conceived, his theory furnishes a principled means for giving more flesh to the definition of persecution. Thus, for example, if a claimant is found to face a real risk of the death penalty, it gives us a way of reasoning that he will thereby face persecution because in international human rights law the death penalty is prohibited except in wartime. Thus, to take another example, if a claimant claims a real risk of religious persecution, a human rights approach affords a framework of analysis based on derogable human rights, the right to religion, the right to freedom of expression and the right to privacy in particular. If the cumulative effect of their violation is of sufficiently severity, the claimant has established a real risk of persecution.

But Hathaway's theory still leaves us with lacunae. it provides both a shorthand definition and the "software" or "app" to delineate persecution in particular situations or cases, but without actually creating any greater content or form to the term's definition.

Article 9 Qualification Directive

Yet since Hathaway gifted us his human rights theory there has in fact been one major development - the drafting and bringing into force as EU law of the Qualification Directive¹⁹. The QD offers much more form and content. At Article 2 (c) it essentially replicates the wording of Article 1A(2) of the Refugee Convention but is not content to leave it at that. Headed "Acts of persecution", Article 9(1) –(2) stipulates that: **[PPT14]**

¹⁸ As noted by Justice Kirby in *Minister for Immigration and Multicultural Affairs v. Ibrahim* [2000] HCA 55 (16 Nov. 2000): "...the notion of "systematic" conduct is a possible, but not a necessary element, in the idea of "persecution". See also the UK Immigration and Asylum Tribunal case, *Doymus v. Secretary of State for the Home Department* (Unreported, IAT, HX/80112/99, 19 July 2000). H. Lambert, "The Conceptualisation of 'Persecution' by the House of Lords: *Horvath vs Secretary of State*", *International Journal of Refugee Law*, 13 (1 and 2), 2001, 16 –31 at 23, n.32 notes that the universality of the criterion of 'persistency' "has been rejected explicitly by the UNHCR (Handbook, para 51 and 53) and by the European Union (EU joint position, para 4), and that it has not been adopted by most scholars, including Goodwin-Gill (*The Refugee in International Law*, supra n.10,at.69) and D. Anker, *Law of Asylum in the United States*, 3rd ed 1999, pp.209–11.

¹⁹ 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, OJ L 304, 30 Sept. 2004 With effect from 21 Dec. 2013 the QD will be repealed and replaced by the "recast" Qualification Directive: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9, 20 Dec. 2011.

- “1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:
- (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
 - (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

[PPT15]

2. Acts of persecution as qualified in paragraph 1, can, *inter alia*, take the form of:
- (a) acts of physical or mental violence, including acts of sexual violence;
 - (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
 - (c) prosecution or punishment, which is disproportionate or discriminatory;
 - (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
 - (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);
 - (f) acts of a gender-specific or child-specific nature.
3. In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.”

It can be seen that Article 9(1) offers a shorthand definition which is essentially Hathaway's save for a salutary modification which avoids making persistency a necessary condition: note the italicised words from Article 9(1)(a): “*by their nature or repetition...*”. But at Article 9(2) it offers in addition an enumerative, non-exhaustive “list” definition of the material scope of the term. Article 9 is formulated so that it is made clear that “acts” can only appear on the 9(2) list if they constitute severe violations of human rights as defined by Article 9(1)²⁰. As the Court of Justice emphasised in *X, Y and Z*²¹ [PPT16] at para 53, it follows from the Article 9(1) formulation that not all violations of human rights constitute persecution within the meaning of Article 1(a) of the [Refugee] Convention. The Court notes that the right to private and family life protected by the ECHR is not among the fundamental human rights from which no derogation is possible. Hence “for a violation of fundamental rights to constitute persecution within the meaning of Article 1(a) of the [Refugee] Convention, it must be sufficiently serious. Therefore not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness.” It used this logic to explain in para 55 why in its view “the mere existence of legislation criminalising homosexual acts could not be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness

²⁰ It is true that the wording of Article 9(1)(b) appears to leave scope for measures other than sufficiently severe violations of human rights to amount to persecution, but it is submitted that use of the phrase “in a similar manner” does not permit a free-standing circumstantial approach. On *eiusdem generis* principles this phrase should be understood as confining assessment to violations of other international law norms. Such a reading also reflects the important truth²⁰ that international human rights law is only part of the subject-matter of (public) international law. This is why it would be wrong to confirm a definition of persecution limited to human rights *per se*. (Further illustration of this point is given below when dealing with armed conflict).

