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Electronic version

URL: <http://journals.openedition.org/dossiersgrihl/3896>

ISSN: 1958-9247

Publisher

Grihl / CRH - EHESS

Electronic reference

Francesco Maiani, « The Concept of “Persecution” in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach », *Les Dossiers du Grihl* [Online], Les dossiers de Jean-Pierre Cavallé, De la persécution, Online since 28 February 2010, connection on 14 November 2019.

URL : <http://journals.openedition.org/dossiersgrihl/3896>

This text was automatically generated on 14 November 2019.



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The Concept of “Persecution” in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach

Francesco Maiani

Introduction

- 1 In explaining to us the object and purpose of this workshop, *Jean-Pierre Cavaillé* has posited that the notion of persecution suffers from a “woeful lack of definition”. If this were unconditionally true, then international refugee law would be in jeopardy.
- 2 It would be in jeopardy, because the concept of “persecution” is central to the universal refugee definition laid down by the 1951 Geneva Convention (GC).¹ Indeed, Article 1A GC defines the refugee as someone who has a well-founded fear of “being persecuted”. If the concept of persecution could be expanded or narrowed at will, then the states would be at liberty to re-define the scope of their obligations as they see fit.
- 3 Fortunately, Jean Pierre’s proposition is not entirely true in refugee law: as we will see, several definitional elements of “persecution” are firmly in place. And still, the concept of persecution is one of those the literature characterizes, and rightly so, as “remarkably plastic”.² So, the concept does suffer from indeterminacy in several important respects. But in which respects? And does it *suffer* from indeterminacy, or is it *blessed* with indeterminacy?
- 4 I will go through these questions in the first part of this paper. The aim here will be to illustrate the extent to which the concept of “persecution” is indeterminate in refugee law, and to highlight the advantages and disadvantages that such indeterminacy entails.
- 5 In the second part of the paper, I will take this discussion further by concentrating on a more specific definitional question: the requirement that persecution be a particularly

"serious" form of harm. It is here, I believe, that refugee lawyers' ambivalence towards the indeterminacy of the concept finds its most telling expression.

The Double Edge of Indeterminacy

6 The Refugee Convention relies heavily on the concept of persecution, but does not define it. It only gives us two direct indications:

- First, in order to qualify as a refugee, a person must risk persecution for reasons of "race, religion, nationality, membership of a particular social group or political opinion". Otherwise stated: whatever literal meanings the word "persecution" may have in other contexts, only persecution that is linked to one of these five grounds is relevant for the Convention.
- Secondly, as made clear by Article 33 GC, threats to life or freedom are readily included within the scope of the term 'persecution'. It must be emphasized here that the converse is not true: persecution cannot be defined as including *only* threats to life and freedom. This view, expressed by *Atle Grahl-Madsen* more than forty years ago, has become canonical in the literature and in international practice.³

7 More definitional elements can be gleaned from dictionaries, which are the repositories of the 'ordinary meaning' of words. Dictionary definitions of 'persecution' are of course not entirely consistent. They all highlight, however, four universally accepted characteristics of persecution. Persecution is a type of harm that is⁴

- Inflicted by a human persecutor – not by natural catastrophes or poverty alone;
- Unjust – persecution according to the Convention is by definition discriminatory, as we have seen;
- "Cruel", or "serious"; and
- Persistent – in the sense that it does not relate to episodic harm, but rather to a sustained or systemic threat of serious and unjust harm.

8 These indications are certainly useful. They help in establishing some basic distinctions, and in structuring analysis. Still, as more than fifty years of debates on the correct interpretation of the refugee definition show, they leave ample room for divergent readings.

9 Here I would like to introduce the *advantage* of indeterminacy. In a way, the indeterminacy of the concept of persecution provides the refugee definition with an indispensable element of flexibility.

I quote from *Atle Grahl-Madsen's* classic work on refugee status:⁵

The term 'persecution' has nowhere been defined and this was probably deliberate. It seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise; in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men.

10 Let us not forget that the Geneva Convention is not about repressing crimes of persecution. The requirement of accuracy, which stays at the forefront in criminal law, is conspicuously absent here. Refugee status is meant to cater to the needs of persons who are placed in an intolerable position in their countries of origin, and the ways and manners through which intolerable life is inflicted upon hated minorities may always change.

