Serious Harm

James C. Hathaway
University of Michigan Law Library, jch@umich.edu

Available at: https://repository.law.umich.edu/book_chapters/267

Follow this and additional works at: https://repository.law.umich.edu/book_chapters

Part of the Human Rights Law Commons, and the Immigration Law Commons

Publication Information & Recommended Citation

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Book Chapters by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
CONTENTS

Acknowledgments  page x
Table of cases  xiv
Table of treaties and other international instruments  lxvii
Abbreviations for courts and tribunals cited  lxxix

Introduction  1

1 Alienage  17
  1.1 Accessing protection  23
    1.1.1 Accessing a state party’s jurisdiction  25
    1.1.2 Unlawful arrival  28
  1.2 Choice of the country of asylum  30
    1.2.1 The legal basis for allocating protective responsibility  33
    1.2.2 The duty to avoid refoulement  36
    1.2.3 The duty to ensure respect for acquired rights  39
  1.3 Determining the state of reference  49
    1.3.1 Dual or multiple nationality  55
    1.3.2 Inchoate nationality  57
    1.3.3 Stateless persons  64
  1.4 Refugees sur place  75

2 Well-founded fear  91
  2.1 Implications of the traditional bipartite standard  93
  2.2 Practical challenges of implementing the bipartite standard  95
2.2.1 The risky objectification of subjective fear
2.2.2 The equation of subjective fear with credibility
2.2.3 The creation of unwieldy exceptions
2.2.4 Assuming subjective fear

2.3 Fear understood as objective apprehension of risk
2.3.1 The literal meaning of “well-founded fear”
2.3.2 The object and purpose of “well-founded fear”

2.4 Well-founded apprehension of risk: stating the test
2.4.1 Risks in application of the test
2.4.2 Shared duty of fact-finding
2.4.3 Relevant evidence

2.5 Country of origin information
2.5.1 Unenforced persecutory laws
2.5.2 Improved respect for human rights

2.6 The claimant’s evidence
2.6.1 The assessment of credibility
2.6.2 Credibility implications of mode of departure, travel, or arrival
2.6.3 Corroboration
2.6.4 Procedural safeguards

2.7 Evidence of individuated past persecution
2.8 Evidence of risk to persons similarly situated
2.9 Assessing well-founded fear within the context of generalized risk

3 Serious harm
3.1 A bifurcated understanding of “being persecuted”
3.2 Identifying serious harm
3.2.1 The subjective approach rejected
3.2.2 The literalist approach rejected
3.2.3 Human rights as the benchmark
3.3 Physical security
3.3.1 Life
3.3.2 Torture or cruel, inhuman, or degrading treatment or punishment
3.3.3 Slavery, including trafficking and forced marriage 220
3.3.4 Physical violence 225
3.3.5 Adequate standard of living 228
3.3.6 Health 235
3.4 Liberty and freedom 238
  3.4.1 Arrest and detention 239
  3.4.2 Prosecution 243
  3.4.3 Freedom of movement 247
  3.4.4 Right to work 252
3.5 Autonomy and self-realization 260
  3.5.1 Religion 262
  3.5.2 Conscience and belief, including resistance to military service 268
  3.5.3 Education 274
  3.5.4 Expression and assembly 278
  3.5.5 Family and marriage 281
  3.5.6 Privacy 284

4 Failure of state protection 288
  4.1 Protection is state protection 289
  4.2 Failure of state protection as an element of “being persecuted” 292
    4.2.1 Unwillingness to protect 297
    4.2.2 Inability to protect 303
    4.2.3 No presumption of state protection 319
    4.2.4 Relevance of failure to seek protection 323
    4.2.5 Relevance of general evidence of state protection 330
  4.3 Internal protection alternative 332
    4.3.1 The conceptual basis of the internal protection alternative 335
    4.3.2 The test for assessing internal protection 342
      Accessibility 342
      Negation of original risk 344
      No new risk of being persecuted or of refoulement 347
      Minimum affirmative state protection 350
5  Nexus to civil or political status 362
  5.1  “For reasons of” 363
  5.2  The nature of the causal link 367
    5.2.1  Intention of the persecutor 368
    5.2.2  Intention of the persecutor or of the state 373
    5.2.3  The predicament approach 376
  5.3  Quantifying the causal link 382
  5.4  The Convention grounds 390
  5.5  Race 394
  5.6  Nationality 397
  5.7  Religion 399
  5.8  Political opinion 405
    5.8.1  Unexpressed political opinion 407
    5.8.2  Political opinion implicit in conduct 409
  5.9  Membership of a particular social group 423
    5.9.1  Gender 436
    5.9.2  Sexual orientation and gender identity 442
    5.9.3  Family 445
    5.9.4  Age 449
    5.9.5  Disability 451
    5.9.6  Economic or social class 452
    5.9.7  Voluntary associations 455
    5.9.8  Former status or association 458

6  Persons no longer needing protection 462
  6.1  Persons who have secured national protection 463
    6.1.1  Voluntary re-availment of national protection 464
    6.1.2  Voluntary re-acquisition of nationality 470
    6.1.3  Voluntary re-establishment in the country of origin 472
    6.1.4  Change of circumstances 476
    6.1.5  Acquisition of a new nationality 494
### 6.2 Persons who benefit from alternative forms of protection

- **6.2.1 Residence with the rights and obligations of nationals**
- **6.2.2 United Nations protection or assistance**
  - “At present receiving . . . protection or assistance”
  - Particularized exceptions to Art. 1(D) exclusion?
  - *Ipso facto* residual entitlement
  - Relevance of UN protection or assistance to non-Palestinians

### 7 Persons not deserving protection

- **7.1 “Serious reasons for considering”**
- **7.2 Serious common crimes**
  - **7.2.1 Justiciable crimes**
  - **7.2.2 Crimes committed abroad**
  - **7.2.3 Serious crimes**
  - **7.2.4 Non-political crimes**
  - **7.2.5 “Balancing” criminality and risk**
- **7.3 International crimes**
  - **7.3.1 Crimes against peace**
  - **7.3.2 War crimes**
  - **7.3.3 Crimes against humanity**
- **7.4 Acts contrary to the purposes and principles of the United Nations**

*Index*
Serious harm

Although the requirement to show a well-founded fear of “being persecuted” is at the heart of the refugee definition, the Refugee Convention does not define or elucidate the meaning to be given to this concept. Indeed, it is generally acknowledged that the drafters of the Convention intentionally declined to define “being persecuted” because they recognized the impossibility of enumerating in advance all of the forms of maltreatment that might legitimately entitle persons to benefit from international protection. The need for a flexible approach to “being persecuted” is especially important today given the duty under the 1967 Protocol to apply the refugee definition in a manner that ensures its relevance to “new refugee situations.”

Yet the importance of interpretive flexibility must be balanced against the imperatives of the rule of law, militating against any approach that “abandon[s] the quest for standards” in interpreting what is perhaps the key term of the treaty. Rather, as Lord Justice Laws explained in Sepet:

> However wide the canvas facing the judge’s brush, the image he makes has to be firmly based on some conception of objective principle which is recognized as a legitimate source of law.

---

2. As noted by Grahl-Madsen, “[i]t seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise; or in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men”: A. Grahl-Madsen, *The Status of Refugees in International Law* (Vol. I, 1966), at 193.
3. The Preamble of the Protocol states that, “new refugee situations have arisen since the Convention was adopted” and “it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951”: Protocol relating to the Status of Refugees, adopted Jan. 31, 1967, entered into force Oct. 4, 1967, 606 UNTS 267 (“Refugee Protocol”).
5. In *Horvath v. Secretary of State for the Home Department*, [2000] Imm AR 205 (Eng. CA, Dec. 2, 1999) Ward L.J. noted, after citing the UNHCR *Handbook’s* statement as to there being no universally accepted definition, *supra* n. 1, that “[d]espite that discouraging note, it is necessary to understand what is encompassed by the notion of persecution”: at [54].
The challenge, then, is to adopt an approach to interpretation of “being persecuted” that is flexible, yet which provides guidance based on objective principle. The goal must be to understand the core construct of “being persecuted” as “a living thing, adopted by civilised countries for a humanitarian end which is constant in motive but mutable in form.”

In this chapter we first explain why the twin challenges of flexibility and principled consistency are best met by adopting the view that a risk of “being persecuted” requires evidence of a sustained or systemic denial of human rights demonstrative of a failure of state protection. We then offer a detailed, though by no means exhaustive, guide to the implementation in practice of this standard.

3.1 A bifurcated understanding of “being persecuted”

While the drafters of the Convention refrained from codifying a precise definition of “being persecuted,” there is nonetheless insight to be gained from analysis of the Convention’s drafting history. First, the drafters clearly viewed persecution as a sufficiently inclusive concept to capture the spectrum of phenomena that had induced involuntary migration during and immediately following the Second World War, including deprivation of life and liberty, the extensive economic persecution inflicted by the Nazis, and the ideological conformism imposed by the Communist states. From the beginning, there was no monolithic or absolute conceptual standard of wrongfulness, the implication being that a variety of measures in disregard of human dignity might constitute persecution. In addition to the Convention’s acceptance of deprivation of basic civil and political freedoms as sufficient cause for international concern, serious social and economic consequences were acknowledged to be included within the notion of persecution. Refugee status was premised on the risk of serious harm, but not on the possibility of consequences of life or death proportions – an understanding affirmed by no means exhaustive, guide to the implementation in practice of this standard.
by Art. 33’s prohibition of sending a refugee to a place where “life or freedom” would be threatened.\(^{12}\)

Second, the intention of the drafters was not to protect persons against any and all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was the risk of a type of injury inconsistent with the willingness and ability of a state to protect its own population.\(^{13}\) As a holistic reading of the refugee definition demonstrates, the drafters were not concerned to respond to certain forms of harm per se, but were rather motivated to intervene only where the maltreatment anticipated was demonstrative of a breakdown of national protection.\(^{14}\) Refugee law is thus “substitute protection”\(^{15}\) in the

---

\(^{12}\) In line with this understanding, courts have appropriately rejected the argument that Art. 33’s reference to “life or freedom” constrains the otherwise inclusive meaning of “being persecuted” in Art. 1(A)(2) of the Convention: see \textit{Adan v. Secretary of State for the Home Department}, [1997] 1 WLR 1107 (Eng. CA, Feb. 13, 1997) (per Simon Brown L.J.): “In my judgment it is article 1... which must govern the scope of article 33 rather than the other way round”: at 1116; see also \textit{Adan v. Secretary of State for the Home Department}, [1999] 1 AC 293 (UKHL, Apr. 2, 1998). For further authority see \textit{Choudhrey v. Immigration Appeal Tribunal}, [2001] EWHC Admin 613 (Eng. HC, Aug. 1, 2001), at [33]; and \textit{OO (Sudan) v. Secretary of State for the Home Department}, [2009] EWCA Civ 1432 (Eng. CA, Nov. 18, 2009), at [24]. For an early decision of the Federal Court of Canada see \textit{Arguello-Garcia v. Canada (Minister of Employment and Immigration)}, [1993] FCJ 635 (Can. FC, Jun. 23, 1993), in which the Canadian Federal Court held (at [4]): “The court has accepted a broad range of harassment and ill treatment as constituting persecution. Furthermore, the court has stated that neither deprivation of physical liberty nor physical mistreatment are essential elements of persecution.” In an oft-cited passage, McHugh J. of the High Court of Australia noted in \textit{Chan v. Minister for Immigration and Ethnic Affairs}, (1989) 169 CLR 379 (Aus. HC, Dec. 9, 1989), at 430–31: “Other forms of harm short of interference with life, liberty may constitute ‘persecution’ for the purposes of the Convention and Protocol. Measures ‘in disregard’ of human dignity may, in appropriate cases, constitute persecution... the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason.” In the US it is clear that harm need not amount to life-threatening violence: \textit{Sizov v. Ashcroft}, (2003) 70 Fed. Appx. 374 (USCA, 7th Cir., Jul. 2, 2003), at 376. See also \textit{Yadegar-Sargis v. Immigration and Naturalization Service}, (2002) 297 F.3d 596 (USCA, 7th Cir., Jul. 22, 2002), at 602.

\(^{13}\) This concern is most clear in the early formulations of the generalized refugee definition. The British draft, for example, provided that the Convention would apply to “unprotected persons” (UN Doc. E/AC.32/L.2 (Jan. 17, 1950), at 1), while the French draft spoke of persons who were “unwilling or unable to claim the protection of [their] country” (UN Doc. E/AC.32/L.3 (Jan. 17, 1950), at 3). As finally agreed to, the Convention extends only to a person who is “unable or... unwilling to avail himself of the protection” of his country of origin: Convention relating to the Status of Refugees, adopted Jul. 28, 1951, entered into force Apr. 22, 1954, 189 UNTS 137 (“Refugee Convention” or “Convention”), at Art. 1(A)(2). In addition, the Preamble to the Convention refers to the intention of the parties to “revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments,” and to the importance of coordinated measures to facilitate the UNHCR’s task of “supervising international conventions providing for the protection of refugees” Preamble. For a modern explanation of this underlying intention, see \textit{Horvath v. Secretary of State for the Home Department}, [2001] 1 AC 489 (UKHL, Jul. 6, 2000), per Lord Clyde.

\(^{14}\) Shacknove helpfully explained, “[i]t is this absence of state protection which constitutes the full and complete negation of society and the basis of refugeehood”: A. Shacknove, “Who Is a Refugee?” (1985) 95 \textit{Ethics} 274, at 277, while Goodwin-Gill has long taken the view that “the degree of protection normally to be expected of the government is either lacking or denied”: G. S. Goodwin-Gill, “Non-Refoulement and the New Asylum Seekers,” (1986) 26(4) Virginia J. Intl. L. 897, at 901. See infra Ch. 4.2.

\(^{15}\) J. Patrnogic, “Refugees – A Continuing Challenge,” (1982) \textit{Annuaire de droit international medical} 73, at 75.
sense that it is a response to disfranchisement from the usual benefits of nationality. The existence of a risk of serious harm standing alone does not therefore suffice; it is rather only when the risk has an unrelenting or inescapable character because there is no domestic remedy that it rises to the level of a risk of "being persecuted."

These basic tenets—an inclusive sense of the types of past or anticipated harm that warrant international protection, and a fundamental concern to identify forms of harm demonstrative of a failure of state protection—underlie the modern understanding of “being persecuted” as the sustained or systemic denial of basic human rights demonstrative of a failure of state protection. As this well-accepted formulation makes clear, the phrase “being persecuted” comprises two essential elements, succinctly expressed by Lord Hoffmann as “persecution = serious harm + failure of state protection.”

---


The second half of this formulation – the failure of state protection – is addressed in Chapter 4. The remainder of the present chapter focuses on the first part of the bifurcated definition of “being persecuted,” namely how to determine whether a person is at risk of serious harm.

3.2 Identifying serious harm

While “framing an exhaustive definition of persecution for the purpose of the Convention is probably impossible,” it is nonetheless “necessary to understand what is encompassed by the notion of persecution.” What standards should guide our understanding of the content of the serious harm component of “being persecuted,” assuming the commitment to a principled but flexible interpretation set out above?

3.2.1 The subjective approach rejected

One approach, predominant in the United States, is to define persecution as “the infliction of suffering or harm upon those who differ... in a way regarded as offensive” or as “punishment or the infliction of harm... that this country does not recognize as legitimate.” This approach emphasizes that “inconvenience, unpleasantness, and even a modicum of suffering may not be enough to meet that [persecution] benchmark”, that persecution is “an extreme concept that does not include every sort of treatment our society regards as...”
offensive”,\textsuperscript{25} that “persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional”,\textsuperscript{26} and that the harm feared “must rise above mere harassment.”\textsuperscript{27} Yet because each of these standards explains only what is not serious enough to be persecution, one appellate judge cogently observed that “we haven’t a clue as to what [the Board of Immigration Appeals] thinks religious persecution is.”\textsuperscript{28} Decision-makers are left largely to their own devices, determining on a “case by case approach” whether a given risk is sufficiently serious to amount to a risk of being persecuted.

While American jurisprudence no doubt represents the zenith of a fundamentally subjective approach to the identification of persecutory harms, other jurisdictions have sometimes endorsed similar sentiments. It has been suggested in Australia, for example, that “the harm or threat of harm will ordinarily be persecution only when . . . it is so oppressive or recurrent that a person cannot be expected to tolerate it.”\textsuperscript{29} And there is Austrian authority for the view that “[t]he term ‘persecution’ means an unjustified interference with an individual’s personal sphere of considerable intensity” which “makes it unacceptable for the individual to stay.”\textsuperscript{30}

Under subjective approaches of these kinds, the question of whether harm is sufficiently “intense,” “offensive,” “oppressive,” or “unjustified” is based on a given decision-maker’s personal assessment of the severity of the harm feared.\textsuperscript{31} This has been said to amount to an


\textsuperscript{29} Ibrahim (Aus. HC, 2000), at 20 [55]. McHugh and Kirby JJ. have said “it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it”: Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs, (2003) 216 CLR 473 (Aus. HC, Dec. 9, 2003), at 489 [40] and 486 [31].

\textsuperscript{30} E v. Federal Minister of the Interior, 95/20/0275 (Au. VwGH [Austrian Administrative Court], Sept. 4, 1996) (unofficial translation). German courts have also used the notion of “severity” or “intensity” to mark out those violations of religious liberty which will constitute serious harm: see E. Geldbach, “Is there a Minimum of Religious Existence?” in A. Kilp and A. Saumets (eds.), Religion and Politics in Multicultural Europe: Perspectives and Challenges (2009), at 247.

\textsuperscript{31} As Geldbach notes in relation to the German requirement that violations of religious liberty be sufficiently “severe” or “intense,” “[h]ow intensity or severity can be measured or what they include is nowhere mentioned”: ibid., at 247. Rather the meaning is “vague and imprecise”: at 247. Further he notes that it “is astounding that Courts would use this kind of language when a basic human right is in question”: at 247.
“I know it when I see it” test,[32] imposing on decision-makers “a most elusive and imprecise task.”[33] For example, American cases have grappled with whether it is necessary that a person have lost teeth or suffered broken bones in a beating,[34] whether an applicant’s hospital stay was sufficiently lengthy to suggest that the harm suffered was serious,[35] and whether a relatively short period of confinement during which a highly invasive and degrading “rape-like” assault was inflicted on the applicant was too short to amount to serious harm.[36]

Application of the subjective approach tends to a near-fixation with physical harm,[37] with assessments often reading like a “grim exercise . . . in measuring the precise extent of human...
cruelty and misery” which impliedly constructs some kind of “table of maims.” In practice, the only claims relatively certain to succeed are those predicated on harms that are deemed severe, extreme, or lethal.

In our view, the subjective approach to identifying persecutory harms is highly problematic, and should be rejected. Because analysis is not anchored in any objective or principled framework it is difficult to achieve even a modicum of consistency as between different courts, even within the same jurisdiction. As noted by Judge Posner, the subjective test adopted in the United States has resulted in “capricious adjudication at both the administrative and judicial level, generating extraordinary variance both in grants of asylum in similar cases at the administrative level and in reversals by courts of appeals of denials.” Indeed, what minimal principle can be identified in the US approach – requiring evidence of harm “that this country does not recognize as legitimate” – runs counter to the duty to

38 Sirbu and Prodan (USCA, 7th Cir., 2013), at 10.

39 In Kord v. Minister for Immigration and Multicultural Affairs, [2001] FCA 1163 (Aus. FC, Aug. 24, 2001), Hely J. noted that “[t]here is no room in the notion of persecution for something in the nature of a table of maims to be rigidly or mechanically applied”: at [34]. This idea comes from workers’ compensation and refers to a table which specifies the amount of compensation payable to a person for particular injuries, such as the loss of a limb: see e.g. Wrongs Act 1958 (Vic).

40 See in particular Rupey (USCA, 7th Cir., 2008), where the Seventh Circuit listed previous cases in which “kidnapping at gunpoint, interrogation and beating did not compel a finding of past persecution”: at 457, citing Memu v. Gonzales, (2007) 474 F.3d 412 (USCA, 7th Cir., Jan. 11, 2007), at 417–18; and where no past persecution was found even though “officials kicked, punched and used a brick to strike petitioner on the head,” citing Zhu v. Gonzales, (2006) 465 F.3d 316 (USCA, 7th Cir., Sept. 29, 2006), at 319. Similarly, in Nelson v. Immigration and Naturalization Service, (2000) 232 F.3d 258 (USCA, 1st Cir., Oct. 27, 2000) the court cited previous authority establishing the very severe level of physical harm required, in noting that in Ravindran v. Immigration and Naturalization Service, (1992) 976 F.2d 354 (USCA, 7th Cir., Sept. 30, 1992), at 756–60, “persecution [was] not found where [a] member of [a] minority ethnic group had been interrogated and beaten for three days in prison and warned about pursuing political activities”: Nelson at 263, and Kapcia v. Immigration and Naturalization Service, (1991) 944 F.2d 702 (USCA, 10th Cir., Sept. 9, 1991), at 704, 708, where there was “no finding of past persecution where one petitioner was ‘arrested four times, detained three times, and beaten once’, and another was ‘detained for a two-day period during which time he was interrogated and beaten’”: Nelson at 263–64.


42 In Wackowski v. Immigration and Naturalization Service, 1999 U.S. App. LEXIS 26590 (USCA, 7th Cir., Oct. 19, 1999), the court said that persecution differs from discrimination in being “either official and severe, or non-official but lethal and condoned”: at 5, citing Bucur v. Immigration and Naturalization Service, (1997) 109 F.3d 399 (USCA, 7th Cir., Mar. 26, 1997) at 402, 403. See also Sizov (USCA, 7th Cir., 2003), at 376.

43 As Anker, supra n. 19, notes, referring to US jurisprudence on persecution, “inconsistent, result-oriented analysis by some courts and adjudicators continues to confuse the development of a meaningful framework for analysing persecution”: at 168–69.

44 Stanjkova (USCA, 7th Cir., 2011), at 948.

45 Buczatowski (USCA, 7th Cir., 2002), at 669 (emphasis added). Even this standard appears to be assessed in some cases from the perspective of what the judges view as legitimate. For example, in Sofinet v. Immigration and Naturalization Service, (1999) 196 F.3d 742 (USCA, 7th Cir., Nov. 2, 1999), the court reviewed previous case law concerning a deprivation of work rights, noting that in Urukov v. Immigration and Naturalization Service, (1995) 55 F.3d 222 (USCA, 7th Cir., Apr. 17, 1995), at 228, “[the] Bulgarian
interpret the Refugee Convention as “an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions.”

More generally, other leading courts have rejected attempts to interpret the category of serious harm by reference to subjective descriptors such as that persecution must be “dramatic or appalling or horrendous”47 or “severe”48 or that “persecution is a strong word,”49 observing that such an approach “is not of great assistance and is apt to mislead.”50 Lord Justice Sedley, for example, famously refused to confine the scope of serious harm by reference to the need for some “minimum level of brutality”51 on the basis that “[s]peaking for myself, I do not know what a minimum level of brutality is.”52

3.2.2 The literalist approach rejected

An alternative to subjectivity is to search for an understanding of persecutory harms by referring to dictionary definitions of “persecution.” Some courts have chosen to rely on government’s restriction of ethnic-Macedonian’s employment opportunities ‘does not rise to the level of “infliction of harm” . . . that we find “illegitimate” to justify granting asylum’; Sofinet, at 747 (emphasis added). On the other hand, in a more recent case the Fifth Circuit has formulated the reference point as “civilized governments”: Jiang (USCA, 5th Cir., 2010), at 864, citing Mikhal v. Immigration and Naturalization Service, (1997) 115 F.3d 299 (USCA, 5th Cir., Jun. 4, 1997), at 303 n. 2, which would appear to involve international standards.

47 Khatib v. Canada (Minister of Citizenship and Immigration), (1994) 83 FTR 310 (Can. FC, Sept. 27, 1994), at [7]. McKeown J. therefore overturned the decision of the Immigration and Refugee Board on the basis that the Board had inappropriately framed the relevant question as being whether “the discrimination . . . experienced [is] so dramatic as to amount to persecution on a cumulative basis”: ibid., at [6]–[7].
48 Minister for Immigration and Citizenship v. SZQOT, (2012) 206 FCR 145 (Aus. FFC, Oct. 12, 2012), at 156 [57], per Mason J. In Australia, the High Court has characterized persecution as involving “some serious punishment or penalty or some significant detriment or disadvantage”: see Chan (Aus. HC, 1989), at 388, per Mason C.J. The Full Federal Court of Australia has in some decisions not even required the “serious” or “significant” test, holding that “persecution involves harm that is more than trivial or insignificant”: Gersten v. Minister for Immigration and Multicultural Affairs, [2000] FCA 855 (Aus. FFC, Jul. 5, 2000); see also Kanagasabai v. Minister for Immigration and Multicultural Affairs, [1999] FCA 205 (Aus. FC, Mar. 10, 1999). Even after the Migration Act 1958 (Cth) was amended to provide that persecution involves “serious harm” (see s. 91R(1)), the Full Federal Court has held that to require “severe harm” is to apply “an incorrect legal test”: SZQOT (Aus. FFC, 2012), at 136 [57] per Nicholas J.
49 This was invoked in R v. Secretary of State for the Home Department; Ex parte Binbas, [1989] Imm AR 595 (Eng. HC, Jul. 25, 1989), at 599, per Kennedy J., but rejected by the Australian High Court in Appellant S395/2002 by the Australian High Court in Appellant S395/2002 (Aus. HC, 2003), at 497.
50 Appellant S395/2002 (Aus. HC, 2003), at 497. In New Zealand, the approach of asking whether a person’s return to their home country would be “intolerable” has been “repeatedly identified by the Authority as a misdirection in law”: see Re GJ, Refugee Appeal No. 1312/93, [1998] INLR 387 (NZ RSAA, Aug. 30, 1995), at 16 and list of cases cited therein.
51 Swazas v. Secretary of State for the Home Department, [2002] 1 WLR 1891 (Eng. CA, Jan. 31, 2002), at 1905 [39]. Similarly, in Stanovikova (USCA, 7th Cir., 2011), Posner J. criticized the decision below which found that the applicants had “not been subjected to the minimum amount of harm required for a finding of persecution”: at 946, which in Posner J.’s view, essentially came down to a finding “that one can imagine worse mistreatment than the [applicants] underwent”: at 948. As Posner J. noted, “[t]hat is not a reasoned basis for rejecting a claim of persecution”: at 948.
52 Swazas (Eng. CA, 2002), at 1905 [39]. However, it is acknowledged that there remains discussion in the jurisprudence as to whether there is some super-added requirement of “seriousness” in relation to the human rights approach: see e.g. Amare v. Secretary of State for the Home Department, [2006] Imm AR 217 (Eng. CA, Dec. 20, 2005).
3.2.2 The literalist approach rejected

(primarily English) dictionaries in order to understand the kinds of harm that should be understood to fall within the notion of “being persecuted,” leading them to determine, for example, that relevant harms must result from the persecutor’s “enmity and malignity.” Yet in overturning the dictionary-based “enmity and malignity” approach, a senior judge lamented that he was “now inclined to see more clearly than before the dangers in the use of dictionary definitions of the word ‘persecuted’ in the Convention definition.”

 Indeed, the literal approach is problematic for at least two key reasons. Most obviously, reference to dictionaries will inevitably suggest a range of different definitions of the word “persecution,” particularly when regard is had to definitions of the equally authentic French text. Second and more fundamentally, a literalist tack cannot be reconciled to the primary rule of treaty interpretation, namely, that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Ordinary meaning cannot, in other words, be identified in a decontextualized and absolutist way, but must be reconciled to a treaty’s context, object, and purpose.

A more sophisticated variant of the literalist approach is to search for guidance on the ordinary meaning of “being persecuted” not in the abstract, but rather by considering

---

53 This is still prevalent in the UK, notwithstanding an early endorsement by the tribunal in Gashi v. Secretary of State for the Home Department, [1997] INLR 96 (UKIAT, Jul. 22, 1996) of the human rights approach, as well as endorsements by the House of Lords and Supreme Court. For example, in Horvath (UKHL, 2000) Lord Lloyd noted: “it has been settled law since the decision of Nolan J. in R v. Immigration Appeal Tribunal, ex parte Jonah [1985] Imm AR 7, 13 that persecution should be given its ordinary dictionary meaning’: at 503; see also Lord Clyde at 514. Interestingly, in Sepet (UKHL, 2003) reference is made to dictionaries, but immediately following this is acceptance of the “sustained or systemic failure” standard in Hathaway, Refugee Status: see at 862–63 [7], per Lord Bingham. However, Clayton states that the dictionary approach “has been falling into disuse in favour of an emphasis on the acts or their effects rather than the motive”: G. Clayton, Textbook on Immigration and Asylum Law Practice (2010), at 457.

54 For example, the Refugee Review Tribunal rejected claims where such malignity could not be established: see e.g. V97/07049, [1997] RRTA 3341 (Aus. RRT, Sept. 3, 1997). However, this approach was ultimately overturned by the High Court: Chen Shi Hai v. Minister for Immigration and Multicultural Affairs, (2000) 201 CLR 293 (Aus. HC, Apr. 13, 2000), at 312–13 [63]. In the context of critiquing this approach, Kirby J. noted in Khawar (Aus. HC, 2002) that, “according to such dictionary meanings ‘persecute’ means ‘to pursue with harassing or oppressive treatment; harass persistently’ and ‘to oppress with injury or punishment for adherence to principles’”: at 35 [106].

55 Khawar (Aus. HC, 2002), at 35 [108].

56 As eloquently expressed by Rodger Haines of the New Zealand Refugee Status Appeals Authority, reliance on dictionaries “is an approach which lends itself to an unseemly ransacking of dictionaries for the mot juste appropriate to the case at hand. This does not assist in a principled analysis of the issues”: Refugee Appeal No. 71427/99 (NZ RSAA, 2000), at [46].

57 See Refugee Convention, at Art. 46, and Vienna Convention, supra n. 8, at Art. 33(1). It is interesting to note that Carlier appears to advocate reference to a dictionary, and yet his discussion of the dictionary definitions in different languages shows the range of definitions produced: J.-Y. Carlier, “The Geneva Definition and the Theory of the Three Scales,” in F. Nicholson and P. Twomey (eds.), Refugee Rights and Realities (1999), at 44.

58 Vienna Convention, supra n. 8, at Art. 31.

59 Similarly, reliance on dictionaries to elucidate the meaning of “persecution” in the context of international criminal law has been found to be inappropriate given the dissonance between the “non-legal” dictionary meaning and the specific context of international criminal law. See Prosecutor v. Kupreskić et al., Case No IT-95-16-T, Trial Judgment (ICTY, Jan. 14, 2000), at [569], rejecting a “non-legal” or “common understanding” based on dictionaries.

60 Refugee Appeal No. 71427/99 (NZ RSAA, 2000), at [46], per Rodger Haines.
interpretations of “persecution” adopted in the field of international criminal law. No doubt inspired by the increasing volume of criminal law jurisprudence explicating this notion, this is an approach that has recently gained prominence in the academic literature.\(^{61}\)

In contrast to purely dictionary-based interpretation, efforts to link refugee law’s “being persecuted” standard to developments under the similar notion of “persecution” adumbrated in the only other branch of international law to employ such a comparable standard make some sense. Indeed, it might be argued that, at least very broadly, jurisprudence in other fields of public international law is part of the “context” of refugee law, and might therefore legitimately be referenced. But on more careful reflection, efforts to import interpretations of criminal law’s notion of “persecution” to elucidate the meaning of refugee law’s construct of “being persecuted” can be seen to be highly problematic.

First, there is no evidence whatever that the drafters of the Convention considered the international criminal law standard in setting refugee law’s “being persecuted” standard, much less that they intended to align refugee law with developments under that regime. The drafters were very much aware of international criminal law and expressly adopted its normative framework as the point of reference for exclusion under Art. 1(F)(a) of the Convention.\(^{62}\) The fact that no comparable reference was made in relation to the “being persecuted” standard surely discounts the superficial relevance of international criminal law’s “persecution” standard as a guide to understanding refugee law’s “being persecuted” test.

Second and more fundamentally, the object and purpose of the criminal and refugee law regimes are simply not comparable – a critical consideration in the interpretive process mandated by international law.\(^{63}\) As a regime designed to punish those found culpable, international criminal law understandably sets the bar for “persecution” at a fairly high level.\(^{64}\) Yet if every applicant for asylum were forced to adduce evidence to substantiate criminal law’s mens rea requirement for “persecution,” it is clear that refugee status would be routinely denied for reasons that have nothing to do with the presence or absence of a need for protection.\(^{65}\)


\(^{62}\) See infra Ch. 7.3.  \(^{63}\) See text supra, Introduction, at nn. 64–71.

\(^{64}\) The crime of persecution is defined differently in the jurisprudence and/or statutes of the different tribunals, but in every case it is clearly a higher test than in refugee law. For example, the Rome Statute of the International Criminal Court, adopted Jul. 17, 1998, entered into force Jul. 1, 2002, 2187 UNTS 90 (“Rome Statute”), defines it as a “crime against humanity” which means that it must be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”: at Art. 7(1)(h). It is emphasized that not every impairment is included, but only “severe deprivation of fundamental rights”; however, this is explained “as part of the effort to bring the dynamic development of human rights into conformity with the principle of legality (nullum crimen sine lege)”: G. Werle et al., Principles of International Criminal Law (2nd edn., 2009), at [893]. Also of course the issue is that the gravity of the harm must be the same as those specifically listed underlying offences of crimes against humanity: see G. Boas, J. L. Bischoff, and N. L. Reid, Elements of Crimes Under International Law (Vol. II, 2009), at 90; Werle et al., supra this note, at [893].

\(^{65}\) A similar view was reached by an Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law, “Summary Conclusions,” (2011) 23 Intl. J. Ref. L. 860, where it was concluded that equating being persecuted in refugee law solely with
3.2.3 Human rights as the benchmark

In line with the duty to interpret “being persecuted” in a manner that takes account of context, object, and purpose, it is striking that human rights norms figure prominently in the Convention’s preamble:

CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights . . . have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms . . .  

Acknowledging that a treaty’s preamble forms part of its context and can elucidate its object and purpose, senior courts have observed that the Refugee Convention was “written against the background of international human rights law,” and more specifically that “[t]his overarching and clear human right object and purpose is the background against which interpretation of individual provisions must take place.” The UNHCR has similarly

the international criminal law standard would “undermine the international protection objectives of the 1951 Refugee Convention, as this could be construed as meaning that persons would fall outside the Convention definition even if they nonetheless face serious threats to their life or freedoms, broadly defined”: at 863 [15]. Accord Goodwin-Gill and McAdam, supra n. 61, at 96.

Kupreškić (ICTY, 2000), at [589] (footnotes omitted). Similarly, in Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Judgment (ICTY, May 7, 1997) the tribunal noted that “[a]lthough there has been an attempt to define the concept [of persecution] in asylum and refugee law this is a distinct area of municipal and international law and thus its norms cannot readily be applied to customary international criminal law entailing individual criminal responsibility”: at [694].


explained that the “strong human rights language” in the Preamble confirms that “the aim of the drafters [was] to incorporate human rights values in the identification and treatment of refugees, thereby providing helpful guidance for the interpretation, in harmony with the Vienna Convention, of the provisions of the 1951 Convention.”

The logic of relying on human rights law to elucidate the meaning of serious harm is, however, not simply a matter of fidelity to rules of treaty interpretation. International human rights standards are rather uniquely suited to the task of defining which risks involve unacceptable forms of serious harm in a manner that offers not only consistency, but also normative legitimacy – these being precisely the standards that states themselves have established to define impermissibly serious harms. Assessing the existence of persecutory harm by reference to widely ratified standards of international human rights law thus provides the ideal alternative to reliance on decision-makers’ personal views about what is “intolerable,” “offensive,” or “illegitimate” since such rights “by very definition . . . transcend subjective and parochial perspectives and extend beyond national boundaries.”

The objective lens afforded by international human rights law has proven especially valuable in answering assertions that the seriousness of a risk may be discounted because the harm feared is “clearly accepted and/or regarded by the majority of the population of [the home country] . . . as traditional and part of the cultural life of its society as a whole.” Because international human rights law is predicated on the inalienable rights of all persons, wherever situated, it provides a critical counterweight to culturally relativist objections to providing protection.

An international human-rights-based framework is also an invaluable means of ensuring that the benchmark for the identification of relevant forms of serious harm does not stagnate, but rather evolves in line with authoritative international consensus.

---


72 Reference to these widely ratified treaties is appropriate regardless of whether they are in practice complied with because, as Lord Hoffmann has observed, “even if many state parties in practice disregard them,” “the instruments show recognition that such rights ought to exist”: Sepet (UKHL, 2003), at 876 [41]. In any event he goes on to say that “[t]he delinquent states do not normally deny this; they usually pretend they comply”: ibid.


74 Fornah v. Secretary of State for the Home Department, [2005] 1 WLR 3773 (Eng. CA, Jun. 9, 2005), at 3787 [44], per Auld L.J., overturned by the House of Lords (Fornah (UKHL, 2006)), where Baroness Hale noted: “It cannot make any difference that the practice is widespread and widely accepted in Sierra Leonian society . . . There is no reason to doubt that FGM is in breach of international human rights law and standards”: at 109 [466]. As this example suggests, this has been particularly prevalent in the context of claims by women who fear a type of harm that is considered integral to the cultural and/or religious practices of their home country. For an in-depth discussion of these issues, see the decision of the New Zealand Refugee Status Appeals Authority in Re MN, Refugee Appeal No. 2039/93 (NZ RSAA, Feb. 12, 1996), at [60]–[70]. In HJ (Iran) v. Secretary of State for the Home Department, [2010] 3 WLR 386 (UKSC, Jul. 7, 2010), Lord Dyson adopted the view of the New Zealand Refugee Status Appeals Authority as stated in Refugee Appeal No. 74665/03, [2005] NZAR 60 (NZ RSAA, Jul. 7, 2004), namely: “We do not accept that the domestic law of the country of origin or cultural relativity can override international human rights norms in the refugee determination context”: at 434 [129].

75 They are enjoyed “by virtue of being a human person”: R. Higgins, Problems and Process: International Law and How We Use It (1994), at 96.

76 For a good example, see text infra Ch. 3.5.2.
international human rights treaties are interpreted by supervisory bodies vested with the authority to assess state compliance and to elucidate the meaning of treaty terms, there is a body of reasoned analysis on which refugee decision-makers may draw. Access to this regularly updated, state-sanctioned interpretive guidance ensures that refugee law remains contextually relevant, dynamic, and sensitive to the contemporary drivers of involuntary alienage.

Given its consistency with rules of treaty interpretation, its reliance on standards of indisputable global authority, and its sensitivity to the importance of dynamic and evolving interpretation, the human rights approach is ideally suited to the task of identifying serious harm for purposes of knowing whether an individual faces the risk of “being persecuted.” So long as the risk of denial of a broadly accepted international human right is sustained—in the sense that, as a practical matter, it is ongoing; or systemic—in the sense that the risk is endemic to the political or social system—it can reasonably be said that there is a risk of “being persecuted” of the kind that may engage Convention obligations.

The “living instrument” approach is well established in interpretation of human rights treaties, including at the regional level. As the European Court of Human Rights has recently explained in Bayatyan v. Armenia, (2012) 54 EHRR 15 (ECHR, Jul. 7, 2011), the court must “maintain a dynamic and evolutive approach”: at [98], that it is “of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory”: at [98], and that the Convention “is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today”: at [102].

The ongoing risk may be one that manifests in a single harm—for example death or severe torture—since, as the New Zealand High Court has explained, the “wrongful act or acts directed against a complainant may be different to the continuing actions of a state in failing to protect its citizen”: K v. Refugee Status Appeals Authority (No. 2), [2005] NZAR 441 (NZHC, Oct. 5, 2004), at [19]. This is emphasized because the phrase “sustained or systemic” has occasionally been misunderstood as necessarily requiring a risk of repeated harm (hence excluding one-off harm such as death). However, this has mostly now been understood to be an error. For example, although the Canadian courts continue to rely on the notion that persecution requires “repetition and relentlessness” (Valentin v. Canada (Minister of Employment and Immigration), [1991] 3 FC 390 (Can. FCA, Jun. 21, 1991), at 396; Rajudeen v. Canada (Minister of Employment and Immigration), (1984) 55 NR 129 (Can. FCA, Jul. 4, 1984)), it is “settled law that, in some instances, even a single transgression of the applicant’s human rights could amount to persecution”: Muthuthevar v. Canada (Minister of Employment and Immigration), [1996] FCT 207 (FCTD, Feb. 15, 1996), at [16]. In Australia, a similar approach is taken: see Petrov v. Vrachnas (Unreported, Aus. FC, Apr. 7, 1997), a “single act of oppression may suffice”; Minister for Immigration and Multicultural Affairs v. Prathapan, (1998) 86 FCR 95 (Aus. FFC, Aug. 12, 1998), at 99, per Madgwick J. See also Doymus v. Secretary of State for the Home Department, OO/TH/01748 (UKAIT, Jul. 19, 2000), where the UK Asylum and Immigration Tribunal concluded that “while persistency is a usual characteristic of persecution, it is not an inevitable one”; and the earlier decision of the Court of Appeal in Demirkaya v. Secretary of State for the Home Department, [1999] Imm AR 498 (Eng. CA, Jun. 23, 1999), at [15]. In the US, see Dandan (USCA, 7th Cir., 2003).