²¹ Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z*, judgment, 7 November 2013.

necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive”. It used the same logic to conclude that nevertheless if a part of any legislation criminalising homosexual acts imposes a term of imprisonment that would be applied in practice, that would amount to punishment which was disproportionate or discriminatory within the meaning of Article 9(2)(c) of the Directive. So here the Court utilises both the conceptualisation of persecution set out in Article 9(1) and the content given to its material scope in the “list” set out in Article 9(2).

The utility of the Article 9(2) list is that if when assessing whether claimed acts are acts of persecution a decision maker sees that they are on this list, then he or she need go no further. If the claimant is accepted as credible persecution has been established. Indeed the EASO module on persecution written for governmental decision-makers expressly advises decision-makers to adopt this approach.

Modalities of persecution

But the QD also identifies key modalities of the term by reference to there being three principal protagonists in the tragedy of persecution.

For enactment of the regrettable ‘drama’ of persecution to arise, there must be an act (or acts) of persecution and there must be at least two or three main characters: the persecutor, the victim of persecution and (in the case of non-State persecution) an unwilling or ineffective protector. Place is also important. Unsurprisingly, much of the analytical industry carried out by UNHCR, academic commentators, judges and others has focused on the respective roles of these three protagonists. With the conclusion in 2004 of the QD there is now formal recognition for the first time in international treaty form (albeit only regional in scope) of these different modalities. Complementing Article 9, which as we have noted deals with “acts” of persecution, Articles 6 and 7 deals with “actors of persecution” and “actors of protection” respectively. Article 8 deals with “internal protection” and the issue of whether movement to another place can provide protection. The QD also codifies other aspects of the term's temporal and personal scope. For example Article 4 (4) establishes the principle that whilst past persecution is not sufficient to establish a well-founded fear of persecution in the present, “[t]he fact that an applicant has already been subject to persecution or serious harm or to direct threats of such prosecution or such harm, is a serious indication of the applicant’s well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated”. Article 5(1) states that a well-founded fear of being persecuted may be based, *sur place*, on events which have taken place since the applicant left the country of origin;

Within Europe therefore we have achieved a working definition. Within Europe it is a matter of law for us. Judges who still offer dictionary definitions err in law. Judges who apply the UNHCR circumstantial approach err in law. Indeed, judges who apply national law or case law definitions of persecution that diverge from Article 9, also err in law. [On the strength of the Swedish Migration Court of Appeal case MIG 2008:21, 23 May 2008,

Swedish courts generally recognise this even though Article 9 has not been implemented in Swedish national law] [PPT17]

The QD: template for a universal working definition

Page | 12 But the burden of my paper is that the QD is not just a regional definition but offers a template for a universal working definition. It should come as no surprise that this should be so because the drafting process was extremely thorough and drew on help from a number of experts including James Hathaway and in this way built on over 50 years of learning within Europe and globally. In addition, it provides two critical ingredients missing from the 1951 Convention. One is that it contains at Article 37 a *rendevouz* clause requiring it to be reviewed at 5 year intervals. Second, in terms of being able to build up a body of uniform jurisprudence over time (which as we have seen was made virtually impossible by the restrictive interstate access to the International Court of Justice provided for by Article 38 of the 1951 Convention), the QD (like all EU legislation) ²²is now subject to interpretation and application by the Court of Justice of the European Community. It took some time for the Court of Justice to deal with any Article 1A(2) questions but last year it gave guidance on Article 9 in the context of a religious persecutiin on case, Joined Cases C-71/11 and C-99/11 *Y and Z*. And, as already noted, on 7 November 2013 it gave judgment in Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z*, cases concerning gay concealment. [PPT18] It is within the power of any national judge of an EU Member State, including many at this conference, to help ensure that other real difficulties of interpretation are referred to this Court.