- 11 In more operational terms, indeterminacy is interpreted by UNHCR as a strong indication in favour of an evolutionary, context-sensitive application of the term.⁶
- 12 To some extent, the advantages promised by indeterminacy have materialized in the Convention's practice of application: the concept of "persecution" has expanded to include forms of harm that were certainly not present to the Convention's drafters, such as domestic abuse. Thus, indeterminacy has allowed the concept to evolve in response to both the "changing nature of persecution", and to the changing sensibilities of our own societies.⁷
- 13 But at the same time, the open-endedness of the refugee definition on this crucial point makes it vulnerable to restrictive interpretations, or even to manipulation. We should not lose sight of the fact that refugee status is a trump card on migration control.⁸ The readiness of industrialized states to afford an exemption from migration control has dwindled considerably with the end of the Cold War and with the concomitant, steep rise of migration pressure.⁹ The repercussions on the way in which the term "persecution" is interpreted and applied have been significant. One example will suffice here.
- 14 In the 1980s and 1990s, at a time when forced migrations were mostly triggered by civil wars and the breakdown of state organizations, the authorities of asylum countries started to enforce strictly a requirement of "individualized" persecution – i.e. a requirement that the asylum seeker show evidence of having been "singled out" for persecution, or of being "more at risk" than similarly placed persons.¹⁰ This reading of the refugee definition is clearly aberrant. The Convention's requirement that persecution be linked to factors such as race or religion makes no numerical distinctions: the affected group can be made up of a handful of individuals or of a whole population – like the European Jews, who were the Convention drafters' model of a refugee population.¹¹
- 15 This is clearly a rather extreme example. But apart from doctrines so obviously dictated by an intent to stem refugee flows, the "fear of numbers"¹² can – and does – insensibly incite national authorities to reduce the concept of persecution to its semantic minimum: the threat to life, limb, or freedom.
- 16 Apart from vulnerability to restrictive interpretations, the indeterminacy of the concept of protection entails another serious drawback: inconsistency within and across different jurisdictions. The two problems are not unconnected, as the following example shows.
- 17 Until recently one issue of interpretation held the centre of the refugee debate in Europe, namely that of the "actors of persecution". Some European countries restricted the sense of "persecution" to harm emanating from the state, or knowingly tolerated by the state – an approach described as the "accountability theory". The other European countries, and UNCHR, held the opposite view, the so-called "protection theory": "persecution", they maintained, can also be inflicted by private parties, and it qualifies its victims as refugees so long as the state is unwilling or unable to afford them effective protection.¹³
- 18 A divergence of this magnitude is clearly unacceptable in the application of a universal definition. As *Lord Steyn* has emphasized in the *Adan and Aitseguer* judgment:¹⁴
- So long as such differences continue to exist, the intention of the Convention to provide a uniformity of approach to the refugee problem will be frustrated and the scheme of the international response will remain grossly distorted.
- 19 Of even greater concern, such a significant difference poses a direct threat to the continuing commitment of the states that uphold more liberal interpretations. In the quoted passage, *Lord Steyn* went on to say:¹⁵

It is both contrary to the intention of the Convention and productive of the most severe abuses that there should be such a premium on making a claim for asylum on the north side of the English Channel as opposed to on the south side. The evidence in the present case discloses that only 5 % of would-be refugees from Algeria are granted asylum if they make their application in France, whereas 80 % of such applicants are successful if applying in the United Kingdom. It is in no way a criticism of the Government of the United Kingdom that it should try to find a solution to this problem.

