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## Refugee or just Stateless?

A Study of International Refugee Law in relation to Stateless Persons  
and Socio-Economic Deprivation

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# Summary

Statelessness restricts the access of many rights, such as education and employment, which leads to many stateless persons finding themselves in socio-economic deprivation. The predicament of socio-economic deprivation can become so acute as to force people to cross international borders to seek protection elsewhere, for example as refugees. In international refugee law, it is widely acknowledged that a claim for refugee status can be based on socio-economic deprivation. Stateless persons can establish a claim for refugee status under the Refugee Convention as well as avail themselves of the protection of the Statelessness Convention and the Reduction of Statelessness Convention. However, the indefinite nature of the refugee definition gives rise to interpretative issues and differences in interpretation between jurisdictions.

The purpose of this thesis is to examine whether the situation of statelessness causes additional interpretative challenges in the context of claims for refugee status based on the denial of economic and social rights and how such potential challenges can best be resolved. To fulfil this purpose, the examination focuses on the requirements of ‘being persecuted’ and a causal link in the refugee definition. To this end, a doctrinal research method has been employed. The elements of the refugee definition have been examined by the use of mainly subsidiary means of interpretation, such as doctrine and case law. In regard to case law, cases concerning stateless claims for refugee status based on socio-economic deprivation from five English language jurisdictions have been discussed.

The situation of statelessness gives rise to additional interpretative challenges in regard to Article 2(3) of the ICESCR. Article 2(3) of the ICESCR is a narrow exception to the non-discrimination principle which applies to developing countries in regard to economic rights and non-nationals. Another specific issue which arises in stateless claims for refugee status based on socio-economic deprivation is what relevance the lack of reciprocal agreements between states should be given. In this regard, a thorough examination of whether differential treatment based on the lack of reciprocal agreements is proportionate must be made. In relation to the requirement of a causal link in the refugee definition, the situation of statelessness causes no additional interpretative issues but rather it complicates the appreciation of the facts of the case. Decision-makers must engage in more depth with the facts of the case and expand their understanding of the situation of statelessness and how it emerges.

# Sammanfattning

Statslöshet inskränker många rättigheter, såsom rätten till utbildning och arbete, vilket leder till att många statslösa personer befinner sig i socioekonomisk utsatthet. Socioekonomisk utsatthet kan leda till så akuta konsekvenser att människor tvingas korsa internationella gränser för att söka skydd någon annanstans, till exempel som flyktingar. I internationell flyktingrätt är det allmänt etablerat att en ansökan om flyktingstatus kan grundas på socioekonomisk utsatthet. Statslösa personer kan hävda flyktingstatus enligt Flyktingkonventionen samt nyttja skyddet i Statslöshetskonventionen och Konventionen om begränsning av statslöshet. Flyktingdefinitionens vaga natur leder dock till tolkningsfrågor och skillnader i tolkning mellan olika jurisdiktioner.

Uppsatsens syfte är att undersöka om statslöshet ger upphov till ytterligare tolkningsfrågor vad gäller ansökningar om flyktingstatus baserade på förnekandet av ekonomiska och sociala rättigheter och hur sådana tolkningsfrågor bäst kan lösas. För att uppfylla detta syfte fokuserar undersökningen på kraven på förföljelse och ett orsakssamband i flyktingdefinitionen. För detta ändamål har den rättsdogmatiska metoden använts. Rekvisiten i flyktingdefinitionen har undersökts huvudsakligen med hjälp av sekundärkällor, såsom doktrin och rättspraxis. Vad gäller rättspraxis har fall från fem engelskspråkiga jurisdiktioner där statslösa personer hävdar flyktingstatus på grund av socioekonomisk utsatthet diskuterats.

Statslöshet ger upphov till ytterligare tolkningsutmaningar i förhållande till artikel 2(3) i ICESCR. Artikel 2(3) i ICESCR är ett undantag från principen om icke-diskriminering som kan nyttjas av utvecklingsländer avseende ekonomiska rättigheter och icke-medborgare. Ett annat specifikt problem som uppstår när statslösa personer hävdar flyktingstatus på grund av socioekonomisk utsatthet är att bestämma vilken betydelse bristen på ömsesidiga avtal bör ha. I detta hänseende måste en grundlig undersökning göras av huruvida särbehandling som grundas på bristen av ömsesidiga avtal är proportionerlig. I förhållande till kravet på orsakssamband i flyktingdefinitionen ger statslöshet inte upphov till några ytterligare tolkningsfrågor, men komplicerar bedömningen av omständigheterna i det enskilda fallet. Beslutsfattare måste djupgående beakta omständigheterna i det enskilda fallet och utöka sin förståelse för statslöshet och hur den uppstår.

# Preface

I would like to express my sincerest gratitude to my supervisor Matthew Scott. Thank you for sharing your thoughts with me and guiding me through this process.

Thank you, Jenny and Erica, for proof reading and making this thesis better.

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Jakob and Tea, thank you for putting things into perspective.

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*Marija Pejic*

# Abbreviations

1967 Protocol	1967 Protocol relating to the Status of Refugees
EU	European Union
ICCPR	1966 International Covenant on Civil and Political Rights
ICERD	1965 International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	1966 International Covenant on Economic, Social and Cultural Rights
IRB	Immigration and Refugee Board
Reduction of Statelessness Convention	1961 Convention on the Reduction of Statelessness
Refugee Convention	1951 Convention relating to the Status of Refugees
RRT	Refugee Review Tribunal
RSAA	Refugee Status Appeals Authority
Statelessness Convention	1954 Convention relating to the Status of Stateless Persons
UDHR	Universal Declaration of Human Rights
UKAIT	United Kingdom Asylum and Immigration Tribunal
UKIAT	United Kingdom Immigration Appeal Tribunal
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
U.S. Court of Appeals 6 <sup>th</sup> Cir.	United States Court of Appeals for the Sixth Circuit
VCLT	1969 Vienna Convention on the Law of Treaties

# 1 Introduction

## 1.1 Background

Worldwide, there are up to 12 million stateless persons. Among these, large groups of people have found themselves in statelessness for a long time, for example the Bedoon in Kuwait and the Rohingya in Myanmar. Even if statelessness affects individuals differently, due to individual circumstances or dependent on the state which the person lives in, statelessness generally has severely destructive impacts on people's lives across the world. For example, statelessness restricts the access to many rights and contributes to human insecurity, forced displacement and conflict.<sup>1</sup> For a better understanding of statelessness, it can be said that statelessness and nationality are two sides of the same coin. Statelessness is addressed in several international instruments and has a universal definition. According to Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (Statelessness Convention) a 'stateless person' is someone 'who is not considered as a national by any State under the operation of its law'. This definition is considered to have acquired customary nature.<sup>2</sup> In other words, a stateless person is someone who does not possess the nationality of any state.

Nationality can be acquired in different ways. The principle of *jus soli* grants the child the nationality of the state in which the child is born ('law of the soil'), whereas *jus sanguinis* grants nationality on the basis of descent ('law of the blood').<sup>3</sup> A third principle of acquisition of nationality is naturalisation, either *jus domicili* or long residence. All three principles follow the overriding idea that nationality demonstrates a link with the state, either by connection with the territory or through lineage.<sup>4</sup> Which principle should prevail is principally a question for domestic legislation. Article 1 of the 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws states that 'It is for each State to determine under its own law who are its nationals' and Article 2 that 'Any question as to whether a person possesses the nationality

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<sup>1</sup> Alice Edwards and Laura van Waas, 'Statelessness' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2016) 290.

<sup>2</sup> Betsy Fisher, 'The Operation of Law in Statelessness Determinations under the 1954 Statelessness Convention' (2015) 33 *Wisconsin International Law Journal* 254, 262.

<sup>3</sup> Paul Weis, *Nationality and Statelessness in International Law* (2<sup>nd</sup> rev edn, Sijthoff & Noordhoff 1979) 95; Alice Edwards, 'The meaning of nationality in international law in an era of human rights: procedural and substantive aspects' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 16.

<sup>4</sup> Edwards (n 3) 16.



of a particular State shall be determined in accordance with the law of that State'. Since states are free to choose which principle of nationality acquisition to apply one can become stateless at birth. For example, if a child is born in a state which applies *jus sanguinis*, to parents who are nationals of a state which applies *jus soli*, the child becomes stateless. Such an individual is considered to be a *de jure* stateless person. *De jure* stateless persons are persons who either did not acquire a nationality at birth or later, or subsequently lost their nationality without acquiring a new one and therefore, are not nationals of any state. Another category of stateless persons is *de facto* stateless persons. A stateless person *de facto* is someone who has no effective nationality, meaning they no longer enjoy the protection and assistance of their national authorities either because they are unwilling or unable to do so.<sup>5</sup> Evidently, a person can become stateless due to many different reasons.

In international law, the situation of stateless persons has been addressed in different ways. Human rights are often declared to be universal on the basis of a claim that every human being is sacred.<sup>6</sup> Indeed, human rights are in theory applicable to all human beings, without regard to nationality.<sup>7</sup> Despite this, statelessness is an obstacle which must be overcome before the enjoyment of many socio-economic rights is possible. Even if stateless people are invisible to a great extent, their suffering is real and sometimes acute.<sup>8</sup> If such suffering becomes acute, for example due to denial of socio-economic rights, stateless persons may be forced to cross international borders to seek protection elsewhere. One alternative in that situation is to aim for the protection afforded by the 1951 Convention relating to the Status of Refugees (Refugee Convention), which protects those who qualify as refugees. The term 'refugee' is defined in Article 1A(2) of the Refugee Convention (the Convention) as someone who:

*As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*

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<sup>5</sup> UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness*, United Nations, August 1949, *Lake Success - New York*, 1 August 1949, E/1112; E/1112/Add.1.

<sup>6</sup> Michael Perry, 'Are Human Rights Universal? The Relativist Challenge and Related Matters' (1997) 19 *Human Rights Quarterly* 461, 462.

<sup>7</sup> Edwards (n 3) 11.

<sup>8</sup> Alice Edwards and Laura van Waas, 'Introduction' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 1.

The temporal limitation of the refugee definition, ‘As a result of events occurring before 1 January 1951’, has been removed by Article 1(2) of the 1967 Protocol relating to the Status of Refugees (1967 Protocol). Someone who is considered to be a refugee under the definition is entitled to the protection of the Convention, unless the rules of cessation (Article 1C) or exclusion (Article 1F) are applicable.

Refugee status is not granted by any state, rather the individual becomes a refugee as soon as they fulfil the criteria in the definition and their status as a refugee is simply recognised by states through refugee status determination.<sup>9</sup> Once someone with a well-founded fear of being persecuted for reasons of one or more Convention grounds crosses an international border and becomes a refugee, they are entitled to the rights accorded to them in the Convention and can claim them in any state party to the Convention.<sup>10</sup> However, the legal consequences of refugee status are based upon the determination of some authority that the criteria are satisfied by the individual in question.<sup>11</sup>

The first refugee protection in international law was designed to protect stateless persons. Formal statelessness, or *de jure* statelessness, was the basis for recognition as a refugee, making stateless persons and refugees two intertwined groups. Leading up to the Second World War, the focus in international refugee law expanded to *de facto* stateless persons as well.<sup>12</sup> *De jure* stateless persons and refugees were divided through the drafting of the Refugee Convention.<sup>13</sup> Instead, the protection of stateless persons was addressed specifically by two new conventions in a time when a lot of people were denationalised due to the Second World War, the Statelessness Convention in 1954 and the later 1961 Convention on the Reduction of Statelessness (Reduction of Statelessness Convention). Stateless persons were considered to be unprotected and in a precarious position, needing more protection than the Universal Declaration of Human Rights (UDHR) could guarantee all human beings.<sup>14</sup>

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<sup>9</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, December 2011, Geneva, para 28.

<sup>10</sup> James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 11.

<sup>11</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> ed, Oxford University Press 2007) 51.

<sup>12</sup> James Hathaway, ‘The Evolution of Refugee Status in International Law: 1920–1950’ (1984) 33 *The International and Comparative Law Quarterly* 348, 358–361; James Hathaway and Michelle Foster, *The Law of Refugee Status* (2<sup>nd</sup> ed, Cambridge University Press 2014) 64.

<sup>13</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 64.

<sup>14</sup> Laura van Waas, ‘The UN statelessness conventions’ in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 65–69.

As the introductory note of the Statelessness Convention states, the Statelessness Convention provides minimum standards of treatment for those who qualify as stateless persons under the definition in Article 1(1). The Reduction of Statelessness Convention was adopted with the approach of reducing statelessness by a set of rules indicating which state is responsible for granting a person nationality if they would be stateless otherwise.<sup>15</sup> However, the precarious position of stateless persons seems not to have been remedied by the two conventions on statelessness, since there is still a very large number of stateless persons across the world more than half a century later.<sup>16</sup> One explanation for this could be that the two statelessness conventions have considerably fewer state parties than the Refugee Convention. The Statelessness Convention has 91 state parties and the Reduction of Statelessness Convention has 73, compared to the Refugee Convention's 146 state parties.<sup>17</sup> Evidently, states are less committed to protect stateless persons than refugees. Some have argued that stateless persons should be incorporated as refugees because of the failure of states to admit to the statelessness regime, but courts have dismissed this approach.<sup>18</sup>

However, the separation of stateless persons and refugees by the drafting of the Refugee Convention and the introduction of two new instruments directly addressing statelessness does not mean that a stateless person can never be a refugee. Clearly, all stateless persons are not refugees, but stateless persons can in some circumstances qualify as such. A stateless person who successfully establishes a claim for refugee status is both a stateless person and a refugee and is encompassed by the protection of both regimes.<sup>19</sup> Since the statelessness regime and the refugee protection regime aim to remedy different aspects of an individual's predicament, it is important that a stateless person is recognised as a refugee if the requirements for refugee status are satisfied. Even if the Refugee Convention applies to stateless persons as well and should be applied equally to everyone without regard to nationality, the situation of statelessness gives rise to another dimension in claims for refugee status and stateless persons claiming refugee status find themselves in a special position within international refugee law.

Considering that the lack of legal identity leads to restricted access to a wide range of socio-economic rights, it is not unlikely that a stateless person may find themselves in socio-economic deprivation. Reports show that stateless

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<sup>15</sup> van Waas, 'The UN statelessness conventions' (n 14) 74–75.

<sup>16</sup> Edwards and van Waas, 'Statelessness' (n 1) 290.

<sup>17</sup> See UN Treaty Collection, Status of Treaties, Chapter V.

<sup>18</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 65.

<sup>19</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 66.

persons experience hardship in relation to education, health services and employment, among other rights. For example, stateless persons may be excluded from health programmes and states' school systems or have a hard time receiving necessary permits for work.<sup>20</sup> In international refugee law, it is widely recognised that the risk of socio-economic deprivation can amount to being persecuted.<sup>21</sup> Therefore, a claim for refugee status by a stateless person may well be based on socio-economic deprivation. Such a claim encompasses both the special situation for stateless persons claiming refugee status and the difficult task of establishing a refugee claim on the basis of socio-economic deprivation.