We note that the “sustained or systemic” phrase, first set out in Hathaway, Refugee Status, while widely accepted (see supra n. 18) has sometimes been misunderstood as a conjunctive rather than disjunctive phrase: see e.g. DG v. Refugee Status Appeals Authority, CP213/00 (NZHC, Jun. 5, 2001). Further, in some early Australian case law the word systematic (rather than systemic) was adopted; but later courts came to understand that this view is mistaken: Ibrahim (Aus. HC, 2000), at [99]–[100]. However, we note that the Migration Act 1958 (Cth) has been amended to require “systematic and discriminatory conduct”: s. 91R(1)(c) (but see Minister for Immigration and Citizenship v. SZCWF, (2007) 161 FCR 441 (Aus. FFC, Sept. 27, 2007)).
This human rights approach is clearly predominant in the common law world,\(^{80}\) and increasingly adopted in the civil law world,\(^{81}\) including in legislation codifying the Refugee Convention in domestic law.\(^{82}\) Perhaps most significantly, the European Union’s Qualification Directive has explicitly adopted the human rights approach by defining an “act of persecution” as an act that is “sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made”\(^{83}\) or an “accumulation of various measures, including violations of human rights.”\(^{84}\) The human rights approach is now endorsed by the UNHCR,\(^{85}\) and


\(^{81}\) For example, the Guatemalan legislation provides that those entitled to refugee status include those who “suffer persecution through sexual violence or other forms of gender persecution based on violations of fundamental human rights in international instruments”: \textit{Acuerdo gubernativo N°383-2001 del 14 de septiembre de 2001, reglamento para la protección y determinación del estatuto de refugiado en el territorio del Estado de Guatemala}, at Art. 11(d) (unofficial translation).

\(^{82}\) Qualification Directive, supra n. 37, at Art. 9.

\(^{83}\) The UNHCR clearly recognizes the link between “being persecuted” and human rights norms: see e.g. UNHCR, \textit{Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees}, UN Doc. HCR/GIP/02/01 (May 7, 2002) (“Guidelines on International Protection No. 1”), at [5] and [9] (citing

\(^{84}\) \textit{Ibid.}. 3 SERIOUS HARM
overwhelmingly approved by scholars. Even in many jurisdictions that have not yet explicitly adopted the human rights approach to the identification of persecutory harms, it is often recognized that “[t]he denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm” – a position that tacitly accepts the logic of the link between serious harm in refugee law and human rights norms.

Despite the clear reasons in support of a human rights framework for interpretation of persecutory serious harm, three questions are sometimes raised. First, can the international

various international instruments at n. 2); UNHCR, Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (April 28, 2004) (“Guidelines on Religion-Based Claims”), at [2], [11], [15]–[16].


In some cases, Australian courts have explicitly referred to international human rights law to assist in assessing serious harm: for example in Wang (Aus. FFC, 2000), both Gray J. at 553 [20] and Merkel J. at 564–65 [74]–[81] explicitly referred to Art. 18(1) of the Civil and Political Covenant, supra n. 81, as did Kirby J. in Applicant NANDB of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs, (2005) 216 ALR 1 (Aus. HC, May 26, 2005), at [116]. See also Chen Shi Hai (Aus. HC, 2000), at 303 [29], per Gleeson C.J., Gaudron, Gummow, and Hayne J.

Other concerns have occasionally been raised, but these are readily dismissed. For example, Martin argues that asylum is a “scarce resource” and thus the definition should be read narrowly: see “The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource,” in H. Adelman (ed.), Refugee Policy: Canada and the United States (1991). See also Mohammed v. Keisler 507 F.3d 369 (USCA, 6th Cir., Nov. 2, 2007), at 370. For a convincing response to Martin see K. Jastram, “Economic Harm as a Basis for Refugee Status and the Application of Human Rights Law to the Interpretation of Economic Persecution,” in J. C. Simeon (ed.), Critical Issues in Refugee Status Determination (2010) 143, at 160–62. Such a “floodgates” concern is not a legal argument: see Chan (Can. SC, 1995), at [57], per La Forest J.; Applicant A (Aus. HC, 1997), at 241, per Gummow J.; R v. Secretary of State for the Home Department; Ex parte Jeyakumaran, [1994] Imm AR 45 (Eng. HC, Jun. 28, 1985), at 48. It has conversely been argued by some that caution should be exercised in embracing too wholeheartedly the human rights framework because it may produce an under-inclusive approach in that “it is possible that all forms of persecution have not yet been identified or codified in international human rights law”: 
human rights framework accommodate the commitment of refugee law to respond to particularized forms of vulnerability, or is its objective nature in some sense at odds with the need to account for individuated concerns? Second, which standards of international human rights law are appropriately relied upon to identify persecutory harms? In particular, does it matter whether pertinent standards have been ratified by either or both of the state of origin and the asylum state? And third and most complex, does the human rights approach mean that a risk of denial of any human right constitutes a risk of serious harm? If not, can a principled line be drawn between those human rights risks appropriately deemed persecutory and those that fail to meet the standard? We consider each of these issues in turn.

Perhaps the most basic question is whether the value of a more principled, objective human rights framework is in some sense obviated by such a framework’s diminished attention to individuated vulnerabilities. While an understandable concern, the truth is that international human rights law not only allows, but actually requires, careful scrutiny of particularized circumstances. For example, the question of whether particular actions amount to “cruel, inhuman or degrading treatment” will depend “on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age, and state of health of the victim.”90 In line with this approach, courts relying on human rights norms to identify serious harm for refugee law purposes have appropriately insisted, for example, that personal attributes such as “age and frailty”91 may have an impact on the seriousness of harm:

It is obvious that the impact and circumstances surrounding the application of a national policy may impact differently on different persons so that in one instance the impact may constitute persecution but in other cases the impact may not be so substantial as to amount to Convention persecution.92

see A. Edwards, “Age and Gender Dimensions in International Refugee Law,” in E. Feller, V. Türk, and F. Nicholson (eds.), Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection (2003), at 50. However, this appears hypothetical, since no concrete examples are provided, and in any event such concerns overlook the fact that the interpretation of core human rights treaties is not static; rather they are subject to evolutionary interpretation by specialized adjudicatory bodies, whose jurisprudence provides further helpful guidance in refugee law. Indeed, as Storey argues, “[t]he time has surely come for the circumstantial approach [advocated by the UNHCR] to be abandoned. It ill behoves UNHCR – the international body charged by Article 35 with supervision of the application of the Refugee Convention – to be seen to be endorsing, even if only intermittently and ambiguously, reliance on a residual area of meaning ungoverned by objective criteria drawn from international law. Manifestly, of the two approaches the human rights approach is the only one that affords a real possibility of achieving a common international understanding”: Storey, supra n. 86.

90 N v. United Kingdom, Application No. 26565/05 (ECtHR, May 27, 2008), at [29]. It is a well-established principle in refugee law that individual circumstances must be assessed; we note for example that the Qualification Directive, supra n. 37, requires that the individual’s particular characteristics be taken into account: see at Art. 4(3)(c).


92 SZBQJ v. Minister for Immigration and Multicultural and Indigenous Affairs, [2005] FCA 143 (Aus. FC, Feb. 28, 2005), at [21]. Thus the decision of Raphael F.M. in SZALZ v. Minister for Immigration and Multicultural and Indigenous Affairs, [2004] FMCA 275 (Aus. FMC, May 18, 2004) that the analysis is purely an objective one such that the finding that harm is not sufficiently serious “cannot be changed because of the more serious effects that it had on the applicant than it might have had on another person” is incorrect: see at [8].
Particular attention is routinely paid to the vulnerability and developmental needs of children, which can of course affect the seriousness of a given denial of human rights. More specifically, it is understood that

[a]ctions or threats that might not reach the threshold of persecution in the case of an adult may amount to persecution in the case of a child because of the mere fact that s/he is a child. Immaturity, vulnerability, undeveloped coping mechanisms and dependency as well as the differing stages of development and hindered capacities may be directly related to how a child experiences or fears harm.94

Similarly, ostracism and rejection by family and other support networks can exacerbate and heighten the severity of harm likely to be suffered by a particular applicant.95 The Australian tribunal therefore determined that “[i]n a context where the applicant would be unable to rely on family support,” generalized stigmatization and the denial of social and economic resources “would amount to serious harm.”96 Indeed, to the extent that adoption of a human-rights-based approach to the assessment of serious harm has a limiting effect, it may well be precisely because it is attentive to particularized circumstances. Thus, “[t]o take an extreme example, heterosexuals could not claim to be persecuted because they are prohibited from engaging in homosexual acts”97 – surely a sensible conclusion.

A second question sometimes posed is whether a general policy of relying on international human rights law to define relevant forms of serious harm is viable given that either or both of the state of origin and asylum country may not be parties to the human rights treaty


95 For a contra example, see SR (Iran) v. Secretary of State for the Home Department, [2007] EWCA Civ 460 (Eng. CA, May 17, 2007).


97 Win (Aus. FC, 2001), at [19].
in which the relevant standard is found. The implied suggestion is that it would in some sense be wrong to assess the existence or absence of persecution by reference to a standard that does not formally bind the states most directly involved. This worry is in our view fundamentally misplaced.

It would, of course, be one thing if the human rights framework were to be relied upon to impose a sanction or otherwise adjudicate whether a treaty obligation has been breached. But in the refugee law context, reference to international human rights standards is made solely for the purpose of seeking authoritative guidance on the interpretation of an otherwise ambiguous term – “being persecuted” – not to engage in an assessment of liability for breach of human rights law. Because it is agreed that the terms of the Refugee Convention should be construed in a manner that facilitates their application across the range of state parties, and which can be justified as a matter of principle, reliance on standards drawn from international human rights law to inform the interpretation of the “being persecuted” requirement is contextually appropriate. So long as the international human right to which reference is made is sensibly understood to be one that is broadly agreed at international law, its invocation as an interpretive tool ought not to be questioned.

This brings us to the third, and most difficult, question: is risk to any and every internationally agreed human right sufficiently serious to amount to the risk of a persecutory harm? Or should an especially serious subset of human rights be authoritatively identified as relevant to refugee law?

At the level of principle, one might argue against any effort to distinguish among agreed human rights standards. As Gibney suggests,

> [h]uman rights are sometimes derided for being a utopian wish list of human desires; however, the exact opposite is true. Human rights are not about luxuries, and they are certainly not about mere desires either. Rather, human rights are better thought of as the basic minimum that each individual has to have in order to live a human (rather than inhuman) existence.

On the basis of this principled reasoning, one might well question whether refugee decision-makers ought to second-guess the list of human rights standards that have been agreed by states. But as a matter of international law, it is difficult to ignore the fact that not all codified human rights standards are created equal: some rights have long pedigrees, others are of more recent vintage; some rights are nearly universally agreed, others enjoy only minimal support; and some rights are clearly defined and unambiguously binding, while others are more vague or framed as duties of process rather than result. Ought such differences to be accorded no weight, particularly given the importance of retaining state support for a progressive and evolving rights-based approach to interpretation of the “being persecuted” requirement?

One possibility would thus be to focus analysis simply on the most basic of international human rights standards, namely those found in the so-called International Bill of Rights: the non-binding but widely referenced Universal Declaration of Human Rights, and the two treaties implementing the Declaration as matters of binding law, the International

---

3.2.3 Human Rights as the Benchmark

Covenant on Civil and Political Rights ("Civil and Political Covenant")\(^{103}\) and the International Covenant on Economic, Social and Cultural Rights ("Economic, Social and Cultural Covenant").\(^{104}\) More than any other gauge, the International Bill of Rights is essential to an understanding of the minimum duty owed by a state to its nationals.\(^{105}\) The Covenants are moreover widely ratified across the full range of states.\(^{106}\)

But since the adoption of the Covenants in the 1960s, the international community has agreed to additional treaties that elucidate in more depth the duties owed by states in a range of specific settings. Many of these – including in particular the Convention on the Elimination of Racial Discrimination,\(^{107}\) the Convention on the Elimination of All Forms of Discrimination Against Women,\(^{108}\) the Convention on the Rights of the Child,\(^{109}\) and the Convention on the Rights of Persons with Disabilities\(^{110}\) – are broadly subscribed to and thus fairly understood to serve as authoritative points of reference, in much the same way as the International Bill of Rights. In any event, the newer generations of treaties essentially complement and contextualize the general rights set out in the International Bill of Rights, showing how those generic standards apply in circumstances of specific vulnerability or need. There can thus be little objection to drawing upon them as a means of understanding the scope of serious harm presently recognized as impermissible. For example, it is increasingly recognized that a "[c]ontemporary and child-sensitive understanding of persecution"\(^{111}\) requires that

\(^{103}\) Civil and Political Covenant, supra n. 81.


\(^{105}\) See Z v. Minister for Immigration and Multicultural Affairs, (1998) 90 FCR 51 (Aus. FC, Dec. 11, 1998), at 60, per Katz J. In Win (Aus. FC, 2001), Madgwick J. stated that “the UDHR and the ICCPR are in my view reliable, sufficiently contemporaneous guides” as to understanding what “civil and political rights the States that made the Convention had in mind”: at [22], citing Shah (UKHL, 1999), per Lord Hoffmann.

\(^{106}\) At the time of writing, the Civil and Political Covenant, supra n. 81, had 167 parties. There were 145 parties to the Refugee Convention, and 146 to the Refugee Protocol. Of the 145 parties to the Refugee Convention, only nine had not acceded to the Civil and Political Covenant (Antigua and Barbuda, China, Fiji, Holy See, Nauru, São Tomé and Príncipe, Solomon Islands, St Kitts and Nevis, and Tuvalu). Of those nine, three had at least signed the Civil and Political Covenant (China, Nauru, and São Tomé and Príncipe). At the time of writing, the Economic, Social and Cultural Covenant, supra n. 104, had 160 parties. Of the 147 parties to the Refugee Convention or Protocol, only thirteen had not acceded to the Economic, Social and Cultural Covenant (Antigua and Barbuda, Belize, Botswana, Fiji, Haiti, Holy See, Mozambique, Samoa, São Tomé and Príncipe, South Africa, St Kitts and Nevis, Tuvalu, and the United States of America), and of those, four had at least signed the Economic, Social and Cultural Covenant (Belize, São Tomé and Príncipe, South Africa, and the United States of America).


\(^{111}\) UNHCR, Guidelines on International Protection No. 8, supra n. 94, at [13]. The Committee on the Rights of the Child has similarly emphasized that the refugee definition “must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children”: Committee on the Rights of the Child, General Comment
when determining whether a child claiming refugee status fits the definition . . . decision makers must inform themselves of the rights recognized in the [Convention on the Rights of the Child]. It is the denial of these rights which may determine whether or not a child has a well-founded fear of persecution if returned to his or her country of origin.\footnote{Kim v. Canada (Minister of Citizenship and Immigration), [2011] 2 FCR 448 (Can. FC, Feb. 12, 2010), at 475. Indeed, the Canadian Federal Court has found legal error where the Immigration and Refugee Board failed to assess separately the claim of a child, distinct from her mother, and failed to refer to administrative guidelines on child refugee claimants: see SRH and NSH v. Canada (Minister of Citizenship and Immigration), [2012] FC 1271 (Can. FC, Oct. 31, 2012), at [32]–[33]. For an excellent discussion of these issues, see J. M. Pobjoy, “A Child Rights Framework for Assessing the Status of Refugee Children,” in S. S. Juss and C. Harvey (eds.), Contemporary Issues in Refugee Law (2013) 91, at 121–29.}

Perhaps because it does not make sense narrowly to define the range of international human rights treaties pertinent to the assessment of serious harm for refugee law purposes, an alternative sometimes suggested – for example, in the European Union’s Qualification Directive – is that the focus of analysis be limited to those human rights that are “non-derogable.”\footnote{Qualification Directive, supra n 37, at Art. 9. We note that there is a worrying tendency in European jurisprudence to equate the question of what is necessary to enliven an implied non-refoulement provision in the European Convention for the Protection of Human Rights, supra n. 81, with what is necessary to establish being persecuted in the refugee context. For example, in the decision of the German Federal Administrative Court in 10 C 19.09 (Ger. BverwG, Dec. 9, 2010), in explaining the need for a “severe” violation of human rights to constitute an act of persecution, the court cited in support the ECtHR jurisprudence concerning prevention of deportation under the European Convention for the Protection of Human Rights: see at [23] and [35].} Yet this approach makes little sense, since non-derogability does not necessarily equate with normative importance or seriousness of harm.\footnote{Indeed there is no derogation clause for emergencies in the Economic, Social and Cultural Covenant, supra n. 104, nor in the Race Convention, supra n. 107, the Women’s Convention, supra n. 108, or the Children’s Convention, supra n. 109. For a detailed discussion of the difficulties in according a higher normative status merely on the basis of derogability, see I. D. Seiderman, Hierarchy in International Law: The Human Rights Dimension (2001), at 67–89.} As the UN Human Rights Committee has explained, “not all rights of profound importance . . . have in fact been made non-derogable.”\footnote{Human Rights Committee, General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994) (“HRC General Comment No. 24”), at [1]. The Committee elaborates more fully on this point in its later General Comment on derogations: Human Rights Committee, General Comment No. 29: States of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) (“HRC General Comment No. 29”). Although some rights are made non-derogable because they represent peremptory norms: HRC General Comment No. 24, at [1].} Derogability serves the quite distinct purpose of identifying those rights that both practically and as a matter of principle may be suspended for limited periods of time, during an officially declared national emergency. Some rights were made non-derogable in international law (such as the right not to be imprisoned for non-payment of debt) not because they are normatively superior to other rights but “because their suspension is irrelevant to the legitimate control of the state in a national emergency.”\footnote{HRC General Comment No. 24, supra n. 115, at [10]. See further Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (“HRC General Comment No. 31”). As McGoldrick has noted, “[i]t is not easy to determine the criteria for express non-derogability. The ECHR has four}
Derogability thus does not provide a principled basis upon which to exclude a given right from the ambit of standards relevant to refugee law’s assessment of serious harm.

An alternative to relying on derogability is to circumscribe the range of relevant rights by reference to the fact that some rights, in particular those in the Civil and Political Covenant, are generally framed as duties of immediate result whereas other rights, predominantly those found in the Economic, Social and Cultural Covenant, are in most cases deemed subject to progressive implementation. This argument may be framed as one of simple normative hierarchy, that is, that those rights that attach immediately are more important than those that are subject only to an obligation of progressive implementation. Alternatively, it may be suggested that referencing rights not subject to a duty of result is simply too complex, with the assessment of compliance with the progressive implementation standard ill-suited to the expertise of most refugee decision-makers. In truth, neither of these arguments for ruling out rights that are to be progressively implemented as relevant to serious harm analysis is sustainable.

As a matter of law, it is now widely understood that the conditioning of social and economic rights on progressive implementation was simply intended to recognize that such rights will often take longer to put in place, not that they are any less important. Indeed, an argument based on normative hierarchy is no longer defensible in light of the widely accepted principle that “[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.” The New Zealand tribunal has thus appropriately rejected, in the context of refugee law, “the notion that international human rights law is to be approached from a hierarchical perspective in which civil and political rights take precedence over, or are a superior form of rights, to their economic, social and cultural counterparts.”

Nor is there force in the alternative argument for rejecting reference to economic, social, and cultural rights on the basis that assessment of breach by reference to the duty progressively to implement such norms is a task ill-suited to the expertise of refugee decision-makers. At the undisputed core of the duty of progressive, non-discriminatory implementation is the prohibition on the act of withdrawal or withholding of rights to particular segments of the population. As such, whatever the duty of progressive implementation means, it most certainly does not contemplate retrogression. Because risks of active withdrawal or deprivation of socio-economic rights are precisely those most frequently advanced by non-derogable rights, the ICCPR has seven, and the ACHR has at least eleven”: D. McGoldrick, “The Interface between Public Emergency Powers and International Law,” (2004) 2 Intl. J. Const. L. 380, at 414. See also UN High Commissioner for Refugees, “Statement on Religious Persecution and the Interpretation of Article 9(1) of the EU Qualification Directive” (Jun. 17, 2011) (“UNHCR, Art. 9(1) of the EU Qualification Directive”), at [4.1.2]. Some obligations are immediately binding, the most obvious being the obligation to “take steps” and the duty of non-discrimination: see e.g. Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations (Dec. 14, 1990) and Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/20 (Jul. 2, 2009) (“CESCR General Comment No. 20”).

Vienna Declaration and Programme of Action, approved by 171 states: UN Doc. A/CONF.157/23 (Jul. 12, 1993), at [5].

BG (Fiji), [2012] NZIPT 800091 (NZ IPT, Jan. 20, 2012), at [90], citing Refugee Appeal Nos. 75221 and 75225 (NZ RSAA, Sept. 22, 2005), at [80], and comparative authority from other jurisdictions, at [91].
persons seeking recognition of refugee status, the alleged complexity of referencing economic, social, and cultural rights is in practice generally a non-issue.\textsuperscript{120}

In sum, in relying on international human rights law to understand forms of serious harm relevant to refugee protection it is not appropriate to restrict analysis only to the standards in the International Bill of Rights, nor to refuse to consider claims based on rights that are either derogable or subject to a duty of progressive implementation. There is, in truth, no convincing conceptual framework that is capable of distinguishing on an absolute basis between those rights that are “basic,” “fundamental,” or “important” and those that are not.\textsuperscript{121}

The importance of refusing to buy into an \textit{ab initio}, automatic screening out of certain categories of internationally recognized human rights does not mean, however, that it is enough merely to point to a relevant international human rights norm in order to ground a finding of serious (and hence persecutory) harm. To the contrary, under the positivist framework advocated here, a finding of serious harm requires careful consideration of whether a generally accepted right as codified in international law is, on the facts of the case, at risk of being violated. This analysis comprises three steps.

First, is the interest at stake within the ambit of a human rights norm as defined by a widely ratified international human rights treaty? If not, it is unlikely to constitute serious harm in refugee law since for the human right fairly to be considered a generally agreed interpretive

\textsuperscript{120} While refugee decision-makers have sometimes dismissed claims based on blatant socio-economic deprivation on the basis of inappropriate reliance on the progressive nature of Economic, Social and Cultural Covenant obligations (see M. Foster, \textit{International Refugee Law and Socio-Economic Rights: Refuge from Deprivation} (2007), at 136–47), international criminal tribunals have not been distracted by whether discriminatory violations of social and economic rights can be justified on the basis of their progressive nature or resource constraints. Just as the Nuremberg Tribunal and the US Military Tribunal after the Second World War convicted defendants of persecution on the basis, \textit{inter alia}, of the denial of employment, and the exclusion of Jews from the public service and from educational institutions (see \textit{Prosecutor v. Krajini\v{c}}, Case No. IT-00-39, Trial Judgment (ICTY, Sept. 27, 2006), at [738]), so too the modern tribunals have found such actions, as well as denial of available medical care, capable of constituting the crime of persecution either alone or in conjunction with other acts when undertaken for a discriminatory reason: \textit{Prosecutor v. Brdanin}, Case No. IT-99-36, Trial Judgment (ICTY, Sept. 1, 2004), at [1046]–[1048]; \textit{Krajini\v{c}} (ICTY, 2006), at [740]–[741]. In none of these cases has it been suggested or considered that the “progressive realization” standard in the Economic, Social and Cultural Covenant, \textit{supra} n. 104, in any way diminishes the capacity of such actions to constitute the crime of persecution. We note that in \textit{Brdanin} the defendants tried to argue that the mass dismissals were not for discriminatory reasons but rather due to economic downturn. This was rejected by the court: at [1038]. Similarly, the International Criminal Tribunal for the former Yugoslavia rejected the argument that an absence of required medical care was caused by a general shortage of supplies; rather it was “deliberately withheld from Bosnian Muslims and Bosnian Croats by the Bosnian Serb authorities for the very reason of their ethnicity”: \textit{Brdanin} (ICTY, 2004), at [1048]. In \textit{Brdanin}, the International Criminal Tribunal for the former Yugoslavia concluded that, “taking into account the cumulative effect” of the denial of the rights of “employment, freedom of movement, proper judicial process, and proper medical care,” “these rights cannot but be considered as fundamental rights for the purposes of establishing persecution”: at [1049].

\textsuperscript{121} I. Brownlie, \textit{Principles of Public International Law} (6th edn., 2003), at 488. See also T. Meron, “On a Hierarchy of International Human Rights,” (1986) 80 Am. J. Intl. L. 1. In respect of the Children’s Convention, \textit{supra} n. 109, a treaty that incorporates both civil/political and social/economic rights, the Committee has emphasized that “there is no hierarchy of rights in the Convention”: Committee on the Rights of the Child, General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, UN Doc. CRC/C/GC/14 (May 29, 2013), at [4].
benchmark for the “being persecuted” inquiry, one should expect to see the norm having been ratified by a super-majority of states across a politically and geographically diverse range of states. Not only the Covenants, but also the specialized treaties on race, women, children, and persons with disabilities would easily meet this standard.

Second, even if the harm threatened is addressed by a broadly agreed human rights norm, is the risk nonetheless one deemed acceptable by reference to the scope of the right as codified? Human rights law provides valuable guidance not only in defining “the basic minimum that each individual has to have in order to live a human (rather than inhuman) existence,” but also by identifying those aspects of human behavior that can be legitimately restricted where critical to a more general social purpose. Some human rights are expressly defined to be subject to limitation that reduces their scope, while others may be subject to lawful derogation which permits a state to “suspend some of their obligations under human rights treaties if a state of emergency requires them to do so.” The international human rights framework thus contains an inbuilt flexibility which acknowledges, first, that not all rights are absolute as their scope may need to be limited, for example, as “necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others”; and second, that in limited and closely circumscribed situations, it may be necessary to disregard or suspend certain rights in the context of an emergency.

Drawing on these express limitations and authorized forms of flexibility, international human rights law positions refugee decision-makers to take a non-absolutist yet principled approach to the identification of serious harm. While neither the existence of inbuilt limitations nor the possibility of emergency derogation should rule out reference to a given human right in considering whether a particular risk is of persecutory harm, these considerations may – on the facts of a given case – show why a particular alleged harm is not, in fact,
rights-violative and thus not appropriately deemed serious harm for purposes of the “being persecuted” analysis. Specifically, a claim of relevant serious harm will not be made out where the facts show that the harm feared was justified on the terms of the relevant human rights norm – either because it followed from a textually permissible limitation or because the risk would exist only in the context of a national emergency that would justify suspension of the right in question. Because these considerations are inherent parts of the international human rights framework, decision-makers can and should take them into account as part of the assessment of whether the facts of the individual case bespeak serious harm sufficient to ground a finding that there is a risk of being persecuted.

Third, there will occasionally be cases in which – despite the fact that the risk alleged implicates a broadly subscribed international human rights norm and considerations neither of internal limitation nor of emergency derogation apply – it may nonetheless be clear upon thoughtful and conscientious reflection that the threat is so far at the margins of a rights violation as to amount to a *de minimis* harm. In such exceptional cases, the risk need not be treated as serious harm for refugee law purposes. Refugee decision-makers should, of course, carefully consider the authoritative interpretation of the right in question rendered by international bodies, including the explication of minimum core obligations. There must be a clear and convincing basis to find that the sustained or systemic risk of denial of a broadly subscribed international human right is truly *de minimis* in the circumstances of a particular case, recalling of course that a risk of being persecuted may be founded on an agglomeration of harms that, taken individually, might not rise to the level of persecution.

Care must be taken to “analys[e] . . . the cumulative effects of the discriminatory incidents and explain why these incidents, in the aggregate, [do] not amount to persecution.” In other words, it is not sufficient simply to state that the harm is *de minimis*, there must be “critical analysis” of why this is so. Such a conclusion will, of course, be a rare exception since, as Justice Sedley pointed out in *Svazas*, “[t]o say that particular ill-treatment falls toward the bottom end of the scale of what amounts to persecution is not . . . to say anything that matters legally.”

In sum, reliance on international human rights law to identify serious harm relevant to finding an individual to be at risk of “being persecuted” is both principled and practical.
As the steps set out above make clear, this approach does not result in a mechanistic exercise devoid of thoughtful analysis on the part of the decision-maker; much less does it posit a process of a priori, rigid classification of relevant harms. The real value of the human rights framework is that it frames the inquiry on the basis of principles agreed to be relevant by states; which are regularly contextualized and updated by legally authoritative general comments and jurisprudence, and which mandate attention to the particular circumstances of the specific individuals seeking protection. The human rights framework for analysis of persecutory harms thus strikes the perfect balance between ensuring fidelity to objective standards of universal authority and empowering decision-makers to do justice to the applicants appearing before them.

Having set out the rationale for, and general parameters of, a human-rights-based approach to understanding persecutory harms, we now consider the application of that framework to the sorts of claims most commonly made by persons seeking recognition of refugee status. Our analysis is organized into three thematic categories: risks to physical security, threats to liberty and freedom, and infringements of autonomy and self-realization. Our reliance on these three broad categories of rights rather than traditional hierarchical categories (in particular, civil and political rights vs. economic, social, and cultural rights) is in line with the now-established principle that all human rights are equal and indivisible. The flexibility of this framework moreover allows us to consider human rights risks in a more fluid way, reflecting the fact that categories of rights are not hermetically sealed, but are rather quite permeable in practice. Indeed, few refugee claims will implicate only a single

---


133 Many of the key human rights treaties allow for individual complaints, and in the case of four of the widely ratified treaties, there is an established body of jurisprudence (Civil and Political Covenant, supra n. 81; Race Convention, supra n. 107; Women’s Convention, supra n. 108; Children’s Convention, supra n. 109), while other complaints procedures have more recently entered into force: see G. Ulfstein, “Individual Complaints,” in Keller and Ulfstein, supra n. 132, at 73. As Ulfstein notes, “[t]he number of states that have accepted the individual complaints procedure is particularly impressive as regards the ICCPR and CEDAW, respectively 113 and 100. But also a considerable number of states have accepted the procedure under the CERD (54), CAT (64) and CRPD (60). In comparison, 66 states have accepted the compulsory jurisdiction of the International Court of Justice (ICJ), and 114 states are parties to the Statute of the International Criminal Court (Rome Statute)”: ibid., at 74.

134 Other than commentaries on specific treaties (see e.g. M. Nowak, UN Convention on Civil and Political Rights: CCPR Commentary (2nd rev. edn., 2005) and S. Joseph, J. Schultz, and M. Castan, The ICCPR: Cases, Materials and Commentary (2005)) most modern human rights textbooks organize discussion of substantive guarantees thematically: see e.g. W. Kalin and J. Kunzli, The Law of International Human Rights Protection (2009), at 271; O. De Schutter, International Human Rights Law (2010). Nickel and Reidy argue that human rights can be organized into “seven families”: security rights; due process rights; fundamental freedoms; rights of political participation; equality rights; social rights; and minority and group rights: J. Nickel and D. Reidy, “Philosophy,” in Moekli, Shah, and Sivakumaran, supra n. 125, 39, at 40–41. This is distinct from the attempt by some philosophers to explain the moral or ethical basis of human rights by reference to a typology of basic human needs: see e.g. J. Griffin, On Human Rights (2008).
human right, requiring the decision-maker always to take account of the cumulative human rights impact of the various harms alleged in order to arrive at a synthesized assessment of the “totality of the claim.”

3.3 Physical security

The quintessential refugee claim involves risks to the applicant’s physical security – most commonly encompassing risks to life; torture; cruel, inhuman, or degrading treatment or punishment; to slavery, including in its contemporary forms; or to other forms of physical violence. As courts have recognized, however, physical security may also be threatened by critical risks to socio-economic rights, including in particular those that require the protection of core health concerns. In the sections that follow, we examine the relevance to the “being persecuted” inquiry of each of these risks to physical security.

3.3.1 Life

Perhaps the most straightforward example of serious harm sufficient to ground a risk of being persecuted is the risk to life, sensibly described as the non-derogable “supreme right,” which is “basic to all human rights.” As the Full Federal Court of Australia explained, “[i]t goes without saying that . . . killing . . . involve[s] serious harm.”

Yet the specific formulation of the right to life as codified at international law does not protect “life” in an absolute and unqualified way. The Civil and Political Covenant rather prohibits only the “arbitrary deprivation” of life and makes it clear, for example, that countries that have not abolished the death penalty do not breach the right to life so long as the death penalty is carried out “pursuant to a final judgment made by a competent court,” imposed “only for the most serious crimes in accordance with the law,” and is not imposed on children or pregnant women. Imposition of the death penalty must not be “contrary to the provisions of the . . . Covenant,” thus clearly proscribing its use to breach a right protected by the Covenant (for example, to punish homosexual conduct

136 Civil and Political Covenant, supra n. 81, at Art. 6(1); Children's Convention, supra n. 109, at Art. 6(1).
137 Human Rights Committee, General Comment No. 6: The Right to Life (Apr. 30, 1982) (“HRC General Comment No. 6”), at [1].
138 Human Rights Committee, General Comment No. 14: Nuclear Weapons and the Right to Life (Nov. 9, 1984), at [1]. It is one of the few rights in the Civil and Political Covenant, supra n. 81, to be described as “inherent” (see also references to “inherent dignity of the human person” at Art. 10 and Preamble). Similarly, the right to life in the Children’s Convention, supra n. 109, is also described as “inherent”: at Art. 6(1); the only other references to inherent rights are to dignity (in Art. 37(c) and the Preamble). See Nowak, supra n. 134, at 17.
139 SZCWF (Aus. FFC, 2007), at 448–49 [34]. Similarly, the US Court of Appeals for the Eleventh Circuit straightforwardly explained, “[p]ut simply, attempted murder is persecution”: Jimenez (USCA, 11th Cir., 2007).
140 Civil and Political Covenant, supra n. 81, at Art. 6(1). 141 Ibid., at Art. 6(2).
142 Ibid.
143 Ibid., at Art. 6(5). See Nowak, supra n. 134, at 138–53. However, note that there may be an independent non-refoulement obligation derived from the Civil and Political Covenant, supra n. 81, which prevents a state which has abolished the death penalty from sending a person to a country where he or she is at serious risk of the death penalty.
144 Civil and Political Covenant, supra n. 81, at Art. 6(5).
The critical question, then, in a refugee status application is whether there is the forward-looking prospect of an arbitrary deprivation of life, in which case the risk of persecutory harm is established.

In the context of civilians fearing loss of life during an international or internal armed conflict, the requirement of arbitrary deprivation of life will ordinarily be met. This is because international humanitarian law requires the protection of civilians and expressly or apostasy). The critical question, then, in a refugee status application is whether there is the forward-looking prospect of an arbitrary deprivation of life, in which case the risk of persecutory harm is established.

In the context of civilians fearing loss of life during an international or internal armed conflict, the requirement of arbitrary deprivation of life will ordinarily be met. This is because international humanitarian law requires the protection of civilians and expressly

145 This is an issue in a range of cases, particularly those involving claims by homosexual men and women, because Iran, Mauritania, Saudi Arabia, Sudan, Yemen, as well as some parts of Somalia and Nigeria presently maintain the death penalty for homosexual conduct: see J. C. Hathaway and J. Pobjoy, “Queer Cases Make Bad Law,” (2012) 44 N. Y. U. J. Intl. L. & Pol. 315. Another example is that apostasy is an offense punishable by the death penalty in Iran: see e.g. Kazemzadeh (USCA, 11th Cir., 2009), at 1354. There can however be challenging issues of nexus in such cases. In Z v. Minister for Immigration and Multicultural Affairs, (1998) 90 FCR 51 (Aus. FC, Dec. 11, 1998), Katz J, cited with approval a passage from the decision of the Full Federal Court in Minister for Immigration v. Respondent A, (1995) 57 FCR 309, in which it was said: “a country might have laws of general application which punish severely, perhaps even with the death penalty, conduct which would not be criminal at all in Australia. The enforcement of such laws would doubtless be persecution, but without more it would not be persecution for one of the reasons stated in the Convention”: at 56. Although see e.g. the decision of the Australian Full Federal Court in Aala (Aus. FC, 2002) in which the court overturned the decision below on the basis that new evidence established that the applicant’s risk of execution for economic crimes would follow from an Iranian law stipulating the death penalty for an economic offense committed “with an anti-government intention”: at [58]. Hence the court found that “the appellant’s fear of execution is founded on his political opinion”: at [58]. See also WAEZ of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs, [2002] FCAFC 341 (Aus. FC, Nov. 8, 2002).

146 The right to life cannot be suspended due to a “public emergency which threatens the life of the nation” (Civil and Political Covenant, supra n. 81, at Art. 4) and hence applies during wartime. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] ICJ Rep 136 (ICJ, Jul. 9, 2004), at 178 [106]: “More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict.” The court cited its earlier decision in Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] ICJ Rep 226 (ICJ, Jul. 8, 1996), at 239 [24], where certain states had argued that “the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict.” The court rejected this argument, stating that “the protection of the International Covenant [n] Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities”: at 240 [25]. See also C. Greenwood, “Scope of Application of Humanitarian Law,” in D. Fleck (ed.), The Handbook of International Humanitarian Law (2nd edn., 2008), at 74. See also HRC General Comment No. 6, supra n. 137, at [2], and HRC General Comment No. 31, supra n. 116, at [11].


148 Storey, supra n. 18, argues that “[w]hen the subject area is armed conflict, the International Court of Justice (ICJ) has held that IHL [international humanitarian law] is the ‘lex specialis’: at 14. Yet, as Durieux correctly explains in a direct rejoinder to Storey’s position, “when a decision-maker is faced with a claim to protection under the Refugee Convention, the subject matter is not armed conflict, it is persecution. Persecution, as defined in the Convention, may occur in times of peace as well as in times of war; in situations of disturbances and tensions as well as in non-international or international armed conflicts; during declared emergencies or through the duration of repressive dictatorships; in the public as well as in the private sphere etc. I do not suggest that these circumstances – the context if I may call it thus – are irrelevant or do not matter. They do matter, but they are not and cannot be the ‘starting point’
prohibits “the civilian population as such and individual civilians” from being the “object of attacks.” Indeed, even an attack on a specific military objective is prohibited where the “attacker does not, or cannot, adequately distinguish combatants or military objects from civilians or civilian objects,” or where the weapon employed is indiscriminate or is used in an indiscriminate way. Given these powerful constraints on the lawful use of armed force even in wartime, risk to a civilian’s life will usually infringe the prohibition of arbitrary deprivation of life, thus amounting to serious harm for refugee law purposes.

Critically, the risk of arbitrary deprivation of life need not stem directly from the actions of a state official; it is sufficient if the state is unable or unwilling to protect against privately inflicted risks to life, including for example female infanticide, the burning of widows, dowry killings, and so-called “honor killings.” Nor does the arbitrary deprivation of life have to occur in such a direct or brutal way. To the contrary, both the Human Rights Committee and courts adjudicating refugee claims have long recognized that life can be of a refugee status inquiry”; J.-F. Durieux, “Of War, Flows, Laws and Flaws: A Reply to Hugo Storey,” (2012) 31(3) Ref. Survey Q. 161, at 164. In our view, international humanitarian law may inform the meaning of “arbitrary deprivation of life”: Nuclear Weapons (ICJ, 1996), at 240 [25]. See Nowak, supra n. 134, at 124 n. 30.

As Holzer observes, 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”: supra n. 150, at 18 n. 102. See also Re H, (1996) 21 I & N Dec. 337 (USBIA, May 30, 1996) and Matter of Villalta, (1990) 20 I & N Dec. 142 (USBIA, Feb. 14, 1990), cited by Holzer. Even Storey admits that “decision-makers have virtually never applied an approach treating [international humanitarian law] as the lex specialis when assessing whether return to armed conflict situations would give rise to persecution”: supra n. 18, at 19. Indeed, the only example cited, in which the Asylum and Immigration Tribunal held that “[c]ivilians caught in the crossfire between armed groups will not normally face anything other than the ordinary incidents of civil war”: AM and AM (Armed Conflict: Risk Categories) Somalia CG, [2008] UKAIT 00091 (UKAIT, Oct. 29, 2008), at [76], exhibits far too broad an exception as a far more nuanced and context-specific analysis is required.

These examples are provided by Human Rights Committee, General Comment No. 28: Equality of Rights between Men and Women, UN Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) (“HRC General Comment No. 28”), at [10].

For successful refugee cases involving the threat of honor killings, see Re MN (NZ RSAA, 1996), at 14–16, 19–40 and Refugee Appeal No. 76044, [2008] NZAR 719 (NZ RSAA, Sept. 11, 2008), at [61]. See also DZ v. Federal Asylum Authority, E3-239.432-0/2008 (Au. AGH [Austrian High Court for Asylum], Jan. 12, 2009); 35751 (Bel. CCE [Belgian Council for Alien Law Litigation], Dec. 11, 2009); and 36561 (Bel. CCE, Dec. 23, 2009).

For example, see HRC General Comment No. 28, supra n. 155, at [10]; HRC General Comment No. 6, supra n. 137, at [5]; Joseph, Schultz, and Castan, supra n. 134, at 184–87. In the case of the Children’s Convention, supra n. 109, Art. 6(2) states that: “States Parties shall ensure to the maximum extent possible the survival and development of the child.” See also Committee on the Rights of the Child,
indirectly threatened by subjection to grave socio-economic conditions, at least where such actions "deprive [the applicant] of basic means of existence." As observed by the US Court of Appeals for the Third Circuit,

[t]he denial of an opportunity to earn a livelihood... is the equivalent of a sentence to death by means of slow starvation and none the less final because it is gradual. The result of both is the same.