- 20 The ominous reference to unilateral “solutions to [such problems]” is eloquent proof of the existential threat posed by divergent interpretations to the whole refugee protection regime. Put simply, the Refugee Convention stands the risk of being interpreted away in a race to bottom between states striving to be “less attractive” to asylum seekers than their respective neighbours.
- 21 The “actors of persecution” issue has, in the meantime, been resolved. By a stroke of the pen, the EU Directive on the Qualification of Refugees has made it mandatory for all Member states to adhere to the (more liberal) protection theory.¹⁶ Other European states following the accountability theory, such as Switzerland, have quickly followed suit.¹⁷
- 22 So, as we see, in many respects the concept of persecution does not suffer anymore from a “woeful lack of definition” in refugee law. We now know that persecution can emanate from the authorities or even from private parties, at least as long as the authorities are unable or unwilling to provide effective protection from the latter. And we know that – even though the “singling out requirement” is still in use in many asylum countries – “persecution” is a kind of harassment that can be aimed at an individual, group, population, as long as it is connected to a common defining characteristic such as race, religion or political opinion. The definitional problem *par excellence* is however still standing: what is persecution under refugee law? What types of harm are sufficiently severe to come within the scope of this notion?
- 23 On this issue as on all the others, there is need for a hermeneutic approach that leads to consistent jurisprudence within and across states. At the same time, it is precisely here that the virtues of flexibility are most needed, if the Convention is to stand the test of time. How have international doctrine and practice reacted to the challenge? As I will try to show, giant steps have been made in the quest for a principled approach. But the heart of the dilemma – consistency vs flexibility – is still intact.

Persecution, Harm, and the “Human-Rights-Informed” Interpretation of the Convention

- 24 Let me recapitulate briefly the elements on the question at hand that can be gathered from the Convention:
- Persecution readily includes, but is not restricted to, threats to life, limb, or liberty (see above). Here we are on a relatively solid ground. In particular, it is undisputed that severe ill-treatment – including torture, rape, genital mutilation, etc. – as well as arbitrary detention amount to persecution.¹⁸
 - The concept of ‘persecution’ must, moreover, be interpreted as a flexible, evolutionary concept.¹⁹
- 25 That being said, neither the Convention taken as a whole – text, object, purpose, *travaux préparatoires* – nor dictionaries offer any clear-cut criteria to judge whether a host of

"treatments" amount to persecution. I cite as examples the curtailment of freedom of thought and religion, as well as the discriminatory deprivation of opportunities for cultural and economic self-fulfillment.

- 26 The traditional way of dealing with this difficulty is to proceed on a case-by-case basis, defining the relevant test through very broad formulas intended to reflect the "true meaning" of the word:
- In US case-law, "persecution" is defined as "the infliction of harm upon those who differ [...] in a way regarded as offensive";²⁰ or punishment "that rises above the level of mere harassment".²¹
 - In Swiss law, persecution includes a threat to life, limb or freedom (which is obvious), as well as "measures that entail an unbearable psychological pressure".²² To shed light on this rather mysterious expression, Swiss judges use another formula: "measures that make it impossible for the affected person to lead a life in dignity in their country of origin" (*ein menschenwürdiges Leben*).²³
- 27 Whatever their inherent merits, these formulas do not advance our understanding of the kind of harm that can be qualified as persecution, and they leave a considerable scope for the subjective intuition of the decision maker.
- 28 In theory, of course, they do maximize the flexibility of the "persecution" concept, and hence its ability to expand and to adapt. But the price to be paid in terms of predictability, objectivity, and consistency within and across jurisdictions is huge. The case-law and doctrine produced under this approach is in fact messy at best, incoherent at worst.
- 29 Moreover, while such a casuistic approach theoretically opens the door to very liberal interpretations of the "persecution" concept, it usually results in very restrictive interpretations. Let me mention the Swiss example. I believe the formula adopted by Swiss judges to be appropriate – it focuses on the possibility to lead *ein menschenwürdiges Leben*, which seems consonant with the spirit of the 1951 Convention. But then, if one peruses the case-law, it turns out that ethnic cleansing policies (not involving murder or torture), drastic limits on religious freedom (unless you are a priest), and economic proscription (short of the denial of subsistence) are *not* usually considered as persecution by Swiss judges.²⁴
- 30 The aforementioned problems – inconsistency, subjectivity, narrowness – more than justify the long-standing effort to find a more principled approach to the "persecution" concept – an approach that would maintain a certain flexibility, but at the same time guarantee a reasonably liberal interpretation, as well as more consistent and objective decision-making within and across states.
- 31 This quest has always been, in fact, the quest for an external reference that could be used in interpreting the persecution concept. And such external reference has always been looked for in the province of international human rights law. As early as 1953, *Jacques Vernant* posited that "persecution" should be equated to²⁵
- Severe measures and sanctions of an arbitrary nature, incompatible with the principles set forth in the Universal Declaration of Human Rights.
- 32 The main counter-argument to his thesis was that the Declaration is a non-binding instrument, and could therefore not be considered as a mandatory point of reference for the interpretation of the Convention.²⁶ But this argument has lost all its force with the

adoption of the two UN Covenants, which transpose into binding law most of the rights proclaimed in the Universal Declaration.