## 1.2 Purpose and Research Question

Since international law in many situations is realised on a national level, the effects of international law are dependent on the interpretation and application of international legal instruments by domestic authorities and courts. The Refugee Convention and the 1967 Protocol are not exempt from the interpretative challenge underpinning international law in general and thus, stateless claims for refugee status based on socio-economic deprivation are not exempt either. The purpose of this thesis is to examine how interpretative difficulties when deciding eligibility for refugee status in general impact the assessment of claims for refugee status based on socio-economic deprivation brought by stateless persons and if the situation of statelessness affects the assessment in a way that creates interpretative challenges specific for stateless claims. If stateless specific challenges are found to exist, the purpose also extends to discussing how stateless specific issues in deciding eligibility for refugee status on the basis of socio-economic deprivation are best resolved.

For the purpose to be achieved, an in-depth examination of the requirement of 'being persecuted' for reasons of a Convention ground in Article 1A(2) of the Refugee Convention in relation to deprivation or denial of economic and social rights is necessary. This analysis will be concentrated on two main questions. First, the question of whether the predicament stateless persons find themselves in due to denial of the access to socio-economic rights satisfies the requirement of 'being persecuted'. In this regard, international law concerning socio-economic rights must be examined as well. Secondly, the question of when the requirement of a causal link in the refugee definition is satisfied. The refugee definition requires the fear of being persecuted to be for reasons of race, religion, nationality, membership of a particular social

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<sup>20</sup> Laura van Waas, *Addressing the human rights impact of statelessness in the EU's external action* (Publications Office 2014) 16.

<sup>21</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 228.

group or political opinion. This requirement, the nexus requirement or causal link requirement, will also be examined thoroughly in relation to stateless claims for refugee status based on socio-economic deprivation. The concept of discrimination and its position in international refugee law will be discussed as well.

Moreover, as the thesis aims to examine stateless claims for refugee status based on socio-economic deprivation, a study of case law is necessary. The refugee definition is interpreted and applied by national courts within their jurisdictions and is given a somewhat different meaning depending on the interpretation made by a specific court or tribunal. Therefore, cases from different jurisdictions will be examined to trace differences in interpretation and application of the Refugee Convention. However, this thesis does not set out to be an exhaustive study of case law but rather a study of different approaches to interpretation and application of international refugee law in relation to stateless claims for refugee status based on socio-economic deprivation and the specific problems which may arise in such claims.

In light of this, this thesis aims to answer the following research question:

*What particular interpretative challenges does the situation of statelessness bring to the context of claims for refugee status based on denial of economic and social rights and how may any such challenges be resolved?*

### **1.3 Delimitations**

The refugee definition in Article 1A(2) of the Refugee Convention is the basis for this study, but the scope of this thesis does not allow for a comprehensive examination of the refugee definition as a whole. Therefore, the requirement of ‘being persecuted’ and the requirement of a causal link to a Convention ground will be in focus. These two requirements are of most relevance for the research question of this thesis as they give rise to most of the interpretative questions regarding the refugee definition. Hence, the remaining requirements of the refugee definition, such as the requirement of a well-founded fear, will not be dealt with in any depth.

In regard to the requirement of ‘being persecuted’, the research question of this thesis only encompasses denial of economic and social rights. Hence, other maltreatment that stateless persons may be subjected to which could constitute persecution will not be discussed.

As the research question of this thesis is focused on refugee claims made by stateless persons, only the Convention grounds race, nationality and membership of a particular social group will be further analysed. All five Convention grounds could be engaged in a claim by a stateless person, but race, nationality and membership of a particular social group are invoked in the specific cases which will be discussed further on and will therefore be in focus.

Article 33(1) of the Refugee Convention, which states the principle of *non-refoulement*, is an important part of the refugee protection in international law. The prohibition of expulsion or return provided by Article 33(1) applies only to refugees, meaning that to be afforded the protection of Article 33(1) the individual must first have been found to be a refugee according to Article 1A(2). This thesis aims at examining the assessment of the refugee definition and not the rights granted to refugees by the Convention. Article 33(1) can only be invoked at a later stage, when someone has been granted refugee status and an examination of Article 33(1) of the Refugee Convention is therefore not encompassed by the purpose of this thesis.

Since this thesis is concerned with the Refugee Convention, no regional or domestic frameworks will be examined. However, one directive from the European Union (EU) will be used as an example in chapter 2.2.1.

In regard to the case study which will be made within the scope of this thesis, only cases from English language jurisdictions will be considered. The reason for this is to prevent linguistic nuances from getting lost in translation from another language to English. Since many jurisdictions use English as their first language, the selection of cases is merely limited by this delimitation. Furthermore, doctrinal research within the field of international refugee law is mostly written in English in relation to the English text of the Refugee Convention. Therefore, discussing cases from English language jurisdictions enables a more comprehensive analysis and discussion of international refugee law. Considering this, Swedish case law will naturally not be discussed.

Furthermore, child asylum claims entail other considerations as a result of specific legal instruments protecting the rights of the child. However, the cases which will be studied within the scope of this thesis are concerned mainly with adult asylum claims. Therefore, specialist human rights treaties, for example the 1989 Convention on the Rights of the Child, will not be regarded.

## 1.4 Method and Material

For the purpose of establishing international refugee law, a doctrinal research method is preferable since its main function is to determine established law through the conventional sources of law.<sup>22</sup> As stated in Article 38(1) of the Statute of the International Court of Justice, the traditional sources of international law are international conventions, international customary law and general principles. Furthermore, case law and teachings of the most highly qualified publicists can be used as subsidiary means for determining the rules of law. This thesis is based mainly on subsidiary means, such as legal doctrine and case law. As the research question of this thesis entails that claims for refugee status be examined, it is necessary to consider case law extensively. Moreover, the legal doctrine which will be used does in many aspects engage with an interpretation of primary sources.

However, the distinct nature of international law impels that other methods than solely a doctrinal research method be used. Therefore, the general rule of treaty interpretation set out in the 1969 Vienna Convention on the Law of Treaties (VCLT) must be considered throughout this study, mainly Article 31(1) of the VCLT which states 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.*

The wording of the paragraph implies that the object and purpose of a treaty is never autonomous from other means of interpretation but should always be used in combination with ‘the ordinary meaning’ of the terms of the treaty. ‘The ordinary meaning’ should always be considered first, before moving on to the object and purpose as a second step in the interpretation process. Since the ordinary meaning of the terms of a treaty can be hard to define due to vague or ambiguous terms, the object and purpose can be used as a supplement. The object and purpose can help to decide which meaning of an ambiguous term is the correct one or to make the meaning of a vague provision more precise.<sup>23</sup> The reasons for which a treaty exists is ‘the object and purpose’ of a treaty. Even though this is subjective, the object and purpose relevant for treaty interpretation is commonly considered to be the object and purpose the treaty parties accord to the treaty.<sup>24</sup>

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<sup>22</sup> Claes Sandgren, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation* (4<sup>th</sup> edn, Norstedts Juridik 2018) 49.

<sup>23</sup> Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 203.

<sup>24</sup> Linderfalk (n 23) 204–205.

Using a doctrinal research method in conjunction with the general rule of treaty interpretation in the VCLT, the relevant international conventions can be examined to discern an accurate interpretation. Mainly the Refugee Convention will be of interest for this thesis, but also other human rights treaties concerning socio-economic rights will be examined. As the research question of this thesis states, how interpretative challenges arising in stateless claims for refugee status based on denial of socio-economic rights should be resolved will be discussed. In this regard, the general rule of treaty interpretation in the VCLT will be of relevance as it helps to evaluate which interpretation is the best solution.

Some commentary regarding the cases which will be discussed is required. As has been explained in 1.3, only cases from English language jurisdictions will be discussed. Within the scope of this thesis, cases from Australia, Canada, New Zealand, the United Kingdom and the United States and the different approaches within these domestic courts, boards and tribunals will be explored. Cases from Australia have been retrieved from Refworld with a search limited to the Australia Refugee Review Tribunal (RRT) and the keywords 'stateless refugee'. Cases from Canada have been retrieved from CanLII by a search limited to the federal courts, boards and tribunals and the keywords 'stateless refugee'. Cases from New Zealand have been retrieved from Refworld by a search limited to the New Zealand Refugee Status Appeals Authority (RSAA) and the keywords 'stateless refugee'. Cases from the United Kingdom have been retrieved from Refworld by a search limited to the United Kingdom Asylum and Immigration Tribunal (UKAIT) and the United Kingdom Immigration Appeal Tribunal (UKIAT) and the keywords 'stateless refugee'. Cases from the United States have been retrieved from Refworld by a search limited to the United States Court of Appeals for the Sixth Circuit (U.S. Court of Appeals 6<sup>th</sup> Cir.) and the keywords 'stateless refugee', as well as from FindLaw by a search limited to the U.S. Court of Appeals 6<sup>th</sup> Cir. and the keywords 'stateless refugee'.

The main criterion for selection has been deprivation or denial of economic and social rights, such as education, employment and health services. All cases concern a stateless individual or individuals who claim refugee status because of denial or deprivation of economic and social rights. However, in some cases the claim for refugee status encompasses other forms of maltreatment as well, for example risk of arbitrary detention, but those aspects will not be discussed in any extent.

In total, 14 cases considering stateless claims for refugee status based on socio-economic deprivation have been examined within the scope of this thesis. Clearly, there are more cases in this category which have not been selected



for this study. More recent cases have been selected over older cases because newer cases reflect contemporary international refugee law. Moreover, cases which have been referenced in legal doctrine have been favoured. Cases in which the individual is subjected to maltreatment which for the most part is constituted by other measures than denial of socio-economic rights, as well as cases which mainly discuss other legal issues, such as credibility, effective nationality or internal relocation have not been selected.

## 1.5 Research Situation

The situation for stateless persons in international law has been dealt with thoroughly in legal research. For example, Paul Weis' book *Nationality and Statelessness in International Law* from 1979 examines nationality and statelessness in depth. A more recent work on nationality and statelessness is *Nationality and Statelessness in the International Law of Refugee Status* by Eric Fripp from 2016. Fripp examines key issues regarding refugee status in relation to statelessness and nationality, for example persecution by denial of nationality, and discusses some of the cases which will be used in this thesis. However, he does not do so in relation to socio-economic deprivation.

In the field of international refugee law, the second edition of *The Law of Refugee Status* by James Hathaway and Michelle Foster is a seminal work. The second edition follows the first edition of the book from 1991 by Hathaway which has been referenced extensively in case law.<sup>25</sup> The second edition has been described as a 'thorough conceptual exploration of international refugee law principles and a comprehensive, globe-spanning case law compendium on virtually every conceivable topic in the field'.<sup>26</sup> The book's authoritative nature and systematic examination of international refugee law makes it a useful and frequent reference in this thesis. However, works from other prominent academics in the field of international refugee law will be used as well, such as the third edition of *The Refugee in International Law* by Guy Goodwin-Gill and Jane McAdam and *The Status of Refugees in International Law* by Atle Grahl-Madsen.

As regards socio-economic rights and international refugee law, a fundamental work is Foster's *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* from 2007. The book provides a detailed analysis of theory and practice of claims for refugee status based on denial of socio-

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<sup>25</sup> Angus Grant, 'The Law of Refugee Status' (2015) 93:2 Canadian Bar Review 567, 567; Audrey Macklin, 'The Law of Refugee Status by James C. Hathaway & Michelle Foster (review)' (2017) 39:1 Human Rights Quarterly 220, 220.

<sup>26</sup> Grant (n 25) 567.

economic rights.<sup>27</sup> Foster has comprehensively examined when socio-economic deprivation amounts to being persecuted.<sup>28</sup>

The specific issues which arise in stateless claims for refugee status based on socio-economic deprivation have not been discussed as extensively as statelessness and refugee law in general. Hopefully, this thesis can contribute to the field of research encompassing both statelessness and international refugee law in relation to socio-economic deprivation.

## 1.6 Terminology

The terms *discrimination* and *differential treatment* are not used interchangeably in this thesis. While differential treatment encompasses all situations where people belonging to one group are treated differently than people not belonging to that group, discrimination refers only to such a distinction which is not justifiable and therefore unlawful.

The term *Convention ground* in this thesis refers to the grounds set out in Article 1A(2) of the Refugee Convention, that is race, religion, nationality, membership of a particular social group and political opinion.

The terms *causal link requirement*, *nexus clause* and *nexus requirement* are used interchangeably and refer to the requirement in the refugee definition of a causal connection between the fear of being persecuted and one or more Convention grounds.

The word *Bedoon* (sometimes spelled Bidoon) refers to long-time residents in Kuwait who have been denied Kuwaiti citizenship. The word stems from the Arabic phrase ‘bedoon jinsiyya’ meaning ‘without nationality’ or ‘without citizenship’.<sup>29</sup> The word is frequently used when discussing the cases selected in this thesis and in this regard, ‘Bedoon’ will be used for the singular and ‘Bedoons’ for the plural.

## 1.7 Outline

This thesis is structured around three main challenges which arise in stateless claims for refugee status based on socio-economic deprivation. The following

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<sup>27</sup> Sasha Baglay, ‘International Refugee Law and Socio-Economic Rights: Refuge from Deprivation’ (2009) 10:3 *Journal of International Migration & Integration* 341, 342.

<sup>28</sup> Jane McAdam, ‘International Refugee Law and Socio-Economic Rights: Refuge from Deprivation’ (2009) 10:2 *Melbourne Journal of International Law* 579, 579.

<sup>29</sup> Human Rights Watch, *The Bedoons of Kuwait: “Citizens without Citizenship”*, 1 August 1995.

chapters will each be dedicated to those challenges. Each chapter is divided into two main parts, the first part will present the legal framework surrounding the issue which will be discussed, and the second part will provide examples of how the challenge is dealt with in case law in relation to stateless claims for refugee status based on socio-economic deprivation. The legal framework provides an understanding for the decision-makers' reasonings, as well as a basis for discussing them. All chapters end with conclusive remarks to summarise and discuss the findings, if any particular challenges in relation to stateless claims have been disclosed.

Chapter 2 examines the question of when the threshold of being persecuted is satisfied in relation to claims based on socio-economic deprivation and how it applies to stateless claims for refugee status.

Chapter 3 is concerned with the question of discrimination in relation to the refugee definition and how different approaches to understanding discrimination in the refugee context affect stateless claims for refugee status.

Chapter 4 is dedicated to the requirement of a causal link between the fear of being persecuted and a Convention ground in the refugee definition, with special focus on the Convention grounds race, nationality and membership of a particular social group. Furthermore, the interpretation of the nexus clause in relation to stateless claims will be discussed.