3.3.2 Torture or cruel, inhuman, or degrading treatment or punishment

The risk of "torture or... cruel, inhuman or degrading treatment or punishment" is another classic form of serious harm of clear relevance to the "being persecuted" inquiry. The prohibition of such actions admits of no limitation and is non-derogable. There can also be no issue of de minimis breach, since an action can amount to a form of torture or cruel, inhuman, or degrading treatment only if it is adjudged to attain a minimum level of gravity. As such, the only task facing a decision-maker in a relevant case is to determine whether the facts found bespeak the risk of a form of prohibited conduct.

The Human Rights Committee has not considered it necessary to draw up a list of prohibited acts or to "establish sharp distinctions between the different kinds of punishment or treatment"; rather, "the distinctions depend on the nature, purpose and severity of the treatment applied." In general terms, however, torture is

---

158 2006/19/0341 v. Independent Federal Asylum Board (UBAS) (Au. VwGH [Austrian Administrative Court], Nov. 8, 2007). In that case the Austrian Administrative Court held that "subjecting members of an ethnic or social group to economic hardship, depriving them of basic means of existence, may justify a claim to asylum" (unofficial translation). See also E v. Federal Ministry of the Interior, 95/01/0529 (Au. VwGH, Apr. 30, 1997) (unofficial translation), and Refugee Appeal No. 74665/03 (NZ RSAA, 2004), at [89]: that "the right to life... in conjunction with the right to adequate food... should permit a finding of being persecuted where an individual faces a real risk of starvation." D. Alland and C. Teitgen-Colly cite the decision of E 44 (Bel. CPRR [Belgian Permanent Refugee Appeals Commission], Dec. 10, 1992), where it was held that economic measures "in themselves insufficient to be qualified as persecution, can be considered as such if they render the applicant's subsistence very difficult or impossible": Traité du droit de l'asile (2002), at 376 (unofficial translation). Arakaki, supra n. 81, notes that the Japanese commentary on the Immigration Control and Refugee Recognition Act in Japan states that "deprivation of all means for life constitutes persecution": at 168. In Australia, the Migration Act 1958 (Cth) now explicitly recognizes the relevance of socio-economic harm in this context, providing that "serious harm" specifically includes "significant economic hardship that threatens the person's capacity to subsist": s. 91R(2)(d), "denial of access to basic services, where the denial threatens the person's capacity to subsist": s. 91R(2)(e), and "denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist": s. 91R(2)(f). See also Refugee Appeal No. 74665/03 (NZ RSAA, 2004), at [89]: that "the right to life... in conjunction with the right to adequate food... should permit a finding of being persecuted where an individual faces a real risk of starvation."


160 Civil and Political Covenant, supra n. 81, at Art. 7.

161 See also Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10 1984, entered into force Jun. 26, 1987, 1465 UNTS 85 ("Torture Convention").

162 Human Rights Committee, General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Oct. 3, 1992) ("HRC General Comment No. 20"), at [4].

163 Ibid., at [4].
any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.\textsuperscript{164}

Where the imposition of severe suffering lacks one of the elements of torture it is properly classified as “inhuman and/or cruel treatment,”\textsuperscript{165} whereas for degrading treatment, the “severity of the suffering imposed is of less importance . . . than the humiliation of the victim, regardless of whether this is in the eyes of others or those of the victim himself or herself.”\textsuperscript{166} It has thus been recognized that a woman’s prior subjection to harm in the form of rape or trafficking may, due to strong cultural tradition, result in ostracism and exclusion rising to a risk of cruel, inhuman, or degrading treatment. For example, in a case concerning a woman who had been raped by Serbian forces, Baroness Hale noted that a refugee claim might be made out despite the absence of a future risk of rape on the grounds that

[t]o suffer the insult and indignity of being regarded by one’s community . . . as “dirty like contaminated” because one has suffered the gross ill-treatment of a particularly brutal and dehumanizing rape . . . is the very sort of cumulative denial of human dignity which to my mind is capable of amounting to persecution.\textsuperscript{167}

Given the need to find overarching severe suffering or humiliation where the risk of torture or cruel, inhuman, or degrading treatment or punishment is alleged, decision-makers will often need to engage in a cumulative assessment of a range of measures or treatment in disregard of human dignity. For example, Australian decisions have recognized as persecutory the cumulative experiences of the victims of persistent indignities, such as the plight of the Sabean Mandeans religious minority in Iran:

If people are, from an early age, considered by the great majority of the people in the society in which they live to be “dirty”, are positively treated as if they are dirty, and if there is otherwise widespread and far reaching discrimination against them, it requires no degree in psychology to accept that this may well be very harmful to mental well-being.\textsuperscript{168}

A risk of cruel, inhuman, or degrading treatment can arise not only from direct forms of physical harm, but also from severe deprivations of socio-economic rights. For example, the Human Rights Committee has found states in violation of the prohibition on degrading

\textsuperscript{164} Torture Convention, supra n. 161, at Art. 1. Importantly, this is qualified in the Torture Convention by the requirement that such act be carried out “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”: ibid. On the other hand, since there is no such textual restriction in the Civil and Political Covenant, supra n. 81, a risk of “torture, or cruel, inhuman or degrading treatment or punishment” may be established, even when the relevant act will be inflicted by persons acting “in a private capacity.” HRC General Comment No. 20, supra n. 162, at [2]; Nowak, supra n. 134, at 161–62.

\textsuperscript{165} Nowak, supra n. 134, at 163. \textsuperscript{166} Ibid., at 165.

\textsuperscript{167} R (Hoxha) v. Special Adjudicator, [2005] 1 WLR 1063 (UKHL, Mar. 10, 2005), at 1074 [36]. The US guidelines concur with this approach, noting that: “In some countries a woman may experience severe discrimination and social ostracization because she was raped. The ostracism is further harm after the rape, and may itself be sufficiently serious to constitute persecution”: US Department of Homeland Security, Training Guidelines on Gender, supra n. 80, at 19.

\textsuperscript{168} SCAT v. Minister for Immigration and Multicultural and Indigenous Affairs, (2003) 76 ALD 625 (Aus FFC, Apr. 30, 2003), at 635 [21], per Madgwick and Conti JJ.
treatment where they have subjected prisoners and detainees to deprivation of socio-economic rights,\textsuperscript{169} including conditions that produce long-term mental health problems.\textsuperscript{170} Under the European regional cognate, inhuman and degrading treatment has been found to exist when a victim was deprived “of means of shelter and support”\textsuperscript{171} when his home was destroyed in the course of a security operation, as well as where an applicant “who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity.”\textsuperscript{172}

In the context of refugee law’s inquiry into the existence of serious harm, the prohibition of torture or cruel, inhuman, or degrading treatment has proved especially important in assessing claims based on the risk of rape or other sexual assault, female genital mutilation, forcible abortion and sterilization, and the infliction of mental suffering and other forms of extreme psychological harm.\textsuperscript{173} We turn now to examine how analysis by reference to international human rights law can assist assessment of whether relevant serious harm is established in such cases.

Sexual assault, including both rape and a broader range of sexually violent acts, is recognized as persecutory harm across a wide range of state parties to the Refugee Convention.\textsuperscript{174} As the US Court of Appeals for the Third Circuit observed, “[t]he scarring effects of rape compare with ‘psychological sequelae of . . . survivors of abuse constituting torture under international law.’”\textsuperscript{175} There is never any justification or excuse for sexual assault, including when committed within the family such as by a husband.\textsuperscript{176} As noted by the US


\textsuperscript{170} C v. Australia, UN Doc. CCPR/C/76/D/900/1999 (HRC, Nov. 13, 2002).

\textsuperscript{171} Dulas v. Turkey, Application No. 25801/94 (ECtHR, Jan. 30, 2001), cited in Foster, supra n. 169, at 302.

\textsuperscript{172} MSS v. Belgium and Greece, (2011) 53 EHRR 28 (ECtHR, Jan. 21, 2011), at [253], citing Budina v. Russia, Application No. 45603/05 (ECtHR, Jun. 18, 2009).

\textsuperscript{173} Indeed, acts of “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” are defined as crimes against humanity in the Rome Statute: see Rome Statute, supra n. 64, at Art. 7(1). This serves to emphasize the severity of such human rights violations.


\textsuperscript{176} For example, the US Immigration and Naturalization Service, in explaining that a state may be complicit in or fail to protect against sexual violence, has noted that, “in some countries, there is no legal recognition that sexual assault is a crime, if committed by a husband against his wife”: US Department of Homeland Security, Training Guidelines on Gender, supra n. 80, at 13.
government, “[r]ape is...based on a desire to degrade, control and/or terrorize a victim or her community.” While women are the primary victims of sexual assault, the Court of Appeals for the Ninth Circuit has sensibly observed that “[t]here is no reason to believe that the trauma for male victims of rape is any less severe than for female victims.”

Another relevant form of torture or cruel, inhuman, or degrading treatment is female genital mutilation (FGM). Although there are different types of FGM, almost all forms involve the infliction of severe harm and thus clearly violate, in addition to the right not to be tortured, a range of other human rights obligations, including the right to security of the person, to the highest attainable standard of health, and in extreme cases, the right to life. FGM thus constitutes persecution regardless of the “particular method of conducting it,” due to “the serious mental and physical harm it inflicts on the women who endure it.”

---

177 US Department of Homeland Security, Training Guidelines on Gender, supra n. 80, at 9. See also the excellent explanation of how this issue needs to be explored by decision-makers: at 10–11. For an explanation as to how rape has been used as a political tool in Zimbabwe in recent years, see N. Valji, L. De La Hunt, and H. Moffett, “Protecting the Invisible: the Status of Women Refugees in Southern Africa,” in J. Handmaker, L. De La Hunt, and J. Klaaren (eds.), Advancing Refugee Protection in South Africa (2008), at 221–22.


179 The UNHCR defines FGM as “all procedures involving partial or total removal of the external female genitalia, or other injury to the female genital organs, carried out for traditional, cultural or religious reasons”: UNHCR, “Guidance Note on Refugee Claims Relating to Female Genital Mutilation” (May 2009), at [2]. The UN Special Rapporteur on Torture has classified it as torture: M. Nowak, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/HRC/7/3 (Jan. 15, 2008), at [51]. See Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2 (Jan. 24, 2008), at [18]. The Human Rights Committee also discusses FGM in the context of torture in HRC General Comment No. 28, supra n. 155, at [11]. The European Court of Human Rights has also found FGM to constitute inhuman and degrading treatment: see Collins and Akaziebie v. Sweden, Application No. 23944/05 (ECtHR, Mar. 8, 2007).

180 Economic, Social and Cultural Covenant, supra n. 104, at Art. 12. See also Committee on the Elimination of Discrimination Against Women, General Recommendation No. 14, UN Doc. A/45/38 (1990), identifying FGM as “prejudicial to the health and well-being of women and children.” The Children's Convention, supra n. 109, at Art. 24(3) requires state parties “to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.” See discussion in Nowak, supra n. 134, at 33–34.

181 UNHCR, “Guidance Note on Refugee Claims Relating to Female Genital Mutilation,” supra n. 179, at [7].


183 Ibid., at 244. See also Benyamin v. Holder, (2009) 579 F.3d 970 (USCA, 9th Cir., Aug. 24, 2009), at 976, citing Mohammed v. Gonzales, (2005) 400 F.3d 785 (USCA, 9th Cir., Mar. 10, 2005), at 795, where it had held that even “Type I – the least severe classified form” is undoubtedly persecution. It should also be noted that the same applies regardless of whether FGM has been “medicalized.” As the UNHCR explains, where it is conducted by health professionals rather than traditional practitioners, “some of the immediate consequences may be mitigated in certain circumstances,” but this “does not necessarily make it less severe” because “there is no evidence that the obstetric or other long-term complications associated with the practice are avoided or significantly reduced”: UNHCR, “Guidance Note on Refugee Claims Relating to Female Genital Mutilation,” supra n. 179, at [5].
It is therefore unsurprising that FGM has routinely been treated as a form of torture or cruel, inhuman, or degrading treatment amounting to serious harm for refugee law purposes. As early as 1991 the French Commission des recours des refugiés recognized that FGM is “unquestionably a violation of international human rights law” and hence persecutory. Similarly, the US Courts of Appeals for the Second and Sixth Circuits have found that FGM amounts to serious harm, relying on the fact that “the practice of FGM has been internationally recognized as a violation of women’s and female children’s rights.”

And the House of Lords, in finding that FGM constitutes serious harm in refugee law, observed that FGM “has been condemned as cruel, discriminatory and degrading by a long series of international instruments, declarations, resolutions, pronouncements and recommendations,” and that it “will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment.”

Importantly, the fact that a woman has already undergone FGM may not negate a fear of future harm, both because FGM “is capable of repetition” and because prior

---

184 For Canadian decisions which have recognized refugee claims based on a risk of FGM, see Immigration Review Board, “Guideline 2: Women Refugee Claimants Fearing Gender-Related Persecution: Update,” Compendium of Decisions (Feb. 2003), at 31–35. In Australia, see e.g. SVFB v. Minister for Immigration and Multicultural and Indigenous Affairs, [2004] FCA 822 (Aus. FC, Jun. 25, 2004), at [7]. In Spain, see STS 5931/2006 (Sp. TS [Spanish Supreme Court], Oct. 6, 2006). In Belgium, see decision of the Belgian Council for Alien Litigation in 979 (Bel. CCE [Belgian Council for Alien Litigation], Jul. 25, 2007), also referring to several cases by the Belgian Permanent Refugee Appeals Commission which recognized that FGM could constitute persecution in the sense of Article 1A(2) of the Refugee Convention (01-0089/F1374 [Bel. CPRR [Belgian Permanent Refugee Appeals Commission], Mar. 22, 2002]; 01-0668/F1356 [Bel. CPRR, Mar. 8, 2002]; and 02-0579/F2562 [Bel. CPRR, Feb. 9, 2007])). In Austria, see 2007/01/0284 v. Independent Federal Asylum Board (UBAS) [Au. VvGH [Austrian Administrative Court], Sept. 23, 2009]; and U431/08 v. High Court for Asylum [Au. VfGH [Austrian Constitutional Court], Nov. 30, 2009]. In Germany, see e.g. 2 K 562/07 [Ger. VG Aachen [German Administrative Court, Aachen], May 10, 2010]; 3 UE 3457/04.A [Ger. VGH Hesse [German Higher Administrative Court, Hesse], Mar. 23, 2005]; A 10 K 13121/03 [Ger. VG Stuttgart [German Administrative Court, Stuttgart], Jun. 10, 2005].

185 Mlle Diop Aminata, 160708 (Fr. CRR [French Refugee Appeals Commission], Sept. 18, 1991), available at Refworld; reprinted in “Cases and Comments,” (1992) 4 Intl. J. Ref. L., at 92–94. More recent cases recognizing FGM include Mlle B, 628346 (Fr. CNDA [French National Court of Asylum], May 7, 2009); Mlle N, 574495 (Fr. CNDA, Apr. 23, 2008); Mlle D, 535997 (Fr. CRR, Nov. 2, 2007); Mlle HS, 492440 (Fr. CRR, Jun. 16, 2005).


187 Fornah (UKHL, 2006), at 428 [8], per Lord Bingham.

188 Ibid., at 454 [70], per Lord Rodger, and at [94], per Baroness Hale. In Fornah, the House of Lords also emphasized that refugee claims “based on fear of FGM have been recognized or upheld in courts all around the world,” citing decisions in England and Wales, the US, Australia, Austria, and Canada: at 438–39 [26] per Lord Bingham.

subjection to FGM may in some cases expose an individual to a distinct form of persecutory harm.\textsuperscript{190} Further, neither the fact that a young girl may believe FGM to be an important rite of passage,\textsuperscript{191} nor the fact that those who carry out FGM may do so simply in the belief that it is a means of initiating a girl into her culture in any way detracts from its purpose in serving and preserving the inferior position of women in the society,\textsuperscript{192} and hence its categorization as serious harm. As courts have correctly observed, there is a breach of international human rights law even in such circumstances given the duty of states to take “all appropriate measures” to end cultural practices grounded in stereotyped roles for women or the notion of their inferiority.\textsuperscript{193}

A third contemporary concern of relevance is forcible abortion,\textsuperscript{194} as well as the sterilization of women and men without consent.\textsuperscript{195} Such practices frequently amount to violations

\begin{flushleft}
\textsuperscript{190} See UNHCR, “Guidance Note on Refugee Claims Relating to Female Genital Mutilation,” \textit{supra} n. 179, at [14]–[15]. \\
\textsuperscript{191} In the UNHCR Guidance Note it is explained that some girls may even be “looking forward” to going through the procedure “as this is often a moment when they receive attention and gifts as the centre of an important ritual”: UNHCR, “Guidance Note on Refugee Claims Relating to Female Genital Mutilation,” \textit{supra} n. 179, at [10]. However, the UNHCR explains that this is irrelevant because FGM is undoubtedly objectively a form of persecution. Hence, it is irrelevant whether the past or future FGM is “forced”: \textit{see Bah v. Attorney General}, (2006) 462 F.3d 637 (USCA, 6th Cir., Sept. 8, 2006): “the IJ [immigration judge] made a legal error in assuming that Bah had to prove that she forcibly resisted FGM at the time the procedure was performed”: at 643, per Gibbons J. (concurring). \\
\textsuperscript{192} \textit{Fornah} (UKHL, 2006), at 461 [93], per Baroness Hale, finding that women who have not been subjected to FGM may face social exclusion and be denied the possibility of marriage and family life. “Women themselves are brought up to believe this as strongly as men. Sometimes and not surprisingly, women themselves perform the operation as part of an elaborate initiation ceremony”: at [93]. \\
\textsuperscript{193} Women’s Convention, \textit{supra} n. 108, at Art. 5. As recognized by the House of Lords, FGM is a practice that is uniquely experienced by women and is difficult to compare to male circumcision (the removal of a boy’s foreskin), since FGM is “a manifestation of deep-rooted gender inequality that assigns them an inferior position in society and has profound physical and social consequences” (\textit{Fornah} (UKHL, 2006), at 461 [93], citing UNICEF, “Innocenti Digest – Changing a Harmful Social Convention: Female Genital Mutilation/Cutting” (2005)), whereas this is not the case for men. Indeed, the World Health Organization notes that male circumcision is associated with a variety of important health benefits and is usually quick and painless (World Health Organization, “Information Sheet on Male Circumcision and HIV Prevention” (Dec. 2006)). It is possible, however, that where there is a risk that male circumcision will be carried out against a man’s will and “undertaken in unhygienic conditions by inexperienced providers with inadequate instruments, or with poor after-care,” which can result in “very serious complications, including death”: World Health Organization, “Information Package on Male Circumcision and HIV Prevention” (Dec. 2007), that a claim may be made out on this basis. \\
\textsuperscript{194} In \textit{Lidan Ding v. Ashcroft}, (2004) 387 F.3d 1131 (USCA, 9th Cir., Nov. 8, 2004) the immigration judge had rejected the applicant’s claim in regard to her past forced abortion on the basis that as “she had not been physically restrained during the procedure,” the abortion was “voluntary”: at 1136. The Court of Appeals overturned the Board of Immigration Appeal’s affirmation of the immigration judge’s decision on the basis that “forced” is a much broader concept, which includes compelling, obliging, or constraining by mental, moral, or circumstantial means, in addition to physical restraint”: at 1140. This decision was interpreting a domestic statute that makes persons “forced to abort a pregnancy” statutorily eligible for asylum: 8 USC § 1101(a)(42). For background to this provision, see S. Legomsky and C. Rodriguez, \textit{Immigration and Refugee Law and Policy} (5th edn., 2009), at 913–15. But see \textit{Xia v. Mukasey}, (2007) 510 F.3d 162 (USCA, 2nd Cir., Dec. 7, 2007). \\
\textsuperscript{195} For a case where past persecution was established on the part of the male claimant in relation to an “attempted sterilization,” see \textit{Jie Hin Shu v. Mukasey}, (2008) 282 Fed. Appx. 879 (USCA, 2nd Cir., Jun. 27, 2008).
3.3.2 Torture or Cruel, Inhuman, or Degrading Treatment

of the right not to be tortured or subjected to inhuman or degrading treatment, as well as implicating other rights such as to security of the person and to autonomy over one's own body inherent in the right to privacy. Accordingly, the Supreme Court of Canada determined in Chan that

whatever technique is employed, it is utterly beyond dispute that forced sterilization is in essence an inhuman and degrading treatment involving bodily mutilation, and constitutes the very type of fundamental violation of basic human rights that is the concern of refugee law.

Decision-makers have, however, sometimes been distracted by the fact that measures such as forced sterilization and forced abortion may be imposed not with any form of particularized animus, but rather pursuant to “a law of general application” that has a neutral and arguably justifiable goal – most commonly, population control. There is, however, no acceptable

196 Civil and Political Covenant, supra n. 81, at Art. 7. The Human Rights Committee cites forced abortion as another measure which violates Art. 7: see HRC General Comment No. 28, supra n. 155, at [11].

197 Chan (Can. SC, 1995): “the sanction of forced sterilization against the appellant in the present case would constitute a gross infringement of the security of the person and readily qualify as the type of fundamental violation of basic human rights that constitutes persecution”: at [72], per La Forest J. (in dissent).

198 HRC General Comment No. 28, supra n. 155, at [20].

199 Chan (Can. SC, 1995), at [73], per La Forest J. (in dissent, though the judges in the majority also assumed that forced sterilization was persecution); Chan v. Canada (Minister of Employment and Immigration), [1993] 3 FC 675 (Can. FCA, Jul. 21, 1993), at 686, per Heald J.; Cheung v. Canada (Minister of Employment and Immigration), [1993] 2 FC 314 (Can. FCA, Apr. 1, 1993), at 324. See also Applicant A (Aus. HC, 1997), where Dawson J. explained that “[t]he appellants claim, and the respondents do not dispute, that forcible sterilization is persecution and that they have a well founded fear of being forcibly sterilized if returned to China”: at 239. See also VTAO v. Minister for Immigration and Multicultural and Indigenous Affairs, (2004) 81 ALD 332 (Aus. FC, Jul. 17, 2004), at 348 [45], per Merkel J., citing Cheung (Can. FCA, Apr. 1, 1993).


201 Xu Ming Li (USCA, 9th Cir., 2002).

202 Mei Fun Wong (USCA, 2nd Cir., 2011), noting that “[a]ny involuntary IUD insertion, even one conducted according to the same medical procedures as a voluntary IUD insertion, involves a serious violation of personal privacy and deprives a woman of autonomy in making decisions about whether to bear a child”: at 72. See Chan (Can. SC, 1995); Immigration and Refugee Board of Canada, supra n. 174, and SZNCK v. Minister for Immigration and Citizenship, (2009) 109 ALD 551 (Aus. FMC, May 28, 2009).

203 As the Second Circuit noted in Mei Fun Wong (USCA, 2nd Cir., 2011), “an act that may be voluntarily undertaken can become persecutory where consent is absent”: at 76.

204 In Cheung the Board had rejected the claim initially on the basis that there was no “persecutory intent on the part of the Chinese government, simply a desperate desire to come to terms with the situation that poses a major threat to its modernization plans. It is not a policy borne out of caprice, but out of
justification under international human rights law for any action that amounts to torture or to cruel, inhuman, or degrading treatment or punishment and hence no question of weighing up the relative merits of government objectives and an individual’s basic rights.\textsuperscript{205} Canadian jurisprudence has thus rightly insisted that “[c]loaking persecution with a veneer of legality does not render it less persecutory.”\textsuperscript{206} This does not mean that a state may not pursue important goals, such as population control.\textsuperscript{207} But as explained by Justice Barnes,

\[\text{[t]hat the state is able to legislate in the area of family planning and population control is not the issue. It is the means by which the state’s objectives are achieved that must be critically examined.}\textsuperscript{208}\]

A fourth context in which the right not to be subjected to cruel, inhuman, or degrading treatment has proven especially relevant is where the refugee claim is based on the risk of “acts that cause mental suffering to the victim.”\textsuperscript{209} As the prohibition on inhuman and degrading treatment protects “both the dignity and the physical and mental integrity of the individual,”\textsuperscript{210} it is appropriate to recognize as serious harm action that is likely to cause serious psychological harm to the applicant.\textsuperscript{211} The risk will be most acute, of course, where economic logic”: extracted in Cheung (Can. FCA, 1993), at 319. But this was overturned by the Federal Court of Appeal. See also Jin Xia Zheng v. Canada (Minister of Citizenship and Immigration), [2009] FC 327 (Can. FC, Mar. 30, 2009), at [13], where the court was reciting the findings of the Board below. See also the decision of the Refugee Review Tribunal, overturned on appeal in SZNCK (Aus. FMC, 2009).

In particular, it is not clear whether it is possible to establish a right to reproduce per se: see e.g. Re ZWD, Refugee Appeal No. 3/91 (NZ RSAA, Oct. 20, 1992), at 37–46; Applicant A (Aus. HC, 1997), at 244. In Australia, the courts consider “that whether the application of a law constituted persecution ultimately depended upon whether the treatment afforded on the basis of the law is appropriate and adapted to achieving some legitimate object of the country concerned”: SZNCK (Aus. FMC, 2009), at [23], citing “settled law” from the High Court (Applicant S v. Minister for Immigration and Multicultural Affairs, (2004) 217 CLR 387 (Aus. HC, May 27, 2004)). For a critique of this approach, see text infra, at nn. 366–69.

\textit{Cheung} (Can. FCA, 1993), at 323. Accordingly, courts have correctly concluded that “[t]he practice of forcing women to undergo sterilization is such an extreme violation of their basic human rights as to be persecutory, even though this was thought to advance the modernization of China”: \textit{Cheung} at 325. See also Re ZWD (NZ RSAA, 1992): “[C]ompulsory abortion and compulsory sterilization may in certain circumstances constitute torture or inhuman or degrading treatment or punishment and be properly stigmatized as persecution”: at 57. The difficulty in such cases however is linking serious harm to a Convention ground: see e.g. in \textit{Applicant A} (Aus. HC, 1997); Re ZWD (NZ RSAA, 1992), in which lack of nexus was the basis for the failure of the claim.

Even in a public emergency, a state can only derogate from obligations “to the extent strictly required by the exigencies of the situation”: Civil and Political Covenant, supra n. 81, at Art. 4(1); HRC General Comment No. 29, supra n. 115, at [2]. The adoption of extreme measures such as forced sterilization or abortion could not be considered “strictly required” when other far less intrusive measures are also available, such as economic incentives. As Linden J.A. explained in \textit{Cheung} (Can. FCA, 1993): “[t]he forced sterilization of a woman is a serious and totally unacceptable violation of her security of the person”: at 323.

\textit{Jin Xia Zheng} (Can. FC, Mar. 30, 2009), at [13].

HRC General Comment No. 20, supra n. 162, at [5]. \textsuperscript{210} \textit{Ibid.}, at [2].

Switzerland’s Asylum Act SR 142.31 (\textit{Loi sur l’asile} (Sw.), RS 142.31) defines a refugee (in Article 3) to include a person “subject to serious disadvantages” where such disadvantages include “measures that exert intolerable psychological pressure”: at Art. 3(1) and (2). The Qualification Directive, supra n. 37, states that “[a]cts of persecution” can include “acts of physical or mental violence, including acts of sexual
the applicant is particularly vulnerable as in the case of children, recognized by the UNHCR to be “more likely to be distressed by hostile situations, to believe improbable threats, or to be emotionally affected by unfamiliar circumstances.”

Exposure to extreme psychological harm has also been asserted as persecution in the context of cases where the applicant would be exposed to the infliction of physical harm on a loved one. This “persecution by proxy” has been recognized, for example, where a parent will be forced to witness a severe form of physical harm inflicted on a child, including subjection of a daughter to FGM. In *Abay and Amare*, for example, the US Court of Appeals for the Sixth Circuit held that refugee status was warranted in cases where a parent and protector is faced with exposing her child to the clear risk of being subjected against her will to a practice that is a form of physical torture causing grave and permanent harm . . . [A] rational factfinder would be compelled to find that Abay’s fear of taking her daughter into the lion’s den of female genital mutilation in Ethiopia and being forced to witness the pain and suffering of her daughter is well-founded.

Much the same approach has also been adopted in the cases of children forced to endure the visiting of physical harm upon a parent, and to a husband who would be exposed to the infliction of physical harm on his wife.

UNHCR, *Guidelines on International Protection No. 8*, supra n. 94, at [16].

*As explained by Posner J., “This is to be distinguished from cases in which the persecution of your relative is evidence that the persecutor is gunning for you as well”: Gatimi v. Holder, (2009) 578 F.3d 611 (USCA, 7th Cir., Aug. 20, 2009), at 16."

*Ni v. Holder, (2011) 635 F.3d 1014 (USCA, 7th Cir., Mar. 25, 2011), at 1017. In *SCAT* (Aus. FFC, 2003), the court noted that “[t]o harm a child may also be to harm its custodial parents”: at 635 [23]."

*Abay* (USCA, 6th Cir., 2004), at 642–43. This principle was affirmed (although factually distinguished) in *Lo v. Holder*, (2012) 698 F.3d 866 (USCA, 6th Cir., Nov. 8, 2012), at 874. See also UNHCR, “Guidance Note on Refugee Claims Relating to Female Genital Mutilation,” supra n. 179. For more recent affirmation of the possibility of such claims in this context, see also *Benyamin* (USCA, 9th Cir., 2009); *Kone v. Holder*, (2010) 596 F.3d 141 (USCA, 2nd Cir., Feb. 25, 2010), at 33; *Abebe* (USCA, 9th Cir., 2005), at 17. But see *Kane v. Holder*, (2009) 581 F.3d 231 (USCA, 5th Cir., Aug. 26, 2009), at 17 and 24. For a fascinating Canadian decision finding that a mother could found her claim based on the risk to her daughter of FGM (on basis of psychological trauma for the mother) as well as the fact that her children would be forcibly removed because of discriminatory custody laws, see *CRDD T93-12198* (Can. IRB, Jul. 13, 1994).

*See e.g. Camara v. Attorney General, (2009) 580 F.3d 196 (USCA, 3rd Cir., Sept. 4, 2009), where a daughter’s witnessing of the abduction of her father amounted to past persecution because it caused her “actual suffering and harm including forcing her to flee her home”: at 204–5. See also UNHCR, *Guidelines on International Protection No. 8*, supra n. 94, at [17]. The Committee on the Rights of the Child has similarly recognized that “[p]ersecution of kin” may amount to persecution in refugee law in the context of children: see CRC General Comment No. 6, supra n. 111, at [74]."

*In Gatimi* (USCA, 7th Cir., 2009), the Court of Appeals for the Seventh Circuit held that: “Genital mutilation of one’s wife, unless one happens to be a supporter of the practice, is a way to punish one, and so the menace to Mrs Gatimi is a legitimate component of Mr Gatimi’s case. To send her back to Kenya to face female genital mutilation would be to enable persecution of him”: at 16. In *Katrinak v. Secretary of State for the Home Department*, [2001] EWCA Civ 832 (Eng. CA, May 10, 2001), the English Court of Appeal noted that “a man may be persecuted by what is done or threatened to his wife” (at [22]) and “it is possible to persecute a husband or a member of a family by what you do to other members of his immediate family” (at [23]).
Extreme psychological harm amounting to torture or cruel, inhuman, or degrading treatment or punishment may also arise from threats of violence or murder. As explained by the US Court of Appeals for the Seventh Circuit, “[t]o live, day after day, knowing that government forces might secretly arrest you is itself a form of mental anguish that can constitute persecution.”

In sum, the prohibition of torture or cruel, inhuman, or degrading treatment is a critical benchmark for a range of contemporary forms of serious harm relevant to the “being persecuted” assessment. Particularly because the prohibition of such actions admits of no limitation, is non-derogable, and is not amenable to consideration of de minimis breach, it has proved an important means of ensuring that a broad range of contemporary concerns – including sexual assault, female genital mutilation, forced abortion and sterilization, and exposure to extreme psychological harm – can fairly be understood to evince the serious harm required for a finding that a person is at risk of being persecuted.

3.3.3 Slavery, including trafficking and forced marriage

Traditional forms of slavery persist in many regions of the world, including in particular chattel slavery systems still found in parts of Africa and the debt bondage systems prevalent in South Asia. Despite the clearly egregious serious harm entailed by subjection to slavery, few refugee claims are made by the victims of such systems, due no doubt to the “complete coercive control” that makes it difficult, if not impossible, to escape from slavery.

In contrast, two forms of modern slavery – trafficking for the purpose of labor and sexual exploitation, and forced or underage marriage – are generating an increasing number of refugee claims.


220 Hathaway, *supra* n. 219, at 16.

221 The right not to be held in slavery or servitude is absolute since it admits of no internal limitation: Civil and Political Covenant, *supra* n. 81, at Art. 8(3), nor is it capable of derogation in times of public emergency: at Art. 4(2). See also International Labour Organization, Convention (No. 182) on the Worst Forms of Child Labour, adopted Jun. 17, 1999, entered into force Nov. 19, 2000, 2133 UNTS 161 (“Convention (No. 182”), at Art. 3(a)–(c). The right not to be “held in slavery” (Civil and Political Covenant, *supra* n. 81, at Art. 8(1)) or “servitude” (Art. 8(2)) includes the right not to be “required to perform forced or compulsory labour” (Art. 8(3)(a), although an exemption is made for prison labor: see Art. 8(3)(b); and for national service or work required in a national emergency or “normal civil obligations”; see Art. 8(3)(c)). Insight into contemporary manifestations of slavery is provided by Conference of Plenipotentiaries convened by Economic and Social Council resolution 608 (XXI) of April 30, 1956, Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, adopted Sept. 7, 1956, entered into force Apr. 30, 1957 (“Supplementary Slavery Convention”), which expressly defines as prohibited forms of servile status debt bondage, serfdom, and systems for the delivery of women for marriage or inheritance without their consent, and of children for exploitation (at Art. 1; see Hathaway, *supra* n. 219, at 9).

In cases involving the risk of being trafficked or re-trafficked, or of being subjected to forced prostitution or other forms of forced labor or domestic servitude, the seriousness of the harm alleged is rarely contested.\(^{223}\) The Australian tribunal has, for example, straightforwardly concluded that refugee status is appropriately recognized where “a real chance exists that the applicant could be forced back into sexual servitude.”\(^{224}\) It is generally understood that in addition to the risk of enslavement as such, trafficked persons are often exposed to deprivation of liberty, forced to perform dangerous and debasing labor, and subjected to physical, sexual, and psychological violence.\(^{225}\) Special human rights protections apply in the case of children,\(^{226}\) ensuring the right to be free from, for example, child prostitution and child pornography,\(^{227}\) which if not respected also amount to serious harm for refugee law purposes.

Claims grounded in the risk of forced marriage\(^{228}\) have proved to be somewhat less straightforward. On the one hand, it is generally accepted that forced marriage can constitute serious harm sufficient to amount to persecution, even if not likely to lead also

\(^{223}\) For positive cases, in France, Alland and Teitgen-Colly, supra n. 158, note the decision of *Mamadou Birahim* (Fr. CRR [French Refugee Appeals Commission], Jun. 30, 2000), where a woman from Mauritania had been placed in quasi-slavery, and made the object of bullying, hard labour, and sexual abuse: at 374. In Belgium, the Belgian Council for Alien Law Litigation has granted refugee status in several cases involving a risk of trafficking: see 49821 (Bel. CCE, Oct. 20, 2010); and see also decision of the former Belgian Permanent Refugee Appeals Commission 03-0582/F1611 (Bel. CPRR, Feb. 5, 2004). In Germany, see e.g. 3 K 1465/09 WLA (Ger. VG Wiesbaden [German Administrative Court, Wiesbaden], Mar. 14, 2011). In Australia, see e.g. V01/13868, [2002] RRT A 799 (Aus. RRT, Sept. 6, 2002); N03/45573, [2003] RRTA 160 (Aus. RRT, Feb. 24, 2003); N03/47757, [2004] RRT 355 (Aus. RRT, May 11, 2004). Importantly, the Department of Immigration and Citizenship acknowledges that rape and other forms of sexual assault inflict severe pain and suffering (physical and mental) and obviously constitute cruel, inhuman, and degrading treatment as well as torture: Department of Immigration, 1996, *supra*, n. 174, at 92–93.

\(^{224}\) N03/47757, [2004] RRTA 355 (Aus. RRT, May 11, 2004); see also 1009355, [2011] RRTA 120 (Aus. RRT, Feb. 8, 2011): “The Tribunal is satisfied that the sexual servitude already endured by the applicant involves serious harm, including deprivation of liberty, physical and mental harassment and economic hardship”: at [89].


\(^{226}\) Children’s Convention, *supra* n. 109, at Arts. 19(1), 32(1), 34, 35. See also UNHCR, *Guidelines on International Protection No. 8*, supra n. 94, at [24]–[30].


\(^{228}\) This is an endemic issue in some countries. For example, “[a]ccording to the UN, as of 2008, 70 to 80 percent of marriages in Afghanistan were forced, taking place without full and free consent or under duress”: Human Rights Watch, “I Had to Run Away: The Imprisonment of Women and Girls for ‘Moral Crimes’ in Afghanistan” (2012), at 30, citing United Nations Development Fund for Women, “UNIFEM Afghanistan Fact Sheet” (2008).
to domestic violence, rape, or a threat to life. This is a sensible view, given that international human rights law clearly codifies the right not to enter marriage “without the free and full consent of the intending spouses” and provides for related guarantees under both the Supplementary Slavery Convention and international humanitarian law. In determining whether marriage is likely to be entered into without “free and full consent” the Human Rights Committee has explained that the “minimum age for marriage” should not only be equal for men and women, but that states must moreover “ensure women’s capacity to make an informed and uncoerced decision.” The Committee has warned that “full and free consent” can be compromised where, for example, a (typically male) guardian is allowed by law to consent to the marriage instead of the woman herself, as well as by laws allowing a rapist to have his criminal responsibility extinguished or mitigated if he marries the victim.

229 Cases of forced marriage will of course often involve a range of other human rights violations, typically violence and sexual assault: for an example, see the decision of the Swiss Asylum Appeal Commission in WH, Äthiopien, 2006/32-336 (Sw. ARK/CRA, Oct. 9, 2006), in which an Ethiopian woman who had been forced to marry an older man who had beaten and raped her was granted refugee status. The Committee on the Rights of the Child notes that “the female child is often subject to harmful traditional practices, such as early and/or forced marriage, which violate her rights and make her more vulnerable to HIV infection, including because such practices often interrupt access to education and information”: CRC, General Comment No. 3, supra note 157, at [11]. Further, as Nowak notes, an early age of marriage for girls (which often also involves forced marriage) “threatens the rights of both the child-mother and the newly born child to life and to maximum survival and development under Article 6” of the Children’s Convention, supra n. 109: Nowak, supra n. 154, at 33. The reference to “women” belies the fact that a great percentage of forced marriages are inflicted on the girl child, a practice which violates a range of rights including non-discrimination (Children’s Convention, supra n. 109, Art. 2), the principle that in all actions concerning children “the best interests of the child shall be a primary consideration” (Art. 3(1)), the right not to be “separated from his or her parents against their will” (Art. 9(1)), to protection against “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation” (Art. 19(1)) and the “right of the child to education” (Art. 28).

230 The equivalent in the Women’s Convention, supra n. 81, at Art. 23(3). The equivalent in the Children’s Convention, supra n. 108, at Art. 16(1)(b) provides to women “the same right freely to choose a spouse and to enter into marriage only with their free and full consent.” See also Economic, Social and Cultural Covenant, supra n. 104, at Art. 10.

231 Supplementary Slavery Convention, supra n. 221, at Art. 1, defining “institutions and practices similar to slavery” to include “(c) Any institution or practice whereby: (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) A woman on the death of her husband is liable to be inherited by another person.”


233 HRC General Comment No. 28, supra n. 155, at [23]. Nowak observes that a General Assembly resolution adopted in implementation of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, UNGA Res. 1763 A (XVII), adopted Nov. 7, 1962, entered into force Dec. 9, 1964, 521 UNTS 231, set the lower limit for capacity to marry at the age of fifteen: Nowak, supra n. 134, at 528. On the other hand, the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, calls for a minimum age of eighteen: see G. Shahinian, Thematic Report on Servile Marriage, UN Doc. A/HRC/21/41 (2012), at [14]. The UNHCR recognizes under-age marriage as persecution: see UNHCR, Guidelines on International Protection No. 8, supra n. 94, at [18].

234 Ibid.

235 HRC General Comment No. 28, supra n. 155, at [23].

236 Ibid.
Numerous courts – including, for example, those in Australia, Belgium, Canada, France, Germany, Spain, the United Kingdom, and the United States – have thus appropriately recognized that the risk of forced marriage amounts to serious harm for refugee law purposes. As the US Court of Appeals for the Second Circuit succinctly framed the point, “lifelong, involuntary marriage” constitutes persecution.