- 33 With this decisive development of international human rights law, and with the decisive contribution of authors such as *James Hathaway*, the "human-rights informed" approach to the persecution concept has come to be accepted as the standard view on the question. Today, it is strongly supported by UNHCR, it is widely accepted in the literature, and it is followed by several jurisdictions.²⁷ Article 9 of the EU Qualification Directive also unambiguously endorses it:

Acts of persecution within the meaning of article 1 A of the Geneva Convention must:

be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention of Human Rights;
or

be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)

- 34 Is the problem solved then? Not really, not in its entirety.
- 35 In the first place, not all jurisdictions have accepted this approach. For instance, as we have seen before, Swiss and US judges continue to be unconvinced by the "human rights approach". Secondly, and more importantly, even among the followers of the human rights approach, there is considerable disagreement as to what treatments amount to "persecution".
- 36 *James Hathaway* has proposed a strict identification between "persecution", on the one hand, and the violation of the rights that are enshrined in the two UN Covenants, on the other hand. To be sure, his position takes into account the diversity of the rights that are recognized by those instruments, and it is far too nuanced and sophisticated to be rendered in full here.²⁸ What follows, therefore, is a rather brutal summary:

- A violation of civil and political rights from which no derogation is permitted is *per se* sufficiently severe to be brought within the term "persecution". Such rights include for example the right to life, the prohibition of torture, and the right to legal personality;
- An ostensible violation of civil and political rights from which derogations *are* permitted would amount to persecution, unless the conditions for a derogation are met. These rights include, for instance, freedom of expression, as well as personal freedom.
- The denial of economic, social, and cultural rights amounts to "persecution" when it is discriminatory in itself, or when it is so complete that the state in question cannot be said to be taking "appropriate steps" to realize those rights.

Hathaway's position has, however, been attacked on two fronts, both as being too restrictive, and too generous.

- 37 On the one hand, UNHCR maintains that²⁹
- While international and regional human rights treaties and the corresponding jurisprudence and decisions of the respective supervisory bodies influence the interpretation of the 1951 Convention, persecution cannot and should not be defined solely on the basis of serious or severe human rights violations.
- 38 On the other hand, even authors and jurisdictions that adhere to the human rights view are reluctant to see persecution in the violation of any one of the rights enshrined in the Covenants.

David Martin has expressed this view in his usual direct fashion:³⁰

[T]o this reader, the concept of 'persecution' simply does not implicate the full range of rights listed in the Covenants, even after application of Hathaway's carefully crafted qualifications.

- 39 Reconsidering the EU position in this light, we may readily see that it espouses this more restrictive position: only the "grave" violation of *some* rights – which are unhelpfully qualified as "*fundamental* human rights", as opposed to "human rights" – is *per se* an act of persecution. The violation of other human rights must be cumulated with other harmful measures in order to attain the requisite level of seriousness.
- 40 These divergences are noteworthy. They are obviously rooted in different legal conceptions as to the proper role of human rights instruments in the interpretation of the concept of persecution: loose reference, or thorough "colonization" of refugee law by human rights law?
- 41 But even more than this, they seem to reflect a deeper concern that *too principled a definition* would deprive the concept of persecution of its requisite flexibility. In other words: the debate on which "human rights informed approach" is the most appropriate is the privileged *locus* of confrontation of the two conflicting aspirations I have referred to above: consistency and flexibility. In spite of universal lip-service to the virtues of a principled and consistent approach it would seem that, to many members of the refugee law community, the lack of definition is not so "woeful" after all.