Chapter 5 aims to sum up the findings in relation to the purpose and research question and discuss how any interpretative challenges revealed in previous chapters can best be resolved.

# 2 Conceptualising Being Persecuted

## 2.1 Introduction

Only an individual who is unable or unwilling to return to their country of nationality or, if stateless, habitual residence because of a well-founded fear of being persecuted can establish a claim for refugee status. Other reasons for being outside one's country or habitual residence are irrelevant to the refugee definition.<sup>30</sup> The refugee definition does not require persecution to actually have occurred. In fact, the Refugee Convention is only concerned with the prospective risk of being persecuted.<sup>31</sup> Since no universally accepted definition of 'being persecuted' exists, it is necessary to discuss this concept in more depth. The lack of a definition of being persecuted in the Refugee Convention may be intentional, as it is necessary that the Convention stays flexible in its interpretation and thus adaptable to new refugee situations.<sup>32</sup> In this chapter, the meaning of 'being persecuted' and what may constitute such a predicament, especially in relation to socio-economic deprivation, will be discussed. In relation to case law, the decision-makers' reasonings and decisions regarding whether the threshold for being persecuted has been satisfied will be analysed.

## 2.2 The Legal Framework

### 2.2.1 Being Persecuted

A widely adapted formulation of 'being persecuted' is that it is comprised by two fundamental elements, commonly expressed as 'persecution = serious harm + failure of state protection'.<sup>33</sup> Hence, a risk of serious harm is not enough, the risk must also be inescapable due to the lack of national protection for it to reach the threshold of a risk of 'being persecuted'. Hathaway and Foster argue that a risk of 'being persecuted' is best understood as requiring

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<sup>30</sup> UNHCR, *Handbook* (n 9) para 39.

<sup>31</sup> Goodwin-Gill and McAdam (n 11) 63; Hathaway and Foster, *The Law of Refugee Status* (n 12) 162.

<sup>32</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 182.

<sup>33</sup> *Islam (A.P.) v. Secretary of State for the Home Department; Regina v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998–1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, 17; *BG (Fiji)*, [2012] NZIPT 800091, New Zealand: Immigration and Protection Tribunal, 20 January 2012, para 96; Hathaway and Foster, *The Law of Refugee Status* (n 12) 185.

evidence of a ‘sustained or systemic denial of human rights demonstrative of a failure of state protection’. Clearly, protection of refugees in international law is considered subsidiary to the protection from one’s own country of nationality or habitual residence.<sup>34</sup> The agents of persecution can be national authorities or non-state actors. When offensive acts are committed by non-state actors, for example paramilitary groups or family members, the acts must be tolerated by the authorities or the authorities must be shown unable or refusing to offer effective protection for it to constitute persecution.<sup>35</sup> It should be noted that the threshold of being persecuted can be met on cumulative grounds. Different measures that do not in themselves amount to persecution can, combined with other detrimental factors, satisfy the requirement of being persecuted.<sup>36</sup>

Different jurisdictions have different approaches to deciding whether a specific treatment or predicament amounts to being persecuted. One approach, adopted mainly by courts in the United States, is the subjective approach. This approach seems to stray towards a fixation with physical harm and measuring of human suffering and the focus is on whether the harm is offensive or unjustified enough. The question of whether the harm is offensive or unjustified enough to constitute persecution is answered on the basis of the decision-maker’s personal estimation of the harm. The subjective approach has been rejected by Hathaway and Foster fundamentally because of its lack of objective basis and the arising problem of achieving consistency in the interpretation between different courts.<sup>37</sup> However, the consideration of what constitutes being persecuted should be subjective in one way. The United Nations High Commissioner for Refugees (UNHCR) emphasises the importance of the circumstances of the individual case when deciding whether actions or predicaments amount to being persecuted because of the differences in psychological make-up between individuals.<sup>38</sup>

Another approach to defining what it means to be persecuted that Hathaway and Foster have rejected is the literalist approach. The literalist approach aims to understand persecutory harm through dictionary definitions of persecution. This approach is problematic mainly because dictionaries will offer numerous definitions and because it does not comply with the general rule of treaty interpretation in the VCLT.<sup>39</sup>

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<sup>34</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 183–185.

<sup>35</sup> UNHCR, *Handbook* (n 9) para 65.

<sup>36</sup> UNHCR, *Handbook* (n 9) para 53.

<sup>37</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 186–189.

<sup>38</sup> UNHCR, *Handbook* (n 9) para 52.

<sup>39</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 190–191.

The predominant and widely adopted approach to understanding ‘being persecuted’ in international refugee law is the human rights-based approach. The human rights-based approach emphasises the link between serious harm in international refugee law and human rights norms and uses the human rights framework for interpretation of harm amounting to persecution.<sup>40</sup> One example of the human rights-based approach can be found in directives from the EU. The refugee definition is enshrined in Article 2(d) of the Qualification Directive<sup>41</sup>. Acts of persecution have been defined in Article 9(1) of the Qualification Directive which states that an act, in order to be considered as an act of persecution, must:

- (a) *be 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 under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or*
- (b) *be an accumulation of various measures, including violation of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).*

This approach complies with the general rule of treaty interpretation as it takes into account the context, object and purpose of the Refugee Convention.<sup>42</sup> According to the UNHCR, the ‘strong human rights language’ in the preamble of the Refugee Convention expresses the aim of the drafters to include human rights values in the application of the Convention and this can serve as guidance when interpreting the Refugee Convention.<sup>43</sup> By using the international human rights framework as a standard for assessing whether or not a specific treatment amounts to being persecuted, the assessment remains dynamic and evolves with international law.<sup>44</sup>

However, the human rights-based approach is not entirely undisputed. It raises mainly two questions. Firstly, it can be questioned whether the objective nature of the human rights-based approach can comply with the need for refugee law to account for individuated concerns. Secondly, it raises the question of how the appropriate standard of international human rights law should

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<sup>40</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 196–197.

<sup>41</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), in: Official Journal of the European Union, L 337/9, 20 December 2011.

<sup>42</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 195.

<sup>43</sup> UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, para 4.

<sup>44</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 194–195.

be determined and if the approach equates any human rights violation with serious harm.<sup>45</sup> The second question is partly answered in regard to the Qualification Directive as Article 9(1) emphasises the non-derogable human rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms, for example Article 3. The approach to focus on non-derogable human rights is questionable, since many fundamental rights are in fact derogable. Hence, non-derogability does not necessarily indicate superiority to other human rights.<sup>46</sup> Another solution is to rely on the UDHR and the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) which enforce the rights set out in the UDHR in binding law. However, other more recent treaties that provide a deeper understanding of the duties of states in relation to certain issues and that are widely ratified must be considered as well.<sup>47</sup>

According to Hugo Storey, there are two main approaches to ‘being persecuted’ in international refugee law, the human rights-based approach and the circumstantial approach. The human rights-based approach has become the dominant approach and aligns international refugee law to international human rights law.<sup>48</sup> The circumstantial approach stems from the UNHCR Handbook, which states that whether other prejudicial actions or threats than threats to life or freedom amount to persecution depends on the circumstances of each case.<sup>49</sup> Storey argues that the circumstantial approach should be abandoned because it enables subjective decision-making and inconsistency between jurisdictions.<sup>50</sup> Andreas Zimmermann and Claudia Mahler also argue that the notion of persecution is connected to the protection of human rights generally and that human rights should be a basis for interpreting ‘being persecuted’.<sup>51</sup>

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<sup>45</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 197–198.

<sup>46</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 202; UN Human Rights Committee, *CCPR 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*, 4 November 1994, CCPR/C/21/Rev.1/Add.6, para 10.

<sup>47</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 200–201.

<sup>48</sup> Hugo Storey, ‘What Constitutes Persecution – Towards a Working Definition’ (2014) 26:2 *International Journal of Refugee Law* 272, 276.

<sup>49</sup> Storey (n 48) 277; UNHCR, *Handbook* (n 9) para 51–52.

<sup>50</sup> Storey (n 48) 277–278.

<sup>51</sup> Andreas Zimmermann and Claudia Mahler, ‘Part Two, General Provision, Article 1 A, para. 2’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 216–223.

## 2.2.2 Socio-Economic Deprivation as Persecution

Even though no clear definition of ‘being persecuted’ exists, it is established that the term does not only encompass acts or treatments which violate life or freedom.<sup>52</sup> Violations of socio-economic rights, or the risk thereof, can constitute a risk of serious harm equivalent to persecution. According to Hathaway and Foster, denial of socio-economic rights can be understood as a denial of the right to an adequate standard of living. Such a denial is persecutory if it can be established that the aggregation of socio-economic harms has a ‘clearly debilitating impact’ on the individual.<sup>53</sup> However, the right to an adequate standard of living is not a right to a comfortable and prosperous existence, but not only a right to minimum survival.<sup>54</sup>

The High Court of Australia has, in regard to differential treatment of individuals and groups in the right to access socio-economic rights, stated that:

*Ordinarily, 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. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective.*<sup>55</sup>

The use of the word ‘and’ in this statement by the High Court of Australia seems to indicate that a cumulative element of various denials of rights is necessary to establish a claim for refugee status. However, a cumulative element might be of importance when the individual is facing various less serious violations of rights, but it does not mean that all violations of socio-economic rights are less serious and therefore need to be combined with other rights violations.<sup>56</sup> Accordingly, the right to an adequate standard of living can be violated by the deprivation of only one aspect of the right.<sup>57</sup>

The socio-economic rights protected by the ICESCR are subjected to progressive realisation according to Article 2(1). This means that the full realisation of the rights in the ICESCR may be achieved progressively, but steps towards a full realisation must be taken in the near future after the entry into force of

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<sup>52</sup> Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press 2007) 92.

<sup>53</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 228.

<sup>54</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 231.

<sup>55</sup> *Chen Shi Hai v. The Minister for Immigration and Multicultural Affairs*, [2000] HCA 19, Australia: High Court, 13 April 2000, para 29.

<sup>56</sup> Foster (n 52) 132–133.

<sup>57</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 233.



the ICESCR for the states concerned.<sup>58</sup> However, progressive realisation should not be misinterpreted as an obligation without meaningful content. Instead, it should be understood as a flexible device which acknowledges the realities and difficulties of full realisation of economic, social and cultural rights.<sup>59</sup>

Foster identifies that courts seem to misinterpret the progressive nature of socio-economic rights as to disregard deprivation of socio-economic rights unless the particular right is absolutely protected in international law. Foster argues that even though a person may not have an absolute right to free secondary education or to access all health facilities, the state will violate the ICESCR if it excludes one group of the population from accessing health facilities that are generally accessible for citizens. Hence, the prohibition of discrimination must be separated from the question of the nature of the right.<sup>60</sup> Another misinterpretation of the progressive nature of socio-economic rights is that violations of those can be justified by a lack of resources in the country in question. The resources of the country may be relevant in determining whether a violation has occurred or not but is not relevant once it is established that a violation has occurred.<sup>61</sup>

It should be noted that Article 2(2) of the ICESCR prohibits discrimination in relation to non-nationals. Furthermore, the prohibition of discrimination is not subjected to progressive realisation or restricted by the available resources.<sup>62</sup> In this regard, Article 26 of the ICCPR is important as well. Article 26 of the ICCPR states that all persons are equal before the law and enjoy, without discrimination, the equal protection of the law. Furthermore, the law should prohibit any discrimination and guarantee equal and effective protection against discrimination on any ground. Article 26 of the ICCPR is concerned with states' legislation and the application of it, meaning a state party to the ICCPR is not allowed to adopt legislation whose content is not in conformity with Article 26. Because Article 26 of the ICCPR is not limited to protect only the rights provided for in the ICCPR, it provides an autonomous right in relation to other rights than the rights protected in the ICCPR.<sup>63</sup> The rights in the IC-

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<sup>58</sup> UN Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, para 2.

<sup>59</sup> UN Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 3* (n 58) para 9.

<sup>60</sup> Foster (n 52) 142–143.

<sup>61</sup> Foster (n 52) 139.

<sup>62</sup> UN Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 13: The Right to Education (Art. 13)*, 8 December 1999, E/C.12/1999/10, para 31.

<sup>63</sup> UN Human Rights Committee, *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, para 12.

CPR apply to everyone, irrespective of reciprocity, and irrespective of nationality or statelessness.<sup>64</sup> Considering this, stateless persons are protected from discrimination in the access of socio-economic rights through Article 26 of the ICCPR, as well as Article 2(2) of the ICESCR.

However, Article 2(3) of the ICESCR allows for developing countries to determine to what extent they, with due regard to human rights and their national economy, want to guarantee the economic rights provided for in the ICESCR to non-nationals. Article 2(3) of the ICESCR addresses the particular situation where the economy of a developing country is dominated by non-nationals and the state needs to limit the access to economic rights, such as employment, for non-nationals to enhance more equitable access to economic opportunities.<sup>65</sup> The Article is a narrow exception to the duty of non-discrimination, which encompasses ‘everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers, [...] regardless of legal status and documentation’.<sup>66</sup>

Article 2(3) of the ICESCR did not pass without controversy, many western countries thought it destroyed the basic principle of non-discrimination while others argued that the exception was necessary to combat economic inequality between nationals of developing and developed countries.<sup>67</sup> Even though Article 2(3) of the ICESCR has never been invoked by a developing country, it allows for developing countries to control their national economies and address inequalities resulting from colonialism.<sup>68</sup> Evidently, Article 2(3) of the ICESCR was not created as a justification for strengthening disadvantage and oppression of historically disadvantaged minority groups.<sup>69</sup>

The UNHCR Handbook does not discuss socio-deprivation in relation to being persecuted in depth but makes a clear distinction between economic migrants and refugees. A migrant is someone who leaves their country for other reasons than a well-founded fear of being persecuted, for example economic considerations. However, economic measures affecting an individual’s life

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<sup>64</sup> UN Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, para 1.

<sup>65</sup> Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 214.

<sup>66</sup> UN Committee on Economic, Social and Cultural Rights, *ICESCR General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para 30; cf Hathaway and Foster, *The Law of Refugee Status* (n 12) 235.

<sup>67</sup> Dinah Shelton, ‘Prohibited Discrimination in International Human Rights Law’ in Stephanie Farrior (ed), *Equality and Non-discrimination under International Law* (vol 2, Ashgate 2015) 346.

<sup>68</sup> Saul, Kinley and Mowbray (n 65) 217.