The more challenging situation is where the marriage is “arranged” rather than “forced.” On the one hand, if a marriage is arranged and is carried out contrary to the clear wishes of one of the spouses, there is a breach of international human rights norms and hence

---

238 In Belgium, the Belgian Permanent Refugee Appeals Commission, in 02-2230/F1623 (Bel. CPRR, Mar. 25, 2004), found that refugee status was appropriate in relation to a young Russian woman of Chechen origin, whose father forced her into marriage with a Turkish citizen. See also 01-0668/F1356 (Bel. CPRR, Mar. 8, 2002). In addition, the Belgian Council for Alien Law Litigation has accepted claims based on a risk of forced marriage: see 29226 (Bel. CCE, Jun. 29, 2009) and 60662 (Bel. CCE, Apr. 29, 2011).
239 The Canadian Immigration and Refugee Board was one of the first to determine that the risk of subjection to forced marriage is presumptively serious enough to amount to persecution, and this has now been affirmed by the Federal Court of Canada: see Vidhani v. Canada (Minister of Citizenship and Immigration), [1995] 3 FC 60 (Can. FCTD, Jun. 8, 1995), at 65.
240 There is ample authority in French jurisprudence for the proposition that forced marriage constitutes persecution: see decisions cited in Cour Nationale du Droit d’Asile [National Court of Asylum], Les grandes décisions du Conseil d’État et de la CNDA sur l’asile (2009) and the Recueils de jurisprudence 1999–2005: Mlle T, 519803 (Fr. CRR [French Refugee Appeals Commission], Jul. 29, 2005); Mme B, 620881 (Fr. CNDA [French National Court of Asylum], Dec. 5, 2008); Mlle N, 574495 (Fr. CNDA, Apr. 23, 2008).
241 For example, the Spanish Supreme Court noted in STS 2781/2009 (Sp. TS, May 11, 2009) that: “a situation of harassment and threats against a woman to oblige her to marry is of a protectable nature and certainly fits in with this social group persecution”: at 3 (citing STS 1172/2006 (Sp. TS, Feb. 28, 2006), STS 938/2007 (Sp. TS, Feb. 15, 2007), STS 277/2008 (Sp. TS, Jan. 31, 2008)) (unofficial translation).
242 In the recent decision of AM and BM (Trafficked Women) Albania CG, [2010] UKUT 80 (UKUT, Mar. 18, 2010), the Upper Tribunal of the Immigration and Asylum Chamber held that “[b]eing forced into marriage is certainly capable of amounting to persecution”: at [171]. See also BB (Guinea) v. Secretary of State for the Home Department, [2007] EWCA Civ 129 (Eng. CA, Jan. 31, 2007), which involved the claim of a young woman who was at risk of being forced to enter an arranged marriage if returned to Guinea where the immigration judge had held: “I am satisfied that this appellant is a member of a particular social group, namely, a woman who is being forced, against her will, to enter into an arranged marriage and to this end I rely upon appeal number TB (PSG – Women) Iran [2005] UKIAT 000653: at [11]. The persecution issue was not challenged on appeal.
243 Various administrative guidelines also support this approach. See generally Dauvergne and Millbank, supra n. 233, at 60–61 for discussion of gender guidelines in different jurisdictions. See also UNHCR, Guidelines on International Protection No. 1, supra n. 85, at [36]. It should be noted however that despite the clear acceptance in principle that forced marriage constitutes persecution, Dauvergne and Millbank have identified a disturbing trend among common law countries whereby “threatened or actual forced marriage is rarely held to trigger protection obligations”: Dauvergne and Millbank, supra n. 233, at 57.
245 Shahinian, supra n. 234, explains that consent is the key, noting that “[a]rranged marriages, which exist in many parts of the world, are based on the consent of both parties”: at [20].
serious harm. But what of a case where a person feels that her ability to consent, while not vitiated completely, is nonetheless severely compromised by societal or familial pressure?

This issue has sometimes arisen in claims brought by homosexuals who fear that in order to avoid disclosing their sexuality, they will be “compelled” to marry. In _SZANS_, the Australian Federal Magistrates Court found that a homosexual man from Bangladesh had made out a claim to face persecutory harm on the basis that he had “a well-founded fear of being potentially forced into a heterosexual marriage” given the strong familial and societal pressure that would be brought to bear on his return. Citing to human rights norms, it was determined that

> [t]he right to refrain from entering into a marriage, except as an act of free choice, is an internationally recognised and fundamental human right... [T]he consequences of a homosexual being forced to participate in a heterosexual marriage not freely entered into constitutes “serious harm.”

On appeal, the recognition of refugee status was overturned on nexus grounds, namely that the pressure to marry in Bangladesh “falls on all single men, and it did not appear that it was applied differentially as between homosexuals and others.” In truth, this reasoning is flawed, as it fails to identify the true human rights risk at stake. For a gay man or lesbian, being forced to enter a heterosexual marriage does not implicate only the right freely to consent to marriage, but more fundamentally infringes the right to an intimate life, to sexual expression, and effectively to “be who he is.” The risk to such legally protected privacy rights is causally related to sexuality, and ought reasonably to have been recognized as such.

More generally, even in the context of marriage between heterosexuals, it is important not to assume that there is no infringement of the requirement of “full and free consent” to marriage just because coercion takes a non-physical form. A more nuanced approach to assessing whether a person is at risk of forced marriage is appropriate, taking account of the “traditional, cultural or religious beliefs” that can underpin societal coercion, wider societal attitudes including that girls and women are “viewed as commodities,” and the threat of social and economic ostracism that often accompanies resistance to forced marriage.

It is thus subjection not only to classic slavery, but also to modern forms of slavery – including trafficking and forced marriage – that may ground a claim to fear serious harm for refugee law purposes. Even the risk of subjection to an “arranged” marriage should be carefully scrutinized to ensure that a refusal to marry by an intended spouse will ultimately be respected, failing which there is a relevant risk given the duty at international law to ensure that marriage is predicated on the “full and free consent” of those to be married.

---

249 Cited in _ibid_., at 590–91 [27].
251 See _infra_ Ch. 3.5.6.
252 Dauvergne and Millbank, _supra_ n. 233, at 74–76. For an example of a failure to take account of vitiated consent, see _In re AT_, 24 I & N Dec. 296 (USBIA, Sept. 27, 2007), at 302–3. See also UNHCR, “Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity” (Nov. 21, 2008), at [13].
253 Shahinian, _supra_ n. 234, at [18].
254 _Ibid_., at [16].
255 Dauvergne and Millbank, _supra_ n. 233, at 76.
3.3.4 Physical violence

The risk of beatings or other physical violence, whether perpetrated by state or non-state actors, engages the right to “security of the person,” and is thus a classic basis on which a refugee claim may be founded. As the Canadian Federal Court of Appeal noted, “beating” is a “prime example[] of ‘persecution.’”

The risk of unlawful violence often arises in the context of otherwise lawful detention by state authorities. Even if the home state has legitimate reasons to arrest and detain an individual, it is not the case that any treatment that follows from that lawful arrest is also lawful or justified. Rather, where there is a real risk that arrest and detention will lead to violations of other rights, a person may establish a risk of serious harm based on consequential risks standing alone. As the Australian Full Federal Court explained, “[a]ny mantle of legitimacy is lost” where a state engages in, for example, the torture or extortion of arrested persons. This is true even where allegations of terrorism are made. In Khatib, the Federal Court of Canada rightly insisted that “[a]lthough the Syrian and Lebanese authorities may be justified in detaining persons . . . to determine if they are terrorists, they are not justified in beating such persons.” In the words of Justice Linden in an earlier decision, “[b]rutality in furtherance of a legitimate end is still brutality.”

The same considerations apply even where the right to freedom from arbitrary arrest or detention has been lawfully suspended in consequence of an official declaration of a national emergency. The prohibition of torture and cruel, inhuman, or degrading treatment

256 As the Human Rights Committee states in Draft General Comment No. 35: Article 9: Liberty and Security of the Person (Jan. 28, 2013) (“HRC Draft General Comment No. 35”), “Security of person concerns freedom from injury to the body, or bodily integrity”: at [3]. See also Refugee Appeal No. 71404/99 (NZ RSAA, Oct. 29, 1999).

257 Chan (Can. FCA, 1993), at 723, per Desjardins J.

258 See Tuhin v. Ashcroft, (2003) 60 Fed. Appx. 615 (USCA, 7th Cir., Mar. 18, 2003); “[a]lthough the charges lodged against Tuhin might have been legitimate, the beatings he suffered at the hands of police were not”: at 619. See also Bandari v. Immigration and Naturalization Service, (2000) 227 F.3d 1160 (USCA, 9th Cir., Sept. 26, 2000), where the court found that the applicant was initially detained on suspicion of violating the criminal law, yet the ensuing physical attacks “were clearly based on Bandari’s religion”: at 1168.


260 Khatib v. Canada (Minister of Citizenship and Immigration), (1994) 83 FTR 310 (Can. FC, Sept. 27, 1994), at [9]. Although see the contra decision of Muldoon J. in Naguleswaran v. Canada (Minister of Citizenship and Immigration) (Unreported, Can. FCTD, Apr. 19, 1995), at [10]–[15]; and again in Nithiyanathan v. Canada (Minister of Citizenship and Immigration) (Unreported, Can. FCTD, Aug. 19, 1997), at [4], [7]. In Balasubramaniam v. Canada (Minister of Citizenship and Immigration), (1994) 88 FTR 86 (Can. FCTD, Sept. 12, 1994), Muldoon J. revealed his true concern about these cases: “Canada would be obliged to receive within its borders a large proportion of the world’s population, if all those who have been beaten in all those countries where the police beat detained persons, were to come where? Canada of course, claiming to be refugees”: at [14]. See also Abu El Hof v. Canada (Minister of Citizenship and Immigration), [2005] FC 1515 (Can. FC, Nov. 7, 2005), at [5]. Even in the US, where the standard applied is often one that requires “extreme” conduct, the Court of Appeals for the Second Circuit has accepted that “even a ‘minor’ beating in detention may rise to the level of persecution”: Vafaee v. Mukasey, (2008) 298 Fed. Appx. 51 (USCA, 2nd Cir., Oct. 28, 2008), at 54, citing Beskovic v. Gonzales, (2006) 467 F.3d 223 (USCA, 2nd Cir., Oct. 24, 2006), at 226.

261 Cheung (Can. FCA, 1993), at 323, per Linden J.A.
or punishment continues to apply in such circumstances, as does the obligation to treat all persons deprived of their liberty “with humanity and with respect for the inherent dignity of the human person.” As such, a violation of either of these guarantees, even during a national emergency, amounts to serious harm for refugee law purposes. Further, the fact that lawful derogation must not involve any actions “inconsistent with [a state’s] other obligations under international law” means that states cannot invoke a state of emergency as justification for acting “in violation of humanitarian law or peremptory norms of international law, for instance, by taking hostages, [or] by imposing collective punishment,” or through “abductions or unacknowledged detention.”

Recognizing the importance of ensuring that even a genuine emergency situation does not provide cover for unlawful actions, the Canadian Federal Court of Appeal in Thirunavukkarasu rejected a finding that the applicant’s arrest and subjection to “beating” were part of the Sri Lankan government’s “perfectly legitimate investigations into criminal and/or terrorist authorities.” To the contrary, the court determined that “beatings of suspects can never be considered ‘perfectly legitimate investigations,’ however dangerous the suspects are thought to be,” concluding that the state of emergency in Sri Lanka cannot justify the arbitrary arrest and detention as well as beating and torture of an innocent civilian at the hands of the very government from whom the claimant is supposed to be seeking safety.

The legal impermissibility of physical violence applies equally where the violence occurs in a family setting (so-called “domestic violence”). Refugee law decision-makers embracing the human rights approach have thus recognized that subjection to “domestic violence”

\[262\] As recognized by MacKay J. of the Federal Court of Canada in Alfred v. Canada (Minister of Employment and Immigration), (1994) 76 FTR 231 (Can. FCTD, Apr. 7, 1994) in the context of another Sri Lankan case, where the judge explained that the appeal was being allowed, inter alia, because: “[t]he tribunal did not assess the physical mistreatment of the applicant by Colombo police in terms of persecution. Under the [Civil and Political Covenant] Articles 7 and 4 make clear that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment even in times of public emergency”: at [8]. See also Bragagnini-Ore v. Canada (Secretary of State), [1994] FCJ 143 (Can. FCTD, Feb. 4, 1994), at [4].

[263] HRC General Comment No. 29, supra n. 115, at [13(a)].

[264] The Civil and Political Covenant, supra n. 81, at Art. 4(1) states that a derogation measure must not be “inconsistent with [a state’s] other obligations under international law.” Hence, in addition to the rights listed in Art. 4(2) which cannot be derogated from, a state is also prohibited from derogating from the requirement in Art. 10 that all persons deprived of their liberty “shall be treated with humanity and with respect for the inherent dignity of the human person”: HRC General Comment No. 29, supra n. 115, at [13(a)].

[265] Ibid., at [13(b)].


[267] Ibid., at [17].

[268] Ibid., at [21]. There are many subsequent decisions applying this principle: see e.g. Joseph v. Canada (Secretary of State) (Unreported, Can. FCTD, Nov. 18, 1994), at [10]–[12]; Irarmachanthiran v. Canada (Minister of Citizenship and Immigration) (Unreported, Can. FCTD, Apr. 24, 1996), at [8]; Wickramasinghe v. Canada (Minister of Citizenship and Immigration), [2002] FCT 470 (Can. FCTD, Apr. 26, 2002), at [8]. In Wickramasinghe, the Trial Division, following Thirunavukkarasu, held “that beatings, arbitrary arrests and detention of suspects, even in a state of emergency, can never be justified or considered a legitimate part of investigations into criminal or terrorist activities, however dangerous the suspects are thought to be.”
amounts to a risk of serious harm relevant to the “being persecuted” inquiry.\(^{270}\) As in the case of other human rights violations, the fact that violence against women or children is “common, widespread and culturally accepted in a particular society”\(^{271}\) is irrelevant in assessing whether it amounts to persecution.\(^{272}\) There is thus no merit in the view, advanced by the Spanish Attorney General in a 2011 case, that the asylum claim of an Algerian woman fleeing domestic violence should be rejected because to recognize it would result in every battered woman being entitled to asylum. As observed by the Spanish Supreme Court in categorically rejecting this argument, the only relevant question is whether the applicant does “not enjoy effective legal protection against serious acts of sexual violence or domestic violence that threaten dignity and physical and moral integrity.”\(^{273}\) This focus of analysis echoes the approach taken in Canadian guidelines that

> [t]he fact that violence, including sexual and domestic violence, against women is universal is irrelevant when determining whether rape, and other gender-specific crimes, constitute forms of persecution. The real issues are whether the violence – experienced or feared – is a serious violation of a fundamental human right for a Convention ground and in what circumstances can the risk of that violence be said to result from a failure of state protection.\(^{274}\)

The same reasoning applies with particular force in the case of violence against children, with the Committee on the Rights of the Child having determined that there are no exceptions or justifications for violations of the duty to “protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.”\(^{275}\) meaning that “all forms of violence against children, however light, are unacceptable.”\(^{276}\)

In sum, freedom from physical violence is a central component of the right to security of the person. Violence cannot lawfully be employed by the police or security apparatus of the state, even consequent to an otherwise lawful arrest and detention. This is true in both ordinary circumstances, and when rights are subject to a national emergency derogation. Nor is the right to physical security restricted to the public sphere. To the contrary, the risk of violence against spouses, children, and others in the so-called private sphere may

\(^{270}\) See *Shah* (UKHL, 1999); *Khawar* (Aus. HC, 2002). For a more recent tribunal decision, see 0802332, [2008] RRTA 547 (Aus. RRT, Jul. 17, 2008). For a list of Canadian decisions recognizing various forms of domestic violence as persecution, see Immigration and Refugee Board, “Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update,” Compendium of Decisions (Feb. 2003) (“Immigration and Refugee Board, Guideline 4”), at 40–44. This has been recognized in civil jurisdictions as well, e.g. in 13874 (Bel. CCE [Belgian Council for Alien Law Litigation], Jul. 9, 2008), the Belgian Council for Alien Law Litigation granted asylum to a Russian woman who feared domestic violence at the hands of her husband; see also 45742 (Bel. CCE, Jun. 30, 2010). See e.g. C. Harvey, *Seeking Asylum in the UK: Problems and Prospects* (2000), at 682; D. Anker, “Refugee Law, Gender and Human Rights Paradigm,” (2002) 15 Harv. Hum. Rts. J. 133.

\(^{271}\) UK Border Agency, “Gender Issues in the Asylum Claim” (Sept. 2010), at 6.

\(^{272}\) Ibid. See also US Department of Homeland Security, *Training Guidelines on Gender*, supra n. 80.


\(^{274}\) Immigration and Refugee Board, Guideline 4, supra n. 270, under “B. Assessing the Feared Harm.”

\(^{275}\) Children’s Convention, supra n. 109, at Art. 19(1).

\(^{276}\) Committee on the Rights of the Child, General Comment No. 13: Right of the Child to Freedom from all Forms of Violence, UN Doc. CRC/C/GC/13 (Apr. 18, 2011), at [17]. See also UNHCR, *Guidelines on International Protection No. 8*, supra n. 94, at [32]–[33].
readily ground a claim to face the risk of being persecuted given the duty on states to protect effectively against such risks.

3.3.5 Adequate standard of living

Physical integrity may by compromised as much by the deprivation of an adequate standard of living as by more direct threats to life or physical well-being. Refugee jurisprudence thus now sensibly recognizes that the risk of violation of socio-economic rights may be understood to amount to a risk of serious harm,277 where a person is denied access to “the necessities of life”,278 where the harm threatened amounts to the “deliberate imposition of substantial economic disadvantage”;279 or where there is evidence of the “deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life,”280 there is evidence of precisely the sort of serious human rights abuse that is at the core of the notion of “being persecuted.”

As the preceding formulations suggest, persecution based on the denial of socio-economic rights is most likely to be understood to amount to the denial of the right to an adequate standard of living – and hence to be persecutory – where there is evidence that the accumulation of socio-economic harms has a clearly debilitating impact on the person concerned.281 This

---


279 This was the test set out in the seminal decision in Kovac v. Immigration and Naturalization Service, (1969) 407 F.2d 102 (USCA, 9th Cir., Jan. 29, 1969), at 106–7, and it has been adopted in many other Circuit Courts of Appeals: see list of cases cited in Li (USCA, 3rd Cir., 2005), at 167. See also Liao v. US Department of Justice, (2002) 293 F.3d 61 (USCA, 2nd Cir., Jun. 20, 2002), at 69–70.


281 The vulnerability of certain groups, especially children, must be considered in this context. The Children’s Convention, supra n. 109, provides in Art. 27(1) that “States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.” For an excellent example of this principle, see Refugee Appeal Nos. 76226 and 76227 (NZ RSAA, Jan. 12, 2009), at [111]. See also Committee on the Rights of the Child, General Comment No. 7: Implementing
is to be distinguished, in particular, from claims grounded in purely financial grievances, which will not ordinarily ground a claim to face the risk of being persecuted. Thus, for example, the High Court of Australia recognized that

[o]rdinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilized world as to constitute persecution.

There is no right to property per se in international law. Hence for example, the claim was appropriately rejected in Hao v. Attorney General, (2010) 365 Fed. Appx. 857 (USCA, 3rd Cir., Feb. 3, 2010), where the applicant was unable to establish that the seizure of personal property (sewing machine, television, and clothes closet) amounted to serious harm. Similarly, in Ling v. Canada (Minister of Employment and Immigration), [1993] 66 FTR 207 (Can. FC, May 20, 1993), the Canadian Federal Court held that “economic sanction, as a means to enforce compliance with the law, does not amount to persecution” at least insofar as the applicant is not deprived of his right to earn a living: at [6].

There are exceptions, for example, where deprivation of private property amounts in the facts of a particular case to a human rights violation such as the right to work (in the case of a business or farm). In Cheng (USCA, 3rd Cir., 2010) the court found that the confiscation of property in the form of assets such as the family farm and truck, which “served as the exclusive source of the family’s livelihood,” constituted an economic sanction “so severe that it jeopardized the family’s freedom and possibly their lives”: Pang v. Holder, (2012) 665 F.3d 1226 (USCA, 10th Cir., Jan. 6, 2012), at 4, describing with approval the decision in Cheng. See also Kadiroglu v. Minister for Immigration and Multicultural and Indigenous Affairs, [1998] FCA 1656 (Aus. FC, Dec. 15, 1998), at 4. Another example is where deprivation of property threatens the right to adequate housing, see e.g. the eloquent dissent of Gregory J. in Mirisawo v. Holder, (2010) 599 F.3d 391 (USCA, 4th Cir., Mar. 17, 2010): “Fundamentally it is without support in the law to hold that the destruction of the most significant investment a person has ever purchased, which is also a necessity of life, does not constitute persecution”: at 403. This is a particular issue for women in respect of whom discriminatory laws regarding inheritance can have a severe impact on the availability of housing, and other essential rights. Some cases have failed to appreciate the relationship between property and vital socio-economic rights: see e.g. Ramirez v. Canada (Solicitor General), (1994) 88 FTR 208 (Can. FCTD, Dec. 9, 1994), at [5]–[12]. On the other hand, in Vanchurina and Radisavevic v. Holder, (2010) 619 F.3d 95 (USCA, 1st Cir., Sept. 8, 2010) a claim based on extortion in relation to the applicant’s business was appropriately dismissed since this “did not deprive [the applicant] of housing or employment”: at 99. Finally, the imposition of exorbitant fines may result in a violation of rights such as to education and health care. This has most frequently arisen in the context of China’s one-child policy, where parents who violate the policy often have a very large fine imposed which, in light of their incapacity to pay, can lead to a violation of the right to education and health care for their children: see e.g. Li (USCA, 3rd Cir., 2005) at 168–69, approved in Pang (USCA, 10th Cir., 2012), at 4. But in many cases the fine has been held not to be sufficiently high as to amount to a risk of serious harm: see Yan Fang Chen v. Attorney General, (2010) 389 Fed. Appx. 879 (USCA, 11th Cir., Jul. 8, 2010). While in some cases the applicant is able to pay the fine (hence allowing his or her child to receive a state education etc.) (see e.g. Yong Hao Chen v. Immigration and Naturalization Service, (1999) 195 F.3d 198 (USCA, 4th Cir., Oct. 20, 1999)) this is a matter of fact and decision-makers should be cautious in assuming without sufficient evidence that a fine will not impede the ability of children born outside of the policy to obtain education or health care.

Chen Shi Hai (Aus. HC, 2000), at 303, per Gleeson C.J., Gaudron, Gummow, and Hayne JJ. In separate reasons, Kirby J. stated that the severe disadvantages imposed on the applicant “would deny the appellant basic entitlements enjoyed by other children in [China] and fundamental rights internationally enshrined in standards accepted as universal and basic, including in Australia”: at 310 [55]. This has continued to be applied in Australia, notwithstanding the introduction of Migration Act 1958 (Cth), s. 91R(2): see e.g. the decision of the Refugee Review Tribunal in 071945034, [2008] RRTA 146 (Aus. RRT, Mar. 28, 2008). See also Cheung (Can. FCA, 1993), where the Canadian Federal Court of Appeal held that: “if Karen Lee were sent back to China, she would, in her own right, experience such concerted and severe
Similarly, the UK tribunal in 
\textit{Gudja} determined that persecution may be constituted by “a concatenation of individual denials of rights; for example to the right to work, to education, to health or to welfare benefits to such an extent that it erodes the very quality of life in the result that such a combination is an interference with a basic human right to live a decent life.”

Indeed, even though the European Union’s Qualification Directive makes explicit reference only to infringement of civil and political rights in its definition of “acts of persecution,” it goes on to provide also that serious harm may be constituted by “an accumulation of various measures, including violations of human rights,” a notion understood by Germany’s Federal Administrative Court to require, where appropriate, consideration of not only “discrimination . . . in respect of access to education or health facilities, but also occupational or economic restrictions on earning a living.”

This is not to suggest, of course, that the relevance of socio-economic rights to the refugee inquiry means that everyone who is poor or who leads a life with few material advantages can successfully advance a claim to refugee status. The focus is rather on whether the risk to socio-economic rights can be said to deny the person concerned that which is required for an “adequate” standard of living. Yet it is of course true that those who are already poor can less readily bear the burdens of the failure to respect socio-economic rights than can those who are more financially secure – meaning that they will sooner face “inadequacy” than others, and hence more readily be able to demonstrate that their standard of living has fallen below the baseline of “adequacy.”

discrimination, including deprivation of medical care, education and employment opportunities and even food, so as to amount to persecution”: at 323. See also \textit{Shi Chen} (USCA, 7th Cir., 2010), at 333–34, and \textit{Li} (USCA, 3rd Cir., 2005).


\textbf{286 See 10 C 23.12 (Ger. BverwG [German Federal Administrative Court], Feb. 20, 2013) at [36] ( unofficial translation).}

\textbf{287 See e.g. \textit{DH v. Refugee Applications Commissioner}, [2004] IEHC 95 (Ir. HC, May 27, 2004), at 24. \textit{As the Supreme Court of Canada explained in \textit{Ward} (Can. SC, 1993), “the international community did not intend to offer a haven for all suffering individuals. The need for ‘persecution’ in order to warrant international protection, for example, results in the exclusion of such pleas as those of economic migrants ie individuals in search of better living conditions, and those of victims of natural disasters, even when the home state is unable to provide assistance”: at [85]. See also \textit{R v. Secretary of State for the Home Department; Ex parte Jammeh}, [1998] INLR 701 (Eng. HC, Jan. 28, 2010), at 705: “Destitution and poverty are not a basis for applying for or being granted asylum.” On the other hand, in some cases claims have been summarily dismissed even where there was a strong case for discriminatory deprivation of socio-economic rights: see e.g. \textit{Pascual v. Mukasey}, (2007) 514 F.3d 483 (USCA, 6th Cir., Dec. 19, 2007), where the court held that notwithstanding evidence that the Mayan indigenous people of Guatemala are “outside the country’s political, economic, social and cultural mainstream” and have “limited educational opportunities and fewer employment opportunities,” “economic stratification and deficient government support, regrettable though they are, do not establish a cognizable case of persecution”: at 488.}

\textbf{289 The right “to an adequate standard of living” combines a number of relevant factors including ‘adequate food, clothing . . . housing’ (Economic, Social and Cultural Covenant, \textit{supra} n. 104, at Art. 11(1)) and the right to water (Committee on Economic, Social and Cultural Rights, General Comment No. 15, The Right to Water, UN Doc. E/C.12/2002/11 (Jan. 20, 2003): “The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival”: at [3]).}

\textbf{290 This issue arose in \textit{Chen Shi Hai} (Aus. HC, 2000), where the High Court of Australia refused to accept one of the primary contentions in that case, namely that the negative consequences of being a “black}
3.3.5 Adequate Standard of Living

How, then, should a decision-maker determine whether the right to an adequate standard of living is infringed in a given case, such that the risk of being persecuted may be established?

It is important to emphasize that while international human rights law does not, of course, provide a right to a comfortable or affluent existence, neither is the right to an adequate standard of living merely a right to minimum survival. Simply put, the right to an adequate standard of living is not violated only when life is threatened. In the US, for example, while some appellate courts unhelpfully insist on evidence of "severe" socio-economic risk, there has been a long-standing recognition that no more than the

child" were really a result of the parents’ poverty in that were they wealthy they could have offset the harm. The court rejected this: "To say that the consequences that are likely to befall him in China will result from his parents' financial situation is simply to say that neither he nor his parents have the means to mitigate the consequences of his adverse treatment": at 305 [36], per Gleeson C.J., Gaudron, Gummow, and Hayne JJ. This was also implicitly recognized by the US Court of Appeals for the Seventh Circuit in Shi Chen (USCA, 7th Cir., Apr. 28, 2010), where it noted that the applicant’s “father testified via affidavit that as a result of these fines [imposed for violation of the one-child policy in China], the family – already very poor – often went hungry”: at 333.

This is so even in Australia where the Migration Act 1958 (Cth) has been amended so that "serious harm" is said to include (inter alia) "significant economic hardship that threatens the person's capacity to subsist": s. 91R(2)(d), and "denial of access to basic services, where the denial threatens the person’s capacity to subsist": s. 91R(2)(e). In VT AO (Aus. FC, 2004) the Australian Federal Court held that s. 91R(2) does not "provide an exhaustive statement of what amounts to 'serious harm": at 351 [57], hence the RRT was in error in assuming that it was necessary to establish a threat to the applicant's capacity to subsist: see 351–52. See also MZWPD v. Minister for Immigration and Multicultural and Indigenous Affairs, [2006] FCA 1095 (AU, FC, Aug. 18, 2006) in which the Australian Federal Court emphasized that, notwithstanding s. 91R(1) and (2), "it is by no means certain that a well-founded fear of racial or religious discrimination in relation to matters such as education, employment and housing cannot amount to 'serious harm' within the meaning of that expression in s. 91R(2)": at [80]. Not only does s. 91R(2) provide "a non-exhaustive list of 'instances of serious harm'": at [82], but the notion of "serious harm" "plainly has a residual meaning beyond the examples given": at [83], citing NBFP (Aus. FFC, 2005).

In re T-Z-, (2007) 24 I & N Dec. 163 (USBIA, May 9, 2007), at 172–73. This case resulted from a highly critical decision of the Second Circuit which remanded the case to the Board of Immigration Appeals "for clarification of the standard governing economic persecution claims" because the Board had not been consistent, applying at least three different standards: see Mirzoyan v. Gonzales, (2006) 457 F.3d 217 (USCA, 2nd Cir., Jul. 20, 2006), at 221–23. For further background to the US case law on economic persecution, see Jastram, supra n. 89, at 149–51. Jastram also sets out different academic positions on the US case law at 159–62. The US position is complicated by the fact that the Board of Immigration Appeals posited two tests: the Kovac (USCA, 9th Cir., 1969) test where an applicant "has suffered a severe loss of an existing economic/vocational advantage" and the stricter test adopted from Re Acosta, (1985) 19 I & N Dec. 211 (USBIA, 1985) namely, that economic deprivation or restrictions must be "so severe that they constitute a threat to an individual's life or freedom" in situations of more generalized economic disadvantage: see Vicente-Elias v. Mukasey, (2008) 532 F.3d 1086 (USCA, 10th Cir., Jul. 11, 2008), at 1088–89; Aranyi v. Mukasey, (2008) 527 F.3d 737 (USCA, 8th Cir., May 28, 2008), at 740–41. The Eighth Circuit continues "to require a showing that allegations of economic hardship threaten the petitioner's life or freedom in order to rise to the level of persecution": Makatengkeng v. Gonzales, (2007) 495 F.3d 876 (USCA, 8th Cir., Aug. 3, 2007), at 883. Although acknowledging that "it might be appropriate for our court to revisit the standard for proving economic persecution," it has not done so: Makatengkeng at 883. Although see Ngengwe v. Mukasey (USCA, 8th Cir., 2008), at 1036. For a similarly strict approach in the Sixth Circuit, see El Assadi v. Holder, (2011) 418 Fed. Appx. 484 (USCA, 6th Cir., Apr. 25, 2011), although a decision issued just one month later affirmed the lower test: Siserba v. Holder, (2011) 646 F.3d 964 (USCA, 6th Cir., May 20, 2011), at 976.
“deliberate imposition of substantial economic disadvantage” need be shown.\textsuperscript{295} Under this standard, it is not necessary to establish “total deprivation of livelihood,”\textsuperscript{296} “total deprivation of livelihood or a total withdrawal of all economic opportunity,”\textsuperscript{297} or to offer “evidence of near-starvation.”\textsuperscript{298} To the contrary, “[g]overnment sanctions that reduce an applicant to an impoverished existence may amount to persecution even if the victim retains the ability to afford the bare essentials of life.”\textsuperscript{299} 

The emphasis on overall impact inherent in the international human right to an “adequate standard of living” is in our view a helpful means of guarding against the trivialization of claims as “mere discrimination,”\textsuperscript{300} or as implicating only “lower order rights.”\textsuperscript{301} It requires attention to the fact that an attempt to exclude segments of the population from economic and social life\textsuperscript{302} can be a more subtle yet nonetheless very powerful and effective method of producing the “slow suffocation of a minority group.”\textsuperscript{303} The Canadian Federal Court has thus insisted that it is incumbent on decision-makers not only to consider the cumulative nature of a range of denials of socio-economic rights, but to provide a reasoned analysis of why a person who has “lived with discrimination and insecurity all of his life”\textsuperscript{304} is not at risk of serious harm.\textsuperscript{305} For example, in the context of a claim by a Palestinian man who

\textsuperscript{295} Kovac (USCA, 9th Cir., 1969), at 107.

\textsuperscript{296} Shi Chen (USCA, 7th Cir., 2010), at 334, citing Koval v. Gonzales, (2005) 418 F.3d 798 (USCA, 7th Cir., Aug. 16, 2005), at 805–7. See also Borca v. Immigration and Naturalization Service, (1996) 77 F.3d 210 (USCA, 7th Cir., Feb. 29, 1996): “By requiring Borca to show a deprivation of all means of earning a livelihood, the BIA failed to heed Congress’s intent, as expressed in the 1965 Amendment, to lessen the burden needed to show persecution”: at 217. See also Stserba (USCA, 6th Cir., 2011), at 976.

\textsuperscript{297} In re T-Z- (USBIA, 2007), at 173–74.

\textsuperscript{298} Li (USCA, 3rd Cir., 2005), at 168.

\textsuperscript{299} In re T-Z- (USBIA, 2007) at 173–74. This principle has recently been affirmed in Pang (USCA, 10th Cir., 2012), at 3.


\textsuperscript{301} There are many examples, but see e.g. the decision at tribunal level in Horvath v. Secretary of State for the Home Department, [1999] 1 INLR 7 (UKIAT, Dec. 4, 1998), where social and economic harms are referred to as “discriminatory measures”: at 28, infringing “lower order ‘rights’”: at 34. This is despite the fact that in Horvath the evidence suggested precisely the type of “slow suffocation of a minority” which has characterized many of the most persecutory regimes in history; see at [48]–[49].

\textsuperscript{302} See e.g. Kapreškić (ICTY, 2000), discussing economic discrimination pursued by the Nazis against German Jews: policy designed to “force them out of economic life in Europe”: at [630].

\textsuperscript{303} N. Ghanea, “Repressing Minorities and Getting Away with It? A Consideration of Economic, Social and Cultural Rights,” in N. Ghanea and A. Xanthaki (eds.), Minorities, Peoples and Self Determination (2004), at 194. In V01/13122, [2003] RRTA 764 (Aus. RRT, Aug. 19, 2003), the Australian Refugee Review Tribunal noted that public and private universities continue to deny admission to Baha’i students, “a particularly demoralizing blow to a community that traditionally has placed a high value on education. Denial of access to higher education appears aimed at the eventual impoverishment of the Baha’i community.” The same can be said about some of the ethnic minorities in Burma. This was also the case for women living under Taliban rule in Afghanistan in which the discriminatory policies imposed “undermine[d] the health, well-being and economic survival of their female citizens,” leading one widow interviewed to state that “she preferred the rocket attacks of the civil war to life under the Taliban: ‘A rocket or a bomb may kill all members of a family at once, but this is a slow death, which is more painful’”: N. Boustany, “Wretched Art They Amongst Women,” Washington Post (Aug. 5, 1998), at 16.

\textsuperscript{304} Mohammed v. Canada (Minister of Citizenship and Immigration), (2009) 348 FTR 69 (Can. FC, Jul. 27, 2009), at [9].

\textsuperscript{305} Regrettably, some decisions engage conclusory reasoning in this regard. For example, in Yadegar-Sargis (USCA, 7th Cir., 2002), the Board of Immigration Appeals had acknowledged that the applicant “had been forced to wear the Muslim garb for fear of being attacked, that she had suffered discrimination with respect to food rationing because she was Armenian, and that her son was forced to go abroad to
3.3.5 Adequate Standard of Living

had spent his whole life in a refugee camp where he experienced “extremely dispiriting
discrimination” – in particular, in obtaining access to housing, medical care, education,
and work – it was held that

[t]he reasons need to articulate why the long history of appalling discrimination by the
State of Lebanon against the Applicant as a stateless Palestinian does not amount to
persecution.307

While the composite nature of the notion of denial of “an adequate standard of living”
frequently means that refugee decision-makers examine the cumulative impact of a range
of socio-economic deprivation,308 in at least some cases the right to an adequate standard
of living may alternatively be infringed by the deprivation of only one particular facet of the
right.

In respect of the right to food, for example, while not every disadvantage in relation to the
procurement of food, such as being “denied such perquisites as discounts on food,”309 will
be rights-violative, it has been recognized that “denial of famine relief in anti-government
areas”310 may constitute persecution; that the “taking of harvests of those perceived as
‘enemies,’ rather than those perceived as allies might found a conclusion of persecution
for a Convention reason”;311 and that “discriminatory exclusion from access to food aid is
capable itself of constituting persecution.”312 In a decision in which denial of food was used
as a weapon, for example, the UK tribunal recognized refugee status on the grounds that

the government of Zimbabwe has used its control of the distribution of food aid as
a political tool to the disadvantage of those thought to be potential supporters of the
MDC. This discriminatory deprivation of food to perceived political opponents, taken

study his native language and culture”: at 600. Notwithstanding this, the Board of Immigration Appeals
held that though “deplorable,” the “incidents constituted harassment, not persecution”: ibid.

Mohammed v. Canada (Minister of Citizenship and Immigration), (2009) 348 FTR 69 (Can. FC, Jul. 27,
2009), at [64].

Ibid., at [67].

The UNHCR has long taken a similar view, stating in its Handbook that persecution may be established
where “measures of discrimination lead to consequences of a substantially prejudicial nature for the
person concerned, eg serious restrictions on his right to earn a livelihood, his right to practise his
religion, or his access to normally available educational facilities”: UNHCR, Handbook, supra n. 1, at
[54].

21, 1984), at 1264.

Chan (Can. FC, 1993), at 724. For an early decision along these lines, see Vidya Ajodhia, IABD M85-
1709 (Can. IAB, Nov. 12, 1987), involving the state-condoned racially discriminatory allocation of
basic foodstuffs in Guyana. In accepting the claim to refugee status of an Indo-Guyanese citizen, the
Board noted: “It may be argued that the unfair distribution of food to Indo-Guyanese is a situation of
discrimination rather than persecution. However, in my opinion, the withholding of essential food on a
daily basis is clearly indicative of persecution”: at 4.

23, 2001), at [7].

RN (Returnees) Zimbabwe CG, [2008] UKAIT 00083 (UKAIT, Nov. 19, 2008), at [249].

Ibid., at [250]. This analysis is consistent with the Committee on Economic, Social and Cultural Rights’
explanation that a violation of the right to food under the Economic, Social and Cultural Covenant,
supra n. 104, can occur when there is, inter alia, a “denial of access to food to particular individuals or
Given the centrality of food to survival, its denial – even standing alone – may clearly have the very sort of devastating effects that bespeak failure to ensure the right to an “adequate standard of living.”

Similarly, while relegation to inferior accommodation is unlikely to be sufficiently serious as to constitute a deprivation of the right to an adequate standard of living, forced eviction will almost certainly be so considered. While it is true that many countries do not have the resources to ensure that everyone enjoys adequate housing – meaning that the simple continuation of inadequate housing will not necessarily be per se in breach of the right to housing – forced eviction is properly understood to be a “gross violation of human rights” that is “prima facie incompatible with” duties under the Economic, Social and Cultural Covenant. Not only is the active evisceration of a right impossible to reconcile to any understanding of progressive implementation of that right, but the complete loss of shelter may, like denial of the right to food, be so devastating that it will readily be understood to amount in and of itself to the denial of the right to an adequate standard of living. Indeed, the Human Rights Committee has recently determined that the related human right to be free from arbitrary interference with one’s home was infringed when Bulgarian authorities proposed to evict a Roma community from their traditional land, noting that the eviction posed “the risk of their becoming homeless, in a situation in which satisfactory replacement housing is not immediately available to them.”

Despite the clear salience of the notion of persecution by the denial of socio-economic rights, it is sometimes suggested that such claims may not be entertained in the context of refugee claims made by a stateless person against her country of former habitual residence. Because under Art. 2(3) of the Economic, Social and Cultural Covenant “developing countries” may decide “to what extent they [will] guarantee . . . economic rights . . . to non-nationals,” the UK tribunal reasoned that the exclusion of a stateless Palestinian from a range of social and economic rights, including “access to Lebanese government hospitals,” was not serious harm because “the differential treatment of Palestinian refugees groups”: Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food, UN Doc. E/C.12/1999/5 (May 12, 1999), at [19] (“CESCR General Comment No. 12”).

For example, a Human Rights Watch report stated that “[a]s noted in Chapter V of this report, which examined the political context of the forced evictions beyond the reasons nominally provided by the government for them, the circumstances of the evictions suggest that at least one of the reasons why they took place was because ZANU-PF was concerned about a potential uprising in urban areas against the government which would have challenged the government’s power”: Human Rights Watch, “Neighbors in Need: Zimbabweans Seeking Refuge in South Africa” (Jun. 2008), at 75.

Committee on Economic, Social and Cultural Rights, General Comment No. 4: The Right to Adequate Housing (Dec. 13, 1991), at [18], and Committee on Economic, Social and Cultural Rights, General Comment No. 7: Forced Evictions, and the Right to Adequate Housing (May 20, 1997), at [9].

Civil and Political Covenant, supra n. 81, at Art. 17(1).


There are, however, cases that appropriately recognized status in such circumstances: see El Himri v. Ashcroft, (2004) 378 F.3d 932 (USCA, 9th Cir., Aug. 2, 2004), at 937; Ouda (USCA, 6th Cir., 2003), at 448; and Mohammed (Can. FC, 2009), at [64]–[67]. See also Krayem v. Secretary of State for the Home Department, [2003] EWCA Civ 649 (Eng. CA, Apr. 4, 2003).

