

Article

# Protected Groups in Refugee Law and International Law

Joseph Rikhof <sup>1,\*</sup> and Ashley Geerts <sup>2</sup>

<sup>1</sup> Adjunct Professor, International Criminal Law, Common Law Section, University of Ottawa, Fauteux Hall, 57 Louis-Pasteur Private, Ottawa, ON K1N 6N5, Canada

<sup>2</sup> Articling Student, Department of Justice, 284 Wellington Street, Ottawa, ON K1A 0H8, Canada; ashleymgeerts@gmail.com

\* Correspondence: jrikhof@uottawa.ca

Received: 28 August 2019; Accepted: 16 October 2019; Published: 22 October 2019



**Abstract:** The 1951 *Convention Relating to the Status of Refugees* (“*Refugee Convention*”) defines ‘persecution’ based on five enumerated grounds: race, religion, nationality, membership of a particular social group, and political opinion. This list of protected groups has not changed in the nearly 70 years since its inception, although the political and social context that gave rise to the *Refugee Convention* has changed. This article examines how ‘membership in a particular social group’ (“MPSG”) has been interpreted, then surveys international human rights law, transnational criminal law, international humanitarian law, and international criminal law instruments to determine whether MPSG can encompass the broader protections afforded under other international law regimes. It concludes that the enumerated grounds are largely consistent with other instruments and protects, or at least has the potential to protect, many of the other categories through MPSG. However, as this ground is subject to domestic judicial interpretation and various analytical approaches taken in different countries, protection could be enhanced by amending the *Refugee Convention* to explicitly include additional protected groups from these other areas of international law, specifically international human rights law and international criminal law.

**Keywords:** persecution; protected groups; social group; international human rights law; international humanitarian law; international criminal law; transnational criminal law; comparative international law analysis; refugee law jurisprudence; international criminal law jurisprudence

---

## 1. Introduction

The 1951 *Convention Relating to the Status of Refugees* (“*Refugee Convention*”) defines ‘persecution’ based on five enumerated grounds: race, religion, nationality, membership of a particular social group, or political opinion (United Nations 1951, art 1(A)(2)). This list of protected groups has not changed since its inception, although the political and social context that gave rise to the *Refugee Convention* has seen dramatic changes since that time. Accordingly, it is appropriate to critically examine the ostensibly narrow scope of protected groups in the *Refugee Convention* and assess whether there are other international law sources that could provide assistance on a more inclusive approach to protection. This article attempts to carry out such an examination by first looking at how ‘membership of a particular social group’ has been interpreted to protect additional categories. It then conducts a survey of international instruments in the areas of international human rights law, transnational criminal law, international humanitarian law, and international criminal law to assess what groups are protected under these regimes. Finally, it compares these groups to determine whether ‘membership of a particular social group’ can encompass the broader protections that may be afforded under other international law regimes.

The survey of instruments in different international law regimes only looks at the text of the provisions enumerating protected groups, not the reasons why the drafters chose the specific language of the provisions; these reasons may vary widely and are outside the scope of this article. For the same reason, there is no discussion of the national implementation of the treaties in question except when discussing refugee law and one aspect of international criminal law, namely protected groups in the crime of genocide, where a brief discussion of national implementation does assist in the purpose of this article as this national implementation has a direct bearing on the interpretation of the international notion of that crime.

## 2. Protected Groups under the *Refugee Convention*

The *Refugee Convention* is the foundational international instrument protecting refugees from persecution. At its core, the principle of non-*refoulement* holds that refugees should not be returned to a country where their life or freedom is threatened because of their race, religion, nationality, membership in a particular social group, or political opinion (United Nations 1951, art 33(1)). This ostensibly narrow list may not, at first glance, reflect the contemporary challenges modern refugees face. However, looking closer at membership of a particular social group (“MPSG”), this ground may be flexible enough to incorporate broader protections and evolve with modern refugee claims.

### 2.1. *Refugee Law and Protected Groups—Social Group*

At first glance, the *Refugee Convention* provides protection limited to groups facing persecution on five enumerated grounds. The first four grounds are relatively straightforward, while the fifth ground, MPSG, has been described as the “ground with the least clarity” (UNHCR 2002, para. 1) and subject to the most judicial scrutiny (Hathaway and Foster 2014, p. 424; Foster 2012, p. 2). However, it is this relatively broad scope that has the greatest flexibility to evolve in response to contemporary challenges that refugees face (Foster 2012, p. 2; UNHCR 2002, para. 1).

The *Refugee Convention* does not define MPSG.<sup>1</sup> As such, this ground has largely developed through domestic jurisprudence. Two dominant interpretive approaches have emerged over time—the protected characteristics approach and the social perception approach. Both are rooted in international rules of treaty interpretation,<sup>2</sup> with the protected characteristics approach considering the context, object and purpose of the *Refugee Convention*, and the social perception approach relying on the ordinary meaning of the text (Foster 2012, p. 12).