<sup>69</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 235.

may be motivated by for example racial or religious intolerance against a particular group. Hence, where destructive economic measures are applied only to a particular group of the population, the predicament of that group may in some circumstances amount to persecution and the victims would become refugees upon leaving the country. A claim for refugee status based on economic measures that are applied without discrimination to the population as a whole would be harder to establish.<sup>70</sup>

Foster argues that courts apply a higher threshold for establishing persecution when the individual claiming refugee status does so on the basis of deprivation of socio-economic rights, in comparison with the threshold generally applied in refugee status cases. The application of a higher threshold is motivated by an understanding that holds socio-economic rights as inferior to civil and political rights.<sup>71</sup> This conception of socio-economic rights as inferior to civil and political rights may stem from earlier understandings of different categories of rights, where ‘first generation’ civil and political rights are superior to ‘second generation’ socio-economic rights. Such a hierarchal approach to human rights does not align with contemporary international law.<sup>72</sup> Moreover, a hierarchal approach to human rights affirms the notion that economic and social rights are inferior to civil and political rights and that the violation of the former rights are less serious. This leads to an under-valuation of refugee claims based on socio-economic deprivation.<sup>73</sup>

Furthermore, Foster identifies that, mostly in cases dealing with economic hardship, an approach that requires socio-economic harm to threaten an individual’s livelihood for it to amount to persecution is applied by courts from different jurisdictions. Such an approach to socio-economic harm is problematic because it ignores types of harm that infringe on an individual’s dignity and may have long-term consequences, without generating immediate economic harm, for example denial of education.<sup>74</sup>

The right to education is protected by Article 13 of the ICESCR. More specifically, Article 13(2)(a) states that primary education should be compulsory and available free to all. This obligation is part of the ‘minimum core obligation’ of the right to education and imposes an immediate duty on state parties.<sup>75</sup> Furthermore, the UN Committee on Economic, Social and Cultural

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<sup>70</sup> UNHCR, *Handbook* (n 9) para 62–64.

<sup>71</sup> Foster (n 52) 123.

<sup>72</sup> Foster (n 52) 158; cf Vienna Declaration and Programme of Action.

<sup>73</sup> Foster (n 52) 122–123.

<sup>74</sup> Foster (n 52) 129–130.

<sup>75</sup> UN Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 13* (n 62) para 57.

Rights has held that education is a human right and an essential mean of realising other human rights.<sup>76</sup> Considering this, the discriminatory denial of primary education in itself amounts to persecution.<sup>77</sup> Whether the denial of access to secondary and tertiary education amounts to persecution is not as clear. The prohibition of discrimination in Article 2(2) of the ICESCR applies to all aspects of education.<sup>78</sup> Denial of access to higher education can result in marginalisation and lack of basic opportunities, especially on a systemic level in relation to specific groups of the population. Undoubtedly, denial of access to higher education is relevant in the assessment of a claim for refugee status, but there are also legitimate suggestions that the denial of higher education can amount to persecution in itself.<sup>79</sup>

Another right that has been acknowledged as a fundamental human right is the right to health.<sup>80</sup> The right to the highest attainable standard of health is protected by Article 12 of the ICESCR. The core obligation of this right constitutes to ensure ‘the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups’.<sup>81</sup> Denial of medical treatment when an individual suffers from a life threatening illness amounts to persecution in itself.<sup>82</sup> On the contrary, the lack of available medical treatment for a condition is not as such sufficient to constitute persecution. However, discriminatory allocation of resources can be relevant to a claim for refugee status.<sup>83</sup> For example, states may invest in a way that disproportionately favours expensive health services which are not in reality accessible for more than a small part of the population.<sup>84</sup>

## 2.3 Interpretation in Stateless Claims

A common understanding of the requirement of being persecuted in the refugee definition is considering ‘being persecuted’ as a threshold of harm which must be satisfied. For example, the UKIAT stated in *BA and Others* that un-

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<sup>76</sup> UN Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 13* (n 62) para 1.

<sup>77</sup> Foster (n 52) 216.

<sup>78</sup> UN Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 13* (n 62) para 31.

<sup>79</sup> Foster (n 52) 222–223.

<sup>80</sup> UN Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 11 August 2000, E/C.12/2000/4, para 1.

<sup>81</sup> UN Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14* (n 80) para 43.

<sup>82</sup> Foster (n 52) 227.

<sup>83</sup> Foster (n 52) 230.

<sup>84</sup> UN Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14* (n 80) para 19.

documented Bedoons in Kuwait faced a real risk of persecution as a consequence of severe discrimination.<sup>85</sup> It was established that undocumented Bedoons in Kuwait were prevented from working in both public and private sectors with few exceptions and receiving the most basic government services. They were also denied access to medical services, housing, documentation, education and driver's licences.<sup>86</sup>

The decision in *BA and Others* was reaffirmed in the latter case of *HE*, where the UKAIT concluded that recent improvements in education and health care for undocumented Bedoons in Kuwait were not of such significance as to give rise to another conclusion.<sup>87</sup> Cumulative discrimination constituted by denial of access to employment, basic government services, medical services, housing, documentation, education and driver's licences was enough to satisfy the threshold of 'being persecuted' according to the standard laid out by the UKAIT:

*[F]or the discrimination to amount to persecution measures must involve persistent and serious ill-treatment without just cause and must be of a substantially prejudicial nature and must affect a significant part of the individual's or group's existence to the extent that it would make their life intolerable if they were to return.*<sup>88</sup>

The wording 'substantially prejudicial nature' is the exact same as in the UNHCR Handbook, but evidently, the UKAIT have added some extra requirements compared to the text of the UNHCR Handbook.<sup>89</sup> In the words of the UKAIT, the measures must not only be of substantially prejudicial nature, but they must also affect a significant part of the individual's or group's existence. Inevitably, the question of what a significant part of one's existence is arises, whether it means a big part or an important part, irrespective of the size of that part in comparison with other parts of one's existence. Regarding the threshold, the UKAIT phrased it as a requirement of an intolerable life, which can be said to be a considerably high threshold as it implies an extreme situation which is beyond bearing.

The question of cumulative discrimination was also considered in the case of *Suleiman*. The Federal Court of Canada held that the Canadian Immigration and Refugee Board (IRB) had failed to consider the 'cumulative aspects of

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<sup>85</sup> *BA and Others (Bedoon - Statelessness - Risk of Persecution) Kuwait v. Secretary of State for the Home Department*, CG [2004] UKIAT 00256, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 15 September 2004, para 81.

<sup>86</sup> *BA and Others* (n 85) para 69.

<sup>87</sup> *HE (Bidoon - Statelessness - Risk of Persecution) Kuwait v. Secretary of State for the Home Department*, CG [2006] UKAIT 00051, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 21 June 2006, para 35.

<sup>88</sup> *HE* (n 87) para 34.

<sup>89</sup> cf UNHCR, *Handbook* (n 9) para 54.

the long and extremely dispiriting discrimination that the Applicant has obviously suffered as a stateless Palestinian in Lebanon'.<sup>90</sup> The IRB had considered the appellant's situation in relation to housing, medical care, education and employment but found that it did not amount to persecution, even when the discrimination was considered cumulatively.<sup>91</sup> However, the Federal Court of Canada stated that 'The 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'.<sup>92</sup> Generally, a claim for fear of persecution is stronger if there is a cumulative element.<sup>93</sup> However, the Federal Court of Canada returned the decision in *Suleiman* for reconsideration by the IRB with a clear urging that the reasons must articulate why the cumulative discrimination suffered by Palestinians in Lebanon does not amount to being persecuted. This may be a way to combat a subjective approach, as more articulate and clearer reasonings help achieve more consistency in interpretation and assessment in between courts. In the case of *Suleiman*, no clear standard for assessing the threshold of being persecuted was articulated. However, the human rights-based approach to being persecuted as defined by Hathaway has been adopted by Canadian courts since the Supreme Court of Canada's judgment in *Ward*.<sup>94</sup>

The appellant in the case of *El Assadi* argued that she would have no rights and would be unable to work in Saudi Arabia due to her status as a stateless woman. The appellant claimed that her inability to work would amount to being persecuted because it would make it impossible for her to make a living. The U.S. Court of Appeals 6<sup>th</sup> Cir. stated that economic deprivation may amount to persecution in situations where the resulting conditions are 'sufficiently severe' to constitute a threat to the individual's life or freedom. Furthermore, the U.S. Court of Appeals 6<sup>th</sup> Cir. concluded that El Assadi had not established that she would face such economic deprivation that would constitute persecution and her appeal was subsequently denied. El Assadi had submitted country reports describing discrimination against women in Saudi Arabia, but according to the U.S. Court of Appeals 6<sup>th</sup> Cir., these reports did not suggest that women could not work 'at all' or that such economic deprivation would be of *sufficient severity* as to amount to persecution.<sup>95</sup> In this passage,

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<sup>90</sup> *Suleiman Mohammed Abdul Rahman v. The Minister of Citizenship and Immigration*, 2009 FC 768, Canada: Federal Court, 27 July 2009, para 64.

<sup>91</sup> *Suleiman* (n 90) para 18–26.

<sup>92</sup> *Suleiman* (n 90) para 67.

<sup>93</sup> cf UNHCR, *Handbook* (n 9) para 55.

<sup>94</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, 733–734.

<sup>95</sup> *El Assadi v Holder, Attorney General*, No. 09-4193, United States Court of Appeals for the Sixth Circuit, 25 April 2011, 4–5 (emphasis added).

it seems as if the U.S. Court of Appeals 6<sup>th</sup> Cir. created two alternative thresholds, one being if women would not be able to work *at all* in Saudi Arabia and the other one being economic deprivation of *sufficient severity*.

Some commentary regarding a complete denial of access to employment as the threshold for being persecuted is necessary. That complete denial of the right to work would amount to persecution is rather uncontested considering that a complete denial of the right to work has a detrimental impact on a person's ability to earn a livelihood.<sup>96</sup> As regards less severe violations of the right to work, courts do not completely agree when the threshold is met. Some courts have recognised claims on the basis of repeated denial of employment in the individual's field of work, while other courts have required a more widespread exclusion.<sup>97</sup> In *El Assadi* it seems as if the U.S. Court of Appeals 6<sup>th</sup> Cir. settled with the less controversial threshold of a complete denial of the right to work, without engaging in a more in-depth assessment of the applicant's situation. Further, economic deprivation of sufficient severity was not established either, which can be considered as a more subjective approach to the question of the threshold of being persecuted. It is unclear what would be sufficiently severe economic deprivation as to amount to being persecuted from the view of the U.S. Court of Appeals 6<sup>th</sup> Cir. However, that the individual must risk a complete denial of the right to work to satisfy the threshold of being persecuted is a clear, but high, threshold. In *El Assadi*, this threshold led to the denial of the applicant's claim for refugee status.<sup>98</sup>

The Australian RRT employs an understanding of the threshold of being persecuted as requiring serious harm and systematic and discriminatory conduct.<sup>99</sup> In *RRT Case No. 0808284* the appellant, a stateless Palestinian born in Kuwait, claimed to be discriminated against in relation to education, among other rights. However, the appellant had completed primary and secondary education as well as tertiary education. He was forced to study in a private institution and could not access public institutions. The Australian RRT did not find the threshold of serious harm to be satisfied in relation to past persecution.<sup>100</sup>

In regard to stateless Palestinians in Kuwait, the U.S. Court of Appeals 6<sup>th</sup> Cir. considered their situation in the case of *Ouda*. The U.S. Court of Appeals 6<sup>th</sup> Cir. held that the Kuwaitis 'engaged in a general campaign to prohibit Palestinians from working, attending school, buying food, obtaining water or

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<sup>96</sup> Foster (n 52) 94.

<sup>97</sup> Foster (n 52) 96–97.

<sup>98</sup> *El Assadi* (n 95) 5.

<sup>99</sup> *RRT Case No. 0808284*, [2009] RRTA 454, Australia: Refugee Review Tribunal, 21 May 2009, para 13.

<sup>100</sup> *RRT Case No. 0808284* (n 99) para 88–89.

obtaining drivers' licences'. The Oudas were also subjected to harassment and threats in the streets. Further, the U.S. Court of Appeals 6<sup>th</sup> Cir. stated that the Oudas were unable to earn a livelihood, travel safely in public and forced to sell their belongings to buy food. According to the U.S. Court of Appeals 6<sup>th</sup> Cir, 'no reasonable factfinder could fail to find that the Oudas were persecuted'.<sup>101</sup>

Furthermore, the UKIAT and the UKAIT considered the situation for stateless Palestinians living in refugee camps in Lebanon in two cases, the later reaffirming the former. In *KK IH HE* from 2004, the appellants claimed to be persecuted mainly on the basis of the conditions in the refugee camps in Lebanon. The UKIAT noted that a majority of Palestinians relied entirely on the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) as a provider of education, health and social services, since they had limited access to the public health services provided by the state of Lebanon.<sup>102</sup> According to the UNRWA, the living conditions in the refugee camps in Lebanon was cramped as they suffered from a lack of adequate infrastructure, overcrowding, poverty and unemployment.<sup>103</sup> Using a hierarchal approach to human rights, the UKIAT stated that the appellants claimed discrimination in regard to several third level rights, such as employment, housing and medical care.<sup>104</sup> To conclude, the UKIAT found that the discriminatory denial of third level rights did not amount to persecution.<sup>105</sup> This decision was reaffirmed in 2008, when the UKAIT concluded that the serious difficulties faced by Palestinians living in refugee camps in Lebanon did not reach the 'minimum level of severity to establish persecution'.<sup>106</sup>

As discussed in chapter 2.2.2, a hierarchal approach to human rights does not align with contemporary human rights law and also leads to an under-valuation of claims for refugee status based on socio-economic deprivation. By not applying a hierarchal approach to human rights, the UKIAT could have engaged with the question of socio-economic deprivation in a way more consistent with international law as well as more sensible and flexible in regard to the appellants' predicaments.

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<sup>101</sup> *Ouda v. Immigration and Naturalization Service*, No. 01-3869, United States Court of Appeals for the Sixth Circuit, 31 March 2003.

<sup>102</sup> *KK IH HE (Palestinians - Lebanon - Camps) Palestine v. Secretary of State for the Home Department*, CG [2004] UKIAT 00293, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 29 October 2004, para 88–89.

<sup>103</sup> *KK IH HE* (n 102) para 91.

<sup>104</sup> *KK IH HE* (n 102) para 95.

<sup>105</sup> *KK IH HE* (n 102) para 106.

<sup>106</sup> *MM and FH (Stateless Palestinians - KK, IH, HE reaffirmed) Lebanon v. Secretary of State for the Home Department*, [2008] UKAIT 00014, United Kingdom: Asylum and Immigration Tribunal / Immigration and Appellate Authority, 25 February 2008, para 144.