Economic, Social and Cultural Covenant, supra n. 104, Art. 2(3).
stems entirely from their statelessness” and was thus “in accordance with international norms.”

Yet in truth, Art. 2(3) was conceived as “a measure of affirmative action in favour of historically underprivileged nationals,” not as a justification for entrenching disadvantage and oppression of historically disadvantaged minority groups. The Committee on Economic, Social and Cultural Rights has moreover made clear that Art. 2(3) is a narrow exception to the general duty of non-discriminatory access to rights, which extends to “everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.” And in any event the scope of Art. 2(3) is significantly more limited than is often assumed. Not only is it an exemption available only to a limited subset of countries, but it applies only to economic rights – not social or cultural rights – and hence may not apply to the right to an adequate standard of living, much less to more specific rights related to health or education. It moreover permits a country to determine only “to what extent” economic rights will be guaranteed to non-nationals, thus providing no justification for a blanket or wholesale denial of a range of economic rights to all or some non-nationals.

In sum, threats to core socio-economic entitlements will frequently give rise to a risk to the internationally guaranteed right “to an adequate standard of living.” While neither the existence of financial grievances nor even poverty per se infringes this standard, there will be cases in which either an accumulation of risks, or – especially in relation to such core entitlements as the rights to food and shelter – the risk to a single core interest standing alone, will infringe this fundamental human right. Where the essentials of life are threatened in these ways, refugee law appropriately recognizes the risk to be of sufficient gravity to be persecutory.

### 3.3.6 Health

Some threats to health amount to risks of torture or cruel, inhuman, or degrading treatment. This right prohibits subjection “without . . . free consent to medical or scientific experimentation,” thus justifying a decision that recognized a risk of persecutory harm
where lesbians were subjected to electro-shock “treatment,” as well as a finding in favor of an autistic boy from Pakistan who was subjected to a series of “degrading and dangerous mystical treatments” on the grounds that he was perceived to have the “curse of Allah.”

More commonly, physical security can be threatened by the denial of critical forms of health care or medical treatment. Indeed, in extreme cases the “systematic denial of medical services . . . amounts to a de facto death sentence.” But serious harm may also be established where the consequences are less severe. This is not to say that there is a risk of being persecuted merely because access to, or the quality of, medical treatment in the home country is inferior to that available in the asylum state. But where there is a sustained or systemic risk of deprivation, withdrawal, or denial of critical or essential health care or medical treatment, harm relevant to the “being persecuted” inquiry is established.

---


331 A denial of access to health care normally available to others in society is a clear violation of the non-discrimination guarantee in the Civil and Political Covenant, supra n. 81, at Art. 2; the Economic, Social and Cultural Covenant, supra n. 104, at Arts. 2(2) and 12; and potentially the non-discrimination provisions in the Race Convention, supra n. 107, at Art. 2; Women’s Convention, supra n. 108, at Arts. 2 and 12; Children’s Convention, supra n. 109, at Art. 2.


333 This is particularly so where a claim, as is often the case, involves the denial of health care or medical treatment as well as other violations of socio-economic rights: see Chen Shi Hai (Aus. HC, 2000); SBAS (Aus. FC, 2003), at [54]–[59]; Tchoukhrova v. Gonzales, (2005) 404 F.3d 1181 (9th Cir., Apr. 21, 2005) (although the court noted in that case that “most of these harms could rise to the level of persecution independently”: at 1192); Cheung (Can. FCA, 1993); Shi Chen (USCA, 7th Cir., Apr. 28, 2010), at 333–34. Germany’s Federal Administrative Court has explained that it is appropriate to consider, in assessing serious harm in refugee law, “discrimination . . . in respect of access to education or health facilities, but also occupational or economic restrictions on earning a living”: 10 C 23.12 (Ger. BverwG [German Federal Administrative Court], Feb. 20, 2013), at [36] (unofficial translation).

334 For example, in Kholyavskiy (USCA, 7th Cir., 2008), the claim of having a well-founded fear of future persecution was appropriately rejected on the basis that the applicant’s medical claim was based on his inability to obtain necessary medication in Russia but there was “no evidence in the record to suggest that the unavailability of the medication is the result of the Russian government’s attempt to injure [him]”: at 574. See also Ixtileco-Morales v. Keisler, (2007) 507 F.3d 651 (USCA, 8th Cir., Nov. 2, 2007), at 656. Similarly, in Refugee Appeal No. 76015 (NZ RSAA, Nov. 14, 2007), the New Zealand Refugee Status Appeals Authority appropriately rejected the claim of a Bolivian man with a physical disability on the basis that any inadequate health care in his home country was due to lack of resources and not due to any discrimination against the applicant: see at [42]–[43]. However, in Paredes v. Attorney General, (2007) 219 Fed. Appx. 879 (USCA, 11th Cir., Mar. 5, 2007), the Eleventh Circuit’s affirmation of the Board of Immigration Appeals’ decision is questionable, given that the accepted evidence was that the Venezuelan government’s prioritization of health care to HIV-infected women and children meant that “homosexual men were usually left without medical treatment”: at 888. In light of the background of homophobia established in the record, this is arguably more than “regrettable”: at 888. In particular, it can be contrasted with the opposite view of the Federal Court of Canada in Diaz v. Canada (Minister of Citizenship and Immigration), [2009] 3 FCR 395 (Can. FC, Nov. 6, 2008).

335 This has been accepted in a range of jurisdictions. In Australia, see Chen Shi Hai (Aus. HC, 2000); Kuthyra v. Minister for Immigration and Multicultural Affairs, [2000] FCA 110 (Aus. FC, Feb. 11, 2000), at [79]. In Ireland, see EMS v. Minister for Justice, Equality and Law Reform, [2004] IEHC 398 (Ir. HC, Dec.
In practice, however, claims raising such issues have not always been understood to bespeak a violation of basic human rights norms, due in part to misunderstandings already discussed about the implications of the duty to implement socio-economic rights progressively, and to the maximum of available resources. While it is true that the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health,” like most other socio-economic rights, is not a duty of immediate result, it is equally true that efforts actively to deny or reduce access to health care cannot on any reading be reconciled to the duty “to take steps . . . with a view to achieving progressively the full realization” of this right. For these reasons, a US appellate court was right to question the refusal of protection to a Russian child with cerebral palsy who was “denied rights afforded to all other citizens” on the basis of his disability. Specifically, the child “was never given any treatment for his cerebral palsy and had difficulty obtaining routine medical care afforded to other Russians as a matter of course.” The court categorically rejected the immigration judge’s view that the Russian government’s actions could be “excused” because Russia “does not have the resources to provide medical attention to individuals at the same standards as in developed nations”.

It is true generally that a country’s failure to provide its citizens with a particular level of medical care or education due to economic constraints is not persecution . . . However, claims of financial difficulties cannot be used to justify the deprivation of services essential to human survival and development, if the deprivation is based on the recipient’s membership in a statutorily protected group . . . [W]here the denial seriously jeopardizes the health or welfare of the affected individuals, a finding of persecution is warranted. This conclusion accords with the core obligation of states to “ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups,” a duty with which a “State party cannot, under any circumstances whatsoever, justify its non-compliance.” Accordingly, claims based on denial of medical treatment for reasons of religion, disability, and HIV status have all been recognized as persecutory. For example, the fact that a country is poor and undeveloped was held not

---

21, 2004), at 11. In the Netherlands, the Judicial Division of the Council of State in A v. Staatssecretaris van Justitie, 200805681/1 (Neth. Rev [Dutch Council of State], May 19, 2009) held that discriminatory exclusion from medical care can amount to persecution. See further analysis in Foster, supra n. 120, at 226–28. See also UNHCR, Guidelines on International Protection No. 8, supra n. 111, at [35].

336 Economic, Social and Cultural Covenant, supra n. 104, at Art. 12. 337 Ibid., at Art. 2(1).


339 Ibid. This case has a complicated procedural history as it was later vacated by the US Supreme Court, although on a different and unrelated point: see Gonzales v. Tchoukhrova, (2006) 549 US 801 (USSC, Oct. 2, 2006).

340 Ibid. 341 Ibid., at 1194–95.


343 Ibid., at [47]. We note that differentiation is not the same as discrimination. See also Committee on the Rights of the Child, General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health, UN Doc. CRC/C/GC/15 (Apr. 17, 2013), at [1], [8]–[11]. Art. 2(3) does not apply to the right to health, it not being an “economic right”: see above discussion at notes 319–327. See e.g. Diaz (Can. FC, 2008), at [32], [37]; Gorzsas v. Canada (Minister of Citizenship and Immigration), (2009) 346 FTR 169 (Can. FC, May 6, 2009), at [26]. Alland and Teitgen-Colly, the authors of the leading French textbook, note that discrimination can rise to the level of persecution through “repetitious
to undercut a claim to fear persecution where, for example, “people infected with HIV may be denied even the low level of care available to others on account of their membership of a particular social group.” As the Canadian Federal Court of Appeal explained in *Covarrubias*:

[W]here a country makes a deliberate attempt to persecute or discriminate against a person by deliberately allocating insufficient resources for the treatment and care of that person’s illness or disability, as has happened in some countries with patients suffering from HIV/AIDS, that person may qualify . . . [for refugee status], for this would be refusal to provide the care and not inability to do so.

The High Court of Ireland took much the same view, finding that a risk of being persecuted might be established where there is a policy that “AIDS sufferers are, having regard to the level of resources available within South Africa, [to be] treated in a discriminatory manner.”

A risk to health may thus ground a claim to face the risk of persecutory harm in a number of ways. While the most straightforward cases are those that threaten the right to life or which amount to a threat of torture or cruel, inhuman, or degrading treatment, the duty of states progressively to implement a more broad-ranging right to health care means that a wider range of claims involving a sustained or systemic risk of deprivation, withdrawal, or denial of critical or essential health care or medical treatment may also evince the required risk of serious harm. Nor is it the case that human rights law sees resource insufficiency as grounds to excuse the failure to allocate available resources without discrimination. To the contrary, where there is evidence that whatever resources are available are deliberately skewed in a way that disfranches a relevant sub-group of the population, the risk of persecutory harm is established.

### 3.4 Liberty and freedom

To this point, we have examined the circumstances in which a human-rights-based approach to the serious harm requirement of refugee law would see various threats to physical integrity—risks to life; of torture or cruel, inhuman, or degrading treatment or punishment; of enslavement, including trafficking and forced marriage; of physical violence; of denial of an adequate character,” such as through refusal of access to medical care or children’s enrollment in schooling: Alland and Teitgen-Colly, *supra* n. 158, at 376–77 (unofficial translation). See also Foster, *supra* n. 120, at 226–31.

345 *N94/04178*, [1994] RRT A 1149 (Aus. RRT, Jun. 10, 1994). In *Diaz v. Canada* (Can. FC, 2008), at [35]–[36], the court quashed the Board’s decision and remitted it on the basis that the Board had failed properly to consider the applicant’s claim that “he would experience persecution and risk as an HIV positive Mexican without meaningful family support, with the potential for systemic barriers to employment, and with the potential for discrimination in health care delivery”: at [37]. See also *Gorzsas* (Can. FC, 2009), at [39].

346 *Covarrubias v. Canada* (Minister of Citizenship and Immigration), [2007] 3 FCR 169 (Can. FCA, Nov. 10, 2006), at 189 [39]. While this was a case concerning s. 97(1)(b)(iv) of the Canadian Immigration and Refugee Protection Act 2001, rather than that part of the Act concerned with refugee status, the court made it clear that it envisaged that such a claim may qualify for refugee status: at 187 [32]. This understanding has been subsequently adopted by the Canadian Immigration and Refugee Board: see e.g. *TA5-11242* (Unreported, Can. IRB, Mar. 9, 2007).

347 *EMS* (Ir. HC, Dec. 21, 2004), at 12. See also *Msengi* (Ir. HC, 2006), at 4–6. This is supported by the Committee on Economic, Social and Cultural Rights’ explanation that: “Inappropriate health resource allocation can lead to discrimination that may not be overt”: CESC General Comment No. 14, *supra* n. 342, at [19].
3.4.1 Arrest and detention

Persecution often takes the form of “detention, arrest, interrogation, prosecution, [and] imprisonment”\(^{348}\) – whether by way of police or other officially mandated custody, house arrest, “involuntary hospitalization,”\(^{349}\) or even “being involuntarily transported.”\(^{350}\) Importantly, though, not every constraint on free movement amounts to a violation of an internationally guaranteed human right: international human rights law requires only that any deprivation of liberty be “on such grounds and in accordance with such procedures as are established by law,”\(^{351}\) and – assuming this first requirement is met – expressly disallows only “arbitrary” arrest or detention.\(^{352}\) It follows, for example, that ordinary policing efforts do not normally infringe this standard, assuming that they are conducted in accordance with valid criminal law and are not arbitrarily conceived or enforced. Beyond the basic requirements of lawfulness and avoidance of arbitrary action, international human rights law requires further that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”\(^{353}\) Taken together, these three requirements provide a sound and workable basis for the assessment of persecutory harm under refugee law.

In assessing whether subjection to arrest and detention amounts to the risk of serious harm, the first critical benchmark is therefore whether the arrest and/or detention are truly “on such grounds and in accordance with such procedure as are established by law.” Because of this requirement, persons facing arrest or detention at the hands of non-state actors will almost always face the risk of persecutory harm. Second, even where the arrest and/or detention takes place within a genuine legal framework, it must not be “arbitrary.” The notion of arbitrariness is not synonymous with “against the law,”\(^{354}\) but prohibits even arrest and detention authorized by law which is discriminatory,\(^{355}\) or which shows “elements of inappropriateness, injustice, lack of predictability, and due process of law.”\(^{356}\) This includes, for example, the “detention of

---

\(^{348}\) This is often stated to be a description of obvious persecution in US jurisprudence: see e.g. *He* (USCA, 6th Cir., 2012), at 13, citing *Gilaj v. Gonzales*, (2005) 408 F.3d 275 (USCA, 6th Cir., May 9, 2005), at 285 and *De Leon v. Immigration and Naturalization Service*, (2004) 99 Fed. Appx. 597 (USCA, 6th Cir., May 12, 2004), at 598.

\(^{349}\) HRC Draft General Comment No. 35, *supra* n. 256, at [6].


\(^{351}\) *Civil and Political Covenant*, *supra* n. 81, at Art. 9(1).

\(^{352}\) *Ibid.*

\(^{353}\) *Ibid.*, at Art. 10(1).

\(^{354}\) HRC Draft General Comment No. 35, *supra* n. 256, at [13].

\(^{355}\) *Ibid.*, at [17].

\(^{356}\) *Ibid.*, at [13]. The due process of law may be informed by *Civil and Political Covenant*, *supra* n. 81, Art. 9(2)–(4), as well as other provisions such as Art. 14.
innocent family members of alleged criminals, the holding of hostages, and arrests for the purpose of extorting bribes." More generally, resort to arrest or detention as a means of deterring the exercise of internationally guaranteed human rights such as freedom of opinion and expression, freedom of assembly, freedom of association, freedom of religion, and the enjoyment of privacy rights is fairly understood to be arbitrary, and hence to amount to serious harm for refugee law purposes.

Third, even if the arrest or detention is both lawful and not arbitrary, it must be effected in a manner that comports with the duty of states to ensure that all persons deprived of their liberty are “treated with humanity and with respect for the inherent dignity of the human person.” Where there is evidence, for example, that the result of an otherwise permissible arrest or detention is subjection to truly undignified conditions, even if falling short of inhuman or degrading treatment, the situation bespeaks a risk of breach of international human rights norms, and is thus serious harm relevant to the assessment of refugee status.

Despite the clarity of this three-part standard, courts have often struggled to assess whether there is evidence of persecution where the risk of arrest or detention occurs in the context of a difficult security situation in the home country. Decision-makers have been understandably concerned not to take an absolutist approach to such cases, recognizing that both national security and the importance of ensuring the security of their population often motivate governments to order preventive detention and other deprivations of liberty.

Some states seek to strike this balance by reference to standards other than international human rights law. Australian courts, for example, have relied instead on a standard derived from that country’s domestic law, namely whether the law under which the applicant will be arrested or detained is “appropriate and adapted to achieving some legitimate object of the country of the refugee.” The amorphous notion of “some legitimate object of the country of the refugee” has been interpreted to justify arrest and detention predicated on the equally malleable notion of protecting and promoting “the general welfare of the state and its citizens.” The requirement that the actions of the home state be “appropriate and adapted” has proved equally elusive.

357 HRC Draft General Comment No. 35, supra n. 256, at [16].
358 Civil and Political Covenant, supra n. 81, at Art. 19. 359 Ibid., at Art. 22.
360 Ibid., at Art. 22. 361 Ibid., at Art. 18. 362 Ibid., at Art. 17.
363 HRC Draft General Comment No. 35, supra n. 256, at [17].
364 Civil and Political Covenant, supra n. 81, at Art. 10(1).
365 The Human Rights Committee has made it clear that preventive detention is permitted pursuant to Art. 9. The usual safeguards apply, however, in that “it must not be arbitrary, and must be based on grounds and procedures established by law...information of the reasons must be given...and court control of the detention must be available...as well as compensation in the case of a breach”:
Human Rights Committee, General Comment No. 8: Right to Liberty and Security of Persons (Jun. 30, 1992), at [4].
367 See Balan v. Minister for Immigration and Multicultural Affairs, (2000) 171 ALR 7 (Aus. FC, Mar. 31, 2000). Although this is particularly prevalent in Australian case law, a similar analysis is sometimes found elsewhere: see e.g. Brar v. Canada (Minister of Employment and Immigration), (1993) 68 FTR 57 (Can. FCTD, Sept. 8, 1993), at [6]; Papa v. Canada (Minister of Employment and Immigration) (Unreported, Can. FCTD, Aug. 15, 1994), at [5]–[6], referring to a “valid social objective.”
In contrast, analysis grounded in international human rights law is likely to lead to more principled results. As the right not to be subjected to arbitrary arrest or detention is, at international law, subject to no internal limitation, the only question is whether it can be justified by reference to the standard of permissible derogation in the context of a “public emergency which threatens the life of the nation.”\(^{368}\) Even in this clearly exceptional context, international human rights law requires further that measures taken derogate only “to the extent strictly required by the exigencies of the situation.”\(^{369}\) Taken together, it is clear that the only “legitimate object” is an “emergency which threatens the life of the nation” (not, for example, promotion of the “general welfare”), and that the means chosen must be “strictly required” (rather than merely “appropriate and adapted”).

It follows more generally that the view sometimes taken that a person is not at risk of “being persecuted” where the home state is acting both reasonably and under color of law is not sustainable. Applying the human rights framework, a decision-maker should rather assess whether the risk of otherwise impermissible arrest and detention is taking place in a country that has validly suspended its duties under international human rights by “officially proclaim[ing]” the existence of a national emergency that “threatens the life of the nation” and by acting in response to that threat in a manner that comports with the obligation to take only measures that “are limited to the extent strictly required by the exigencies of the situation”\(^{370}\) and which do not involve “discrimination solely on the ground of race, colour, sex, language, religion or social origin.”\(^{371}\) In reviewing compliance with these requirements, for example, the Human Rights Committee determined that Israel’s administrative detention laws derogate from the right not to be subjected to arbitrary arrest

\(^{368}\) Civil and Political Covenant, supra n. 81, at Art. 4(1). The Human Rights Committee has explained that “[m]easures derogating from the provisions of the Covenant must be of an exceptional and temporary nature” and that, in order to invoke Art. 4(1), “two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency”: HRC General Comment No. 29, supra n. 115, at [2]. It should be noted that while Art. 9 is subject to derogation, the Human Rights Committee has taken the view that the requirement of court review over the lawfulness of detention forms a non-derogable element in Art. 9: HRC General Comment No. 29, supra n. 115, at [27]. According to the UN Special Rapporteur on the Question of Human Rights and States of Emergency, Art. 9 is “one of the rights most frequently affected by this type of situation, to the point that it is rare for a state of emergency not to involve the suspension of this right”: L. Despouy, Report by the UN Special Rapporteur on the Question of Human Rights and States of Emergency, UN Doc. E/CN.4/Sub.2/1997/19 (Jun. 23, 1997), at [161].

\(^{369}\) In de Montejo v. Colombia, Communication No. 64/1979, UN Doc. CCPR/C/OP/1 (HRC, Mar. 24, 1982) the Human Rights Committee noted that: “In the specific context of the present communication there is no information to show that article 14(5) was derogated from in accordance with article 4 of the Covenant; therefore the Committee is of the view that the State party, by merely invoking the existence of a state of siege, cannot evade the obligations which it has undertaken by ratifying the Covenant. Although the substantive right to take derogatory measures may not depend on a formal notification being made pursuant to article 4(3) of the Covenant, the State party is duty bound, when it invokes article 4(1) of the Covenant in proceedings under the Optional Protocol, to give a sufficiently detailed account of the relevant facts to show that a situation of the kind described in article 4(1) of the Covenant exists in the country concerned”: at [10.3].

\(^{370}\) HRC General Comment No. 29, supra n. 115, at [4]. Of course there will be severe limits on a refugee decision-maker’s ability to closely analyze this: see e.g. A v. Secretary of State for the Home Department, [2005] 2 AC 68 (UKHL, Dec. 16, 2004).

\(^{371}\) Civil and Political Covenant, supra n. 81, at Art. 4(1).
or detention “more extensively than what in the Committee’s view is permissible,”372 casting doubt on the validity of the Australian tribunal’s finding that arrest and detention in that country were not persecutory because they were “appropriate and adapted to achieving a legitimate object of the country concerned (Israel).”373

The issue of valid suspension of the usual rules regarding permissible arrest and detention was frequently considered by decision-makers in the context of the claims of Tamils fleeing the Sri Lankan civil war. Confronted with evidence in many cases that the government arrested, detained, and questioned Tamils (or a subset of Tamils) in response to specific or general threats to safety and security, it was sometimes assumed that short periods of arrest and/or detention were lawful and hence not evidence of persecution.374 The analysis was often too facile, since valid derogation at international law requires compliance with an additional constraint, namely that even an emergency suspension of rights may not “involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”375 As noted by the Canadian Federal Court of Appeal, it follows that where the Sri Lankan arrests “were motivated by the simple fact of the appellant’s being a Tamil”376 one cannot assume without careful analysis of the question of discrimination that the particular risk of arrest and detention was valid under international law, and thus non-persecutory.377

In sum, while states have a duty to protect the population as a whole by engaging in ordinary policing – and may, of course, in most cases arrest and detain persons on the basis of their criminal law authority – they must act on grounds and in accordance with procedures established by law.378 Even where the arrest and/or detention take place within

372 See Human Rights Committee, Concluding Observations, Israel, UN Doc. CCPR/CO/78/ISR (Aug. 21, 2003), at [12]. See also Human Rights Committee, Concluding Observations, Israel, UN Doc. CCPR/C/ISR/CO/3 (Sept. 3, 2010), at [7].


374 Although see Velluppillai v. Canada (Minister of Citizenship and Immigration) (Unreported, Can. FCTD, Mar. 9, 2000), where the Canadian Federal Court held that while it may generally be true that “[s]hort detentions for the purpose of preventing disruption or dealing with terrorism do not constitute persecution,” it is necessary to take account of the “special circumstances of the applicant . . . in particular his age [76]”: at [15]. This has been applied in subsequent case law: Murugamoorthy v. Canada (Minister of Citizenship and Immigration), (2003) 33 Imm. L. R. (3d) 119 (Can. FC, Sept. 29, 2003), at [6] and Kularatnam v. Canada (Minister of Citizenship and Immigration), [2004] FC 1122 (Can. FC, Aug. 12, 2004), at [10].

375 Civil and Political Covenant, supra n. 81, at Art. 4.

376 Thirunavukkarasu (Can. FCA, 1993), at [21].

377 It should be noted that the prohibited grounds in Civil and Political Covenant, supra n. 81, at Art. 4(1) are narrower than those in both Art. 2(2) and Art. 26. In particular, “national origin” is not included because during drafting, “it was accepted that ‘national origin’ could not be a prohibited ground of discrimination because nationals of enemy states were often discriminated against in war time”: McGoldrick, supra n. 116, at 413. But see A (UKHL, 2004). See generally, D. Cassel, “International Human Rights Law and Security Detention,” (2009) 40 Case W. Res. J. Intl. L. 383. Hence, a law which applies on its terms solely to a protected group, or in practice is applied only in respect of a protected group, is very likely to contravene the prohibition on discrimination and hence to constitute arbitrary arrest or detention amounting to serious harm: see Applicant A (Aus HC, 1997), at 258–59. But see Balan (Aus. FC, 2000).

378 For a very good treatment of this issue, see R (Sivakumar) v. Secretary of State for the Home Department, [2003] 1 WLR 840 (UKHL, Mar. 20, 2003), especially at 847 [18], where Lord Steyn explained his finding that the decision below which found that the applicant Tamil from the north of Sri Lanka who had been tortured as part of the investigation into suspected terrorist activities was not a refugee was in error: “On
a genuine legal framework, they must moreover not be “arbitrary,” and cannot result in the arrested or detained person being treated in an inhumane or undignified way.\textsuperscript{379} The risk of an arrest or detention that fails to meet these standards is presumptively serious harm for refugee law purposes. While states enjoy somewhat greater latitude to arrest and detain in the context of a genuine and officially declared national emergency, their broadened authority must nonetheless comport with the duties to take only such steps as are strictly required by the exigencies of the emergency, and to act in a way that is not solely grounded in discrimination. Only where there is compliance with these internationally defined norms will arrest and detention even in the context of a national emergency fail to be evidence of persecutory harm.

3.4.2 Prosecution

As in the case of the more specific issue of arrest and detention discussed above, persons facing the risk of prosecution under laws of the country of origin cannot normally be said to fear persecution.\textsuperscript{380} If the only risk faced is of legitimate prosecution or punishment for breach of the ordinary criminal law, refugee status is not to be recognized:

Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim – or potential victim – of injustice, not a fugitive from justice.\textsuperscript{381}

Indeed, a fugitive from justice is explicitly excluded from refugee status by virtue of Art. 1(F)(b).\textsuperscript{382}


For example, cases where the applicant was at risk of being prosecuted under the law of bovicide in Nepal: Lama v. Minister for Immigration and Multicultural Affairs, [1999] FCA 1620 (Aus. FC, Nov. 19, 1999) and SZDNE v. Minister for Immigration, [2004] FMCA 717 (Aus. FMC, Oct. 14, 2004); where the applicant was at risk of prosecution for assaulting a government official in the course of that official’s enforcement of family planning laws: Jiang (USCA, 5th Cir., 2010); where the applicant was at risk of being prosecuted for engaging in trading within the security zone in southern Lebanon occupied by Israel: El Hejjar v. Minister for Immigration and Multicultural Affairs, [2000] FCA 263 (Aus. FCC, Mar. 13, 2000) (although we note that the risk of torture in that case would give rise to a claim for complementary protection); where the applicant was at risk of capital punishment for murder in Yemen even where it is imposed by a Sharia court: Saleh v. Immigration and Naturalization Service, (1992) 962 F.2d 234 (USCA, 2nd Cir., Apr. 29, 1992), at 238–39; where any consequences the applicant feared in Haiti were the result of the human rights violations committed under the authority of the applicant’s husband: Mme Duvalier, 81.963 (Fr. CE [French Council of State], Jul. 1, 1992); and where the applicant was at risk of prosecution for his role in a fraudulent transaction involving a VAT refund where there was no evidence of political pretext or corruption in that case: Refugee Appeal No. 76339, [2010] NZAR 386 (NZ RSAA, Apr. 23, 2010). See generally Grahl-Madsen, supra n. 2, at 192.

\textsuperscript{379} UNHCR, Handbook, supra n. 1, at [56].

\textsuperscript{380} For an in-depth analysis of this provision, see infra Ch. 7.2.
On the other hand, a state’s laws, including in particular its criminal law, can be manipulated as a tool to persecute. Because persecution and prosecution are not mutually exclusive, a decision-maker confronted with the risk of what seems to be the exercise of criminal law authority must ensure that a prosecution is not in substance rights-violative, and hence serious harm for purposes of the “being persecuted” analysis. A risk of persecutory harm may arise in any of three situations: where a person will be prosecuted and/or punished outside the legitimate process of the state; where the criminal law breaches international human rights law; or where the criminal law is enforced or punishment meted out in a disproportionate or discriminatory manner. We examine each of these scenarios in turn.

First, there is a risk of serious harm where a person faces “prosecution” for actions not truly unlawful in the home state. For example, in considering the claim of a Chinese national at risk of official sanctions for assisting North Korean refugees, the US Court of Appeals for the Ninth Circuit determined that there was no Chinese law, statute or regulation prohibiting such conduct, meaning that any punishment imposed by state authorities could not be characterized as simply prosecution for violation of the ordinary criminal law. The Canadian Federal Court of Appeal has similarly recognized refugee status where the risk of “prosecution” will in fact be conducted under a “parallel system of political courts . . . [which] is universally recognized as subversive of the rule of law,” and where the applicant’s claim “was not based on fear of facing a criminal charge; it was based on fear of summary execution.” These decisions accord with the view of Grahl-Madsen that

[i]n cases where the government resorts to . . . extra-legal, or at least extra-judicial, measures, it seems fitting to speak of political persecution rather than prosecution for political offences. The same may apply if the courts have lost their independence and are in fact only a prolonged arm of the executive.

A second context in which what appears superficially to be only the risk of criminal law enforcement may amount to serious harm is where the law under which prosecution

---


384 In addition, prosecution under retroactive laws – that is, where the act was not criminal at the time of commission, Civil and Political Covenant, supra n. 81, at Art. 15 – may also amount to serious harm in this context.

385 Xun Li (USCA, 9th Cir., 2009), at 1109–10, discussing previous authority also. In that case, “[n]either the IJ [immigration judge] nor the Attorney-General was able to cite to any Chinese statute or regulation that criminalizes Li’s conduct, and the record demonstrates that no such law exists”: at 1110. Hence, “the record compels the conclusion that the officials were not engaged in legitimate criminal prosecution”: at 1111 (emphasis in original). See further infra Ch. 5.8.

386 Cobbold v. Canada (Minister of Employment and Immigration) (Unreported, Can. FCA, Nov. 30, 1990), at [2].

387 Addo v. Canada (Minister of Employment and Immigration), (1992) 142 NR 170 (Can. FCA, May 7, 1992), where the Canadian Federal Court of Appeal overturned the Panel’s decision: at [3].

388 Grahl-Madsen, supra n. 2, at 84.
or punishment is to occur is, on its face, in breach of international human rights law – for example, the “virulently anti-Semitic” Nazi-era Nuremberg Laws.\textsuperscript{389} Such “laws” are, of course, patently at odds with human rights law and cannot therefore be justified as the exercise of legitimate national criminal law authority. Yet an Australian decision assessing risk of “prosecution” under Bangladeshi law for desertion of a merchant ship failed even to inquire whether such a law was in breach of the prohibition of enforced labor.\textsuperscript{390} Instead, relying on Australia’s \textit{sui generis} approach previously described, the Full Federal Court found that the pertinent question was simply whether the punishment threatened was “appropriate and adapted” to achieving the objective of “securing Bangladesh’s reputation as a source of merchant seamen, important for the country as a means of providing employment and for future remittances”\textsuperscript{391} – an approach clearly at odds with a human-rights-based understanding of when what appears to be “prosecution” is in fact “persecution.” Similar questions arising in relation to religious practice, freedom of conscience (including military conscription), privacy, political expression and participation, and the ability to leave one’s country are considered below in the context of analysis addressed to those more specific issues.

Third, it may be the case that an otherwise valid criminal law is enforced in a discriminatory manner, whether in terms of the decision to prosecute, the procedure followed, or the punishment imposed following conviction.\textsuperscript{392} As noted by the US Court of Appeals for the Seventh Circuit in explaining why a refugee claim might be made out in such circumstances, the [immigration judge’s] “legal” conclusion that Tuhin fled “prosecution” not “persecution” seems to be based on a fundamental misunderstanding of the law... A facially legitimate prosecution may amount to persecution if the prosecution was motivated by a “nefarious purpose,” i.e., to punish political opinion... Tuinh asserted that he was targeted for prosecution because of his leadership role in the Jatiya Party. In support of this assertion, he pointed to the police beatings and threats that accompanied his arrest and human rights reports suggesting that the sweeping laws under which he was charged were frequently used to punish political expression and that the punishments under those laws were severe, ranging from five years to death for minor offenses such as obstructing

\textsuperscript{389} Xun Li (USCA, 9th Cir., 2009), at 1108, citing \textit{Sanchez-Trujillo v. Immigration and Naturalization Service}, (1986) 801 F.2d 1571 (USCA, 9th Cir., Oct. 15, 1986), at 1574. In the particular facts in Xun Li, the court noted: “International treaties further buttress our conclusion that Li’s conduct was not criminal. China itself has treaty obligations to protect the North Korean refugees. China has acceded to the 1951 UN Convention relating to the Status of Refugees and the 1967 Protocol to that Convention”: at 1111.

\textsuperscript{390} SZNWC (Aus. FFC, 2010), although we note that the Federal Magistrate in the decision below did refer in passing to “international and human rights standards”: SZNWC \textit{v. Minister for Immigration}, [2010] FMCA 266 (Aus. FMC, May 13, 2010), at [44].

\textsuperscript{391} SZNWC (Aus. FFC, 2010), at 36 [53], citing the Refugee Review Tribunal’s reasons. It is not clear from where the tribunal derived this objective. For another case which has not assessed such claims appropriately, see e.g. the confusing case on proselytization: SZDTM \textit{v. Minister for Immigration and Citizenship}, [2008] FCA 1258 (Aus. FC, Aug. 19, 2008). See also NAVZ (Aus. FC, 2005), and \textit{supra} nn. 365–367.

\textsuperscript{392} We note that the Qualification Directive, \textit{supra} n. 37, is particularly detailed in this regard, stating at Art. 9(2) that “[a]cts of persecution” include:

\begin{itemize}
  \item [(b)] legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
  \item [(c)] prosecution or punishment which is disproportionate or discriminatory;
  \item [(d)] denial of judicial redress resulting in a disproportionate or discriminatory punishment."
\end{itemize}
Similar concerns may arise in the case of prosecution for the criminal offense of “zina,” pertaining to “sexual intercourse by two individuals who are not married to each other.”

While framed in gender-neutral terms in the Afghan criminal code, in practice the provision is disproportionately used to prosecute women, often as a result of their subjection to rape, kidnapping, or enforced prostitution. Women subject to “prosecution” under the law are therefore not subject simply to the enforcement of an ordinary criminal law, but are—assuming the consequences to be sufficiently serious—at risk of serious harm relevant to the “being persecuted” inquiry.

Beyond simply selective prosecution, the legitimacy of the criminal law process can also be undermined by adjudication which ignores basic standards of procedural fairness or due process in order to effect or support political repression. In such a case, the individual concerned faces a violation of procedural rights, including the right of everyone to “a fair and public hearing by a competent, independent and impartial tribunal established by law.” More generally, because such a “prosecution” loses its claim to legal legitimacy, both the risk of conviction as well as any sanctions that may be imposed on the applicant following conviction may constitute serious harm for refugee law purposes.

For much the same reasons, what appears to be only exposure to prosecution may in substance amount to a risk of persecutory harm where the punishment meted out for breach of even an ordinary criminal law is discriminatory, in violation of human rights norms, or simply clearly excessive. As the US Court of Appeals for the Ninth Circuit explained,

---

393 Tuhin (USCA, 7th Cir., 2003), at 619–20; see also Lin v. Immigration and Naturalization Service, (2001) 238 F.3d 239 (USCA, 3rd Cir., Jan. 24, 2001), where the Third Circuit overturned the Board of Immigration Appeal’s refusal on the basis that there was no evidence to support the BIA’s assertion that the applicant was wanted only for trespass committed during a political protest; rather, he was clearly being pursued for his political opinion and activism: see 244–46. For an example of a case where it was appropriately found that the applicant faced prosecution not persecution, see Morente v. Holder, (2010) 401 Fed. Appx. 17 (USCA, 6th Cir., Oct. 29, 2010), at 24–25.

394 Human Rights Watch, supra n. 228, at 34. Ibid., at 60–78.


396 See e.g. Pacificador v. Canada (Minister of Citizenship and Immigration), (2003) 243 FTR 126 (Can. FC, Dec. 12, 2003), where the Canadian Federal Court found that the Board was in error in refusing the applicant’s claim where it had found that: “the prosecution of the Applicant was highly tainted by corruption and that such corruption was due to his political and family affiliation, a ground for claiming Convention refugee status”: at [78].

397 Civil and Political Covenant, supra n. 81, at Art. 14(1).

398 For a clear general statement of this proposition, see Wang (Aus. FFC, 2000), at 562–63; see also Chen Shi Hai (Aus. HC, 2000), at 301. This was made very clear in Linden J.A.’s judgment in Cheung regarding forced sterilization of women in the context of China’s one-child policy, where he explained, “[i]f, for example, rather than forced sterilization, the policy was to put to death every child subsequently born to a one-child family, no one could possibly deny that the law was persecutory. There is a point at which cruel treatment becomes persecution regardless of whether it is sanctioned by law”: Cheung (Can. FCA, 1993), at 323. See also UK Border Agency, “Considering Asylum Claims and Assessing Credibility” (Mar. 2011), at [5.9].

399 In Weheliye v. Minister for Immigration and Multicultural Affairs, [2001] FCA 1222 (Aus. FC, Aug. 31, 2001), the Federal Court of Australia overturned the Refugee Review Tribunal’s decision on the basis that it had failed to consider whether the laws of adultery in Somalia were applied in a discriminatory
“a showing of disproportionate punishment may support a claim that the prosecution is a pretext for persecution on account of political opinion.”

In sum, while undertaking criminal prosecutions is a legitimate function of government and is indeed required in order for a state to fulfil its human rights obligations, it is nonetheless possible that a risk of prosecution may amount to serious harm for refugee law purposes. Analysis of these issues by reference to international human rights standards produces a principled and consistent approach to determining when there is a risk of persecutory harm, rather than simply legitimate prosecution – in particular where a person will be prosecuted and/or punished outside the legitimate process of the state; where the criminal law breaches international human rights law; or where the criminal law is enforced or punishment meted out in a disproportionate or discriminatory manner.

### 3.4.3 Freedom of movement

Persons lawfully in a state are entitled, within the territory of that state, to enjoy both liberty of movement and freedom to choose their place of residence. As the International Court of Justice affirmed in the *Israeli Wall* case, efforts to impede free internal movement “are contrary to international law” as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also [on the facts here] impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child.

Under a human rights framework, therefore, those denied either free internal movement or the right to choose their place of residence face the presumptive risk of serious harm relevant to the “being persecuted” inquiry. While such claims arise infrequently, there is a logic to their recognition: not only is the refusal to allow a lawful resident to move freely within her own country clear evidence of the social and political disfranchisement that refugee law is meant to remedy, but it is in substance an only somewhat less intrusive form of detention.

manner: at [58]. There are cases where male applicants have argued that prosecution under the adultery laws in Iran constitutes serious harm: see e.g. *Minister for Immigration and Multicultural Affairs v. Darboy*, (1998) 52 ALD 44 (Aus. FC, Aug. 6, 1998), where the court held that the tribunal had committed a reviewable error for failing to consider “whether the law was applied in a way that was discriminatory”: at 52.


Civil and Political Covenant, *supra* n. 81, at Art. 12(1).

*Legal Consequences of the Construction of a Wall* (ICJ, 2004), at 201 [163].