Concluding Remarks

- 42 This discussion on the desirability of a tight (versus loose) reference to human rights law as interpretive tool for the concept of "persecution" is central to the broader subject of the paper. It is, in fact, a discussion on how much "indeterminacy" (or "flexibility") is desirable for this concept in refugee law. So far I have presented it mainly as a battle of ideas, but in formulating my concluding remarks I believe it necessary to highlight its *policy* context and substance.
- 43 I have hinted before to the fact that the approach advocated by Hathaway is under attack from two fronts. In fact, two radically opposed preoccupations underlie the charge of *inflexibility* that is made against it: a "protection-minded", and a "control-minded" one.
- 44 UNHCR's argument – clearly of the "protection-minded" sort – is that human rights violations should really only constitute the core of the persecution concept, which should be allowed some *upward* flexibility. The policy reasons behind this position are transparent: to advocate for a (more) comprehensive view of refugeehood. The gains to be obtained from a defense of flexibility as indeterminacy are, however, less clear to me. Is there much to be obtained in terms of protection by rejecting Hathaway's strict classification of human rights violations as persecution? It is difficult to imagine harm serious enough to merit the name of "persecution", but *not involving* an attack upon the wide range of interests that receive protection under universal human rights law – ranging from physical liberty and integrity, to free speech and expression, to respect for private and family life, to the rights to work, to education, and to the equal participation in public affairs. And is Hathaway's approach really *inflexible*, if by this we mean that it would impair the ability of the persecution concept to evolve with the realities on the ground and the sensibilities of society? I am inclined to think that the

contrary is true: human rights law *does* evolve, and it does so precisely according to the realities on the ground and the sensibilities of our societies.³¹

- 45 The contrary position – which is widely represented in national jurisprudence – is far easier to understand. It reflects the reluctance to commit oneself to a clear-cut interpretive standard that could not be easily abandoned should circumstances change dramatically. Otherwise stated: the reluctance of legislators, judges, and some authors around the world to take a final step, and give an unequivocal meaning to “persecution” in refugee law, is perhaps not due to a *conceptual* difficulty, but rather to the need to retain some discretion in order to steer asylum policies in a rapidly changing world.
- 46 If the above contains some element of truth, then a final point is perhaps worth making: within limits, indeterminacy is an almost inherent feature of the “persecution” concept in refugee law. Woeful or not, its root cause is not (only) an intellectual inability to agree on the essentials of the concept, but rather the hard political tension that underlies the refugee protection regime – namely, the tension between the universalist commitment to give protection, on the one hand, and the task to control migration that is implied in our understanding of statehood, on the other hand.

NOTES

1. UN Treaty Series n° 2545, vol. 189, p. 137.
2. See *David Martin*, *Gender cases: doubts and questions*, in: IARLJ, *The Changing Nature of Persecution*, 2000, 102-116, at 102 f, where this expression is referred to the refugee definition.
3. *Atle Grahl-Madsen*, *The Status of Refugees in International Law*, vol. I, 1966, 196 or 197; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, § 51.
4. See e.g. the definition given by the *Nouveau Petit Robert*, 1998: “*traitement injuste et cruel infligé avec acharnement*”. The elements listed here are universally accepted, but certainly not unproblematic. See e.g., on the human causation of harm, *Andrew Shacknove*, *Who is a refugee?*, *Ethics* 1985, 274-284, 279 f.
5. *Grahl-Madsen*, cit., 193.
6. UNHCR, *Handbook*, cit., § 52-53. See also UNHCR, *Interpreting Article 1 of the 1951 Convention on Refugee Status*, Geneva, April 2001, § 16.
7. See *Martin*, cit., at 102 f.
8. See *James Hathaway*, *The Law of Refugee Status*, 1991, 231-233.
9. See in particular *Andrew Shacknove*, *From Asylum to Containment*, *International Journal of Refugee Law* 1993, 516-533.
10. For a description of this trend, see UNHCR, *An Overview of Protection Issues in Europe – Legislative Trends and Positions Taken by UNHCR*, Geneva, September 1995, 65 ff.
11. See *James Crawford/Patricia Hyndman*, *Three heresies in the Application of the Refugee Convention*, *International Journal of Refugee Law* 1989, 155-179. See also UNHCR, *Interpreting Article 1*, cit., § 20-22.