In regard to cumulative discrimination and a hierarchal approach to human rights, the Canadian IRB dealt with a stateless Palestinian who claimed he had a well-founded fear of being persecuted in relation to Lebanon in a case from 2001. He provided evidence that he had no right to social assistance from the UNRWA and that he had no right to work in his field.<sup>107</sup> He also claimed that he had no right to medical services or rations because he had received education through the UNRWA. The Canadian IRB found that the applicant's right to work would be severely restricted and had no reason to disbelieve his claim regarding medical services and rations. Moreover, the applicant feared arbitrary arrest and detention. The IRB concluded that the appellant would experience 'concerted and severe discrimination, including deprivation of medical care, employment opportunities and adequate housing and food'. Considered cumulatively, the IRB found that the 'denial of both level 2 and three rights' amounted to persecution. Arbitrary arrest and detention constituted a violation of level two rights, while denial of the right to work, the right to an adequate standard of living (including food, clothing and housing) and the right to education were considered third level rights violations.<sup>108</sup>

The Canadian IRB clearly concluded that the threat of arbitrary arrest and detention amounted to persecution, while no clear conclusion in regard to only the socio-economic rights engaged in the case was reached.<sup>109</sup> This decision is interesting as it considers socio-economic rights in conjunction with freedom from arbitrary arrest and detention. It is unclear if the Canadian IRB would have reached the same conclusion even without a violation of 'level two rights'. According to Foster, courts have a tendency to consider violations of level three rights as less serious discrimination and therefore require violations of other 'higher level rights' for the discrimination cumulatively to amount to persecution.<sup>110</sup> Since the Canadian IRB clearly articulated that the threshold for being persecuted was satisfied solely on the basis of the threat of arbitrary arrest and detention, it is not unreasonable to think that the conclusion would not have been the same had the appellant only feared discrimination in relation to socio-economic rights.

In regard to Article 2(3) of the ICESCR, the decision in *MM and FH* is of interest. According to the UKAIT, the difficulties faced by Palestinians in regard to employment stemmed from their inability to avail themselves of reciprocal agreements. Further, the UKAIT held that the 'limitations placed

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<sup>107</sup> *X. v. Canada (Immigration and Refugee Board)*, 2001 CanLII 26842 (CA IRB), Canada: Immigration and Refugee Board, 12 April 2001, 4.

<sup>108</sup> *X. v. Canada* (n 107) 6–7.

<sup>109</sup> *X. v. Canada* (n 107) 6–7.

<sup>110</sup> Foster (n 52) 132–133.

by the Lebanese authorities on Palestinians are properly justified on the grounds of their statelessness' and that it could not be compared to deliberate imposition of punishment as it was a 'state of affairs that exists in relation to Palestinians, outside of the control of the Lebanese authorities, i.e. that the Palestinians are stateless'.<sup>111</sup> Finally, the UKAIT concluded that the differential treatment of Palestinians in Lebanon was in accordance with international human rights norms. Unfortunately, the UKAIT did not expand its reasoning in relation to Article 2 of the ICESCR. The UKAIT also acknowledged Article 26 of the ICCPR but stated that the differential treatment of Palestinians, constituted by a restricted access to rights, was justified by lack of resources and reciprocity.<sup>112</sup> Article 2(3) of the ICESCR was also considered in the case of *KK IH HE*. However, the UKIAT simply concluded that Lebanon could be considered a developing country, without hearing any arguments on it.<sup>113</sup>

As discussed in chapter 2.2.2, Article 2(3) of the ICESCR is restricted in its scope, since it only applies to developing countries and only in regard to economic rights. Accordingly, it may not be applicable to the right to an adequate standard of living, and definitely not in regard to health or education. Moreover, Article 2(3) of the ICESCR provides no general justification for a full denial of economic rights to non-nationals, but only a permission to determine 'to what extent' economic rights will be guaranteed to non-nationals.<sup>114</sup>

The claims in both *KK IH HE* and *MM and FH* related to several social rights, for example health care and education, which seem to have been somewhat neglected in the courts' reasonings. A clear distinction between economic and social rights must be made. Further, the UKAIT in *MM and FH* considered the lack of resources as relevant for the assessment of whether a violation of rights had occurred, which is an accurate interpretation of the relevant legal provisions. Hence, the UKAIT considered the lack of resources as a justification for not increasing the access to rights for Palestinians in Lebanon and not a justification for a violation that had already occurred.<sup>115</sup> However, the assessment of the facts of the case could still be considered differently in relation to the 'minimum level of severity' threshold, which at face value seems as a considerably low threshold but by the judgments in *KK IH HE* and *MM and FH* is given a quite different meaning.

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<sup>111</sup> *MM and FH* (n 106) para 136.

<sup>112</sup> *MM and FH* (n 106) para 143.

<sup>113</sup> *KK IH HE* (n 102) para 104.

<sup>114</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 235.

<sup>115</sup> cf Foster (n 52) 139.

## 2.4 Concluding Remarks

From the account of the legal framework it is evident that interpretative challenges arise in relation to the understanding of what it means to be persecuted, due to the lack of a universal definition of 'being persecuted' in the Refugee Convention. The predominant approach to interpreting 'being persecuted' is the human rights-based approach. By adopting the human rights-based approach, human rights are used as a benchmark for assessing whether the threshold of 'being persecuted' has been satisfied. However, the human rights-based approach is not adopted by all decision-makers within all jurisdictions worldwide and even among those who do adopt it, differences in interpretation appear.

In regard to violations of economic and social rights, additional interpretative challenges arise. Foster has identified that a higher threshold is applied to claims based on socio-economic deprivation, in comparison to claims based on violation of other rights. In my opinion, this is evident also from the cases discussed in this chapter. For example, in the case of *El Assadi*, the U.S. Court of Appeals 6<sup>th</sup> Cir. required complete denial of the right to work for the threshold of being persecuted to be satisfied. A complete denial of the right to work is a considerably high threshold to satisfy, and even partial denials of the right to work can have detrimental effects on an individual's possibility to earn a livelihood.

Concerning the general difficulty to establish a claim for refugee status based on socio-economic deprivation in regard to the threshold of 'being persecuted', statelessness does not seem to give rise to additional interpretative challenges. According to Article 2(2) of the ICESCR, the rights guaranteed by the ICESCR are so in relation to all individuals, irrespective of for example nationality. However, in regard to economic rights, Article 2(3) of the ICESCR is relevant and applies only to non-nationals. This exception is special in relation to non-nationals, and thus stateless persons. It raises additional challenges in the interpretation of 'being persecuted' as it allows for developing countries to determine to what extent they want to guarantee economic rights, for example the right to work, to non-nationals.

In relation to differential treatment in access to socio-economic rights, lack of resources and lack of reciprocity are brought up as justifications which are relevant under the ICCPR, especially in regard to Article 26. Such justifications are relevant for the assessment of whether a violation has occurred or not. If a claim for refugee status is based on socio-economic deprivation, these

justifications affect the assessment of 'being persecuted'. Clearly, lack of resources as a justification affects all individuals more or less generally. However, lack of reciprocity is a problem for stateless persons specifically as they have no state to act as a party in reciprocal agreements with other states. Hence, lack of reciprocity can always be used as a justification for differential treatment of stateless persons. Nevertheless, the differential treatment cannot be disproportionate.

To conclude, the situation of statelessness reveals some additional interpretative challenges in relation to the threshold of 'being persecuted' and socio-economic deprivation. Article 2(3) of the ICESCR clearly applies only to non-nationals and thus, statelessness gives rise to additional interpretative problems in relation to this specific article. Article 26 of the ICCPR does not apply only to stateless persons, but justifications for differential treatment which are relevant under the ICCPR can be relevant for stateless persons especially. One example is lack of reciprocity, which due to the nature of statelessness becomes an impossible obstacle for stateless persons to overcome.

# 3 The Refugee Definition and Discrimination

## 3.1 Introduction

The relationship between the refugee definition and discrimination can be understood in mainly two ways in international refugee law, either as the link between an act or treatment and a Convention ground or as a term describing less serious forms of harm, that is such treatment which does not amount to being persecuted. Discrimination is sometimes used interchangeably with ‘harassment’. Others describe it as a scale at which there is a point where discrimination is so severe or serious that it constitutes persecution.<sup>116</sup> Rebecca Dowd argues that persecution and discrimination are two separate things. Discrimination may lead to persecution, but someone who is being persecuted can be so without also being subjected to discrimination.<sup>117</sup> In this chapter, the two main notions of discrimination in relation to the refugee definition will be discussed in more depth as well as two distinctively different approaches to considering the issue of discrimination which can be traced in case law and their impact on stateless claims for refugee status based on socio-economic deprivation.

## 3.2 The Legal Framework

### 3.2.1 Discrimination as Persecution

The High Court of Australia has addressed the relationship between being persecuted and discrimination in a way that implies that being persecuted always has a discriminatory element:

*Persecution involves discrimination that results in harm to an individual. But not all discrimination amounts to persecution. [...] The Convention protects persons from persecution, not discrimination. [...] [W]hile persecution always involves the notion of selective harassment or pursuit, selective harassment or pursuit may not be so intensive, repetitive or prolonged that it can be describes as persecution.<sup>118</sup>*

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<sup>116</sup> Rebecca Dowd, ‘Dissecting Discrimination in Refugee Law: an Analysis of its Meaning and its Cumulative Effect’ (2010) 23:1 International Journal of Refugee Law 28, 32.

<sup>117</sup> Dowd (n 116) 34.

<sup>118</sup> *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim*, [2000] HCA 55, Australia: High Court, 26 October 2000, para 55.

However, the key element in this regard seems to be to identify the point at which discrimination becomes persecution.<sup>119</sup> According to the UNHCR, discrimination does not automatically constitute persecution but can, in certain circumstances, do so. Discrimination can amount to persecution when it leads to ‘consequences of substantially prejudicial nature’, for example serious restrictions in the right to work or access education. Discrimination may also, even if it is not of serious character, result in a reasonable fear of being persecuted if it gives rise to a feeling of anxiety and insecurity regarding the individuals future existence.<sup>120</sup> A claim for refugee status due to various discriminatory measures that do not in themselves amount to being persecuted can be sufficient as a result of the cumulative element.<sup>121</sup>

Neither the ICCPR nor the ICESCR provide a definition of discrimination. Nonetheless, the equivalent terms have been defined in Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (‘racial discrimination’) and in Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (‘discrimination against women’). The Human Rights Committee has, with the previously mentioned definitions as support, defined ‘discrimination’ in regard to the ICCPR as:

*[A]ny distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>122</sup>*

The wording ‘purpose or effect’ in this definition implies that it is not necessary to establish intent to discriminate.<sup>123</sup> Moreover, it should be noted that not every differential treatment is equivalent to discrimination. If the criteria for differentiation is reasonable and objective and the differentiation has a legitimate aim under the ICCPR, the differential treatment does not constitute discrimination.<sup>124</sup> A justification test has been developed in practice, mostly by the European Court of Human Rights, which requires differential treatment to (1) pursue a legitimate aim and (2) be proportionate. The first requirement is seldom a problem for states to uphold, since most distinctions can be motivated by a legitimate aim, for example the protection of public order. By contrast, the proportionality requirement is harder to satisfy since it aims to

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<sup>119</sup> Dowd (n 116) 33.

<sup>120</sup> UNHCR, *Handbook* (n 9) para 54–55.

<sup>121</sup> Dowd (n 116) para 55.

<sup>122</sup> UN Human Rights Committee, *CCPR General Comment No. 18* (n 63) para 7.

<sup>123</sup> Shelton (n 67) 355.

<sup>124</sup> UN Human Rights Committee, *CCPR General Comment No. 18* (n 63) para 13.

strike a fair balance between societal interests and respect for individual rights. This assessment has been made easier by international human rights bodies which have pointed out certain reasons which do not justify differential treatment, for example stereotypes or prevailing views in society.<sup>125</sup> Note that ‘justified discrimination’ does not exist, either a distinction is justified, or it constitutes discrimination.<sup>126</sup>

The distinction of direct and indirect discrimination should also be noted. Direct discrimination can arise from an adverse distinction in the law or in the application of a non-discriminatory law that is directly related to a prohibited ground of discrimination.<sup>127</sup> Laws or their application can also, without being related to a prohibited ground, result in distinctions which disproportionately affect people with certain characteristics.<sup>128</sup> The Human Rights Committee has defined indirect discrimination as resulting from the ‘discriminatory effect of a rule or a measure that is neutral on face value or without intent to discriminate’, if the rule or measure ‘exclusively or disproportionately affect’ persons holding a certain characteristic which is protected by the relevant non-discrimination provision, without being justified on objective and reasonable grounds.<sup>129</sup> The concept of indirect discrimination aims at targeting seemingly neutral practices that reinforce existing disadvantages stemming from deep-rooted and deliberate marginalisation and recognises that such practices can be as much of a violation as direct discrimination.<sup>130</sup>

For the assessment of whether being subjected to certain discriminatory measures amounts to being persecuted it is of importance to consider which ground the discrimination is based upon. The UNHCR has held that discrimination on the basis of race amounts to persecution when it affects the individual’s human dignity in such a way that is incompatible with the most fundamental and absolute human rights or where the ignorance of racial barriers results in serious consequences.<sup>131</sup> Hence, racial discrimination can in itself be such a serious human rights violation that amounts to persecution.<sup>132</sup> In comparison, the principle of non-discrimination on the basis of nationality limits the freedom of states in some areas but is not a peremptory norm as

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<sup>125</sup> Daniel Moeckli, ‘Equality and Non-Discrimination’ in Stephanie Farrior (ed), *Equality and Non-discrimination under International Law* (vol 2, Ashgate 2015) 63–64.

<sup>126</sup> Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press 2009) 352.

<sup>127</sup> Kälin and Künzli (n 126) 351.

<sup>128</sup> Kälin and Künzli (n 126) 355.

<sup>129</sup> UN Human Rights Committee, Communication No 998/2001, *Mr. Rupert Althammer et al. v. Austria*, 22 September 2003, para 10.2; cf Kälin and Künzli (n 126) 355.

<sup>130</sup> Kälin and Künzli (n 126) 355.

<sup>131</sup> UNHCR, *Handbook* (n 9) para 69.

<sup>132</sup> Dowd (n 116) 39.

such.<sup>133</sup> Evidently, the implications of racial discrimination are more discerned in international law than discrimination based on other grounds, such as nationality.

### 3.2.2 Discrimination as the Causal Link

The key element of the requirement of a causal link in the refugee definition is to establish a nexus between the risk of being persecuted and one or more Convention grounds. However, it is not uncontested between which two factors the link should be established. It could either be between the Convention ground and the intention of the persecutor to inflict harm or the state not to provide protection, or the Convention ground and the predicament of the individual.<sup>134</sup>

In some jurisdictions, courts have interpreted the nexus clause as a requirement of a causal link between one or more Convention grounds and the persecutor's intent, meaning that the persecutor's infliction of harm must be motivated by one or more protected characteristics which the individual holds. Other courts have adopted an understanding of the term 'being persecuted' as a combination of a fear of serious harm by a non-state agent and the state's inability or unwillingness to provide protection. In such cases, the nexus clause is satisfied if there is a link between one or more Convention grounds and one of the two elements of the term 'being persecuted'. This understanding of the nexus clause makes it easier for an individual to satisfy the requirement, but it still requires an element of intention.<sup>135</sup>

A third approach to the nexus clause is that it requires the individual to establish a causal link between one or more Convention grounds and the reasons for their well-founded fear of being persecuted, meaning their predicament. The difference of this approach is that it asks the question 'why is the individual in the predicament which they are in?' rather than 'why does the persecutor wish to harm the individual or the state avoid protecting them?'.<sup>136</sup> A predicament-based approach can be described in the words of the New Zealand RSAA in relation to the language of the refugee definition:

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<sup>133</sup> Ian Brownlie, *Principles of Public International Law* (7<sup>th</sup> ed, Oxford University Press 2008) 574.