The internationally guaranteed right to freedom of movement also encompasses the right of everyone to "be free to leave any country, including his own."\(^{405}\) This aspect of the right to freedom of movement is implicated in refugee applications where the claimant faces the real chance upon return of punishment for having left her country – including subjection to criminal sanctions such as imprisonment, "physical intimidation, arrest, loss of employment or expulsion of their children from school or university."\(^{406}\) Such penalties cannot be understood to be simply the general application of valid criminal law since they are, in substance, the criminalization of an internationally guaranteed human right.\(^{407}\) For this reason, courts in, for example, Austria,\(^{408}\) Belgium,\(^{409}\) and Canada\(^{410}\) have found that a person who would be charged or prosecuted for having exercised their right to "be free to leave any country, including his own," faces the risk of persecutory harm.\(^{411}\)

Despite the presumptive relevance to the "being persecuted" inquiry of denials of either the right to internal movement or to leave one's country, a human rights framework acknowledges that these rights may be subject to restrictions that "are provided by law, are necessary to protect national security, public order (\textit{ordre public}), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized" in the Civil and Political Covenant.\(^{412}\) If the limitation to which an applicant would be subject falls within the scope of such a permissible limitation it is not rights-violative, and thus not a form of persecutory harm. Yet as determined in the \textit{Israeli Wall} case, "it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends."\(^{413}\) Any restriction "must conform to the principle of proportionality"\(^{414}\) and "must be the least intrusive . . . amongst those which might achieve the desired result."\(^{415}\)

\(^{405}\) Civil and Political Covenant, \textit{supra} n. 81, at Art. 12(2).
\(^{406}\) The Human Rights Committee notes that state practice reveals unnecessary measures which include "harassment of applicants, for example by physical intimidation, arrest, loss of employment or expulsion of their children from school or university": Human Rights Committee, \textit{General Comment No. 27: Freedom of Movement}, UN Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999) ("HRC General Comment No. 27"), at [17].
\(^{407}\) See text \textit{supra}, at nn. 389–91.
\(^{408}\) The Austrian Administrative Court "has repeatedly stated that sanctions for illegal departure and stay abroad, if considerably severe and disproportionate, may be relevant for granting asylum": \textit{S v. Independent Federal Asylum Board (UBAS)}, 2001/20/0426 (Au. VwGH, Jan. 29, 2004) (unofficial translation). See also 99/20/0160 \textit{v. Independent Federal Asylum Board (UBAS)} (Au. VwGH, Nov. 21, 2002).
\(^{409}\) The Belgian Council for Alien Law Litigation found that an Uzbek national who would be subject to treatment such as "questioning at the very least" likely accompanied by "harassments, telephone threats and more serious violations of human rights" on return to Uzbekistan (from which he had departed illegally) constituted serious harm: see 22144 (Bel. CCE, Jan. 28, 2009) (unofficial translation).
\(^{410}\) In Canada, notwithstanding the negative decision of the Federal Court of Appeal in \textit{Valentin} (Can. FCA, 1991), the court has held that a claim may be made out where a Cuban man would be subjected to imprisonment as well as "repercussions over and beyond the statutory sentence": \textit{Castaneda v. Canada (Minister of Employment and Immigration)}, (1993) 69 FTR 133 (Can. FCTD, Oct. 19, 1993), at [15].
\(^{411}\) For an incorrect approach to this type of case which fails to take into account that a law criminalizing departure in fact criminalizes the exercise of human rights, see \textit{Guo Wei Zhi v. Minister for Immigration and Multicultural Affairs} (Unreported, Aus. FC, Dec. 10, 1998). See also \textit{AA v. Secretary of State for the Home Department}, [2007] 1 WLR 3134 (Eng. CA, Apr. 12, 2006).
\(^{412}\) Civil and Political Covenant, \textit{supra} n. 81, at Art. 12(3).
\(^{413}\) \textit{Legal Consequences of the Construction of a Wall} (ICJ, 2004), at 193.
\(^{414}\) \textit{Ibid.}, citing HRC General Comment No. 27, \textit{supra} n. 406, at [14].
\(^{415}\) \textit{Ibid.}\)
Thus, for example, persons facing the application of domestic laws or administrative practices that effectively nullify either the right to internal movement or to leave one’s own country will almost always face the risk of persecutory harm, since such a total abrogation of a right will be virtually impossible to justify as necessary and proportional.\footnote{Civil and Political Covenant, supra n. 81, at Art. 12(3), clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected: HRC General Comment No. 27, supra n. 406, at [14]. The permissible limitations which may be imposed on the rights protected under Art. 12 must not nullify the principle of liberty of movement, and are governed by the requirement of necessity provided for in Art. 12(3), and by the need for consistency with the other rights recognized in the Covenant: HRC General Comment No. 27, supra n. 406, at [2].}

Beyond the rights to internal freedom of movement and to be able freely to leave one’s own country, international human rights law also guarantees that “[n]o one shall be arbitrarily deprived of the right to enter his own country.”\footnote{The Human Rights Committee has emphasized that “there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable”: Civil and Political Covenant, supra n. 81, at Art. 12(3) specifically applies to the “above-mentioned rights.”} This right prohibits efforts directly or indirectly to deny re-entry,\footnote{As the Human Rights Committee notes in General Comment No. 27: “It implies the right to remain in one’s own country”: HRC General Comment No. 27, supra n. 406, at [19].} for example by “stripping a person of nationality or . . . expelling an individual to a third country [thereby] arbitrarily prevent[ing] [a] person from returning to his or her own country.”\footnote{Ibid., at [21].} This aspect of the right may be infringed either on a particularized basis or more generally, an example of the latter being the citizenship laws of some states that deprive women of citizenship upon marriage to a foreign national.\footnote{This is recognized in administrative guidelines in Australia: see Department of Immigration and Multicultural Affairs, supra n. 174, at 98. It is stated that: “Gender-based persecution for reasons of nationality may have its genesis in laws which deprive a woman of her citizenship in certain situations (for example, marriage to a foreign national).” This is also recognized in the UK Border Agency, “Gender Issues in the Asylum Claim” (Sept. 2010): “women may be deprived of full citizenship rights in certain circumstances, if they marry a foreign national. In such circumstances it may be necessary to consider what harm results from this loss and whether it amounts to persecution on the basis of nationality”: at 10.}

In contrast to other aspects of freedom of movement, the right not to be arbitrarily denied the right to enter one’s own country is not subject to limitation (only emergency derogation, discussed above, is permissible).\footnote{Art. 12(4) is not subject to the same limitations as Art. 12(1) and (2), as Art. 12(3) specifically applies to “the above-mentioned rights.”} It follows that where a person faces the risk of denial of re-admission to her own country, human rights law is engaged, thus grounding a claim to serious harm for refugee law purposes.\footnote{The fact that the deprivation of citizenship will most likely have occurred prior to the application for refugee status has been held not to affect the validity of a claim because such an act of exclusion causes ongoing, significant harm to the individual concerned: 10 C 50.07 (Ger. BverwG [German Federal Administrative Court], Feb. 26, 2009), at [22] (unofficial translation). See also Refugee Appeal No. 73861 (NZ RSAA, Jun. 30, 2005).}

Despite the clear logic of seeing a prohibition of re-entry into one’s own country as denial of the right to freedom of movement and hence as serious harm, there is nonetheless a unique conceptual awkwardness to such claims. In cases predicated on risk of the denial of re-entry, the relevant harm will not accrue, as is usually the case, inside the country of
origin — since entry is by definition refused. Recognition of refugee status is nonetheless appropriate since the definition requires only that the person seeking protection “is outside” her country because of a well-founded fear of being persecuted. There is, in other words, no need to find that the harm feared is one that would actually take place inside the home state, but simply that the risk of being persecuted accounts for the inability to return. A person who is prevented from re-entering her own country is outside her country because the prospect of a rights-violative denial of re-entry explains her inability to return there.\footnote{Whether or not a person is actually stripped of nationality, the arbitrary refusal of the right to return to one’s country of citizenship for a Convention reason “amount[s] to persecution” on the basis that it would “negate one of the most fundamental rights attached to nationality, namely the right to live in the home country . . . Denial of the right of abode would necessarily prevent the applicant from exercising a wide range of other rights — if not all — typically attached to nationality, as well as almost inevitably involving an interference with private and/or family life”: \textit{MA (Ethiopia) v. Secretary of State for the Home Department}, [2010] INLR 1 (Eng. CA, Apr. 2, 2009), at [60] (per Élias L.J.) and at [66] and [73] (per Stanley Burnton L.J.). See also \textit{Refugee Appeal No. 73861} (NZ RSAA, 2005), at [107]: “Indeed he was effectively expelled from the country as part of a series of persecutory acts by the Saudi authorities.” Further it held that, “[h]is exclusion from Saudi Arabia, itself a form of persecution, is ongoing”: at [117]. In \textit{10 C 50.07} (Ger. BverwG [German Federal Administrative Court], 2009) the court explained that “[d]e facto deprivations of citizenship may be relevant to asylum when the state leaves the individual with the formal legal position, but de facto denies him or her the resulting rights of citizenship, and in particular does not grant him or her the protection of the state”: at [23] (unofficial translation). On denial of re-entry as persecution, see \textit{Adan} (Eng. CA, 1997), at 1124–26. See also \textit{Ward} (Can. SC, 1993), at 711 for reference to this issue in historical materials.}

Importantly, the right to re-enter one’s own country — indeed, the whole of the right to freedom of movement, including to internal movement and choice of residence — is not a right that inheres only in citizens. Courts have sometimes assumed that a denial of re-entry “does not interfere with a stateless person’s rights in the way that it does with the rights of a national,”\footnote{See Race Convention, \textit{supra} n. 107, at Art. 5(d)(ii); Children’s Convention, \textit{supra} n. 109, at Art. 10(2); Convention on the Rights of Persons with Disabilities, UNGA Res. A/RES/61/106, 2515 UNTS 3, adopted Dec. 13, 2006, entered into force May 3, 2008, at Art. 18(1)(d).} thus impugning a claim to recognition of refugee status made on this basis. Yet international human rights law makes no such distinction.\footnote{See \textit{supra} Ch. 1.3.3; and M. Foster, “An Alien by the Barest of Threads: The Legality of the Deportation of Long-Term Residents from Australia,” (2009) 33 Melb. U. L. Rev. 483, at 516–17.} The right to return is a right to return to one’s “own country” — a notion that does not mean simply a right to go back to one’s country of “citizenship” or “nationality.”\footnote{HRC General Comment No. 27, \textit{supra} n. 406, at [20]. See also Joseph, Schultz, and Castan, \textit{supra} n. 134, at 375. This is supported in Concluding Observations of the Human Rights Committee in respect of Israel: see Human Rights Committee, Concluding Observations, Israel, UN Doc. CCPR/C/79/Add.93 (Aug. 18, 1998), in relation to Palestinians “travelling in and between East Jerusalem, the Gaza Strip and the West Bank,” that “Israel is urged to respect the right to freedom of movement provided or under article 12, including the right to return to one’s country”: at [22].} Rather, human rights supervisory bodies have determined that a stateless person with a long-standing and genuine connection to their country of residence is also entitled to claim the state as “his own country” and thus to re-enter that state.\footnote{See \textit{supra} n. 424} Both persons with citizenship and those who are stateless may therefore make claims to refugee status grounded on the risk of unlawful denial of
re-entry. Indeed, since many if not most stateless persons who leave the country in which they were once habitually resident will find themselves barred from returning to that country, the persecutory nature of that harm will in practice open the doors to refugee status for a significant subset of the stateless population.

In contrast to persons who are outside their own country because they face the forward-looking rejection of re-entry, a person who has been denationalized – purely past persecution, and incapable of being repeated – will not necessarily be able to establish a forward-looking risk of serious harm. Unless able to show that the denationalization poses a real chance of denial of re-entry, a refugee claim by a denationalized person may be recognized only if she is able to establish a distinct forward-looking risk of harm. Thus, for example, Germany’s Federal Administrative Court found that “a deprivation of citizenship for reasons relevant to asylum may represent persecution” because in stripping an individual of her nationality the state deprives the individual in question of his or her fundamental status as a citizen, and thus necessarily denies residency protection, thereby rendering the person stateless and unprotected – in other words: it excludes him or her from the state’s system of protection and peace.

Although the English Court of Appeal rejected the argument that a stateless Palestinian could found a claim on denial of re-entry in MA (Palestinian Territories) (Eng. CA, 2008), the same court apprehended the “force of [the] argument” that the appellant “has a well founded fear of being persecuted for a Convention reason namely race because, as a Palestinian, he will not be readmitted to the West Bank”: MT v. Secretary of State for the Home Department, [2009] Imm AR 290 (Eng. CA, Oct. 22, 2008), at [46]. Scott Baker L.J. felt compelled to reject the claim based on the precedent of MA (Palestinian Territories): at [47]. There is support for this in state practice. For example, in 1995 the US Immigration and Naturalization Service General Counsel issued a legal opinion addressing the question of asylum eligibility for stateless Palestinians, stating that “Palestinians who are expelled, denied re-entry, or have their property confiscated without compensation because of their Palestinian nationality may qualify for refugee status, if there is not a legitimate, non-discriminatory basis for the governmental action”: see K. Musalo, J. M. Moore, and R. A. Boswell, Refugee Law and Policy (3rd edn., 2007), at 273. In Ouda (USCA, 6th Cir., 2003) the Court of Appeals for the Sixth Circuit held, in considering whether there was a risk of being persecuted on the part of the Palestinians on return to Kuwait, that “[t]he mere fact that the Oudas were ordered by the government to leave Kuwait because they were perceived enemies of their country is sufficient alone to establish past persecution”: at 454. However, in other decisions, claims have been rejected because petitioners have “failed to show that entry would be denied to them based on their nationality as opposed to the law of those countries favouring citizenship based on ancestry or marriage”: Ouda at 453, citing Al Najjar (USCA, 11th Cir., 2001), at 1291–92. In Canada it has long been accepted that the decision-maker “is compelled to ask itself why the applicant is being denied entry to a country of former habitual residence because the reason for the denial may, in certain circumstances, constitute an act of persecution by the state”: Thabet v. Canada (Minister of Citizenship and Immigration), [1998] 4 FC 21 (Can. FCA, May 11, 1998), at [32]. In AAAAD v. Refugee Appeals Tribunal, [2009] IEHC 326 (Ir. HC, Jul. 17, 2009) the Irish High Court granted leave to bring judicial review proceedings on the question whether persecution could be established on the basis that “the applicant will not be accepted back into Kuwait because he is a Bidoon”: at [86].
The US Court of Appeals for the Seventh Circuit similarly noted that while not all denationalizations are “instances of persecution,” nonetheless

[if Ethiopia denationalized the petitioner because of his Eritrean ethnicity, it did so because of hostility to Eritreans; and the analogy to the Nazi treatment of Jews is close enough to suggest that his denationalization was persecution Indeed, if to be made stateless is persecution, as we believe... then to be deported to the country that made you stateless and continues to consider you stateless is to be subjected to persecution.430

In line with these decisions, despite the insufficiency of (past) denationalization per se to ground a claim of forward-looking serious harm, it is surely right to recognize the existence of serious harm at least in those cases where the denationalized person would, once in the country, face forms of consequential human rights abuse – including because of exclusion from the state’s protective apparatus – that rise to the level of serious harm.431

In sum, the risk of denial of the right to internal freedom of movement and choice of residence will ordinarily amount to serious harm for refugee law purposes, unless that denial conforms to the strict requirements for valid limitation of that right at international law. Denial of the right to enter one’s own country – a right not subject to limitations, and inhering in both citizens and in non-citizens who have a long-term attachment to the country – is also a clear breach of the internationally guaranteed right to freedom of movement, the risk of which will thus properly be understood to be serious harm for refugee law purposes.

3.4.4 Right to work

The prohibition of forced labor is derived from both the Civil and Political Covenant’s prohibition of servitude432 and from the Economic, Social and Cultural Covenant’s stipulation that work must be “freely chosen”433 – meaning that a person may “not [be] forced in any way whatsoever to exercise or engage in employment.”434 A claim based on forced or

430 Haile v. Holder, (2010) 591 F.3d 572 (USCA, 7th Cir., Jan. 6, 2010), citing for example “instances in which, as a result of altered boundaries, a person finds himself a citizen of a different country”: at 573. See also Stserba (USCA, 6th Cir., 2011), at 973–76.

431 In EB (Ethiopia) v. Secretary of State for the Home Department, [2007] EW CA Civ 809 (Eng. CA, Jul. 31, 2007), Jacob L.J. noted that ordinarily “someone who has been deprived of nationality because of race would, if returned, be in a near-impossible position – unable to vote, to leave the country or even unable to work. They may well be treated as pariahs precisely because they had their nationality taken away”: at [75]. See also Haile v. Gonzales, (2005) 421 F.3d 493 (USCA, 7th Cir., Aug. 29, 2005), at 497 in relation to two Ethiopians of Eritrean descent stripped of their Ethiopian citizenship. In Tesfamichael v. Minister for Immigration and Multicultural Affairs, [1999] 60 ALD 223 (Aus. FC, Dec. 2, 1999) the Federal Court held that expulsion or exile from the country of nationality would “fall within the category of harm sufficient to constitute persecution”: at [54]. This was supported by early academic writings. For example, Grahl-Madsen took the view that “[a]s denationalization (deprivation of citizenship) for political, ethnic or similar reasons incurs loss of civil rights, that too may be classified as persecution”: Grahl-Madsen, supra n. 2, at 215.

432 Which includes “forced or compulsory labour”: Civil and Political Covenant, supra n. 81, at Art. 8(3)(a).

433 Economic, Social and Cultural Covenant, supra n. 104, at Art. 6(1).

434 Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work, UN Doc. E/C.12/GC/18 (Feb. 6, 2006) (“CESCR General Comment No. 18”), at [6]. We note that Art. 2(3) permits discrimination in limited circumstances against non-nationals in regard to “economic rights” which may include work. This will not, however, sustain a blanket prohibition: see text supra, at nn. 323–27.
3.4.4 Right to Work

compulsory labor would thus clearly rise to the level of serious harm sufficient to ground a claim to face the risk of “being persecuted.”

Refugee claims are, however, rarely grounded in forcible subjection to work. The more common allegation is instead that an applicant has been denied access to work on a discriminatory basis. Since everyone has “the right to work, which includes the right of everyone to the opportunity to gain his living by work,” many claims involving denial of the ability to work have been sensibly recognized by refugee decision-makers as demonstrative of serious harm. So long as denial of the ability to work is based on discrimination, the fact that the duty to allow all persons free access to work is technically an obligation subject to progressive implementation (rather than requiring immediate implementation) is irrelevant: under Art. 2(2) of the Economic, Social and Cultural Covenant, states are required to pursue implementation of such rights “without discrimination of any kind.”

While denial of the right to work is perhaps most often considered as part of a claim to fear persecution on cumulative grounds, it may also independently ground a claim to fear serious harm for refugee law purposes in situations where the deprivation is sufficiently extensive.

First and perhaps most readily understood to be persecutory harm is the situation in which an applicant faces the risk of “economic proscription” – the complete, or nearly complete, denial of the right to work. Given the clear correlation between work and

435 See discussion of slavery, supra Ch. 3.3.3.
436 Economic, Social and Cultural Covenant, supra n. 104, at Art. 6(1).
437 Ibid., at Art. 2(2). See also CESCR General Comment No. 18, supra n. 434, at [33], describing violations of the obligation to respect the right to work.
438 In addition to common law jurisprudence on this topic, discussed below, Germany's Federal Administrative Court has explained that it is appropriate to consider, in assessing serious harm in refugee law, “discrimination . . . in respect of access to education or health facilities, but also occupational or economic restrictions on earning a living”: 10 C 23.12 (Ger. BverwG, Feb. 20, 2013), at [36] (unofficial translation). For an earlier decision, see 2 BvR 205/92 (Ger. BverfG [German Federal Constitutional Court], May 20, 1992). In addition, in Jesús Luis v. Administración del Estado (Sp. TS, Oct. 13, 2004), the Spanish Supreme Court considered the loss of his job due to political activities to be part of the applicant's claim for persecution, which also included fear of arrest and detention.
survival in most economies.\textsuperscript{440} It is unsurprising that Grahl-Madsen writing nearly fifty years ago explained that “[i]t is an established practice that economic proscription so severe as to deprive a person of all means of earning a livelihood” constitutes persecution, and that “[s]uch proscription is deemed to exist in the case of systematic denial of employment.”\textsuperscript{441}

Economic proscription is most easily established in the context of “blacklisting” or other exclusion from work in a state-controlled economy. As explained by the Federal Court of Canada:

The ability to sustain oneself normally depends upon the opportunity to work and earn a livelihood . . . [i]f, in a country in which the state controls the economy, the state takes steps to prevent a person from securing employment, the consequences will be substantially prejudicial to the person concerned. Systematic governmental interference with the opportunity to find work must be viewed as a serious restraint on an individual.\textsuperscript{442}

In such a case, the fact that an applicant “did, and might again, obtain employment illegally, is no answer.”\textsuperscript{443} Outside the context of a state-controlled economy, economic proscription also exists where a sustained or systemic denial of the right to work – whether at the hands of the state, or not subject to rectification by the state – substantially impairs the ability of an individual to survive.\textsuperscript{444} In \textit{Ouda}, for example, the US Court of Appeals for the Sixth Circuit found there to be evidence of persecutory harm since

[a]fter Kuwait was liberated, Ouda’s father was not allowed to return to work because he was a Palestinian who was perceived as supporting Iraq when he continued teaching during the war. Indeed, the Kuwaitis engaged in a general campaign to prohibit Palestinians from working, attending school, buying food, obtaining water or obtaining drivers’ licenses.\textsuperscript{445}

The Canadian Federal Court has also clearly insisted on “the importance of being able to pursue a livelihood,”\textsuperscript{446} requiring decision-makers carefully to consider “the restriction on

\textsuperscript{440} The Committee on Economic, Social and Cultural Rights has explained that: “The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community”: \textit{CESCR General Comment No. 18}, supra n. 434, at [1]. See also “The Michigan Guidelines on the Right to Work (No. 5, 2009),” (2010) 31 Mich. J. Intl. L. 293 (“Michigan Guidelines on the Right to Work”), at 293, noting that it is “interrelated, interdependent with, and indivisible from the rights to life, equality, the highest attainable standard of physical and mental health, [and] an adequate standard of living.”

\textsuperscript{441} Grahl-Madsen, supra n. 2, at 208; Hathaway, \textit{Refugee Status}, at 238; and Foster, supra n. 120, at 90–91.

\textsuperscript{442} \textit{Xie v. Canada (Minister of Employment and Immigration)}, (1994) 75 FTR 125 (Can. FCTD, Mar. 3, 1994), at [11]. The court went on to say that if “his blacklisting makes it illegal for him to be employed by anyone in China,” this would likely result in persecution: at [12]. The court did not make a conclusive finding, as its role was simply to find error and send the matter back to the panel for rehearing: see at [15]. See also \textit{Li v. Canada (Minister of Employment and Immigration)}, (1994) 88 FTR 46 (Can. FCTD, Nov. 23, 1994): “Such total or systemic inability to earn a living constitutes persecution”: at [30]; \textit{Soto v. Canada (Minister of Citizenship and Immigration)}, [2002] FCT 768 (Can. FCTD, Jul. 10, 2002), at [16]–[22].

\textsuperscript{443} \textit{Xie} (Can. FCTD, 1994), at [13].


\textsuperscript{445} \textit{Ouda} (USCA, 6th Cir., 2003), at 454.

\textsuperscript{446} \textit{Horvath v. Canada (Minister of Citizenship and Immigration)}, [2011] FC 1350 (Can. FC, Nov. 23, 2011), at [43].
3.4.4 Right to Work

[an] Applicant’s ability to pursue a livelihood.” The court has applied this requirement in a range of cases – including, for example, where there was evidence of persistent discrimination in accessing employment by Roma in Hungary; where there was a failure to “consider whether the systemic discrimination against HIV-positive persons [in Venezuela] in employment amounted to persecution”; and where there were allegations of systemic barriers to employment in Mexico based on HIV status. Courts have been appropriately cautious, requiring sufficient evidence that a denial of the right to work is indeed sustained or systemic, since the loss of one particular job is of course not sufficient in and of itself to establish serious harm under international human rights law.

Economic proscription may also be manifested by the destruction of a person’s business, confiscation of property, or prohibition on or inability to operate a business. So long as the risk truly rises above financial hardship and amounts in substance to the inability to earn one’s livelihood, the right to work is engaged. An Australian decision has thus recognized that

[where land is seized unjustly or unlawfully by a government or its agents or where a government condones or approves of seizure by individuals using threats of violence and the land provides the livelihood of the person dispossessed, and the seizure is part of a pattern of seizures based on race, religion, political opinion or targeted at an identifiable

---

447 Ibid., at [42].
448 Ibid., at [32]–[43].
452 See S2012 of 2003 v. Minister for Immigration, [2008] FMCA 954 (Aus. FMC, Jul. 31, 2008), at [23], and Cheng (USCA, 3rd Cir., 2010), where the US Court of Appeals for the Third Circuit held that “the seizure of property as significant as the family farm and truck, when those assets served as the exclusive source of the family’s livelihood, constitutes a severe economic sanction that ‘could threaten [the] family’s freedom if not their lives’”: at 194 (citations omitted).
453 Hence in Khourassany v. Immigration and Naturalization Service, (2000) 208 F.3d 1096 (USCA, 9th Cir., Apr. 5, 2000) the court appropriately rejected a claim where the applicant “was able to continue to operate his other businesses even after his restaurant was forced to close”: at 1100. See also Sanchez v. Canada (Minister of Citizenship and Immigration), (2006) FC 604 (Can. FCTD, May 16, 2006), where the court found that “[a]t most, the actions of the FARC were effectively depriving [the applicant] of the opportunity to pursue part-time work [in the form of a part-time business outside of his day job]”: at [17]–[20].
Serious harm... all of the elements needed to satisfy the test of persecution under the Convention... are present.455

But what of cases that fall short of economic proscription, in which the risk to the right to work does not involve the complete nullification or substantial impairment of the right? Is there a risk of serious harm where, for example, an individual is prohibited from working in a profession or other occupation for which she is objectively qualified?

As a matter of international human rights law, the right to work is understood to transcend mere survival. It rather “forms an inseparable and inherent part of human dignity,”456 and is essential to “development and recognition within the community.”457 Indeed, the exclusion of a person from the profession or occupation for which she is objectively qualified, particularly when accompanied by relegation to a job considered demeaning, is often undertaken precisely in order to degrade or demean, and for that reason may actually amount to degrading treatment.458 Refugee claims by Mandeans denied employment because they are considered “dirty”459 and by a Roma cook refused employment because “restaurant patrons would not eat in a restaurant with a Roma cook”460 raise precisely this possibility. As the Australian Federal Court has made clear, it would be just as much oppressive and thus involve persecution if, instead of there being no ability to obtain employment, there is ability to obtain employment but limited to jobs which are... demeaning to the person employed to do them.461

But even where there is no such issue of degrading treatment, it may still be the case that denial of access to work for which one is objectively qualified justifies a finding of serious harm for refugee law purposes.462 Drawing on High Court of Australia authority that “the

456 CESCR General Comment No. 18, supra n. 434, at [1].
457 Ibid. 458 See supra Ch. 3.3.2.
459 SBBG(Aus. FFC, 2003), where the Federal Court noted, in explaining its reasons for quashing the Refugee Review Tribunal decision, that “it is at least arguable that what the Tribunal described as ’inconveniences, disruptions and limitations’ are, in law, ’persecution’ under the Convention”: at [29].
460 Horvath (Can. FC, Nov. 23, 2011), at [32].
461 Prahastono (Aus. FC, 1997), at 267, and authorities cited therein. In Kord (Aus. FFC, 2002) the Full Federal Court expressed the principle as follows: “[h]ad he [the applicant] not been able to find employment at all, or if the differences between the conditions of the employment open to him and of that not open to him were significant, those matters would also have been relevant”: at 87 [53]. In Soon v. Minister for Immigration and Ethnic Affairs, (1994) 37 ALD 609 (Aus. FC, Sept. 13, 1994) the Federal Court dismissed the application on the basis that “[t]here is no evidence that he has been forced to engage in demeaning work well below the level of any qualifications he has so as in substance to deny his right to work”: at 617.
462 In those jurisdictions, such as the US, which tend to frame the analysis as one involving economic disadvantage, the focus is often, unsurprisingly, on the economic impact of exclusion from work. Hence, if a person is merely excluded from work in his or her chosen field, but can otherwise obtain some form of employment, refugee claims are less likely, although not impossible, to establish. For example, the Eighth Circuit continues “to require a showing that allegations of economic hardship threaten the petitioner’s life or freedom in order to rise to the level of persecution”: Makatengkeng v. Gonzales, (2007) 495 F.3d 876 (USCA, 8th Cir., Aug. 3, 2007), at 883, and “to rise to the level of [persecution]”; an economic deprivation must be sufficiently severe “to constitute a threat to an individual’s life or freedom”: Ji v. Mukasey, (2008) 263 Fed. Appx. 116 (USCA, 2nd Cir., Feb. 7, 2008), at 118. (See also Aranyi v. Mukasey, (2008) 527 F.3d 737 (USCA, 8th Cir., May 28, 2008), at 740–41; Naik v. US Attorney General, (2010) 402 Fed. Appx. 451 (USCA, 11th Cir., Nov. 5, 2010), at 454; Barreto-Clara v. US Attorney General, (2001) 275 F.3d 1334 (USCA, 11th Cir., Dec. 19, 2001); Sofinet v. Immigration and Naturalization Service, (1999) 196 F.3d 742
denial of access to employment, to the professions and to education... may constitute persecution if imposed for a Convention reason,” it has been determined that there is a risk of serious harm where a person is relegated to work “of a type which ignores any academic or special experience or qualification to work in a highly skilled area for which the person has been specially trained.” Similarly, the Federal Court of Canada has determined that “[t]o permanently deprive a teacher of her profession and to forever convert an educated young woman into a farm-hand and garment worker, constituted persecution.” The US Court of Appeals for the Sixth Circuit similarly insisted that since “[d]estitution or total deprivation of livelihood... is not required,” there is persecutory harm where a person has been subject to “sweeping limitations” on access to work in her chosen profession, “particularly if that profession is a highly skilled one [in that case, medicine] in which the person invested education and training.”

(USCA, 7th Cir., Nov. 2, 1999.) On the other hand, in Kadri v. Mukasey, (2008) 543 F.3d 16 (USCA, 1st Cir., Sept. 30, 2008), the US Court of Appeals for the First Circuit criticized existing authority relating to economic persecution on the basis that the “BIA and our sister circuits have not been consistent in articulating such a standard”; indeed “the BIA has applied at least three different standards”; at 22. In remanding that case to the Board of Immigration Appeals to apply the new standard set out in In re T-Z- (USBIA, 2007), the First Circuit noted that the applicant’s inability to practice as a doctor “may be able to sustain a claim for persecution”: at 22. See also Borca (USCA, 7th Cir., 1996), at 212, regarding a Romanian radiologist who was relegated to work as a farm labourer.

Chan (Aus HC, 1989), at 430. This has been cited in many subsequent decisions relating to employment: see e.g. Chen v. Minister for Immigration and Ethnic Affairs, (1995) 58 FCR 96 (Aus. FC, Jun. 30, 1995), at 104; Gunaseelan v. Minister for Immigration and Multicultural Affairs, (1997) 49 ALD 594 (Aus. FC, May 9, 1997), at 599; Prahastono (Aus. FC, 1997), at 264–65. Further, this remains the position notwithstanding that Migration Act 1958 (Cth), s. 91R(2) provides that “instances of serious harm” include “denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist”: (f). See also NBFP (Aus. FFC, 2005); SBBG (Aus. FFC, 2003), at [29]; MZKAO v. Minister for Immigration and Multicultural and Indigenous Affairs, [2003] FMCA 284 (Aus. FMC, Jun. 23, 2003), at [14] (upheld in Applicant MZKAO v. Minister for Immigration and Multicultural and Indigenous Affairs, [2003] FCA 1484 (Aus. FC, Dec. 12, 2003)). Migration Act 1958 (Cth), s. 91R is clearly designed to tighten the test for serious harm: see Minister for Immigration and Multicultural and Indigenous Affairs v. VBAO, (2004) 139 FCR 405 (Aus. FC, Nov. 19, 2004), at 409 [20]. Although see SZMGR v. Minister for Immigration and Citizenship, [2009] FMCA 174 (Aus. FMC, Mar. 20, 2009) for the view that the pre-s. 91R case law is relevant to determining “serious harm.” Note that in MZWPD (Aus. FC, 2006) it was said that while s. 91R(2) “imposes a significant constraint on what may amount to persecution,” it is non-exhaustive and does not constitute a definition: at [82]–[83]. See also SZCWF (Aus. FFC, 2007), at [32].


He v. Canada (Minister of Employment and Immigration), (1994) 78 FTR 313 (Can. FC, Jun. 1, 1994), at [15]. See also Cabello et al. v. Canada (Minister of Citizenship and Immigration), (1995) 93 FTR 156 (Can. FCITD, Jan. 30, 1995), at [5]–[6]. See also Foster, supra n. 120, at 100. There is a risk however that an element of presumption and judgment may enter decision-making in this area: see e.g. Refugee Appeal No. 70863/98 (NZ RSAA, Aug. 13, 1998), where the Refugee Status Appeals Authority found that an Iranian woman prohibited from working as a hairdresser was not a victim of persecution because there “has not therefore been a substantial investment in terms of years of training and accumulated experience which may make any proscription on following one’s normal profession particularly onerous”: at 9.


Stserba (USCA, 6th Cir., 2011), at 977.
Such an approach resonates with recognition that the internationally guaranteed right to work is not merely about protecting economic survival, but is also “central to . . . development of the human personality.” As eloquently explained by the Refugee Appeal Board of South Africa in a case concerning the inability of a Zimbabwean to practice his profession for political reasons:

The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.

Denial of access to government employment should be given particular weight in the assessment of serious harm in line with the Civil and Political Covenant’s guarantee that “[e]very citizen shall have the right and the opportunity, without [discrimination] and without unreasonable restrictions” to “have access, on general terms of equality, to public service in his country.” This is so not only in fairly straightforward cases of a state-controlled economy, or where work in government is a prerequisite to professional qualification. More fundamentally, a discriminatory refusal to allow someone to work in her state’s public service sends a clear signal of precisely the sort of disfranchisement from membership in the body politic that is at the heart of refugee law. As thoughtfully observed by Justice Mansfield in the Australian Federal Court decision of Thalary:

Far from treating its citizens equally, the State then is sanctioning discrimination against some of them for Convention reasons. It is difficult to envisage circumstances where such discrimination may, in a practical sense, be insignificant. That is the more so when there is a significant economic disadvantage consequent upon that restriction, although actual economic disadvantage in an immediate personal sense is not per se the critical matter. It is unnecessary to resort specifically to relatively recent historical examples to make the point. To characterise the circumstances as not sufficiently serious to constitute persecution in my view fails to acknowledge the fundamental significance of the State positively excluding certain of its citizens for Convention reasons from employment by the State and its organs.

In contrast to cases in which the right to work is infringed by means of economic proscription or refusal of access to the work for which one is objectively qualified, claims that raise only concerns about the quality or conditions of employment do not ordinarily rise to the level of persecutory harm. Subjection to diminished conditions such as reduced salary, demotion, or loss of other benefits is more likely to be dismissed as raising concerns...
“in the nature of unpleasantness or a conflict of personalities” in the workplace, thus not qualifying as serious harm for refugee law purposes. But even here, care must be taken to ensure that the real import and impact of the “conditions” of work are understood. If, for example, an individual is, for discriminatory reasons, given the choice of working only in an especially dangerous job or not working at all, she is in substance subject to economic proscription: the choice between starving due to lack of work or risking serious bodily harm or death in order to work is no choice at all. Similarly, where the conditions of employment rise to the level of degrading treatment – for example, where the treatment to which the Albanian applicant had been subjected in the Yugoslav army was “meant to humiliate and eliminate Albanian soldiers” – the issue is not simply poor working conditions, but rather the risk of degrading treatment (or worse) which is clearly tantamount to serious harm.

As can be seen, the right to work conceived through the lens of human rights law provides important benchmarks for the assessment of serious harm. Most obviously, the risk of forcible subjection to work is clearly rights-violative and hence a form of persecutory harm. More generally, both subjection to economic proscription and denial of work for which an individual is objectively qualified can also be forms of serious harm. Particular attention
should be paid to restrictions on access to government service given the strong signal such actions send about social and political exclusion. And while mere reduction in the overall quality of working conditions will not ground a claim to fear persecutory harm, it is otherwise where the scale or gravity of such reductions means that there is, in substance, the risk of degrading treatment or another violation of human rights law.

### 3.5 Autonomy and self-realization

In addition to rights designed to protect physical security and liberty and freedom, the third main category of international human rights law comprises rights that promote autonomy and self-realization. An individual faces the risk of serious harm for purposes of the “being persecuted” analysis not only when basic security or freedoms are threatened, but equally when protected forms of identity, autonomy, and self-worth are at risk. Human rights law guarantees the right of an individual to hold and to live in accordance with her beliefs, both religious and political; to be educated (recognized as a central aspect of “the development of the human personality”); to express views individually and collectively; and to form and maintain intimate relationships, both within a family and more generally.

An overarching question related to many rights of autonomy and self-realization is whether there can be said to be any duty on the part of an applicant to avoid the risk of being persecuted by desisting from a relevant act, or by concealing his or her identity. Decision-makers have sometimes suggested that because engaging in actions such as public religious practice, overt expressions of political opinion, or living openly as a homosexual is “voluntary,” refugee status need not be recognized where “acting discreetly” at home is an alternative to seeking asylum abroad.

This reasoning is, however, not justified as a matter of international law. Rights of autonomy and self-realization exist in order to allow persons to be and to express themselves in ways deemed fundamental without fear of harm or need to conceal. The rationale for these rights is precisely to enable individuals to make choices about what to believe, how to express those beliefs, and how to form and maintain intimate personal relationships. To

---


479 For example, in Applicant LSLS v. Minister for Immigration and Multicultural Affairs, [2000] FCA 211 (Aus. FC, Mar. 6, 2000), the Federal Court of Australia upheld a decision refusal the claim of a Sri Lankan homosexual, noting that “[i]mplicit in [the] finding of the Tribunal is the view that a level of discretion for the purpose of avoiding persecution is to be expected of the applicant.” Hence, the Refugee Review Tribunal had held that the applicant could “avoid a real chance of serious harm by refraining from making his sexuality widely known — by not saying that he is homosexual and not engaging in public displays of affection towards other men. He will be able to function as a normal member of society if he does this”: at [7], [20]. For other examples, see R. Haines, J. C. Hathaway, and M. Foster, “Claims to Refugee Status Based on Voluntary but Protected Actions,” (2003) 15 Intl. J. Ref. L. 430 at 435, and C. Dauvergne and J. Millbank, “Before the High Court: Applicants S396/2002 and S395/2002, a Gay Refugee Couple from Bangladesh,” (2003) 25(1) Syd. L. Rev. 97. In Nezhadian v. Minister for Immigration and Multicultural Affairs, [2001] FCA 1415 (Aus. FC, Oct. 18, 2001) the Federal Court of Australia criticized the “discretion” concept as essentially providing a means by which a decision-maker justified a preferred outcome: at [10].

480 We note that this issue has also sometimes arisen in the context of “well-founded fear” (see supra Ch. 2.7) and nexus to a Convention ground (see infra Ch. 5.4).
suggest that there is a duty to conceal a protected characteristic or to desist from living openly in accordance with one’s beliefs or nature is to suggest that there is, in substance, a duty not to avail oneself of one’s basic human rights.

The High Court of Australia took the lead in rejecting the notion of a duty of discretion or concealment, finding in the seminal decision of S395 that “persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality.” The Supreme Court of the United Kingdom helpfully elaborated the fundamental logic of assessing the genuineness of risk without reference to whether an individual could avoid persecution by desisting from exercising her rights:

The underlying rationale of the Convention is . . . that people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay. In the absence of any indication to the contrary, the implication is that they must be free to live openly in this way without fear of persecution. By allowing them to live openly and free from that fear, the receiving state affords them protection which is a surrogate for the protection which their home state should have afforded them.

And most recently, the Court of Justice of the European Union has also firmly rejected any duty of concealment, finding that where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status . . . The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.

The reasoning of these senior courts is largely in accordance with a human rights framework for identifying relevant forms of serious harm. It should, however, be noted that rights of autonomy and self-realization are rarely framed in absolute terms; rather their scope is frequently limited by factors intended to accommodate competing rights and important social interests. It follows that a limited exception to the rule that there is no duty to desist from activities that form part of a protected interest is appropriate where the limitation imposed falls within the scope of an exception expressly authorized at international law. In all other cases, a risk of serious harm that follows from the expression of, for example, religious identity, political opinion, or sexual orientation must be assessed without reference to the possibility to avert harm by concealment.

481 Appellant S395/2002 (Aus. HC, 2003), at 489 [40], per Kirby and McHugh JJ.; see also at 500–1 [80]–[82], per Gummow and Hayne J.). In SZHBP v. Minister for Immigration and Citizenship, (2007) 97 ALD 84 (Aus. FC, Aug. 15, 2007), the Australian Federal Court applied the principles from Appellant S395/2002 to the political context: see especially at [27]–[35]. We note, however, that in Applicant NABD of 2002 (Aus. HC, 2005) a majority of the High Court of Australia declined to find that the Refugee Review Tribunal had been in error in finding that the applicant was not at risk because “those converts who go about their devotions quietly are generally not disturbed”: at [12].

482 HJ (Iran) (UKSC, 2010), at [33], per Lord Rodger; see also at [29], per Lord Hope; at [94], per Lord Walker; at [103], per Lord Collins; at [110], per Lord Dyson. See also RT (Zimbabwe) (UKSC, 2012), at 356 [25], per Lord Dyson (with whom Lord Hope, Baroness Hale, Lord Clarke, Lord Wilson, and Lord Reed agreed).

483 Bundesrepublik Deutschland v. Y (C-71/11) and Z (C-99/11) (CJEU, Sept. 5, 2012), at [79]. See also Minister voor Immigratie en Asiel v. X (C-199/12), Y(C-200/12) and Z v. Minister voor Immigratie en Asiel (C-201/12) (CJEU, Nov. 7, 2013), at [71].
3.5.1 Religion

The right to religious freedom at international law includes the freedom not only to hold religious beliefs and values, but also to manifest them “either individually or in community with others and in public and private,” and specifically to engage in “worship, observance, practice and teaching.” While inability to practice religion is often enforced or accompanied by other types of serious harm, the deprivation of religious freedom is serious harm per se:

If a person is forbidden to practise his religion, the fact that he is not imprisoned, tortured, or banished, and is even allowed to attend school, does not mean that he is not a victim of religious persecution.