12. Jean-François Durieux, *Is a New European Refugee Regime Emerging?*, *Refugee Survey Quarterly* 2001, 47-50, at 49.
13. For an overview, see *Walter Kälin*, *Non-state Agents of Persecution and the Inability of the State to Protect*, *Georgetown Immigration Law Journal* 2000-2001, 415-431.
14. House of Lords, *R. v SSHD ex parte Adan et Aitseguer*, 19 December 2000, IRLJ 2001, 202-229, Lord Steyn, at 226.
15. *Ibidem*.
16. Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *Official Journal of the EU* 2004 L 304/12. See Art. 6.
17. On this point, and on the specific role played by EU law in this context, see *Francesco Maiani*, *La Suisse, le système de Dublin et l'influence du droit communautaire sur son droit d'asile*, in: *Epiney/Haag/Heinemann* (Eds.), *Le Défi des frontières - Mélanges en l'honneur de Roland Bieber*, 2007, 812-830
18. UNHCR Handbook, *cit.*, § 51. See also UNHCR, *Guidelines on International Protection (n° 1) : Gender-related Persecution*, HCR/GIP/02/01, Geneva, July 2008, § 9.
19. UNHCR Handbook, § 51.
20. US Court of Appeals, Ninth Circuit, *Nagoulko vs INS*, 24 June 2003, § 16.
21. US Court of Appeals, Seventh Circuit, *Tesfu vs Attorney-General*, 14 March 2003, § 11.
22. Article 3(2) of the Federal Law on Asylum (Swiss Classified Compilation of Federal Legislation, 142.31): "Sont notamment considérées comme de sérieux préjudices la mise en danger de la vie, de l'intégrité corporelle ou de la liberté, de même que les mesures qui entraînent une pression psychique insupportable [...]".
23. *Walter Kälin*, *Grundriss des Asylverfahrens*, 1990, 47 ff; Decision of the Swiss Asylum Appeal Commission, EMARK/JICRA 1996/28, § 4c-dd; Judgement of the Swiss Federal Administrative Tribunal, E-3516/2006, 15 June 2007, § 5.5.
24. See respectively on ethnic cleansing: Swiss Asylum Appeal Committee EMARK/JICRA 2000/17, § 11b, and 2005/12, § 7; on religious freedom: Swiss Asylum Appeal Committee EMARK/JICRA 1993/7, § b and 1995/1; on economic proscription: Swiss Asylum Appeal Committee EMARK/JICRA 1996/1, § 5d-cc, 1996/27c-bb, Judgement of the Swiss Federal Administrative Tribunal, E-3516/2006, 15 June 2007, § 5.5, as well as *Mario Gattiker*, *La procédure d'asile et de renvoi*, 3 ed., 1999, 58.
25. *Jacques Vernant*, *The Refugee in the Post-War World*, 1953, at 8, quoted in *Grahl-Madsen*, *cit.*, at 193.
26. *Grahl-Madsen*, *cit.*, at 194.
27. *Hathaway*, *Refugee Status*, *cit.*, chap. 4, particularly at 106; UNHCR, *Interpreting Article 1*, *cit.*, § 2-5 and 17.
28. See *Hathaway*, *Refugee Status*, *cit.*, 106-124.
29. UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004*, Geneva, January 2005, at 20.
30. *David Martin*, *Book Review of Hathaway's Law of Refugee Status*, *American Journal of International Law* 1993, 348-351, 350. See also House of Lords, *Sepet et Bulbul v SSHD*, 20 March 2003, *International Journal of Refugee Law* 2003, 276-302, Lord Bingham, § 9.
31. Access to refugee status for genuine conscientious objectors to military service is a good case in point. UNHCR has long advocated for the inclusion of this class of persons, and the "Hathaway approach", strictly identifying persecution with breaches of universally recognized human rights, has long stood in the way (see UNHCR Handbook, *cit.*, 170 ff; UNHCR, *Submission to the House of Lords in the case of Sepet and Bulbul*, 8 January 2003, on file with the author, § 3.1 ff; House of Lords, *Sepet and Bulbul*, *cit.*). The evolution of human rights law on this point (see *Sarah*

Joseph, Human Rights Committee: Recent Jurisprudence, Human Rights Law Review 2007, 567-581, at 575 ff) has however reversed the situation. Hathaway's approach is now, arguably, of considerable assistance for the recognition of genuine conscientious objectors as refugees.

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