<sup>134</sup> James Hathaway and Michelle Foster, 'The Causal Connection ("Nexus") to a Convention Ground' (2003) 15 *International Journal of Refugee Law* 461, 463; Hathaway and Foster, *The Law of Refugee Status* (n 12) 367.

<sup>135</sup> Hathaway and Foster, 'The Causal Connection ("Nexus") to a Convention Ground' (n 134) 463–465.

<sup>136</sup> Hathaway and Foster, 'The Causal Connection ("Nexus") to a Convention Ground' (n 134) 465–467.



*The employment of the passive voice (“being persecuted”) establishes that the causal connection required is between a Convention ground and the **predicament** of the refugee claimant. The Convention defines refugee status not on the basis of a risk “of persecution” but rather “of **being persecuted**”. The language draws attention to the fact of exposure to harm, rather than to the act of inflicting harm. The focus is on the reasons for the claimant’s predicament rather than on the mindset of the persecutor [...].<sup>137</sup>*

It is not uncontested which interpretation of the nexus clause that should prevail. Hathaway and Foster argue that the predicament-based approach should be adopted. They give three main reasons for this opinion. First, the refugee definition requires a link between the condition of ‘being persecuted’ and one or more Convention grounds, which is different from establishing a link between ‘persecution’ and one or more Convention grounds. The passive voice of the refugee definition provides an important difference here.<sup>138</sup> Another argument is that the object and purpose of the Refugee Convention do not align with a requirement of intention. The aim of the Refugee Convention is to protect those in need of protection from a risk of being persecuted, not prosecute those responsible for persecution. Lastly, since the Refugee Convention is anchored in non-discrimination norms, the understanding of the refugee definition should not differ from the general understanding in non-discrimination law that discrimination can be established on the basis of intent or effect. Thus, intent should not be necessary to establish in this regard.<sup>139</sup> This argument for adopting the predicament-based approach is supported by the Michigan Guidelines as well.<sup>140</sup>

Sometimes, claims for refugee status are denied because the individual has not been able to prove that the agents of persecution has had the intent to persecute the individual. Evidence of intent can be sufficient to establish a claim for refugee status, but it is not necessary since there are no suggestions in the drafting history of the Refugee Convention that the intent of the persecutor should be a decisive factor. However, intent may be relevant as evidence of a well-founded fear, but the absence of proof of persecutory intent does not preclude that a well-founded fear exists. The controlling factor is that of a serious possibility of being persecuted, not proof of intent to harm from the

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<sup>137</sup> *Refugee Appeal No. 72635/01, 72635/01*, New Zealand: Refugee Status Appeals Authority, 6 September 2002, para 168 (emphasis in original).

<sup>138</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 378; cf *Refugee Appeal No. 72635/01* (n 137) para 168.

<sup>139</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 378–379.

<sup>140</sup> James Hathaway, ‘The Michigan Guidelines on Nexus to a Convention Ground’ (2002) 23:2 *Michigan Journal of International Law* 211, para 6–10.

persecutor.<sup>141</sup> Put in the words of the New Zealand RSAA, the Refugee Convention ‘cannot be interpreted so as to impose on the claimant the often impossible task of establishing intent’, rather ‘A low evidentiary threshold is more in keeping with the humanitarian purpose of the Convention’.<sup>142</sup> However, in common law jurisdictions the predominant approach is the motivation-based approach.<sup>143</sup>

In relation to the nexus requirement in socio-economic claims, Foster has identified that the group-based nature of denials of socio-economic rights creates a problem for individuals who claim refugee status on the basis of such denials to establish a nexus to a Convention ground. Courts seem to interpret the nexus clause as requiring the individual to prove that they are ‘singled out’ and thus targeted in a different way than other people of, for example, the racial group to which the individual belongs. General disadvantage in relation to socio-economic rights is not enough to establish a causal link to a Convention ground, but in many cases the courts reached such a conclusion even where there was evidence of socio-economic disadvantage suffered particularly by one, for example, racial or ethnic group in society.<sup>144</sup> Such an interpretation of the nexus clause has been rejected.<sup>145</sup>

### 3.3 Interpretation in Stateless Claims

As mentioned previously, there is no requirement in the refugee definition to prove intent or motive on the side of the persecutor. Intent or motive to persecute should not be a decisive factor when establishing whether someone is at risk of being persecuted for a Convention ground or not.<sup>146</sup> Nonetheless, some courts have interpreted the refugee definition in such a way. In two cases concerning claims brought by stateless persons from the Australian RRT, the RRT explicitly interpreted the refugee definition as requiring motivation on the part of the persecutor. In both cases, the same standard paragraph was used when describing the relevant law in regard to the refugee definition:

*Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted*

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<sup>141</sup> Goodwin-Gill and McAdam (n 11) 100–102.

<sup>142</sup> *Refugee Appeal No. 72635/01* (n 137) para 171.

<sup>143</sup> Foster (n 52) 280.

<sup>144</sup> Foster (n 52) 287.

<sup>145</sup> Foster (n 52) 287–288; Storey (n 48) 285.

<sup>146</sup> Goodwin-Gill and McAdam (n 11) 100–102; cf chapter 3.2.2.

*for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.*<sup>147</sup>

The appellant in *RRT Case No. 0808284* was a Palestinian born in Kuwait. He had completed 17 years of education and had been employed in sales and marketing for several years in Kuwait.<sup>148</sup> The appellant claimed that he had suffered serious disadvantage in relation to education, employment and freedom of movement in Kuwait as a stateless Palestinian.<sup>149</sup> In regard to the access of work in public sector, the appellant argued that the state of Kuwait was sanctioning discrimination against some of its citizens for Convention grounds.<sup>150</sup> The appellant in *RRT Case No. 0908992* was an older stateless man from Indonesia who had lived in China and the former British Overseas Territory of Hong Kong before coming to Australia.<sup>151</sup> His claim was based on economic hardship, mainly the difficulty of finding work, in Hong Kong, China or Indonesia.<sup>152</sup> The RRT stated that returnees to Hong Kong, China and Indonesia would face difficulties but they were not subjected to ‘adverse treatment’ or denied protection by the authorities in those countries.<sup>153</sup> In both cases, the RRT concluded that the individual had not satisfied the requirements in the refugee definition.<sup>154</sup> However, the question of the threshold for being persecuted was predominant in both cases.<sup>155</sup>

Courts in other jurisdictions may not apply a motivation-based approach to the refugee definition as explicitly as the Australian RRT, but motivation as a requirement in the refugee definition can said to be implied in the reasoning regarding being persecuted. In the case of *Ouda*, the U.S. Court of Appeals 6<sup>th</sup> Cir. held that the Board of Immigration Appeals had erred in their conclusion that the appellant had failed to prove past persecution and therefore did not correctly give the appellant the benefit of the presumption of a well-founded fear of future persecution. The U.S. Court of Appeals 6<sup>th</sup> Cir. concluded that the evidence proved that the appellant and her family were ‘threatened and beaten up, and that they were deprived of food, water, a livelihood and the ability to leave their house *because they were Palestinians*’.<sup>156</sup> This

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<sup>147</sup> *RRT Case No. 0808284* (n 99) para 14; *RRT Case No. 0908992*, [2010] RRTA 389, Australia: Refugee Review Tribunal, 14 May 2010, para 14.

<sup>148</sup> *RRT Case No. 0808284* (n 99) para 22.

<sup>149</sup> *RRT Case No. 0808284* (n 99) para 28.

<sup>150</sup> *RRT Case No. 0808284* (n 99) para 54, at section 4.

<sup>151</sup> *RRT Case No. 0908992* (n 147) para 2.

<sup>152</sup> *RRT Case No. 0908992* (n 147) para 143.

<sup>153</sup> *RRT Case No. 0908992* (n 147) para 145.

<sup>154</sup> *RRT Case No. 0808284* (n 99) para 116; *RRT Case No. 0908992* (n 147) para 149.

<sup>155</sup> *RRT Case No. 0808284* (n 99) para 114; *RRT Case No. 0908992* (n 147) para 134–136.

<sup>156</sup> *Ouda* (n 101) (emphasis added).

implies that the U.S. Court of Appeals 6<sup>th</sup> Cir. found the agents of persecution to be motivated by the Oudas' Palestinian heritage.

The Canadian IRB can also be said to have engaged in a more implicit motivation-based approach to deciding whether the appellant had a well-founded fear of being persecuted for a Convention ground in a case from 2015 concerning a stateless Palestinian woman and her son from the United Arab Emirates. The Canadian IRB stated that the United Arab Emirates had laws of general application in regard to non-nationals and due to this, non-nationals did not have the same right as nationals to access various services. For example, people without legal status had problems with access to education, health care and public services.<sup>157</sup> The Canadian IRB stated that:

*Disadvantage through not being a national is not in and of itself persecutory. The documentary evidence does not disclose that Palestinian stateless persons as a group are singled out for treatment that constitutes persecution under the Refugee Convention.*<sup>158</sup>

The appellants were found not to be refugees under the Convention.<sup>159</sup> The IRB was correct to conclude that general disadvantage is not enough to establish the causal connection required in the refugee definition. However, if a predicament-based approach was applied, the conclusion could have been different as it would put the predicament of the appellants in focus rather than the lack of intent from the state of the United Arab Emirates to single out stateless Palestinians for persecution.

On the contrary, a predicament-based approach can be said to have been adopted by the New Zealand RSAA in two decisions following the decision in *Refugee Appeal No. 72635/01*, both dealing with stateless Bedoons from Kuwait. In the first case from 2004, the appellant and his family had been denied access to free education, health care and other social benefits. They were also prohibited from working and were denied basic official documentation, including driver's licences.<sup>160</sup> The New Zealand RSAA concluded that the cumulative harm of past discriminatory measures directed against the appellant amounted to persecution and that, if returned to Kuwait, 'his *circumstances* would be little changed'.<sup>161</sup> Furthermore, the New Zealand RSAA concluded that the 'persecution feared by the appellant is by reason of the Convention grounds of nationality and his membership of the social group of

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<sup>157</sup> *X (Re)*, 2015 CanLII 110288 (CA IRB), Canada: Immigration and Refugee Board, 3 March 2015, 7–8.

<sup>158</sup> *X (Re)* (n 157) 8.

<sup>159</sup> *X (Re)* (n 157) 8.

<sup>160</sup> *Refugee Appeal No. 74467*, 74467, New Zealand: Refugee Status Appeals Authority, 1 September 2004, para 75.

<sup>161</sup> *Refugee Appeal No. 74467* (n 160) para 103 (emphasis added).

*bidoons*'.<sup>162</sup> Using the word 'circumstances' and phrasing the conclusion about the nexus requirement in a way that describes the relevant Convention grounds as a reason for the persecution feared by the appellant, implies a predicament-based approach. Evidently, the appellant was found to be a refugee under the Convention.<sup>163</sup>

In the second case from 2010, the New Zealand RSAA stated that the appellant and his family would continue to live solely on charity and the appellant would be denied access any form of social services, including education, health care and benefits.<sup>164</sup> On the basis of this statement, the New Zealand RSAA concluded that 'The appellant's predicament on return, therefore, is that he has a well-founded fear of being persecuted for reasons of race, nationality and/or membership of a particular social group, namely *bedoon*'.<sup>165</sup> Similar to the earlier 2004 case, the New Zealand RSAA seems to have focused on the situation that the appellant would find himself in upon return to Kuwait whether the reason for his predicament was one or more Convention grounds, without considering any particular intention or motivation on the part of the persecutor. The appellant was found to have satisfied the requirements in the refugee definition.<sup>166</sup>

### 3.4 Concluding Remarks

In international refugee law, discrimination can play two roles, either as a form of persecution or as the causal link between the well-founded fear of being persecuted and one or more Convention grounds. It is not uncontested whether being persecuted always involves a discriminatory element or if one can be persecuted without also being discriminated against. In relation to discrimination as the causal link, two main approaches can be traced. The motivation-based approach is more predominant in common law jurisdictions, but the predicament-based approach can be said to align more with the human rights-based approach as well as with the general rule of treaty interpretation in the VCLT.

The difficulty of establishing a claim for refugee status based on socio-economic deprivation if a motivation-based approach is adopted lies in the inability of the motivation-based approach to consider indirect discrimination properly. For example, laws of general application which at first glance seem

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<sup>162</sup> *Refugee Appeal No. 74467* (n 160) para 104 (emphasis in original).

<sup>163</sup> *Refugee Appeal No. 74467* (n 160) para 105.

<sup>164</sup> *Refugee Appeal No. 76506, 76506*, New Zealand: Refugee Status Appeals Authority, 29 July 2010, para 83.

<sup>165</sup> *Refugee Appeal No. 76506* (n 164) para 84 (emphasis in original).

<sup>166</sup> *Refugee Appeal No. 76506* (n 164) para 85.

non-discriminatory can disproportionately affect the lives of one group of the population in detrimental ways. Hence, that a law is general in its application does not automatically lead to the conclusion that the law does not indirectly discriminate a certain group of people. In my view, the decision-makers should engage in a more in-depth examination of laws of general application to ascertain that they do not in fact adversely affect a certain group of the population in a disproportionate way and not solely conclude that the law is general in its application and therefore does not give rise to persecutory circumstances.

The nature of indirect discrimination almost precludes a successful claim for refugee status on the basis of such discrimination if an element of motivation or intent is required on the part of the persecutor. Refugee claims based on systemic or indirect denial of socio-economic rights would rarely be successful, because the motivation element would be lacking in most cases due to the nature of systemic or indirect discrimination. Clearly, this is a problem in almost every claim based on socio-economic deprivation and the situation of statelessness does not give rise to additional interpretative issues in this regard.

However, as stateless persons often find themselves in denial of socio-economic rights the motivation-based approach may affect stateless claims disproportionately compared to claims brought by individuals who hold a nationality. Nonetheless, this is not an interpretative issue in relation to the refugee definition but rather an issue which lies in the nature of statelessness.