What objections can be raised to treating the QD as a template for a universal working definition? One which has been voiced is that it cannot be right for a global treaty to be interpreted through the lens of a regional treaty and to attempt such is a recipe for “Eurocentric” interpretations of the Refugee Convention²³. My approach, however, does not advocate taking the QD as Holy Scripture, only making it the template of a “working definition”. And in itself there can be no jurisprudential error in any judge, whether at a national or regional level, striving to give Article 1A(2) a truly universal meaning. That said, I say in my longer paper that if it can be demonstrated that the QD either in its text (which is susceptible of revision every 5 years) or in its interpretation by the Court of Justice diverges from the global jurisprudence, then that can be charted. Indeed I think the recast Directive may have diverged from global jurisprudence in relation to the cessation clause and Article 1C(5). I also think that even though not in the context of the Refugee Convention but only its parallel subsidiary protection regime, the Court of Justice’s current engagement with Article 15(c) -the provision dealing with threats of serious harm arising from armed conflict - shows alarming signs of pursuing an “autonomous definition” approach which risks casting “international protection” (refugee and subsidiary protection

²² Since December 2009 when the Lisbon Treaty abolished ex-Article 68 which had restricted the possibility to make references to the Court of Justice on asylum and other justice and home affairs matters to courts of final instance.

²³ Roger Errera, ‘The CJEU and Subsidiary Protection: Reflections on *Elgafaji* – and After’ (2011) 23 *International Journal of Refugee Law* 93.

together) adrift from international law²⁴. But none of this undermines our treating Article 9 and other provisions of the QD dealing with the modalities of persecution as a “working definition”.

In my longer paper, I work through in detail the different respects in which the QD develops the material, temporal and personal scope of the Article 1A(2) definition of “being persecuted” and its geographical dimension (in relation to internal relocation), I say that - utilising the QD - it is now possible to assemble integral parts of a working definition of “being persecuted” of global application.

Therefore I say that it is time – it is time to recognise not only that we can define persecution but that remarkable progress has already been made towards doing so, once the task is reconceived. It can be seen that it is possible to give a short or shorthand definition to this term which at once identifies it as consisting in severe violations of international law norms and affords scope for further evolution to deal with new forms of persecution. But it can also be seen, it is argued, that there is a need for a more detailed, more “systematic” or multi-faceted definition that involves clarification of the modalities of persecution, of its temporal dimensions and of its material and personal scope. Given that despite most of the groundwork having been done already by scholars, judges and commentators, my forthcoming article in the Chetail and Bauloz book is the first attempt (so far as this author is aware) to offer a concerted definition of “being persecuted” (based, in relation to its material scope, on a non-exhaustive list approach), there is bound to be considerable room for improvement in the future. Because the 1951 Convention (like other asylum-related legal protection regimes) is a living instrument, it is also an attempt that even when refined, will always be subject to further evolution. Many of the propositions set out below - some 27 of them - will be well-known and are borrowed unapologetically from the EU QD. Indeed, if they were not well-known, they could scarcely claim a place in a global definition. Some say what persecution is not, others what it is. Yet even if each is understood or converted into a set of merely negative propositions, taken cumulatively they are testament to just how many fallacies and shibboleths have been laid to rest the past 60 years.

My own analysis in my longer article yielded the following list:

Approaches to definition [PPT19]

The search for a definition of “being persecuted” and other key terms in Article 1A(2) and elsewhere in the 1951 Refugee Convention must be a search for a common universal meaning and must be informed by a holistic approach which understands that key terms – persecution and protection in particular - are interdependent.

²⁴ For a fuller treatment, see H. Storey “Armed Conflict in Asylum Law: the “War Flaw”, *Refugee Survey Quarterly*, 2012, Vol. 31, No. 2, pp. 1–32

Persecution is to be understood as severe violations of international law norms, in particular international human rights norms.²⁵

Persecution consists in acts that are sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights; or that are an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner. This formulation may also serve as a short (or shorthand) definition of the term.

Persecution can arise even if the violations of human rights concerned are not “sustained”, “systematic” or “systemic” or “persistent”.

Modalities [PPT20]

Actors of persecution can be either State or non-State actors.

There is no requirement of persecutory intent.

Actors of protection can be State or de facto State entities.