Given the scope of the protected interest, refugee decision-makers have appropriately recognized the existence of serious harm not only when the ability to hold beliefs is threatened, but equally when there is an inability freely to practice one’s religion. As the US Court

---

484 Civil and Political Covenant, supra n. 81, Art. 18. See further Human Rights Committee, General Comment No. 22: Freedom of Thought, Conscience or Religion, UN Doc. CCPR/C/21/Rev.1/Add.4 (Jul. 30, 1993) (“HRIC General Comment No. 22”): “The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts”: at [4]. It is important to emphasize, however, that a person can be subjected to serious harm on the basis of his or belief alone, and it is not necessary that the harm follows from “manifestation or practice of a religious faith.” For this reason, the decision of the Australian Federal Court in WAEW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs, [2002] FCAFC 260 (Aus. FFC, Aug. 22, 2002) was erroneous as it affirmed the decision below which had incorrectly held that “absent any such manifestation or practice of a religious faith, there was no basis on which the appellant could be found to have a well-founded fear of persecution by reason of religion”: at [14].

485 Civil and Political Covenant, supra n. 81, Art. 18(1).

486 Bucur (USCA, 7th Cir., 1997), at 405.

487 It has been suggested that to require a person “to renounce his or her religious beliefs or to desecrate an object of religious importance” might be “regarded as a form of ‘torture’”: Fatin (USCA, 3rd Cir., 1993), at 1242. The court went on to explain however that “[s]uch a requirement could constitute torture or persecution, however, only if directed against a person who actually possessed the religious beliefs or attached religious importance to the object in question”: at 1242. See also Fisher v. INS, (1994) 37 F.3d 1371 (USCA, 9th Cir., Oct. 5, 1994), at 1379–81; Kazemzadeh (USCA, 11th Cir., 2009); Gomes v. Gonzales, (2007) 473 F.3d 746 (USCA, 7th Cir., Jan. 11, 2007), at 753. The German Administrative Court in Wiesbaden in a 1992 decision recognized the claim of a Nepalese national from a Brahmin family who had converted to Christianity and who risked continued pressure by his family and employer to reconvert to Hinduism if returned to Nepal: II E 5495/84 (Ger. V G, Wiesbaden, 1992), reported at (1994) 6 Intl. J. Ref. L. 673.

of Appeals for the Seventh Circuit explained, “it is virtually the definition of religious persecution that the votaries are forbidden to practice it.” The view traditionally taken in German jurisprudence – that the “denial or even surrender of . . . beliefs under threat of punishment” or prevention of “professing . . . beliefs . . . in the private sphere” was persecutory harm, while the prohibition or restriction of “[r]eligious activities in public, including missionary work,” was not – is thus not correct. As much has now been

489 Sizov (USCA, 7th Cir., 2003), at 378, citing the previous decision of Bucur (USCA, 7th Cir., 1997). See also Muhur v. Ashcroft, (2004) 355 F.3d 958 (USCA, 7th Cir., Jan. 20, 2004), at 960–61, as cited in Kazemzadeh (USCA, 11th Cir., 2009), at 1358, per Marcus J. (specially concurring), in an extensive critique of the Board of Immigration Appeals’ decision which suggested that the applicant could hide his religious conversion. Marcus J. cites authority from other circuits which reject the “discretion” or “reasonableness” doctrine, and also reviews at considerable length the jurisprudence surrounding the “free exercise” clause in the First Amendment to the US Constitution, noting that the “right to practice one’s faith and to do so in public stands at the heart of free exercise”: at 1359. The judge concluded that “[i]n either the founders nor the drafters of the Refugee Convention could have accepted the narrow view that secret practice can cure persecution”: at 1361 (see also the opinion of the court in Kazemzadeh at 1355, delivered by Pryor J.). See also Golestorhki v. Canada (Minister of Citizenship and Immigration), (2008) 169 ACWS (3d) 846 (Can. FC, Apr. 18, 2008): “This ‘quiet Christian’ analysis is flawed because religious persecution can exist where a claimant is prevented from practising his religion due to fear”: at [18]. See also NM (Christian Converts) Afghanistan CG, [2009] UKAIT 00045 (UKAIT, Dec. 5, 2008), at [66]. Of course it should be noted that courts have not always been consistent in finding that repression of religious freedom in itself constitutes serious harm: see e.g. Li Hua Zheng v. Gonzales, (2005) 416 F.3d 97 (USCA, 1st Cir., Aug. 4, 2005) and Babayan (USCA, 9th Cir., 2005) at 980. For further discussion of US case law, see Anker, supra n. 19, at 224–27. We note that the UNHCR Handbook, supra n. 1, which states that persecution may include “prohibition of membership of a religious community, of worship in private or in public, of religious instruction”: at [72], has been adopted in administrative guidelines in Australia: Department of Immigration, 1996, supra n. 174, at [5.2], and in the UK: UK Border Agency, “Considering Asylum Claims and Assessing Credibility” (Mar. 2011), at [6.3]. See also UNHCR, Guidelines on Religion-Based Claims, supra n. 85, at [12].

490 I C 9.03 (Ger. BverwG [German Federal Administrative Court], Jan. 20, 2004), at 8–9 (unofficial translation).

491 Ibid.

492 Ibid. For example, in I C 9.03 (Ger. BverwG, Jan. 20, 2004), the German Federal Administrative Court held that the ban on Muslim converts to Christianity from attending “public or official” church services did not interfere with the protected religious subsistence core in asylum law, and that such interference would only be established if common prayer and worship in private with other like-minded people was prohibited and carried a risk for those carrying out such activity. For earlier decisions, see Federal Republic of Germany Constitutional Court Decision 2 BvR 1300/89 (Ger. BverfG, 1992), reported at (1993) 5 Intl. J. Ref. L. at 116–17, which held that “a prohibition of religious manifestations in public only, which left room for religious manifestations in private, did not amount to persecution”: at 116. The position is neatly summarized by the Federal Administrative Court in 10 C 19.09 (Ger. BverwG, Dec. 9, 2010), in which the court referred questions to the Court of Justice for the European Union: see infra n. 495. The court noted that the respondent government had pointed “to the case law that prevailed in Germany prior to the transposal of Directive 2004/83/EC, according to which persecution relevant to asylum could be assumed only in cases of interference with the core aspects of a religious belief, but not in cases of restrictions on the public exercise of a faith”: at [9], (unofficial translation). In addition to Art. 18(1) of the Civil and Political Covenant, supra n. 81, it is notable that Art. 9 of the European Convention for the Protection of Human Rights, supra n. 81, also explicitly protects public practice. For this reason, the German position was heavily criticized: see e.g. Erich Geldbach, “Is there a Minimum of Religious Existence?” in A. Kilp and A. Saumets (eds.), Religion and Politics in Multicultural Europe: Perspectives and Challenges (2009): “the minimum theory as put forth by German courts has no international foundation, no theological basis and is very weak as far as its judicial underpinning is concerned”: at 251.
recognized in the European Union’s Qualification Directive, affirmed by the Court of Justice of the European Union to mean that “religion” encompasses “all its constituent components, be they public or private, collective or individual.” In line with this understanding, Germany’s Federal Administrative Court has recently determined that “the mere prohibition of participation in formal worship in public may constitute a sufficiently serious act . . . and therefore, persecution.”

Thus, for example, the Federal Court of Canada rightly determined that “[b]y destroying house churches, the Chinese government is infringing on that right [to religion] in a persecutory manner.” Even less brutal means of denying the freedom to choose one’s preferred form of religious expression – for example, limiting collective religious observance to state-approved churches, even if theoretically of the same faith as that embraced by an applicant – violate the right of religious freedom, and are thus evidence of persecutory harm. As observed by the Australian Full Federal Court,

[w]hat type of “religious” freedom is it, that limits the practice of communal rites to a service conducted by State-approved persons who substitute government propaganda for elements of theological doctrine?

This is not to say that the rights to religious beliefs and expression – conceived at both the individual and collective level – are absolute, or without limits. Some courts have sought to impose a “reasonableness” overlay on the scope of protected activities. In Kassatkine, for example, even as the Federal Court of Canada insisted that “[a] law which requires a minority of citizens to breach the principles of their religion [or] to be lifelong outlaws, is patently persecutory,” it opined that this was true only “so long as those religious tenets are not unreasonable as, for example, exacting human sacrifice or the taking of prohibited drugs as a sacrament.” While the court’s concern was of course understandable, reliance on a subjective “reasonableness” test to circumscribe the scope of protected religious activity is deeply troubling.

Under a human rights approach, the sound alternative is to be guided by the Civil and Political Covenant’s requirement that “[f]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

---

494 Qualification Directive, supra n. 37, at Art. 10(1)(b) recognizes that freedom of religion encompasses “the participation in, or abstention from, formal worship in private or in public, either alone or in community with others.”

495 Bundesrepublik Deutschland v. Y (C-71/11) and Z (C-99/11) (CJEU, 2012), at [63].


498 Wang (Aus. FFC, 2000), at 551, per Wilcox J.


500 Ibid. See Haines, Hathaway, and Foster, supra n. 479, at 443, citing domestic cases on drugs and religion.

501 Civil and Political Covenant, supra n. 81, Art. 18(3). Given the clear link made between acts of persecution and human rights standards in the Qualification Directive, supra n. 37, leading commentators take the view that such limits are relevant to whether an act constitutes an “act of persecution” in the sense of
3.5.1 Religion

limitation allows for a balancing of religious freedom with the protection of other important rights, yet ensures a principled form of scrutiny before a given intrusion is deemed not to be rights-violative (and thus, not serious harm for refugee law purposes).502

The limitations clause in the Civil and Political Covenant is, however, “to be strictly interpreted and restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner,”503 meaning that societal bias and prejudice against a particular minority religion cannot constitute a legitimate reason to limit manifestation of the disfavored religion or belief.504 Further, “restrictions are not allowed on grounds not specified [in relation to religious freedom] . . . even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security.”505 Restrictions are, on the other hand, appropriate to prevent such rights violations as ritual killings, child sacrifice, the practice of suttee, harmful traditional practices inconsistent with the rights of women and/or children,506 the manifestation of religion or belief which amounts to “propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,”507 and more generally to protect the rights and freedoms of others.508

502 On the other hand, a refugee decision-maker should not assume without any “evidentiary or factual foundation” that a restriction on religious freedom is justified: Joseph v. Sri Lanka, Communication No. 1249/2004, UN Doc. CCPR/C/85/D/1249/2004 (HRC, Nov. 18, 2005), at [7.3].

503 HRC General Comment No. 22, supra n. 484, at [8]. As the Full Federal Court of Australia has explained in this context: “a law regulating the practice of religion, requiring that it be practiced or observed in a particular way or targeting or applying only to persons practicing religion, is not a law of ‘general application’. Thus, a fear of prosecution or punishment by the authorities for the breach of such laws can, of itself, give rise to a well-founded fear of persecution for a Convention reason . . . the Chinese laws in question appear to prohibit religious practice other than by ‘authentic’ religious groups . . . and regulate the practice of religion by those groups by requiring that they be registered in accordance with Chinese law. Plainly, such laws are not laws of general application”: Wang (Aus. FFC, 2000), at 563 [66]–[68], per Merkel J. (with whom Wilcox and Gray JJ. agreed).


505 HRC General Comment No. 22, supra n. 484, at [8].

506 See the decision of the German Federal Administrative Court, 1 C 9.03 (Ger. BverwG, Jan. 20, 2004), at 8–9, where the court cites suttee and child sacrifice as examples of permissible limitations on freedom of religion. See also UNHCR, Guidelines on Religion-Based Claims, supra n. 85, at [16].

507 In accordance with the Civil and Political Covenant, supra n. 81, at Art. 20. As stated by the Human Rights Committee in its General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Jul. 29, 1983), at [1], state parties are under the obligation to enact laws to prohibit such acts.

508 However, in many cases, the fact that there is no conceivable legitimate basis on which religious freedom could be limited means that no further inquiry is necessary. For example, in relation to Falun Gong, which appears to have proved particularly troubling to some decision-makers, there appears to be no basis on which the Chinese government can or indeed has claimed to be legitimate in its attempts to eradicate it. As Posner J. has noted, “the ferocious antipathy to . . . [Falun Gong] by the Chinese government – that government’s determination to eradicate it root and branch – is mysterious but undeniable”: Zhen Li Iao v. Gonzales, (2005) 400 F.3d 530 (USCA, 7th Cir., Mar. 9, 2005), at 532. The Human Rights Committee has found, in the absence of any explanation from states party to justify or explain limitations, that
This international-law-based limitations framework also provides an answer to the view sometimes taken that a prohibition of religious activity is persecutory only after an examination of “the importance or centrality of the practice [being limited] within the religion and/or to the individual personally.”509 While it of course makes sense to ground refugee status only in a risk relevant to the person seeking protection, it is in our view unwise for decision-makers to engage in a “centrality to the religion” test before deeming a given restriction to be important enough to amount to persecutory harm.510 Just how is such an appraisal to be made? Indeed, decisions that have held that public practice is not “an inherent or significant component of Falun Gong”511 or that a “requirement to proselytize is not a core component of his [Christian] faith nor, indeed, at all essential to it”512 have been fairly criticized as “superimposing an a priori classification derived from [the decision-maker’s] own conceptions of the usual practices of the [relevant] denomination which the applicant had embraced.”513

they cannot be justified: see e.g. Boodoo v. Trinidad and Tobago, UN Doc. CCPR/C/74/D/721/1996, A/57/40, Vol. II (HRC, Apr. 2, 2002), at [6.6]. This was made clear by the Federal Court of Australia in Liu v. Minister for Immigration and Multicultural Affairs, [2001] FCA 257 (Aus. FC, Mar. 16, 2001). The tribunal had ruled that if China “considers that certain forms of religious behaviour, including missionary type work, is not allowed in order to preserve good order and public safety, then that is a matter open to it and not something which comes within the terms of the Convention”: at [7], but the Federal Court disagreed, noting that the tribunal had given “a far broader application to the restrictions contained in Article 18(3) than the sub-article itself provides for”: at [21]. See also Bediako v. Canada (Solicitor General), [1995] FCJ 292 (Can. FCJTD, Feb. 22, 1995), in which the tribunal had held that the fact that the applicant’s church was banned was “justified under articles 18(3) and 19(3) of the Universal Declaration of Human Rights (sic),” at [6], which the Federal Court found was “not reasonably open to it,” and was “perverse or capricious”: at [9].

509 UNHCR, Guidelines on Religion-Based Claims, supra n. 85, at [16].
510 The position of the German Federal Administrative Court in the past was that, in order to constitute persecution, “the suppressed religious practice must be indispensable to the religious community, according to its own understanding, also to the individual believers themselves”: 10 C 19.09 (Ger. BverwG, Dec. 9, 2010), at [43], citing 1 C 9.03 (Ger. BverwG, Jan. 20, 2004), at [25]. However, the court now “is inclined to think that it may be sufficient if the applicant for asylum feels that the suppressed religious practice of his faith is obligatory for himself or in order to preserve his religious identity”: 10 C 19.09 (Ger. BverwG, Dec. 9, 2010), at [43]. This position was affirmed in 10 C 23.12 (Ger. BverwG, Feb. 20, 2013), at [29]–[30] (unofficial translation).
511 Minister for Immigration and Multicultural and Indigenous Affairs v. VWBA, [2005] FCAFC 175 (Aus. FFC, Aug. 26, 2005), at [38]. Further, it was held that it “does not need to be practised in public, or with others, but can be practised privately”: at [12] and [38]. This was the basis on which the Refugee Review Tribunal had decided the claim and this was upheld by the Full Federal Court. In dissent, Marshall J. criticized the Refugee Review Tribunal’s decision on the basis that the tribunal had accepted that the choice of the applicant to practice privately was “not a voluntary choice uninfluenced by the fear of harm”: at [56].
512 Applicant NABD of 2002 (Aus. HC, 2005), at [97], per Kirby J., citing the findings of the Refugee Review Tribunal.
513 Ibid., per Kirby J. (in dissent), responding to the finding of the Refugee Review Tribunal in that case that the Uniting Church is not one of the “fundamental faiths” that require proselytizing by their adherents: at [97]. Thus, it was “not inconsistent with his belief and practices’ for the appellant, were he returned to Iran, to avoid proselytizing the Christian religion or other active conduct that would bring him to official notice”: at [67]. However, as Kirby J. noted, “a person who converted to Christianity... living in a country overwhelmingly constituted of adherents to a different religion, might well feel a greater desire to tell others about his new beliefs,” as was indicated by the applicant’s evidence in that case: at [99]; see also McHugh J. at [47]. See also VWBA (Aus. FFC, 2005), at [56], per Marshall J. (in dissent); NACR of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs, [2002] FCAFC 318
Not only is an approach that discounts harms to “non-central” aspects of religious observance problematic as a matter of practicality, but it distracts attention from the key issue. Where there is evidence that a given prohibition will impinge on an applicant’s freedom of religion or belief, the salient question should be only whether the prohibition is one legitimately imposed under international law. If not, it is difficult to understand why a limitation found by the decision-maker to infringe the applicant’s religious freedom ought to be treated as anything other than persecutory. This principle provides a clear answer to the not-infrequent assertion that Ahmadis from Pakistan should “curb [their] proselytizing zeal” to take into account the sensibilities of those adhering to the majority religion. Not only does religious freedom clearly include “[b]earing witness in words and deeds,” but the right of a government to limit this freedom on grounds of “morals” has been authoritatively determined by the Human Rights Committee to bar any limitation

(Aus. FFC, Nov. 15, 2002), especially at [39], per Lee J. (in dissent). In *Minister for Immigration and Multicultural Affairs v. Zheng.*, [2000] FCA 50 (Aus. FFC, Feb. 10, 2000), the Refugee Review Tribunal had dismissed the applicant’s claim on the basis that there was “no doctrinal difference in religious practice between the underground Church on the one hand and the open registered Church on the other”: cited in *Wang* (Aus. FFC, 2000), at 559 [47]. Although this was upheld by the Full Federal Court in *Zheng*, it was criticized and not followed in *Wang* (Aus. FFC, 2000): see at 560–71. See also *Mu v. Canada (Minister of Citizenship and Immigration)*, [2004] FC 1613 (Can. FCTD, Nov. 17, 2004), in which the Minister had attempted to draw “a distinction between practicing in public and practicing in a group” in the context of Falun Gong: at [8]. But Harrington J. rejected this on the basis that “[g]iving public witness is a fundamental part of many religions”: at [9]. See also *Zhen Li Iao* (USCA, 7th Cir., 2005), at 532–33, and *Shan Zhu Qiu v. Holder*, (2010) 611 F.3d 403 (USCA, 7th Cir., Jul. 12, 2010), at 407–8.

This issue frequently arises in the context of persons prohibited from wearing religious clothing or symbols. One of the issues is whether the law banning religious insignia is truly applied across the board. In *Aykut*, in rejecting the claim based on Turkey’s prohibition on the applicant wearing the veil in certain situations, Gauthier J. emphasized that the relevant law legitimately aimed at promoting secularism, evidenced by the fact that it “applies to all forms of religious dress or insignia including beards, cloaks, turbans, fez, caps, veils, headscarves”: at [41]; see also at [33]–[35]. The reference to “secular policies” is a reference to the need for the restriction to be based on some legitimate policy aim, for example secularism, gender equality, or the right to freedom of religion of others. See e.g. decisions of the European Court of Human Rights in *Sahin v. Turkey*, (2005) 41 EHRR 8 (ECtHR, Jun. 29, 2004), at [108]; and (2007) 44 EHRR 5 (ECtHR [GC], Nov. 10, 2005), at [115], and *Dahlab v. Switzerland*, Application No. 42393/98 (ECtHR, Feb. 15, 2001). More recently, the Human Rights Committee has found France in violation of Art. 18 of the Civil and Political Covenant, supra n. 81, where the applicant, a member of the Sikh religion, was required to appear bareheaded in an identity photograph (*Singh v. France, Communication No. 1876/2009*, UN Doc. CCPR/C/102/D/1876/2009 (HRC, Sept. 27, 2011), at [8.1]–[8.5]), and where the applicant, a member of the Sikh religion, was expelled from school for insisting on wearing the *keski*: *Singh v. France, Communication No. 1852/2008*, UN Doc. CCPR/C/106/D/1852/2008 (HRC, Dec. 4, 2012), at [8.7]–[8.8].

*Ahmed v. Secretary of State for the Home Department*, [2000] INLR 1 (Eng. CA, Nov. 5, 1999), where the Court of Appeal rejected the Immigration and Asylum Tribunal’s approach which did require the applicant to do so. By contrast, the New Zealand Refugee Status Appeals Authority has held that “in a predominantly Moslem country where the question of conversion from Islam to Christianity is an extremely sensitive issue, we do not consider it unreasonable for the Government to impose a prohibition on proselytizing activities by Christians. Such measures are justifiable on the grounds at least of public safety or order”: *Re MI, Refugee Appeal No. 10/92* (NZ RSAA, Jul. 22, 1993). See further discussion of these issues, including an excellent recent case, *MN and others* (UKUT, 2012), in *infra* Ch. 5.7, cited with approval in *10 C 23.12* (Ger. BverwG [German Federal Administrative Court], Feb. 20, 2013), at [27].

which discriminates “in favour of or against one or certain religions or belief systems” – precisely the purport of Pakistan’s notorious Ordinance XX.

In sum, the denial of religious freedom, including prohibition or serious restriction on the ability to practice in community with others, is rights-violative and hence appropriately understood to be serious harm for purposes of refugee law. While some aspects of the right to religious freedom – including the right to have or adopt a religion and the right not to be subject to coercion – are not subject to limitation at international law, refugee cases involving public manifestation should be assessed in light of the ability of states under international human rights law to restrict this aspect of religious freedom in order to balance competing interests, rights, and freedoms – but only in a non-discriminatory, minimally intrusive way.

3.5.2 Conscience and belief, including resistance to military service

In addition to religious freedom, international human rights law guarantees also the broader notion of freedom of thought and conscience. Described as a right of “spiritual and moral existence” that ensures the ability to “develop autonomously thoughts and a conscience free from impermissible external influence,” freedom of thought and conscience is a right that is also closely connected to both the right to privacy and the right to “hold opinions without interference.” In refugee law practice, the relevance of this right has most commonly been considered in the context of whether subjection to compulsory military service is serious harm for purposes of the “being persecuted” analysis.

Cases in which children are subjected to forcible recruitment or conscription are the easiest to resolve since both human rights and humanitarian law prohibit the recruitment and engagement of children in armed conflict. As such, the Committee on the Rights of the Child has explained,

---

517 Human Rights Committee, General Comment No. 34: Article 19: Freedoms of Opinion and Expression, UN Doc. CCPR/C/GC/34 (Jul. 21, 2011) (“HRC General Comment No. 34”), at [48].


519 Civil and Political Covenant, supra n. 81, at Art. 18(1).

520 Nowak, supra n. 134, at 412–13.

521 Ibid.

522 Civil and Political Covenant, supra n. 81, at Art. 17: see also infra Ch. 3.5.6.

523 Art. 19(1); see Nowak, supra n. 134, at 412–13.

524 For a rare exception, see Re MN (NZ RSAA, 1996), in which the New Zealand Refugee Status Appeals Authority considered that the applicant’s fear of suffering disproportionate punishment for failing to comply with the Iranian dress code for women violated her right to freedom of thought and conscience under Art. 18, explaining that Art. 18 “is directly relevant to the appellant’s deeply held views of her right to function as an autonomous and independent individual, to her passionate opposition, both to the patriarchal society comprising her extended Arab family, and to the male domination of women in Iranian society at large”: at [81].

525 It is clear that the Civil and Political Covenant, supra n. 81, at Art. 18(1) is the appropriate place for consideration of this issue. Although “service of a military character” is mentioned in Art. 8, this is so as to exclude from the scope of “forced or compulsory labour,” “any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors.” Hence the Human Rights Committee has held that “the Covenant itself neither recognizes nor excludes a right of conscientious objection,” and thus a claim “is to be assessed solely in light of article 18 of the Covenant”: Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea, Communication Nos. 1321/2004 and 1322/2004, UN Doc. CCPR/C/88/D/1321-1322/2004 (HRC, Jan. 23, 2007), at [8.2].
under-age recruitment (including of girls for sexual services or forced marriage with the military) and direct or indirect participation in hostilities constitutes a serious human rights violation and thereby persecution.\(^{526}\)

A Spanish court thus appropriately concluded that “the recruitment of children could be considered persecution . . . on the grounds that children are entitled to special protection as recognized in the various specific human rights instruments.”\(^{527}\)

There are at least two other relatively clear cases in which the subjection of adults to military service compels a finding of serious harm.

The first is where the risk is of conscription not by the state, but by vigilante or other non-state actors.\(^{528}\) In such cases, the deprivation of liberty inherent in conscription cannot be said to be “in accordance with such procedures as are established by law”\(^{529}\) – making it rights-violative for reasons considered above.

The second clear case for the recognition of serious harm is where the risk faced is not simply the deprivation of liberty that is inherent in a generalized duty to render military service to one’s country, but rather subjection to a regime of discriminatory conscription\(^{530}\) or conditions of service,\(^{531}\) or where there is “disproportionately severe punishment for [a] military

---

\(^{526}\) CR C General Comment No. 6, supra n. 111, at [59]; see also UNHCR, Guidelines on International Protection No. 8, supra n. 94, at [19]–[23]. The Children’s Convention, supra n. 109, at Art. 38(2) provides that “States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities,” and at Art. 38(3), “States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.” In addition, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, adopted May 25, 2000, entered into force Feb. 12, 2002, 2173 UNTS 222 (which at the time of writing had 151 parties) provides at Art. 2 that “States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces,” and at Art. 4(1) provides that “[a]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.” See UNHCR, Guidelines on International Protection No. 8, supra n. 94, at [19] for discussion of international humanitarian law.


\(^{528}\) In Applicant S (Aus. HC, 2004), the High Court of Australia did not address the issue in these terms, rather in terms of whether the Taliban regime enjoyed sufficient legitimacy so as to have vested in it a state’s authority to conscript as a function of sovereignty: see at [47], per Gleeson C.J., Gummow, and Kirby JJ.; and at [101]–[102], per Callinan J. (in dissent).

\(^{529}\) In Refugee Appeal No. 75378 (NZ RSAA, 2005), the New Zealand Refugee Status Appeals Authority adverted to the “prescribed by law” issue in relation to Applicant S: see at [73].

\(^{530}\) For example, in Applicant S (Aus. HC, 2004), the Refugee Review Tribunal had accepted that the Taliban undertook ad hoc, random, forcible recruitment of young men, the only apparent criterion for recruitment being that the young men be able-bodied. The High Court held that the tribunal had erred in failing to consider whether “able-bodied young men” comprised a particular social group. See also 96/18/0485 v. Security Director for Vienna (Au. VwGH [Austrian Administrative Court], Feb. 9, 1999), where it was held that “ethnically motivated conscription for military service, different treatment during military service or more severe punishment for draft evasion may qualify an applicant for refugee status, if consequences amount to threat of life or health” (unofficial translation).

\(^{531}\) Canada Immigration and Refugee Board, “Refusal to Perform Military Service as a Basis for a Well-Founded Fear of Persecution” (Sept. 1992). Other examples given are “unfair delegation of military assignments while in service” and “unfair extension of service period beyond what is lawfully established.” See also Duarte de Guina (USCA, 9th Cir., 1999), in which the US Court of Appeals for the Ninth Circuit reversed the Board of Immigration Appeal’s rejection of refugee status because the Board had based its
offence” based on discrimination. While most persons subject to official conscription will, of course, be subject to restrictions on movement and consequential deprivation of liberty, these restrictions can usually be justified under the limitations established at international law.

But for reasons similar to those considered above in relation to the general question of subjection to prosecution under the criminal law, military conscription ceases to be lawful if it is conceived or conducted in a rights-violative way – including on the basis of impermissible discrimination. Canadian courts have thus sensibly determined that there may be a risk of persecutory harm where “the treatment afforded to selective conscientious objectors in Israeli military prisons was harsher than that afforded to those who were jailed because they had refused to serve for other reasons and that selective conscientious objectors received longer sentences,” as well as if members of the US military “publicly opposed to the war in Iraq” were found to be differentially subjected to court martial and to other punishment “because of their political opinion.”

But what of the situation where there is no overt discrimination in either the design or implementation of an official system of military conscription, but some persons – motivated by reasons of religion, political opinion, or other reasons of conscience – nonetheless resist military service? Is the risk they face of being forced into military service or of being punished for evading or deserting military service serious harm relevant to the “being persecuted” analysis?

Assuming that a decision-maker is satisfied that an applicant has “a real, not a simulated belief,” the critical issue under a human-rights-based analysis is whether the person decision on the notion that “mandatory military service, without more, even against one’s will, is not a ground for asylum”: at 1160; yet the evidence established that “[f]rom the time he was conscripted into the Guatemalan military” the applicant “was explicitly targeted for... oppression because he was an Indian”: at 1161.

532 UNHCR, Handbook, supra n. 1, at [169]. See also Refugee Appeal No. 75378 (NZ RSAA, Oct. 19, 2005), at [42]. All of these examples would amount to a violation of Art. 18(1) in conjunction with Art. 2(1) of the Civil and Political Covenant, supra n. 81.

533 RS v. Canada (Minister of Citizenship and Immigration), [2012] FC 860 (Can. FC, Jul. 6, 2012), at [21].


536 The analysis in Hathaway, Refugee Status, that there are specific circumstances in which a person may base a successful claim on either fear of being forced into military service, or subjection to punishment for evading or deserting military service, was cited with approval by the Federal Court of Australia in Applicant NG 1352 v. Minister for Immigration and Multicultural Affairs, [1999] FCA 495 (Aus. FC, May 7, 1999), at [16]; Mijoljevic v. Minister for Immigration and Multicultural Affairs, [1999] FCA 834 (Aus. FC, Jun. 25, 1999), at [23]; and Minister for Immigration and Multicultural Affairs v. Shaibo, [2000] FCA 600 (Aus. FC, May 10, 2000), at [28].

537 As the UNHCR acknowledged as long ago as 1979, persons who claim refugee status on the basis of a refusal to perform military service are neither refugees per se nor excluded from protection: UNHCR, Handbook, supra n. 1, at [168].


concerned is entitled to assert his principled beliefs against the lawful entitlement of the home state to require military service of its citizens. Under a system of generalized military conscription, the resultant loss of liberty will usually be justifiable under international law (and hence not persecutory). In any event, exposure to that risk will not be the basis for a successful claim to refugee status because it is not a risk faced “for reasons of” a Convention ground. But if resistance to military service is a protected component of the distinct freedom of thought and conscience, then a minority of those subject to conscription – the conscientious objectors – will face a super-added harm (deprivation of freedom of thought and conscience) that may well be “for reasons of” a Convention ground. In contrast to those who suffer no breach of their right to freedom of thought and conscience because they hold no belief at odds with military service, this minority faces something more which – if rights-violative, and hence serious harm – puts them in a legally distinct position.

Two questions need to be addressed in order to make this assessment. First, does the right to “thought [and] conscience” in the Civil and Political Covenant’s guarantee of “freedom of thought, conscience and religion” include opposition to military service? And second, can that belief or conscience lawfully be subject to limitation by the home state?

The interpretation and understanding of the human right to freedom of “thought [and] conscience” has evolved over time\(^{540}\) such that it is now clearly understood that “to compel a person to use lethal force, although such use would seriously conflict with the requirements of his conscience or religious beliefs, falls within the ambit of article 18.”\(^{541}\) Thus, “the right to conscientious objection to military service is inherent to the right to freedom of thought, conscience and religion.”\(^{542}\) As a Grand Chamber of the European Court of Human Rights recently determined in relation to the regional counterpart of this right,

opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person’s conscience or his

\(^{540}\) Yeo-Bum Yoon (HRC, 2007), at [8.2]. It should be noted that any ambiguity as to whether the position had evolved sufficiently at the time General Comment No. 22 was issued has now been dispelled by the clear findings of violations of Art. 18 by Korea. In this respect, the House of Lords’ decision in Sepet (UKHL, 2003) that the statements in General Comment No. 22 are “somewhat tentative” (at 866 [13]) and hence do not constitute a “clear assertion of binding principle” (at 867 [13]), no longer hold force (per Lord Bingham, Lord Steyn agreeing at 872 [24] and Lord Hutton agreeing at 880 [56]; see also Lord Hoffmann at 878 [48]–[49]).

\(^{541}\) Yeo-Bum Yoon (HRC, 2007), at [8.3], citing HRC General Comment No. 22, supra n. 484, at [11]. The reference to “lethal force” has been criticized as evincing a “fairly narrow understanding of conscientious objection” (see Nowak, supra n. 134, at 424); but it is not clear that this is necessarily required. In other decisions on this point, for example in Eu-Min Jung v. Korea, Communication Nos. 1593 to 1603/2007, UN Doc. CCPR/C/98/D/1593-1603/2007 (HRC, Apr. 30, 2010), the Committee did not use the “lethal force” language, stating simply that: “the authors’ refusal to be drafted for compulsory military service was a direct expression of their religious beliefs which, it is uncontested, were genuinely held and that the authors’ subsequent conviction and sentence amounted to an infringement of their freedom of conscience and a restriction on their ability to manifest their religion or belief”: at [7.4]. Although Yeo-Bum Yoon (HRC, 2007) involved claims by Jehovah’s Witnesses, the later case of Eu-Min Jung (HRC, 2010) involved, inter alia, a pacifist: see [2.12]. The New Zealand Refugee Status Appeals Authority has provided an excellent guide on this issue in Refugee Appeal No. 75378 (NZ RSAA, 2005), in which it emphasizes the need to establish a “belief” which “transcends mere point of view and rather describes a state of mind that is fundamental to the identity of the individual as a human being”: at [66].

deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of [the right to freedom of thought, conscience, and religion].

As authoritatively interpreted by the Human Rights Committee, the risk to freedom of thought and conscience is implicated in such cases whether or not the risk relates to service in a conflict "condemned by the international community as contrary to basic rules of human conduct" and regardless of whether "performing military service would include crimes or acts" that amount to international crimes. Hence, while the presence of such factors in a particular case may serve to underline the strength of belief or conscience of the applicant, it is not a prerequisite to a finding that the applicant is at risk of persecutory harm. So long as a genuine reason of conscience is identified and – borrowing from the

---

543 Bayatyan (ECtHR, 2011), at [110]. This is reminiscent of a passage in which the Canadian Federal Court referred to a classic statement of the US Supreme Court that: "If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by...God' in traditionally religious persons": Lebedev v. Canada (Minister of Citizenship and Immigration), [2007] FC 728 (Can. FC, Jul. 9, 2007), at [46], citing Welsh v. United States, (1970) 398 US 333 (USSC, Jun. 15, 1970), at 339–40, but ultimately concluding that there is no "internationally recognised right to either total or partial conscientious objection": at [48], applying Sepet (UKHL, 2003).

544 UNHCR, Handbook, supra n. 1, at [171].

545 The Qualification Directive, supra n. 37, at Art. 9(2)(e) includes, in its definition of “acts of persecution,” “prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion.”


547 The statement from UNHCR, Handbook, supra n. 1 appears to have been taken as a requirement by some decision-makers: see e.g. Hinzman v. Canada (Minister of Citizenship and Immigration), [2007] 1 FCR 561 (Can. FC, Mar. 31, 2006) and Hughey v. Canada (Minister of Citizenship and Immigration), [2006] FC 421 (Can. FC, Mar. 31, 2006), both dealing with applications by deserters from the US army who objected to the war in Iraq on the basis of its illegality. In Sepet (UKHL, 2003) Lord Bingham noted that "[t]here is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community" (at 863 [8]), citing Canadian and US authority. However, in Refugee Appeal No. 75378 (NZ RSAA, 2005) the New Zealand Refugee Status Appeals Authority clearly did not require this state of affairs, although it was present in that case: see at [118]; see also [114]–[117]. As the Authority eloquently explained, decision-makers should avoid "making fine and arguably artificial distinctions as to the political or other nature of the belief, depending on whether the conflict is 'internationally condemned' or not. It is difficult to discern how the nature (political or otherwise) of the objection changes with the form of service that may be required": at [116]. In Australia, see SZAOG v. Minister for Immigration and Multicultural and Indigenous Affairs, (2004) 86 ALD 15 (Aust. FFC, Nov. 26, 2004), where North J. held that the Refugee Review Tribunal’s failure to consider the applicant’s claim that he objected “to service in the Chechen conflict because the army in which he was required to serve had been involved in breaches of humanitarian law and human rights abuses” amounted to jurisdictional error: see at [18] per North J. (in dissent).
language of the European Court of Human Rights — there is “a serious and insurmountable conflict between the obligation to serve in the army and a person’s conscience or his deeply and genuinely held religious or other beliefs,” there is presumptive evidence of a risk that amounts to serious harm.

The second and sole remaining question under a human-rights-based analysis is whether the applicant’s freedom to “manifest” her beliefs may nonetheless be justifiably curtailed by “such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” While the maintenance of a military, at least for purposes of national defense, arguably falls within the permissible grounds of limitation, the limit on freedom of thought and conscience must not just relate to a ground, but must be “necessary” to secure a listed purpose. The Human Rights Committee has made it clear that satisfaction of this critical criterion requires assessment of whether the home state has introduced alternatives to compulsory military service. It has moreover specifically rejected the argument that failure to provide for alternative service can be justified by reference to “public safety,” “national defensive capacities,” or “to preserve social cohesion.” The Committee has rather determined that

it is in principle possible, and in practice common, to conceive alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service.

In line with this approach, the Canadian Federal Court appropriately required that the assessment of the refugee claim of an Israeli conscientious objector take account of evidence that “there is no law allowing for conscientious objector status in Israel and the so-called Conscientious Objector Committee is haphazard, secretive and difficult to access.” More generally, whatever alternative service is made available to conscientious objectors must not itself be rights-violative.

548 Bayatyan (ECtHR, 2011), at [110].
549 Civil and Political Covenant, supra n. 81, at Art. 18(3). The Human Rights Committee has assumed that Art. 18(3) applies, although one could argue that it does not apply either because there can be no limitation on the right to have freedom of thought and conscience, or on the basis that no one shall be subject to coercion (Art. 18(2)), which is not subject to limitation. However, the better view is that where a person seeks to avoid a legal obligation or duty on the basis of a conscientious belief, this represents a practice or public manifestation of religion or belief which is subject to limitation under Art. 18(3) (see Nowak, supra n. 134, at 413). We note, however, that there is apparent disagreement amongst members of the Human Rights Committee on this issue in the recent decision in Atasoy and Sarkut (HRC, 2012); see in particular individual opinions appended at 13–21. In Bayatyan (ECtHR, 2011), the European Court of Human Rights undertook a lengthy assessment of whether the limitations clause applied: see at [113]–[128].
550 Yeo-Bum Yoon (HRC, 2007), at [8.4]; affirmed in Min-Kyu Jeong (HRC, 2011), at [7.2].
551 Ibid. Ibid., at [8.4]. See also Atasoy and Sarkut (HRC, 2012), at [10.4]: “A State party may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside of the military sphere and not under military command. The alternative service must not be of a punitive nature, but must rather be a real service to the community and compatible with respect for human rights.”
552 Kirichenko v. Canada (Minister of Citizenship and Immigration), [2011] FC 12 (Can. FC, Jan. 6, 2011), at [50].
553 The UNHCR has noted that the existence of community service is not necessarily sufficient, because “some forms of community service may be so excessively burdensome as to constitute a form of punishment, or the community service might require the carrying out of acts which clearly also defy
Thus, while subjection to compulsory officially mandated military service will not in and of itself amount to the risk of serious harm for refugee law purposes, it is otherwise if the risk is faced by a child or if conscription is conceived or implemented in a discriminatory fashion. And because a conscientious objector faces not just the usual risk of (legally justifiable) loss of liberty but also risk to freedom of thought and conscience, a claim to face the risk of persecutory harm can be established in such a case unless the home country makes available a true non-combatant and rights-regarding form of alternative service.

### 3.5.3 Education

The fundamental nature of the right to education has been emphasized by the Committee on Economic, Social and Cultural Rights, which has determined that it is inextricably linked to dignity and to the “development of the human personality.” Indeed, as Grahl-Madsen insightfully observed,

> it seems clear that if a person will be excluded from institutions of learning in his home country for political reasons, this will affect his whole life much more profoundly than a relatively short term of imprisonment.

In formal terms, the right to education, embodied in Articles 13 and 14 of the Economic, Social and Cultural Covenant, as well as Article 28 of the Convention on the Rights of the Child, requires that “[p]rimary education shall be compulsory and available free to all.” Secondary education “shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education,” and higher education “shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”

The fact that these rights are framed as duties of progressive implementation is rarely an impediment to the recognition of serious harm in refugee cases since, as previously analyzed, considerations of home state capacity have no place in refugee claims that involve the withdrawal, deprivation, or discriminatory denial of access to education. In other

---

555 | The UNHCR appears to now take this position, at least where the basis of refusal is religious belief: see UNHCR, *Guidelines on Religion-Based Claims*, supra n. 85, at [26], where it is stated that a law may be persecutory where “the military service cannot reasonably be expected to be performed by the individual because of his or her genuine beliefs or religious convictions.” For support for this position, see comments of High Court in *Applicant S* (Aus. HC, 2004), at [63], per Gleeson C.J., Gummow, and Kirby J.; at [83], per McHugh J.; cf. at [101]–[103], per Callinan J. (in dissent).