# 4 The Causal Link in the Refugee Definition

## 4.1 Introduction

To satisfy the refugee definition, an individual's fear of persecution must be connected to a Convention ground. The nexus clause, 'for reasons of', in Article 1A(2) of the Refugee Convention can be justified on the basis of a need for a restricting criterion due to the limited capacity of states to accommodate all people in risk of persecution. The nexus requirement aims to establish a causal link between the risk of being persecuted and one or more Convention grounds. Hence, it is not enough to establish, for example, that a person is at risk of being persecuted and that they belong to a particular social group. There must be a causal relationship between the risk of being persecuted and the protected ground.<sup>167</sup> In this regard it should be noted that it does not matter if the individual actually possesses the relevant ground or if it simply has been ascribed or attributed to them.<sup>168</sup> Furthermore, the individual and the persecutor can share the protected characteristic which is reason for the risk of being persecuted and a causal link can be established even if not all persons defined by that ground are at risk of being persecuted.<sup>169</sup> In this chapter, the requirement of a causal link will be examined, with special focus on the Convention grounds race, nationality and membership of a particular social group. In relation to case law, reasonings which highlight how decision-makers decide upon the nexus requirement in relation to stateless claims based on socio-economic deprivation will be discussed.

## 4.2 The Legal Framework

### 4.2.1 The Strength of the Causal Link

The causal link can be implied rather than explicit and there is no requirement that one or more Conventions grounds give reason for the entirety of the risk of being persecuted.<sup>170</sup> However, there is no consensus as to what the appropriate test to assess whether the nexus requirement has been established or

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<sup>167</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 362–363.

<sup>168</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 391.

<sup>169</sup> Hathaway and Foster, 'The Causal Connection ("Nexus") to a Convention Ground' (n 134) 462.

<sup>170</sup> Hathaway and Foster, 'The Causal Connection ("Nexus") to a Convention Ground' (n 134), 462.

not is, for example whether the Convention ground must be a fundamental cause, the central or predominant cause or merely a contributing cause. One test is the ‘but for’ test, used mostly in tort law. The test requires the individual to prove that the risk of being persecuted would not exist ‘but for’ the Convention ground. This test has been criticised because it lacks the ability to accommodate situations involving multiple causes, both independent and cumulative causes.<sup>171</sup>

Another test is to interpret the nexus clause as to require one or more Convention grounds to be central to the risk of being persecuted. The ‘central or predominant cause’ test may give rise to inconsistent determinations due to the ambiguity in the idea of a central or predominant cause. A third standard has been derived from non-discrimination law; if the act has been done for multiple reasons and one of those reasons is a protected reason, the act is considered to be done for that protected reason, regardless of whether the protected reason is a dominant reason for the act. This test may be appropriate for refugee law as well, since both refugee law and non-discrimination law have a remedial objective. However, the test may risk trivialising the refugee protection by requiring the recognition of refugee status where the role of the Convention ground was minor.<sup>172</sup>

According to the Michigan Guidelines, it is not relevant to seek guidance from other branches of international or domestic law due to the protection-oriented and forward-looking nature of refugee status determination. Considering the object and purpose of the Refugee Convention and practical challenges of refugee status determination, the relevant standard of causation is that the Convention ground needs to be a contributing factor to the risk of being persecuted. However, if the Convention ground has a minor, almost irrelevant role, the nexus requirement is not satisfied.<sup>173</sup>

## 4.2.2 Race

Race is not defined in the Refugee Convention but the historical aspect makes it clear that it was intended to include Jewish victims of the Second World War, who had been persecuted because of ethnicity irrespective of whether they had practiced their religion or not.<sup>174</sup> However, race is defined in other

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<sup>171</sup> Hathaway and Foster, ‘The Causal Connection (“Nexus”) to a Convention Ground’ (n 134) 470–471.

<sup>172</sup> Hathaway and Foster, ‘The Causal Connection (“Nexus”) to a Convention Ground’ (n 134) 473–475.

<sup>173</sup> Hathaway, ‘The Michigan Guidelines on Nexus to a Convention Ground’ (n 140) para 11–13.

<sup>174</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 394.



international legal instruments, for example Article 10(1)(a) of the Qualification Directive defines the concept of race as to include in particular ‘considerations of colour, descent, or membership of a particular ethnic group’. The ICERD provides some help in this regard as well, in Article 1(1) racial discrimination is defined as any distinction based on ‘race, colour, descent, or national or ethnic origin’. Race can include groups defined by physical, linguistic or cultural distinctiveness, not only major ethnic groups.<sup>175</sup> Considering this, the term race refers mainly to social prejudice.<sup>176</sup> Thus, race should be understood broadly to encompass all kinds of ethnic groups that are considered ‘races’ in common usage.<sup>177</sup>

Clearly, it is possible that race may overlap other factors such as religion or nationality, but since the nexus clause can be satisfied by establishing a link to one or more Convention grounds this is not problematic.<sup>178</sup> A broad understanding of the term race aligns with the purpose of the Refugee Convention.<sup>179</sup> Generally, the fact of belonging to a specific racial or ethnic group is not enough to establish a claim for persecution. However, the UNHCR acknowledges that there may be situations where particular circumstances affecting the group leads to a situation where mere membership of that group is in itself sufficient to establish a causal link to a Convention ground.<sup>180</sup>

### 4.2.3 Nationality

Having a nationality implies that someone is a member of a state which is a subject of international law. Through the state, the subject of international law, the individual becomes connected with international law.<sup>181</sup> Weis consider the term nationality as a ‘politico-legal term denoting membership of a State’.<sup>182</sup> Through this definition, a name is given to the legal connection between an individual and the state. Meaning, nationality not only encompasses the membership of a state, but the attachment to a state for purposes of international law.<sup>183</sup> In international refugee law, the term nationality should be understood as both a link to a state for purposes of international law and as a wider cultural or political concept.<sup>184</sup> According to Grahl-Madsen, the term

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<sup>175</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 394.

<sup>176</sup> Atle Grahl-Madsen, *The Status of Refugees in International Law* (vol 1, Sijthoff 1966) 218.

<sup>177</sup> UNHCR, *Handbook* (n 9) para 68.

<sup>178</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 394–395.

<sup>179</sup> Goodwin-Gill and McAdam (n 11) 70.

<sup>180</sup> UNHCR, *Handbook* (n 9) para 70.

<sup>181</sup> Weis (n 3) 13.

<sup>182</sup> Weis (n 3) 3.

<sup>183</sup> Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing 2016) 5–6.

<sup>184</sup> Fripp (n 183) 147.

nationality can mean both citizenship and membership of an ethnic group and both meanings are relevant for the Refugee Convention.<sup>185</sup> On the contrary, Zimmermann and Mahler argue that nationality does not refer to the legal bond between an individual and a state such as citizenship, but rather to an individual's ethnic origin.<sup>186</sup>

However, nationality should not only be equated with citizenship in the context of the Refugee Convention. The term also refers to membership of a particular ethnic or linguistic group and may overlap with the term race.<sup>187</sup> Furthermore, the term nationality can also be understood as to encompass membership of particular religious or cultural communities. It is not necessary that those persecuted for reasons of nationality are a minority group in their country.<sup>188</sup> As with other Convention grounds, the Refugee Convention protects individuals who do not hold the relevant attribute, in this case nationality. Thus, it protects stateless persons.<sup>189</sup> The Convention also encompasses individuals with inferior political status, for example individuals holding a different version of nationality ascribed to them by the state, or individuals belonging to a group of nationals which the state refuses to recognise as citizens.<sup>190</sup>

#### **4.2.4 Membership of a Particular Social Group**

Many cases encompassed by membership of a particular social group may be covered by other Convention grounds as well, but membership of a particular social group is broader in its application than the other grounds.<sup>191</sup> Membership of a particular social group is the Convention ground with least clarity, but it is well established that the group cannot be defined solely on the ground that members of it are at risk of being persecuted.<sup>192</sup> This reasoning has led to dismissed claims from Chinese individuals who fear forced sterilisation or abortion, because decision-makers believe that the only characteristic shared by the group is a risk of being persecuted.<sup>193</sup>

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<sup>185</sup> Grahl-Madsen (n 176) 218–219.

<sup>186</sup> Zimmermann and Mahler (n 51) para 583.

<sup>187</sup> UNHCR, *Handbook* (n 9) para 74.

<sup>188</sup> Goodwin-Gill and McAdam (n 11) 73.

<sup>189</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 397; Grahl-Madsen (n 176) 219.

<sup>190</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 398.

<sup>191</sup> Grahl-Madsen (n 176) 219.

<sup>192</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 424–425.

<sup>193</sup> Alexander Aleinikoff, 'Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group'' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 292–293.

Furthermore, the size of the group is irrelevant, for example family and women could both be considered as a particular social group. 'Particular' in the context of membership of a particular social group means that a group should be identifiable.<sup>194</sup> Normally, such a group is constituted by individuals of similar background, habits or social status.<sup>195</sup> However, it is not necessary that there be any voluntary relationship or cohesion or homogeneity between members of the group.<sup>196</sup> The concept of a particular social group encompasses both 'internal' characteristics as well as 'external' perceptions, meaning that the essential element in the definition is a combination of matters of choice and matters over which group members have no control. In the context of the Refugee Convention, a social group should be identified on the basis of linking and uniting factors, for example ethnic, cultural and linguistic origin, education, economic activity and shared values. Another important aspect is the societal attitude towards the group, especially the treatment of the group by national authorities.<sup>197</sup>

There are two main interpretative approaches to determining membership of a particular social group, immutable characteristic or 'social perception'. The immutable characteristics approach means that the social group is defined upon a common immutable characteristic shared by all members of the group and that characteristic is either not changeable to the individual or is so fundamental to individual identity or conscience that it cannot be required to be changed.<sup>198</sup> The social perception approach focuses on if all members of a group hold a common characteristic or attribute which distinguishes the group from society at large. However, it is not clear how distinguished the group has to be from the rest of society for it to constitute a particular social group. The French understanding of the social perception approach requires the group to be defined by authorities and society in general on the basis of the common characteristic of all members of the group.<sup>199</sup> The UNHCR has stated that both the immutable characteristics approach and the social perception approach should be reconciled in one single standard:

*[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which*

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<sup>194</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 425.

<sup>195</sup> UNHCR, *Handbook* (n 9) para 77.

<sup>196</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 425.

<sup>197</sup> Goodwin-Gill and McAdam (n 11) 75.

<sup>198</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 426.

<sup>199</sup> Hathaway and Foster, *The Law of Refugee Status* (n 12) 428–429.

*is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.*<sup>200</sup>

As for other Convention grounds, mere membership of a particular social group is generally not enough to establish a claim for refugee status but may in some cases, depending on the circumstances, be enough.<sup>201</sup> Moreover, it should be noted that social group determinations are fact and country specific, meaning that it cannot be assumed that a group identified as a social group in one country will also be identified as such in another country.<sup>202</sup>

### 4.3 Interpretation in Stateless Claims

In *Refugee Appeal No. 72635/01* from 2002, the New Zealand RSAA dismissed the appellant's appeal on alternative grounds, one being that the nexus requirement had not been established. Regarding the nexus requirement the New Zealand RSAA argued that the appellant's predicament was because of his statelessness and had no connection to a Convention ground:

*[T]he appellant is stateless for one reason only, namely because Kuwaiti citizenship law is based on jus sanguinis. [...] There is no evidence that the jus sanguinis principle was adopted by Kuwait with a view to withholding nationality from any identifiable groups such as the Bedoons. [...] The adoption of the jus sanguinis principle by Kuwait does not have any Convention "reason" nor is there any such Convention reason in the application of that principle to the appellant. [...] [T]he fact that the appellant is a Bedoon is not a contributing factor to a risk of being persecuted.*<sup>203</sup>

This interpretation and application of the nexus requirement in relation to Bedoons from Kuwait seems to have been abandoned by the New Zealand RSAA with the judgment in *Refugee Appeal No. 74467* two years later. In *Refugee Appeal No. 74467* the New Zealand RSAA concluded that, if the pattern of historical discrimination towards Bedoons in Kuwait is appreciated, the 'historical nexus between the status of bidoon and one or more Convention grounds is apparent' and that these grounds 'embrace race and nationality (tribe/ clan/ geographical origins/ settled/ nomadic), religion (Sunni/Shia) and gender (social group)'.<sup>204</sup>

The judge in *Refugee Appeal No. 74467* did not find the above quoted reasoning in *Refugee Appeal No. 72635/01* persuasive, mainly for two reasons.

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<sup>200</sup> UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, para 10–11.

<sup>201</sup> UNHCR, *Handbook* (n 9) para 79.

<sup>202</sup> Aleinikoff (n 193) 310.

<sup>203</sup> *Refugee Appeal No. 72635/01* (n 137) para 182 (emphasis in original).

<sup>204</sup> *Refugee Appeal No. 74467* (n 160) para 94.

Firstly, the reasoning focused disproportionately on the *jus sanguinis* principle in the citizenship law of Kuwait. Secondly, the basis for the conclusion that there were no discriminatory elements in the adoption or implementation of Kuwait's citizenship legislation was not presented, rather the conclusion was simply asserted. According to the judge in *Refugee Appeal No. 74467*, the operation of the *jus sanguinis* principle could hardly explain the extreme situation in Kuwait, where up to one third of the population was stateless by 1988. The *jus sanguinis* principle is applied in other Middle Eastern countries as well, without the same result as in Kuwait. Evidently, something more than just the neutral application of the *jus sanguinis* principle created statelessness in Kuwait.<sup>205</sup> Hence, the judge held that 'the statelessness of the *bedoons* is intimately linked to the fact that discriminatory notions have informed both the content and implementation of Kuwait's Citizenship Law'.<sup>206</sup>

The new approach to considering claims brought by Kuwaiti Bedoons seems to have been adopted in later decisions from the New Zealand RSAA. In a subsequent case from 2010, the New Zealand RSAA simply concluded that the appellant had a well-founded fear of being persecuted 'for reasons of race, nationality and/or membership of a particular social group, namely *bedoon*'.<sup>207</sup>

As regards Bedoons from Kuwait, in *BA and Others* from 2004 the UKIAT decided that the appellant had established a nexus to a Convention ground.<sup>208</sup> The UKIAT held that the Bedoons have an 'extended tribal identity and so cannot be reduced to persons defined simply by their statelessness', which is sufficient to consider them encompassed by the Convention ground race.<sup>209</sup> Furthermore, the UKIAT also identified Bedoons in Kuwait as a particular social group because of their 'extended tribal origins and the existence of a number of legislative and societal measures of discrimination marking them out from others' and that they could be said to 'exist independently of, and not be solely defined by, these measures of discrimination'. It should be noted that *Refugee Appeal No. 72635/01* was referenced in *BA and Others* and the UKIAT held that the judgment in *Refugee Appeal No. 72635/01* overlooked the tribal background and identity of Kuwaiti Bedoons.<sup>210</sup>

In the subsequent case of *HE* from 2006, the UKAIT decided that the appellant, also a stateless Bedoon from Kuwait, had made out his claim under the

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<sup>205</sup> *Refugee Appeal No. 74467* (n 160) para 86–87.

<sup>206</sup> *Refugee Appeal No. 74467* (n 160) para 88 (emphasis in original).

<sup>207</sup> *Refugee Appeal No. 76506* (n 164) para 84 (emphasis in original).

<sup>208</sup> *BA and Others* (n 85) para 90.