In order to meet the refugee definition it is not necessary to show that the well-founded fear is of persecution countrywide. Conversely, establishing a well-founded fear of persecution in one’s home area will not make one a refugee unless internal relocation to another part of the country is not a viable alternative. [OHP11]

Temporal dimensions [PPT21]

Article 1A(2) imposes a requirement of current persecution: it poses the hypothetical question of whether, if return were to take place now (ex nunc), persecution would arise.

It is a logical corollary of the focus in Article 1A(2) on current fear of persecution that a person can have such a “sur place” fear, i.e. a fear arising out of events or his own actions that have occurred since departure from the country of origin.

Past persecution does not in itself constitute “being persecuted”, but the fact that an applicant has already been subject to persecution is a serious indication of such, unless there are good reasons to consider that such persecution will not be repeated.

Material scope [PPT22]

Persecution encompasses both physical and mental forms of serious harm.

²⁵ As to why international human rights norms are not to be treated as the only relevant norms of international law, see below under “International Law Context”.

Persecution can include indirect persecution, e.g. through serious harm caused to family members.

Persecution can consist in violations of basic socio-economic rights.

Depending on the societal context, laws which fail to conform to basic international human rights standards can be instruments of persecution.

Laws may also constitute persecution if applied in a discriminatory or disproportionate way.

Prosecution only becomes persecution if likely failures in the fair trial process go beyond shortcomings and pose a threat to the very existence of the right to a fair trial (the test of flagrant denial).

Persecution can take specific forms, including gender-specific, child-specific, "LGBTI"-specific and disability-specific forms.

Personal scope [PPT23]

Assessing whether a person has a well-founded fear of being persecuted requires a person-specific or individualized approach.

Well-founded fear of being persecuted denotes an objective test in which fear is understood as a forward-looking expectation of risk.

Persecution can be actual or attributed: whether there is a well-founded fear of being persecuted is a matter to be approached from the perspective of the persecutor.

[PPT 24]

Voluntary action can give rise to a well-founded fear of persecution where it consists in the exercise of basic human rights. If an applicant's actions will infringe the human rights of others, then, at least in some categories of cases, those actions will not necessarily amount to him "being persecuted".

A person cannot be expected to take voluntary action to avoid persecution if to do so would infringe their basic human rights. A person who may avoid persecutory harm by behaving discreetly will be at risk of persecution if one of the reasons for so behaving is fear of persecution.

In deciding whether contrived sur place persecution amounts to persecution there is no requirement of good faith.

"Being persecuted" does not require being "singled-out".

The fact that assessment of persecution must examine individual circumstances does not preclude group-based persecution.

International law context [PPT 25]

Page | 16 *The human rights approach to persecution must be complemented, where relevant, by norms drawn from international law, including humanitarian law (IHL).*

I would suggest that this assembly of propositions could also be described as a carrying through of Hathaway's original conception, but in fact the very last underscores what I think is the need for an important qualification of Hathaway's theory. His theory is predicated on the notion that *IHRL* provides a complete code for defining who is a refugee and, as part of that, of what is the meaning of persecution. As such I say it is incomplete and obscures the fact that to interpret the 1051 Convention it is necessary to have recourse not just to *IHRL* but *international law more generally*. Thus when construing the concept of nationality (first use term within Art 1A2) it would be contorted to say we give it a *IHRL* reading, since in fact we go direct to nationality law as a distinct body of public international law. Recent debates have brought to the fore the issue of the ability of a pure *IHLR* reading of Article 1A(2) to deal adequately with claims persons fleeing armed conflict or generalised violence, given that even *IHRL* recognises that when it comes to armed conflict the *lex specialis* is international humanitarian law (*IHL*). These two examples point to the need for a 21 century approach to the definition of persecution being one that affords it an international law framework without restriction to *IHRL*.²⁶L.

²⁶ Vanessa Holzer, 'The Relevance of the 1951 Convention for the Protection of Individual Forced to Flee Armed Conflicts', in J Hertwig and S Maus (eds), *Global Risks: Constructing World Order through Law, Politics and Economics* (Peter Lang GmbH, Frankfurt am Main, 2010). See further, Hugo Storey, 'Armed Conflict in Asylum Law: The "War-Flaw" *Refugee Survey Quarterly*, 31 (2012) 32.