556 | CESCR General Comment No. 11, *supra* n. 478, at [22].


561 | This is because progressive implementation clearly requires a state to “take steps... with a view to achieving... the full realization” of socio-economic rights (Economic, Social and Cultural Covenant,
words, if a state has capacity to provide only limited educational opportunities for its population, it may not restrict such opportunities, for example, only to boys. The US Court of Appeals for the Ninth Circuit was thus correct to find that “[t]he [Russian] government’s refusal to provide . . . an elementary education to ‘disabled children’ solely because they are members of the particular social group . . . cannot be excused on the basis of the need to limit expenditures.”

The duty of progressive implementation also proscribes state actions that reduce or nullify rights, meaning that a claim to fear serious harm will readily be established where a state removes educational opportunities from a particular region or section of the population. Importantly, a state must respect the availability of education by not prohibiting or summarily closing religious schools, institutions entitled to special protection given the Civil and Political Covenant’s requirement that states respect the liberty of parents “to ensure the religious and moral education of their children in conformity with their own convictions.”

While states are not required publicly to fund private schools, denial of the ability to provide religious or other private education to children may constitute serious harm in the circumstances identified by the US Court of Appeals for the Seventh Circuit:

If a government as part of an official campaign against some religious sect closed all the sect’s schools (but no other private schools) and forced their pupils to attend public school, this would be, we should think . . . a form of religious persecution.

Claims based on the denial of educational opportunities are often part of a claim to fear cumulative harm since in addition to the inherent loss involved in the deprivation of education, a lack of educational opportunities for children “often reinforces their subjection to various other human rights violations.” For example, there is a “direct correlation between . . . primary school enrolment levels for girls and major reductions in child marriages.” Yet a violation of the right to primary education is in and of itself sufficient to constitute serious harm. There is, for example, no need to show

---

supra n. 104, at Art. 2(1)). The prohibition against discrimination is moreover “subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education”: CESCR General Comment No. 13, supra n. 478, at [31]. We note that Art. 2(3) does not apply to education, as it is not an “economic right”: see text supra, at nn. 323–27.

Tchoukhrova (USCA, 9th Cir., 2005), at 1194.

“‘There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education”: CESCR General Comment No. 13, supra n. 478, at [45].

Civil and Political Covenant, supra n. 81, at Art. 18(4). Bucur (USCA, 7th Cir., 1997), at 405.

See e.g. Chen Shi Hai (Aus. HC, 2000), at 303 [29]. In Hapuarachchige v. Minister for Immigration and Ethnic Affairs, (1997) 73 FCR 288 (Aus. FC, Mar. 18, 1997), Carr J. noted that, “[i]f or the purposes of this argument, it can readily be accepted that racial discrimination in the areas of education and employment may amount to persecution”: at 301.

CESCR General Comment No. 11, supra n. 478; CESCR General Comment No. 13, supra n. 478, at [1].

CESCR General Comment No. 11, supra n. 478, at [4].

Of course, it is necessary to establish that the applicant truly is at risk of a complete denial of education, not merely that he or she has been denied access to one particular school. For example, in Halabi v. Canada (Minister of Employment and Immigration), [1993] FCJ 401 (Can. FCTD, Apr. 30, 1993) the Federal Court found that “[i]n this case though the expulsion was alleged to be for political actions, there is no evidence whatsoever that after having been expelled from the institution he made any efforts to enrol in others”: at [4]. This has also been recognized in civil law jurisprudence. According to Alland and Teitgen-Colly, the authors of the leading French textbook, discrimination can rise to the level of persecution through “repetitious character,” such as through refusal of access to medical care or children’s
that economic opportunities will be reduced as the result of the denial of access to education.\textsuperscript{570} The risk of denial of access to education is, of course, particularly compelling in the case of children since the right to education is integral to the “full development of the human personality and the child’s sense of its dignity.”\textsuperscript{571} For this reason the UNHCR correctly affirms that “bearing in mind the fundamental importance of education and the significant impact a denial of this right may have for the future of a child, serious harm could arise if a child is denied access to education on a systematic basis.”\textsuperscript{572} Refugee status has thus been appropriately recognized where a child will be deprived of the right to education for a Convention reason.\textsuperscript{573} As an Australian court determined in the case of a thirteen-year-old Thai girl at risk of being returned to work on a farm and thus deprived of education,

\textit{[i]t is difficult to conceive that a child returned to Thailand to work on a farm, denied the opportunity of education, could be regarded as not suffering serious harm . . . The serious harm . . . need not be overt physical ill treatment, significant economic hardship enrollment in schooling: Alland and Teitgen-Colly, \textit{supra} n. 158, at 376–77 (unofficial translation). And Germany’s Federal Administrative Court has explained that it is appropriate to consider, in assessing serious harm in refugee law, “discrimination . . . in respect of access to education or health facilities, but also occupational or economic restrictions on earning a living”: \textit{10 C 23.12} (Ger. BverwG, Feb. 20, 2013), at [36] (unofficial translation). It should be noted that where the applicant is able to afford alternative private education for a child, the denial of public education may not amount to persecution: see e.g. \textit{Matter of H-L-H- and Z-Y-Z-}, [2010] 25 I & N Dec. 209 (USBIA, Mar. 26, 2010), at 217.


\textsuperscript{570} \textit{Cf. Gonzalez-Alvarado v. Immigration and Naturalization Service}, 1996 U.S. App. LEXIS 16488 (USCA, 9th Cir., Jun. 18, 1996). Although in \textit{M93 of 2004 v. Minister for Immigration}, [2006] FMC 252 (Aus. FMC, Feb. 24, 2006), Mclnis F.M. found that the denial of education “clearly has the potential to provide the basis for significant economic hardship or denial of access to basic services where in both instances that denial threatens the person’s capacity to subsist”: at [42]. See also \textit{Harirchi v. Minister for Immigration and Multicultural Affairs}, [2001] FCA 1576 (Aus. FFC, Nov. 7, 2001), in which the Full Federal Court of Australia affirmed the Refugee Review Tribunal’s decision in that case in which the tribunal had “accepted that denial of access to education could amount to persecution and could bring an applicant within the scope of the Convention”: at [9]. In that case however the applicant had attended university and it was not clear that any denial of further educational opportunities were for a Convention reason.

\textsuperscript{571} \textit{AB (Germany)}, [2012] NZIPT 800107-111 (NZ IPT, Aug. 16, 2011), at [77].

\textsuperscript{572} UNHCR, \textit{Guidelines on International Protection No. 8}, supra n. 94, at [36].

\textsuperscript{573} As the Canadian Federal Court noted in relation to a nine-year-old Afghani girl whose claim was that she would be deprived of the right to education on return, “[e]ducation is a basic human right and I direct the Board to find that she should be found to be a Convention refugee”: \textit{Ali v. Canada (Minister of Citizenship and Immigration)}, (1996) 119 FTR 258 (Can. FCTD, Sept. 23, 1996), at [4]. See also \textit{Mirzabeglui v. Canada (Minister of Employment and Immigration)}, [1991] FCJ 50 (Can. FCA, Jan. 28, 1991), at [1]; \textit{Halabi} (Can. FCTD, 1993), at [4]; and \textit{Hernandez v. Canada (Minister of Citizenship and Immigration)}, [2010] FC 179 (Can. FC, Feb. 18, 2010): “a person may be the victim of persecution if, because of a Convention ground, he or she is prevented from continuing his or her education”: at [40]. The Australian Refugee Review Tribunal has also held that “[d]iscriminatory denial of access to primary education is such a denial of a fundamental human right that it amounts to persecution”: \textit{V95/03256}, [1995] RRTA 2263 (Aus. RRT, Oct. 9, 1995), at [47].
or denial of access to basic services but rather may be constituted by the simple denial of education to a child which at the very least would appear to be a fundamental right.\(^574\)

Nor is the only relevant risk defined by total exclusion from education. There is an infringement of human rights law also where clearly inferior educational facilities are offered to a disfavored group – for example, where a racial or ethnic group is characterized as “mentally inferior” and relegated to “a remedial class” or “special school.”\(^575\) A refugee claim may also be established on the basis of *de facto* exclusion, for example where primary education is technically open to all, yet some children are in practice prevented from attending school\(^576\) – including because of a failure to respond to bullying and harassment that makes attendance at school unbearable.\(^577\)

Claims to face serious harm can also be grounded in denial of access to secondary education, since international human rights law sets requirements of general availability and accessibility\(^578\) and prohibits the denial of or withdrawal of access to secondary education on the basis of a protected ground.\(^579\) Most decision-makers have thus sensibly refrained from distinguishing between primary and secondary education in articulating the principle that a denial of access to education can amount to serious harm, often speaking simply of the right of “children” to an education.\(^580\) Indeed, it is common for decisions affirming the salience of denial of education as serious harm to involve children whose age suggests that it is secondary rather than primary education that is at risk.\(^581\)

---

574 M93 of 2004 (Aus. FMC, 2006), at [42], finding that the denial of education may well pose a “threat to the person’s capacity to subsist,” at [42], but this was in the context of the specific language of s. 91R(2) of the Migration Act 1958 (Cth).

575 A good example is provided in the case of Roma children from Hungary, where the Canadian Refugee Protection Division found that members of this group only have a 50 percent chance of completing primary school and less than 2 percent of gypsy teenagers attend high school: YSC (Re), [1998] CRDD No. 26 (Can. IRB, Jan. 22, 1998). See also the evidence in Bledy (Can. FC, 2011), at [5]. This is supported by case law in the European Court of Human Rights which has found discrimination against Roma children in the provision of education by “placing the majority of them in special schools for children with learning disabilities or particularly low intelligence” (see discussion in Clayton, *supra* n. 53, at 466–67).

576 See generally Foster, *supra* n. 120, at 217. This is particularly a problem in parts of Africa heavily affected by HIV. A study by Human Rights Watch found that in one heavily AIDS-affected province in Kenya, girls make up only 6 percent of those who are promoted to grade five after four years of primary school: Human Rights Watch, “In the Shadow of Death: HIV/AIDS and Children’s Rights in Kenya” (Jun. 2001). See e.g. Freiberg v. Canada (Secretary of State), (1994) 78 FTR 283 (Can. FCTD, May 27, 1994), where the Federal Court of Canada found that the “problems encountered by [the applicant’s] daughter at school and the attacks suffered (she was beaten by other students),” “had serious consequences for the right . . . of access to educational institutions”: at [20]–[21]. See also SBAS (Aus. FC, 2003), where the Federal Court held that: “[t]o suggest, as the RRT did, that distress caused to a child by a teacher on account of a child’s religious beliefs as an incident of governmental educational policy was a matter ‘to be dealt with by parents and does not indicate to the tribunal that the situation at school for young Sabeans is so bad as to be considered persecutory’, is to fail totally to understand the nature of the claim advanced”: at [63] (emphasis in original).

577 See e.g. Freiberg v. Canada (Secretary of State), (1994) 78 FTR 283 (Can. FCTD, May 27, 1994), where the Federal Court of Canada found that the “problems encountered by [the applicant’s] daughter at school and the attacks suffered (she was beaten by other students),” “had serious consequences for the right . . . of access to educational institutions”: at [20]–[21]. See also SBAS (Aus. FC, 2003), where the Federal Court held that: “[t]o suggest, as the RRT did, that distress caused to a child by a teacher on account of a child’s religious beliefs as an incident of governmental educational policy was a matter ‘to be dealt with by parents and does not indicate to the tribunal that the situation at school for young Sabeans is so bad as to be considered persecutory’, is to fail totally to understand the nature of the claim advanced”: at [63] (emphasis in original).


580 See e.g. *Chen Shi Hai* (Aus. HC, 2000), at 303 [29].

581 See e.g. *Halabi* (Can. FCTD, 1993), where the refugee claimant was aged seventeen. The claim failed on an evidentiary basis. *Zhang* (USCA, 9th Cir., 2005) involved the claim of a Chinese girl who was fourteen at the time of leaving China, which is the relevant age since the court was there considering whether she had established “past persecution” (as per the relevant US statute). The court stated that, “[d]enial of
The jurisprudence suggests somewhat more reluctance to recognize persecutory harm in the case of denial of access to tertiary education, often in the mistaken belief that there is no internationally guaranteed right to access post-secondary education.\textsuperscript{582} While it is true that access to tertiary education may be validly limited “on the basis of capacity,”\textsuperscript{583} the deprivation or withdrawal of tertiary education for discriminatory reasons amounts to a human rights violation that cannot be justified on the basis of resource constraints. Indeed, government policy directed at preventing a particular segment of the community from accessing university education is often aimed at the “impoverishment of the [relevant] community”\textsuperscript{584} or the exclusion of that particular community “in an insidious and incremental way so as not to attract the attention of the international community.”\textsuperscript{585} Accordingly, American courts have acknowledged that systemic exclusion of a protected group from tertiary education, such as “the exclusion of Jewish students from German universities under the Nürnberg Laws”\textsuperscript{586} or a Romanian law “forbidding [ethnic Hungarians] from [attending] college” is persecutory “even if it did not prevent them from earning a livelihood.”\textsuperscript{587}

In sum, while denials of primary or secondary education for a Convention reason are most readily recognized as persecutory, bars on access to tertiary education may also be the basis for a finding of relevant serious harm. This not only follows from the nature of relevant obligations under international human rights law, but is also profoundly sensible since education is “an empowerment right . . . the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”\textsuperscript{588}

### 3.5.4 Expression and assembly

The Civil and Political Covenant protects the right to “hold opinions without interference”\textsuperscript{589} and also the right “to freedom of expression.”\textsuperscript{590} More explicit affirmation of the overarching principle of freedom of expression is evident in related commitments to “freedom of thought,”\textsuperscript{591} the “right of peaceful assembly,”\textsuperscript{592} and the right to “freedom of access to educational opportunities available to others on account of a protected ground can constitute persecution”: at 1247, and remanded the case to the immigration judge to properly consider this aspect of her claims.

\textsuperscript{582} See analysis of decisions in Australia, New Zealand, and Canada, discussed in Foster, \textit{supra} n. 120 at 143–45.

\textsuperscript{583} Economic, Social and Cultural Covenant, \textit{supra} n. 104, at Art. 13(2)(c).

\textsuperscript{584} See \textit{V01/13122} (Aus. RRT, 2003), discussing the Iranian policy towards the Baha’i.

\textsuperscript{585} \textit{N01/38085} (Aus. RRT, Feb. 18, 2002), discussing the plight of the Rohingya from Burma.


\textsuperscript{587} \textit{Bucur} (USCA, 7th Cir., 1997), at 403–4. The court distinguished earlier decisions on the basis that they had involved the denial of education to non-citizens of equal educational opportunities with citizens: at 403. See also \textit{Korniejew v. Ashcroft}, (2004) 371 F.3d 377 (USCA, 7th Cir., Jun. 14, 2004), at 383. See also \textit{Harirchi} (Aus. FFC, 2001), in which the Full Federal Court of Australia affirmed the Refugee Review Tribunal’s decision which had held that “denial of access to education could amount to persecution” in the context of a case involving tertiary education: at [9]. The case had been properly rejected on evidentiary grounds. See further authorities cited in Foster, \textit{supra} n. 120, at 223–24.

\textsuperscript{588} CESCR General Comment No. 13, \textit{supra} n. 478, at [1].

\textsuperscript{589} Civil and Political Covenant, \textit{supra} n. 81, at Art. 19(1).

\textsuperscript{590} \textit{Ibid.}, at Art. 19(2).

\textsuperscript{591} \textit{Ibid.}, at Art. 18(1).

\textsuperscript{592} \textit{Ibid.}, at Art. 21.
association with others, including the right to form and join trade unions.\(^{593}\) The Human Rights Committee has described freedom of opinion and freedom of expression as being indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.\(^{594}\)

Instances in which the denial of freedom of opinion and expression is the harm feared per se are rare. More commonly, the risk faced is for reasons of holding or expressing an opinion (raising the question of whether the risk is “for reasons of” a political or other opinion, addressed in Chapter 5) with the harm itself constituted by subjection to arrest, detention, and potentially prosecution under the criminal law of the home state (issues considered above). But whether the claim is the unusual one in which the risk is the denial of freedom of opinion and expression itself or the more common scenario of the imposition of sanctions for holding or expressing an opinion, the critical question for analysis of serious harm is whether the limitation on freedom of opinion and expression sought to be imposed is one that is permissible at international law. If the limitation is permissible, then a human rights framework suggests that serious harm is not established. Similarly, if the criminal or other law is deployed fairly to enforce a limitation on freedom of opinion and expression, then the risk is simply of valid prosecution or punishment, not of “being persecuted.”

The Civil and Political Covenant expressly authorizes several forms of limitation on freedom of expression, assembly, and association. Some are quite specific, for example that “[a]ny propaganda for war shall be prohibited by law,”\(^{595}\) and that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”\(^{596}\) In addition, excepting only the absolute right to hold opinions, expressive freedoms may be subject to limitations “provided by law” and which are shown to be “necessary . . . for the protection of national security or of public order (ordre public), or of public health or morals.”\(^{597}\) The rights to peaceful assembly and freedom of association may additionally be limited as necessary to protect public safety, or the “rights and freedoms of others.”\(^{598}\)

593 Ibid., at Art. 22(1). See also Art. 25 and rights to political participation.

594 HRC General Comment No. 34, supra n. 517, at [2].

595 Civil and Political Covenant, supra n. 81, at Art. 20(1).

596 Ibid., at Art. 20(2).

597 Civil and Political Covenant, supra n. 81, at Art. 19(3) specifically applies to the rights in Art. 19(2) not Art. 19(1). Art. 19(3)(b) is preceded by the statement that the “exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities”: at Art. 19(3). Another basis for limitation is where necessary for “respect for the rights or reputation of others”: see also at Art. 21 and Art. 22(2). An example of a case in which a limitation was found reasonable was where the applicant feared prosecution under a law of general application in India which prohibited flag burning. The Australian Federal Court held that “a general law outlawing flag burning would appear, on its face, to have a perfectly legitimate purpose, namely the prevention of defacing national symbols”: Sidhu v. Holmes, [2000] FCA 776 (Aus. FC, Jun. 9, 2000), at [19]. Although the court also noted that in that case “there was no material before the Court to indicate that the law was in fact intended to achieve any other purpose and nor was there any evidence to establish that the law was, or would be, applied in a politically discriminatory fashion”: at [23]. This decision was upheld on appeal: see Sidhu v. Holmes, [2000] FCA 1653 ( Aus. FFC, Nov. 28, 2000), at [24].

598 Civil and Political Covenant, supra n. 81, at Art. 21.
As earlier analyzed, the scope of permissible limitation has been carefully circumscribed by the Human Rights Committee. It has emphasized that not only must any valid limitation be “provided by law” – not simply by administrative procedure or practice – but also that the nature and scope of the limitation must be only for an authorized reason and “must conform to the strict tests of necessity and proportionality.” The Committee has more generally determined in quite emphatic terms that “when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed.

Because freedom of expression, assembly and association may only be limited for quite specific reasons and must be narrowly tailored to meet those specific objectives, a risk of serious harm for refugee law purposes is readily recognized in instances of deployment of the criminal law to effect the near-complete denial of these rights. As determined by the New Zealand tribunal,

> given the complete suppression of political activity in Iran (outside of a very narrow band of “acceptable” conduct as defined by the current regime) the appellant was denied a core human right... In Iran, the severe if not extreme penalties imposed on those engaged in the non-violent expression of their political opinion cannot, on any sensible view, be described as prosecution rather than persecution.

Even where the limitation of expressive freedom is more carefully constrained, it is important carefully to assess the reasons for and proportionality of what may appear to be a valid constraint. As noted by Justice Finn of the Australian Federal Court, “[i]t is not unheard of, for example, for a State to utilise sedition-like and public security offences to silence its opponents.” Thus, while a law of general application designed to protect public safety resulting in, for example, a prosecution of “people engaged in violent demonstrations with damage to property and loss of life” or of those involved in a political organization that engages in “substantial violent and criminal activities” may be perfectly legitimate, analysis

---

599 See e.g. text supra, at nn. 412–16 and 501–8.
600 HRC General Comment No. 34, supra n. 517, at [22]. For a recent example, involving prosecution in Russia for expression of views concerning homosexuality found in violation of Art. 19, see Fedotova v. Russia, Communication No. 1932/2010, UN Doc. CCPR/C/106/D/1932/2010 (HRC, Nov. 30, 2012).
601 HRC General Comment No. 34, supra n. 517, at [20].
604 WADL v. Minister for Immigration and Multicultural Affairs, [2002] FCAFC 276 (Aus. FFC, Aug. 29, 2002), at [23]. See also the careful and detailed analysis in Cruz-Samayoa (USCA, 6th Cir., 2010), finding that the applicant was at risk of prosecution not persecution for his leadership role in violent demonstrations.
605 Guitierrez v. Secretary of State for the Home Department, [2000] EWCA Civ J0504-17 (Eng. CA, May 4, 2000), at 5. See also MZQAP v. Minister for Immigration and Multicultural and Indigenous Affairs, (2005) 85 ALD 41 (Aus. FFC, Mar. 15, 2005), where the Full Federal Court upheld the decision of the
should be undertaken of whether the law is designed so as to minimize the infringement on expressive freedom, and whether it has been shown not only to be related to the protection of public safety, but truly “necessary” to achieve that end.\textsuperscript{606}

In assessing the validity of a given limitation, it is also important to assess the relevance of other rights that can have a close connection to the right to freedom of expression. For example, given the clear protection of the rights of ethnic, religious, and linguistic minorities at international law,\textsuperscript{607} a state cannot validly rely on the general limitations clause to justify the suppression of peaceful protests by such minority groups – even if such protests are seen to be socially disruptive or otherwise uncomfortable for the majority. In line with this understanding, the Canadian tribunal sensibly recognized the existence of persecutory harm in the case of a Macedonian man from Bulgaria subject to “a sustained and systematic attempt to prevent any exercise whatsoever of minority cultural rights.”\textsuperscript{608}

In sum, a risk to the right to “hold opinions without interference” – which is not subject to any form of lawful limitation – should generally be understood to be serious harm for refugee law purposes, whether the risk is to the right per se or of criminal law or other enforcement intended to suppress the holding of a given opinion. Where the risk is instead to “freedom of expression” – including to such related rights as the “right of peaceful assembly” and the right to “freedom of association with others, including the right to form and join trade unions” – risks that fall outside the bounds of authorized limitation at international law will similarly be persecutory harms. Both the rationale for, and scope of, such limitations must, of course, be carefully assessed in line with international legal norms before either the denial of the right itself or enforcement intended to suppress the right is deemed permissible and thus insufficient to ground a claim to serious harm for refugee law purposes.

3.5.5 Family and marriage

The protection of the family as “the natural and fundamental group unit of society,”\textsuperscript{609} including the “right of men and women of marriageable age to marry and to found a

Refugee Review Tribunal which held that a law banning the LTTE under legislation banning terrorist organizations did not amount to persecution; see at 46–47 [24]–[26]. Although in \textit{R v. Federal Ministry of the Interior}, 94/20/0722 (Au. VwGH, Jul. 27, 1995), the Austrian Administrative Court held that even though the applicant may have supported separatist aims as a supporter of AISSF, which was responsible for murders, hostage-taking, and rapes, these were not necessarily attributable to the applicant, who had never been accused of committing such crimes but had allegedly just made propaganda for the organization. Hence the court held that his fear of imprisonment could be linked to his political opinion. We note that issues surrounding whether mere membership of a political organization which engages in such activity is sufficient to warrant exclusion under Art. 1(F)(b) are further examined in that context in \textit{infra} Ch. 7.

\textsuperscript{606} See e.g. \textit{Dwomoh v. Sava}, (1988) 696 F. Supp. 970 (USDC SDNY, Oct. 13, 1988), where the US District Court for the Southern District of New York held that: “in countries where there is no procedure by which citizens can freely and peacefully change their laws, officials or form of government, and where some individuals who express views critical of the government are arrested and held incommunicado for long periods without due process, a coup attempt is a form of expression of political opinion the prosecution of which can qualify as ‘persecution’ within the statutory definition of ‘refugee’”: at 979. See also \textit{Camara v. Canada (Minister of Employment and Immigration)}, [1991] F CJ 56 (Can. FCA, Jan. 28, 1991). See also \textit{SZDOS v. Minister for Immigration}, [2005] FMCA 121 (Aus. FMC, Feb. 28, 2005), at [38]–[39].

\textsuperscript{607} Civil and Political Covenant, \textit{supra} n. 81, at Art. 27.

\textsuperscript{608} \textit{F (ZU) (Re)}, [1990] CRDD 1126 (Can. IRB, Nov. 22, 1990), at 3.

\textsuperscript{609} Civil and Political Covenant, \textit{supra} n. 81, at Art. 23(1).
family" can inform the inquiry into serious harm for refugee law purposes in several ways.

First, as considered above, persons who face the risk of forced marriage, properly understood to be a form of modern slavery, can of course also ground their claim on breach of the requirement at international human rights law that “[m]arriage shall be entered into [with] the free and full consent of the intending spouses.”

Second, a refugee claim may be based on the risk of enforced separation from family members in the home state. In some cases, given the risk of often severe psychological harm, the harm feared may rise to the level of cruel or inhuman treatment, discussed above. But the right to family life has independent utility in, for example, cases in which the risk feared is loss of custody due to the application of discriminatory or arbitrary family laws. Given the duty of states to “ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution,” a woman confronting a

---

610 Ibid., at Art. 23(2).
611 Ibid., at Art. 23(3).
612 See e.g. SZQOT (Aus. FFC, 2012), in which Nicholas J. observed that, “it may be open to a decision maker to conclude that a husband had a well founded fear of persecution if, for example, widespread discrimination against couples on racial or religious grounds made it impossible for the husband to live with his wife without fear of them being harassed. The husband and the wife might then be forced to live apart”: at 157 [64].
613 The most extreme cases involve the risk of loss of a child in the form of a risk to the life of the child. See e.g. the decision of the German Federal Constitutional Court in 2 BvR 1549/91 (Ger. BverfG, May 11, 1992), where the court held that threats against the life of one’s child constitute real threats of persecution against the mother: reported at (1994) 6 Intl. J. Ref. L. 668. In Gatimi (USCA, 7th Cir., 2009), Posner J. noted, “[i]f your child is killed, in order to harm you, the fact that you are not touched does not mean that those acts cannot constitute persecution of you”: at 16, and Ni (USCA, 7th Cir., 2011): at 1017. See also N v. Federal Ministry of the Interior, 95/20/0246 (Au. VwGH [Austrian Administrative Court], Sept. 12, 2006).
614 In B (PV) (Re), [1994] CRDD 12 (Can. IRB, May 10, 1994) the Canadian tribunal considered evidence that on return to Somaliland, the applicant would automatically lose custody of her two minor children (and all contact) because under Sharia law “children belong to the clan of their father and for this reason a divorced woman would not be given the custody of her children, either male or female”: at 3. This was supported by the fact that the applicant had already lost custody of, and all contact with, her eldest son: at 4. Taking into account that such discriminatory laws violate a number of rights in the Universal Declaration, supra n. 81, and the Women’s Convention, supra n. 108, the Division concluded that, “the psychological trauma which the claimant would suffer upon losing custody and access to her two remaining children would constitute ‘serious harm’ in the Convention refugee sense. Having endured years of physical and emotional abuse in order to avoid losing her children, the claimant’s statement that she would be ‘destroyed’ if she lost her children now does not strike the panel as a mere figure of speech”: at 4. In the later decision of the CRDD in MA1-00356 (Can. IRB, Dec. 18, 2001) one of the members relied on a decision of the Canadian Supreme Court (KIW v. Winnipeg Child and Family Services, [2000] 2 SCR 519 (Can. SC, Oct. 13, 2000)), which held that the removal of a child from a parent’s care was detrimental to the psychological well-being of the parent and thus potentially in violation of section 7 of the Canadian Charter of Rights and Freedoms which protects the right to “life, liberty and security of the person.” For a recent UK decision, see AM and BM (UKUT, 2010), where the Upper Tribunal of the Immigration and Asylum Chamber held that, in relation to a former victim of trafficking, “where the victim of trafficking has a child, if it is considered that the family’s sense of ‘honour’ meant that a daughter could not live in the family home with an illegitimate child, that could lead to the family separating the child from the victim of trafficking. That too would amount to persecution”: at [171]. In Tamas-Mercea v. Reno, (2000) 222 F.3d 417 (USCA, 7th Cir., Jul. 28, 2000) the court stated that “having one’s children forcibly taken, killed or kidnapped might rise to the level of persecution”: at 425.
615 Civil and Political Covenant, supra n. 81, at Art. 23(4).
discriminatory custody law that would nearly automatically award custody of the children to her husband can fairly be said to face the risk of persecutory harm.

Indeed, the child facing such a situation may herself be said to face the risk of persecutory harm in the sense not only of arbitrary interference with her family, but also often of extreme psychological suffering that rises to the level of cruel, inhuman, or degrading treatment. More generally, the child facing enforced separation from her parent may confront a range of related risks:

[U]naccompanied and separated children face greater risks of, inter alia, sexual exploitation and abuse, military recruitment, child labour (including for their foster families) and detention. They are often discriminated against and denied access to food, shelter, housing, health services and education. Unaccompanied and separated girls are at particular risk of gender-based violence, including domestic violence. In some situations, such children have no access to proper and appropriate identification, registration, age assessment, documentation, family tracing, guardianship systems or legal advice.

The third context in which claims for refugee status may implicate the right to family and marriage is where there is a risk of a prohibition on marrying freely. In Israel, for example, inter-religious marriage is not recognized as legally valid unless performed outside the country. Palestinians from the West Bank, Gaza Strip, and “enemy countries” are moreover collectively barred from securing a residency permit in Israel, meaning that the ability of even a validly married Palestinian couple to live together may be severely compromised on the basis of race. In both these senses, the right “to marry and to found a family” is infringed, especially given the clearly framed provision in the Civil and Political Covenant that “[t]he family . . . is entitled to protection by society and the State.”

Persons facing the risk of denial of the right to same-sex marriage face a comparable, if somewhat more legally challenging, form of serious harm. International human rights law somewhat oddly protects “[t]he right of men and women of marriageable age to marry and to found a family.” As codified, the right is not restricted to “a man and a woman”; the rather awkward plural phrasing might thus plausibly be said to extend the right to marry to same-sex couples since a gay couple is composed of “men,” while a lesbian couple consists of “women.” The duty to implement all Convention rights without discrimination, and the explicit guarantee of equal protection of the law without reference to either “sex” or “other status,” would suggest a similar result.

Arguments raised against seeing the right to marry as applicable to same-sex couples are not terribly persuasive. It is true that there is nothing in either the context or object and purpose of the provision on the right to marry that suggests an intention to effect what would have been – almost a half-century ago when the Covenant was adopted – quite a radical stance. Yet both international human rights law and refugee law decisions have recognized the importance of seeing human rights standards as living instruments, not conceptually bound by views at the time of adoption. It can also be argued that while the right to marry is framed as a right that cannot be limited or qualified, certain common restrictions are permissible, such as “restrictions on incestuous marriages or on persons

---

616 See Refugee Appeal Nos. 76226 and 76227 (NZ RSAA, 2009), at [112]. See also UNHCR, Guidelines on International Protection No. 8, supra n. 94, at [17].
617 CRC General Comment No. 6, supra n. 111, at [3].
619 Civil and Political Covenant, supra n. 81, at Art. 23(1). 620 Ibid., at Art. 23(2).
who are already married\textsuperscript{621} or a prohibition on bigamy or polygamy – so why not a similar implied restriction against same-sex marriage? The answer in human rights terms, is however, clear. Whereas some constraints, such as a prohibition on polygamy, might be said to follow from the Civil and Political Covenant’s requirement that states take appropriate steps “to ensure equality of rights and responsibilities of spouses as to marriage” (since such practices “violate[] the dignity of women”\textsuperscript{622}) there is no comparable argument grounded in the Covenant or international law more generally to imply such a constraint to same-sex marriage.

Despite the strength of the arguments favoring the view that denial of the right to marry to same-sex couples is in breach of the internationally protected right to marry, it is also true that this debate remains presently unsettled.\textsuperscript{623} Given this lack of clarity, it is especially important that decision-makers look beyond simply the claim that the denial of the ability to marry is in and of itself serious harm to consider also the prospect that a homosexual from a country that denies marriage rights may also face other forms of serious harm. Simply put, if the home state has stigmatized or explicitly or implicitly forbidden an intimate relationship on Convention grounds, inability to marry may not be the only harm feared.\textsuperscript{624}

The rights to family and marriage codified in international human rights law thus provide a helpful measure of relevant serious harm for refugee law purposes. There may be a risk of persecutory harm where the risk is of forced marriage; where there is the prospect of enforced separation from family members in the home country; and, in at least some circumstances, where there is a legal prohibition on marriage to a freely chosen partner.

3.5.6 Privacy

The right not to be “subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”\textsuperscript{625} may


\textsuperscript{622} See HRC General Comment No. 28, supra n. 155, at [24], analyzing Civil and Political Covenant, supra n. 81, at Art. 23(4). We also note that while such a limitation could not be justified as an official derogation, reading a limited exception into Civil and Political Covenant, supra n. 81, at Art. 23 could be permitted on the basis of Article 5(1)’s statement that Covenant rights cannot be interpreted as implying any right to engage “in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein.” See also Committee on the Elimination of Discrimination Against Women, General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women, UN Doc. CEDAW/C/GC/29 (CEDAW, Feb. 26, 2013), at [27].

\textsuperscript{623} A prohibition on same-sex marriage has been held not to violate Art. 23: \textit{Joslin v. New Zealand, Communication No. 902/1999}, UN Doc. CCPR/C/75/D/902/1999 (HRC, Jul. 30, 2002), cited in Joseph, Schultz, and Castan, supra n. 134, at 608. See also Nowak, supra n. 134, at 525, also citing decisions of the European Court of Human Rights at n. 58. In \textit{Joslin}, the Human Rights Committee noted that “Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term ‘men and women,’ rather than ‘every human being,’ ‘everyone’ and ‘all persons.’ Use of the term ‘men and women,’ rather than the general terms used elsewhere in Part II of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other”: at [8.2], cited in Nowak, supra n. 134, at 526.

\textsuperscript{624} See e.g. \textit{Al-Ghorbani and Alghurbani v. Holder}, (2009) 585 F.3d 980 (USCA, 6th Cir., Nov. 9, 2009).

\textsuperscript{625} Civil and Political Covenant, supra n. 81, at Art. 17.
serve to ground refugee claims based on a fear of illegal searches of a person’s home by state agents, illegal surveillance, and home invasions by state or non-state agents. More critically, however, the right to privacy has also been interpreted to encompass “the sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone.” It is this aspect of “individual existence and autonomy” or “self-realization” that encompasses sexual autonomy – an issue that has most commonly arisen in refugee law in the context of claims by homosexual or transsexual applicants.

It is not, of course, necessary to rely on a risk to privacy rights in order to find serious harm where members of a sexual minority will be subject to exogenous harm – for example, to beatings or other physical assaults. But privacy rights may be a useful means of explaining the serious harm that will be faced by someone who faces the risk of two distinct forms of harm: first, of “prosecution” under sodomy or other discriminatory laws; and second, the risk faced by a person who will (sensibly) conceal her sexual identity upon return home in order to avoid the risk of physical harm or other clearly persecutory harms. We examine each of these issues in turn.

First, as analyzed above, a person who is subject to punishment under a law that is itself in conflict with a norm of international human rights law cannot be said to be at risk of legitimate prosecution; she rather faces the risk of the distortion of the criminal law to achieve a persecutory end. As such, the risk of serious harm for refugee law purposes is established in the form of an unjustified loss of liberty or other consequence of the unlawful “prosecution.” In this regard, it is important to note that the right to privacy cannot (as can some other rights) be delimited by reference to such factors as the protection

626 Tuhin (USCA, 7th Cir., 2003): conduct that “might cross the line from harassment to persecution includes: ‘detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings or torture’”: at 619 and authorities cited therein.
628 Nowak, supra n. 134, at 377; see also Joseph, Schultz, and Castan, supra n. 134: a right to privacy comprises “freedom from unwarranted and unreasonable intrusions into activities that society recognises as belonging to the realm of individual autonomy”: at 476–77.
629 Nowak, supra n. 134, at 385.
630 As in the cases considered above, the notion that an applicant can be expected to exercise a duty of concealment so as to avoid persecution has now been discredited in the leading common law courts: Appellant S395/2002 (Aus. HC, 2003); HJ (Iran) (UKSC, 2010); Refugee Appeal No. 74665/03 (NZ RSAA, 2004), at [114]. As in the case of religious freedom, some German decisions have relied on the concept of “forum internum” to define a core area of homosexual behavior such that if the applicant is able to be discreet and is only prevented from revealing his or her homosexuality in public, this has to be reasonably expected: see e.g. 11 K 81/06.A (Ger. VG Düsseldorf [German Administrative Court, Düsseldorf], Jan. 30, 2007); 5 K 1875/08.A (Ger. VG Düsseldorf, Mar. 11, 2009). Other courts have criticized this approach as obsolete on the basis that the Qualification Directive is said to indicate that homosexuality is an integral part of human identity which cannot be expected to change: see e.g. M 21 K 04.51 494 (Ger. VG München [German Administrative Court, Munich]); and 1 A 1824/07 (Ger. VG Oldenburg [German Administrative Court, Oldenburg], Nov. 13, 2007). This issue would now appear to be settled in light of the recent decision in Minister voor Immigratie en Asiel v. X (C-199/12), Y (C-200/12) and Z v. Minister voor Immigratie en Asiel (C-201/12) (Nov. 7, 2013), in which the CJEU held that “requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it”: at [70].
of “public health or morals.”

While it is true that the right as enshrined in the Civil and Political Covenant proscribes only “arbitrary” interference with privacy, the Human Rights Committee has made clear that “the expression ‘arbitrary interference’ can . . . extend to interference provided for under the law.”

Critically, the Committee also insisted in Toonen that a state cannot assert its own definition of “morality” to justify the criminalization of homosexuality:

The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee’s scrutiny a potentially large number of statutes interfering with privacy.

Because the criminalization of homosexuality per se is thus incapable of justification, a refugee claim based on risk of subjection to criminal sanctions for breach of a sodomy or similar law should be understood to meet the requirement to show the risk of relevant serious harm. For example, the Belgian Conseil du Contentieux des étrangers appropriately and straightforwardly recognized refugee status to persons at risk of arrest (as well as of consequential physical assault in prison) on the basis of homosexuality under the “laws” of Mauritania and Senegal.

The second context in which the right to privacy is of importance to the claims of members of sexual minorities is where – rather than confronting either violence or arrest for being open – the individual concerned opts to conceal her sexual identity. In such cases, the risk faced in the home country has been determined by the New Zealand Refugee Status Appeals Authority to be denial of the right to privacy. In considering the case of a young man from Iran who feared that he would be persecuted for reasons of his sexual orientation, it was accepted that homosexuality is illegal in Iran, and continues to be punished with extreme severity (ranging from the death penalty to flogging). It was found that to avoid these sanctions, homosexuality must be “carefully hidden under the camouflage of feigned heterosexuality.”

Noting that, in the case of Toonen, the Human Rights Committee determined both that “it is undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy’” and, most importantly, that “the continued

---

631 See e.g. Civil and Political Covenant, supra n. 81, at Art. 19(3)(b).
632 UN Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), Apr. 4, 1988, at [4].
633 Toonen v. Australia, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (HRC, Mar. 31, 1994), at [8.6]. See Refugee Appeal No. 74665/03 (NZ RSAA, 2004), at [112]. Indeed, this has been affirmed more recently by the Human Rights Committee in Fedotova (HRC, 2012), where it stated that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations . . . for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination”: at [10.5].
634 35247 (Bel. CCE [Belgian Council for Alien Law Litigation], Dec. 2, 2009).
635 36527 (Bel. CCE [Belgian Council for Alien Law Litigation], Dec. 22, 2009).
636 Refugee Appeal No. 74665/03 (NZ RSAA, 2004), at [114]. See also Hathaway and Pobjoy, supra n. 145.
of even an unenforced anti-sodomy law infringes the privacy right, it was determined that the applicant faced the risk of persecutory harm in Iran, specifically that a return to Iran would deny him “a meaningful ‘private’ life.”

Much the same result would be reached by focusing instead on the risk of serious psychological harm inherent in the need to conceal one’s sexual identity in order to be safe. As the gay applicant testified in *RG (Colombia)*, for him, self-repression “would be to die.” Hence the “long-term deliberate concealment” of a person’s sexuality, involving denial of the “fundamental right to be what they are,” can amount to the kind of threat to “mental integrity” appropriately considered within the ambit of cruel, inhuman, or degrading treatment at international law.

In sum, claims to fear serious harm on the basis of risk to the right to privacy as the relevant form of serious harm are thus appropriately recognized not only where there is a risk of illegal searches or surveillance or of home invasion, but also where personal autonomy – including sexual autonomy and expression – is threatened. Laws that criminalize homosexuality are not valid at international law by virtue of their clear conflict with the right to privacy, meaning that the risk of “prosecution” under such a law is in substance persecutory, and hence serious harm. And where a member of a sexual minority feels compelled to conceal his or her identity to avoid abuse or arrest, she will generally continue to be at risk of serious harm, whether framed as a violation of the right to privacy or, in the alternative, a risk of cruel, inhuman, or degrading treatment.

---