<sup>209</sup> *BA and Others* (n 85) para 88.

<sup>210</sup> *BA and Others* (n 85) para 89.

Refugee Convention without engaging in the question of whether the nexus requirement had been established at all.<sup>211</sup>

A similar line of reasoning as the one in *Refugee Appeal No. 72635/01* was expressed by the UKAIT in the case of *MM and FH* from 2008 regarding stateless Palestinians living in refugee camps in Lebanon. The appellants claimed that they were discriminated against for reasons of race as Palestinians living in refugee camps in Lebanon.<sup>212</sup> The UKAIT concluded that:

*[T]he differential treatment of Palestinian refugees stems entirely from their statelessness, and that the justification for not increasing access of Palestinians refugees to civic rights i.e. lack of reciprocity and lack of resources, is proper and reasonable and is in accordance with international human rights norms.*<sup>213</sup>

However, the UKAIT did not clearly articulate what standard it applied in relation to the causal link. The New Zealand RSAA in *Refugee Appeal No. 72635/01* adopted the contributing cause test when assessing whether or not the nexus requirement had been satisfied.<sup>214</sup> In regard to the appellant, the New Zealand RSAA concluded that the fact that the appellant was a Bedoon was not a ‘contributing factor to a risk of being persecuted’.<sup>215</sup>

The Australian RRT did not find a nexus to a Convention ground to be established in a case where the appellant, a stateless Palestinian living in Kuwait, claimed to be discriminated against in the right to access employment for reasons of race. The Australian RRT did not accept his argument since the appellant had worked in Kuwait for many years before coming to Australia.<sup>216</sup> The standard used by the Australian RRT in regard to the nexus requirement seems to have been the central and predominant cause standard as the RRT argued:

*The persecution feared need not be solely attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared [...].*<sup>217</sup>

Unfortunately, the Australian RRT did not expand its argument regarding why race was not the ‘essential and significant motivation’ for the feared persecution in this case, rather it seems as if the fact that the appellant had not

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<sup>211</sup> *HE* (n 87) para. 36–37.

<sup>212</sup> *MM and FH* (n 106) para 144.

<sup>213</sup> *MM and FH* (n 106) para 143.

<sup>214</sup> *Refugee Appeal No. 72635/01* (n 137) para 177.

<sup>215</sup> *Refugee Appeal No. 72635/01* (n 137) para 182.

<sup>216</sup> *RRT Case No. 0808284* (n 99) para 88.

<sup>217</sup> *RRT Case No. 0808284* (n 99) para 15 (emphasis in original).

established past persecution was the basis of the conclusion regarding the nexus clause.

In comparison, the Canadian IRB found the nexus requirement to be established regarding a stateless Palestinian from Lebanon, without any in-depth reasoning regarding the causal link. The Canadian IRB held that the evidence supported the claim that there was ‘systematic and persistent discrimination against Palestinians in Lebanon’.<sup>218</sup> Hence, the Canadian IRB simply stated that the appellant had a ‘well-founded fear of persecution due to his *nationality* as a Palestinian in Lebanon’.<sup>219</sup> However, in a following case the Canadian IRB reached the opposite conclusion when dealing with a stateless Palestinian living in the United Arab Emirates who claimed a nexus to a Convention ground on the basis of nationality or ethnicity.<sup>220</sup> The Canadian IRB argued that the evidence did not show that Palestinians were ‘singled out’ for persecutory treatment because the United Arab Emirates had laws of general application in relation to all non-nationals.<sup>221</sup> In neither of the two cases the Canadian IRB clearly articulated what standard for assessing whether a causal link had been established or not it relied on.

## 4.4 Concluding Remarks

Evidently, the New Zealand case law regarding Bedoons from Kuwait has developed from a more restrictive interpretation of the nexus requirement to a more resilient approach which encompasses and considers historical aspects of the situation for Bedoons in Kuwait. From the perspective of the individual, this is a positive development as the nexus requirement becomes easier to establish. As refugee status determination entails a comprehensive examination of the claim made out by the appellant with regard to the context, including historical, in which the individual claimant exists, this development is positive from a legal perspective as well. Hence, I agree with the judgment in *Refugee Appeal No. 74467* by the New Zealand RSAA that the historical context in which Kuwaiti Bedoons find themselves reveals a causal link to a Convention ground.

In regard to Palestinians, the case law has not developed as clearly in comparison to cases concerning Bedoons from Kuwait. In most cases which have been dealt with in this study, the decision-makers do not engage in-depth with the nexus requirement and whether it has been established. Therefore, different approaches and standards are not easy to trace. While the problem for

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<sup>218</sup> *X v. Canada* (n 107) 6.

<sup>219</sup> *X v. Canada* (n 107) 7 (emphasis added).

<sup>220</sup> *X (Re)* (n 157) 5.

<sup>221</sup> *X (Re)* (n 157) 8; cf chapter 3.3.

Bedoons seems to be, or have been, to argue that there is a Convention ground which is relevant for their claims, it seems as if the problem for Palestinians is to establish a link at all. Decision-makers do not seem to have a hard time finding claims by Palestinians to be connected to for example nationality, but rather the problem is to find the causal link to that Convention ground.

Race, nationality and membership of a particular social group seems to be the Convention grounds of most relevance for stateless persons and are invoked in the cases discussed within the scope of this thesis. Unfortunately, not all decision-makers expand their reasonings concerning which standard for establishing the causal link should be applied. However, statelessness does not give rise to additional problems in this regard.

A line of reasoning which have been used by decision-makers in relation to both Bedoons and Palestinians, is to claim that the appellant is discriminated against because of their statelessness, and not a Convention ground. It seems as if the causal link is harder to establish due to the fact that the apparent reason for the individual's predicament, statelessness, is not a Convention ground. However, when decision-makers engage more with the facts of the case and look beyond the situation of statelessness, as was done by the decision-maker in *Refugee Appeal No. 74467*, statelessness does not need to become an additional obstacle for the individual to overcome. Evidently, this is an issue which lies in the appreciation of the facts of the case, rather than in the interpretation of the refugee definition. Thus, my conclusion is that no additional interpretative issues arise in relation to stateless claims for refugee status based on socio-economic deprivation in relation to the requirement of a causal link in the refugee definition.



## 5 Findings and Conclusion

Stateless persons and refugees are two distinct groups of people, protected by two different regimes in international law. However, an individual may find themselves encompassed by both regimes if the circumstances of the individual's claim entail so. Just as holding a nationality gives rise to rights and duties under international law, the lack of nationality leads to the lack of rights for the individual. Despite human rights being universal and applicable to all human beings irrespective of nationality, the protection of human rights for non-nationals and stateless persons is different from the protection for nationals. This becomes evident when the situation for stateless persons in relation to economic and social rights is examined. The situation of statelessness restricts the access of many rights, economic and social rights are no exception. That the deprivation of socio-economic rights can make out a claim for refugee status has been widely acknowledged in international refugee law. In light of this, this thesis has discussed the implications of the situation of statelessness in refugee claims based on socio-economic deprivation.

Considering the purpose of this thesis, international refugee law in general and with special regard to socio-economic deprivation and stateless persons has been studied. Through the examination of case law from five different English language jurisdictions, different approaches to deciding claims for refugee status based on socio-economic deprivation have been traced and discussed in relation to claims brought by stateless persons. The purpose of studying case law has been to examine whether the situation of statelessness gives rise to additional interpretative issues in refugee claims based on socio-economic deprivation, apart from the general interpretative difficulties which already exist in international refugee law.

In relation to the threshold of being persecuted, the situation of statelessness does not cause any additional difficulties in refugee status determination. There are general difficulties in satisfying the threshold of being persecuted when the claim for refugee status is based on socio-economic deprivation. These difficulties arise from the under-valuation of socio-economic rights and violations of such rights as well as a misinterpretation of the progressive nature of socio-economic rights. Decision-makers tend to apply a higher threshold when assessing refugee claims based on socio-economic deprivation than other refugee claims. For example, the U.S. Court of Appeals 6<sup>th</sup> Cir. held that the evidence did not suggest that women in Saudi Arabia were prevented from working at all, when dismissing the applicant's claim for refugee status

in *El Assadi*. Applying a threshold which requires the individual to be completely precluded from working is a considerably high threshold as a more partial denial of the right to work can be enough to severely impact the individual's possibility to earn a livelihood. As 'general difficulties' imply, this is a problem for all refugee claims based on socio-economic deprivation and the situation of statelessness does not complicate the situation any further.

However, the findings made in previous chapters show that the situation of statelessness brings additional interpretative challenges in relation to Article 2(3) of the ICESCR, which applies only to non-nationals. Therefore, the situation of statelessness brings a particular interpretative challenge to the context of claims for refugee status based on socio-economic deprivation in this regard. Article 2(3) of the ICESCR is very limited in its scope as it applies only to developing countries and in regard to economic rights. Access to social rights, for example education or health care, cannot be restricted on the basis of this Article. Even though Article 2(3) of the ICESCR is a narrow exception from the non-discrimination principle in Article 2(2) of the ICESCR and aims to favour nationals of developing countries to combat the inequality between nationals of developing and developed countries, it is evident from the case law study of this thesis that the exception can be considered in the context of refugee status determination.

Both in the cases of *KK IH HE* and *MM and FH*, the decision-makers relied on Article 2(3) of the ICESCR in their reasonings regarding the differential treatment of stateless Palestinians living in refugee camps in Lebanon. Unfortunately, it is not entirely clear how the decision-makers interpreted the provision as they did not provide any extensive reasonings. However, the decision-makers did consider Lebanon a developing country in regard to which Article 2(3) of the ICESCR can be applied and in both cases reached the conclusion that the appellants could not be considered as refugees under the Refugee Convention. In my opinion, Article 2(3) of the ICESCR should be interpreted solely as an exception for developing countries to invoke in regard to differential treatment between nationals and non-nationals in access to economic rights and should not be considered relevant in the context of refugee status determination. It should not be used as a justification for continued oppression and marginalisation of certain groups. The misinterpretation of Article 2(3) of the ICESCR may preclude successful claims for refugee status based on socio-economic deprivation.

Another specific issue which arises in relation to stateless claims for refugee status based on socio-economic deprivation is what relevance should be given to reciprocal agreements. Evidently, the lack of reciprocal agreements can be invoked as a reason for not giving non-nationals access to certain rights and

can be invoked in relation to persons holding a nationality as well. However, it is clear that reciprocal agreements are impossible for stateless persons to achieve. The lack of reciprocal agreements as justification for differential treatment of stateless persons can be used as a way to effectively exclude stateless persons and preclude them from settling in society. Even though lack of reciprocity may be a legitimate ground for distinction, decision-makers must engage in a thorough examination of whether the differential treatment is proportionate. In this regard, a fair balance between state interests and respect for individual rights must be struck. If lack of reciprocal agreements as a reason for differential treatment disproportionately affects one group of people, the differential treatment cannot be considered to be justified and thus constitutes discrimination. Such discrimination can be the basis of a claim for refugee status.

The lack of reciprocity as a reason to deny access to rights in conjunction with an unwillingness to naturalise stateless persons keeps stateless persons in a situation where they have very restricted access to rights and almost no chances of becoming nationals. Furthermore, if the state is not a party to the two statelessness conventions, the lives of stateless persons are made even harder. One example of this is Lebanon, which is not a state party to the two statelessness conventions and invokes the lack of reciprocal agreements as a reason for denying stateless Palestinians access to many rights.

Further, this thesis finds that there is a problem with applying a motivation-based approach to claims for refugee status based on socio-economic deprivation because the motivation-based approach is unable to consider systemic or indirect discrimination in a sufficient way. In my view, there is no doubt that indirect discrimination in the access of economic and social rights can be as detrimental for an individual as direct discrimination. Therefore, it is important that the refugee definition is interpreted in a way that does not make refugee claims based on indirect discrimination harder to establish than other refugee claims. Hence, a predicament-based approach is preferable. Notably, in this regard the situation of statelessness does not cause any additional interpretative challenges.

The examination of case law within the scope of this thesis shows that the situation of statelessness may complicate a claim for refugee status in relation to establishing a causal connection to a Convention ground. Statelessness is not in itself a Convention ground but as the case law studied in this thesis reveals, a stateless person can be at risk of being persecuted for reasons of, for example, race, nationality or membership of a particular social group. Though, statelessness is in many cases the apparent reason for the individual's predicament and tend to overshadow relevant Convention grounds that may

be contributing to the predicament. Further, the predicament of a stateless person may overlap more than one Convention ground. This could be a strength, as the causal link can be established in regard to more than only one apparent Convention ground. On the other hand, it can be a weakness because statelessness cannot clearly be connected to one specific Convention ground and thus it may be harder for a decision-maker to reveal a relevant Convention ground. In my opinion, this is not an interpretative issue related to the refugee definition but rather a problem in how decision-makers approach stateless claims for refugee status based on socio-economic deprivation.

It may well be so, in certain cases, that the predicament of an individual stems entirely from the situation of statelessness but it is unlikely that the situation of statelessness exists in a vacuum without any association to some type of discrimination on the basis of, for example, race or nationality. Rather, if decision-makers approach stateless claims for refugee status with more sensibility towards and understanding of the situation of statelessness and how it emerges, a more comprehensive assessment of the predicament of the individual in relation to international refugee law can be made. To simply conclude that the predicament of a stateless person stems entirely from their statelessness and that the situation of statelessness exists outside the control of the state in which the stateless person lives, does not indicate that the decision-maker has adequately appreciated the nature of statelessness.

The findings of this thesis lead to the conclusion that the situation of statelessness does cause some additional interpretative issues in claims for refugee status based on socio-economic deprivation. In addition, the situation of statelessness seems to impact other aspects of the decision-making which are not related solely to the interpretation of the refugee definition. The general difficulty of establishing a claim for refugee status on the basis of socio-economic deprivation, due to for example the under-valuation of such claims, in conjunction with the aggravating nature of statelessness, for example the overshadowing effect statelessness has on the causal link, leads to a devastating situation for people living in statelessness around the world. Moreover, the hardship of stateless persons does not benefit from the poor interest from states in addressing and reducing statelessness, evident by the limited number of state parties to the statelessness conventions.

Finally, this thesis aims to address how the interpretative issues revealed best be resolved. Evidently, international refugee law is underpinned by interpretative challenges. There are different approaches to understanding the refugee definition and some of them have been discussed in this thesis. In my view, the human rights-based approach and the predicament-based approach should

be adopted to accommodate claims for refugee status based on socio-economic deprivation properly. In regard to Article 2(3) of the ICESCR, there are particular interpretative issues, mostly regarding what relevance it should be given in the assessment of whether a violation of economic rights has occurred. I maintain that Article 2(3) of the ICESCR should be given limited relevance in the context of refugee status determination. Rather, state policies which disproportionately affect stateless persons should be considered. However, the most effective solution to the problems revealed by this thesis would be to eradicate statelessness.

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