The protected characteristics approach focuses on the innate or unchangeable characteristic of the particular social group (“PSG”). The United States in *Re Acosta*, 19 I&N, Dec 211 (BIA 1986) (“*Acosta*”) first articulated this approach when the Board of Immigration Appeals (BIA) recognized the other protected grounds described persecution based on an ‘immutable’ characteristic (Hathaway and Foster 2014, p. 426).<sup>3</sup> The Supreme Court of Canada in *Canada Attorney General v Ward*, [1993] 2 SCR 689 at 739 (“*Ward*”) adopted this approach and identified three types of PSG:

1. Groups defined by an innate or unchangeable characteristic;
2. Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and

<sup>1</sup> The *travaux préparatoires* is relatively silent on this ground, which was a last-minute addition proposed by Sweden and accepted with little discussion. For a brief history, see (Foster 2012, pp. 423–24; Goodwin-Gill and McAdam 2007, p. 74; Zimmermann 2011, pp. 62–65; Aleinikoff 2003, pp. 265–66).

<sup>2</sup> The *Vienna Convention on the Law of Treaties* sets out, as a general rule of interpretation, 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” (United Nations 1969).

<sup>3</sup> The BIA stated: “persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship ties, or in some circumstances, it might be a shared past experience such as former military leadership or land ownership” (*Re Acosta*, 19 I&N, Dec 211 at 233 (BIA 1986)).

3. Groups associated by a former voluntary status, unalterable due to its historical performance.

This principled interpretation recognizes that MPSG should evolve in line with internationally recognized human rights and principles of non-discrimination (Hathaway and Foster 2014, p. 427).<sup>4</sup> A similar approach is followed in countries such as New Zealand, South Africa, and the United Kingdom (Foster 2012, p. 8; Hathaway and Foster 2014, p. 427).<sup>5</sup>

The social perception approach focuses on how the group is set apart from society. This approach was first developed by Australia in *A v Minister for Immigration & Ethnic Affairs*, [1997] HCA 4, (1997) 190 CLR 225 at 11 AustLII, where the High Court looked at the meaning of ‘particular,’ ‘social,’ and ‘group’ to define PSG as “a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large” (Foster 2012, p. 9). In *Applicant S v Minister for Immigration and Multicultural Affairs*, [2004] HCA 25 at para. 36, 217 CLR 387, the Australian High Court identified three factors that must be met:

First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large.<sup>6</sup>

France also follows the social perception approach, though it differs slightly in its interpretation. In *Ourbih*, Conseil d’Etat SSR, Dec 171858, 23 June 1997, the Conseil d’Etat set out two criteria to define a particular social group: “the existence of characteristics common to all and which define the group in the eyes of the authorities in the country and of society in general” (Foster 2012, p. 11; Hathaway and Foster 2014, p. 429; Aleinikoff 2003, pp. 281–82). These criteria were applied in the context of sexual orientation, requiring the claim to be manifested in external behaviour (Foster 2012, p. 11). Goodwin-Gill and McAdam find that a group may be distinguished from society without sharing an immutable characteristic; therefore, it is necessary to look at a range of factors that combine to create a risk given the claimant’s personal circumstances, time, and place (Goodwin-Gill and McAdam 2007, pp. 84–85). They suggest it is more helpful to look at the group “within” society, as opposed to the group as “set apart” from society (Goodwin-Gill and McAdam 2007, p. 85).

Each approach has its own advantages and disadvantages. The protected characteristics approach comports with principles of treaty interpretation looking at the object and purpose of the *Refugee Convention*, provides a principled framework for interpretation, and allows for a contemporary interpretation consistent with evolving human rights principles (Hathaway and Foster 2014, p. 436; Council of Europe 2004a). However, it is criticized as overly complicated and may not offer as much protection (Foster 2012, p. 13). The social perception approach is straightforward and, presumably, allows for broader protection (Foster 2012, p. 13). However, this approach relies on a textual analysis yet there is no “ordinary meaning” of the term ‘PSG’; resorting to an individual interpretation of the words can lead to an artificial definition detached from the *Refugee Convention’s* intention (Hathaway and Foster 2014, p. 432). Its inherent ambiguities have led to decisions based on subjective preferences of a given decision-making panel, which may artificially narrow claims (Hathaway and Foster 2014, pp. 432–36).

<sup>4</sup> Justice La Forest, writing for the Court, found “[t]he meaning assigned to “particular social group” in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative” (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 739).

<sup>5</sup> In *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah*, [1999] UKHL 20, 2 All ER 545 (25 March 1999) BailII at 20, the House of Lords stated: “[i]f one is looking for a genus in order to apply the *ejusdem generis* rule of construction to the phrase “particular social group”, it is to be found in the fact that the other Convention reasons are all grounds on which a person may be discriminated against by society. See also the New Zealand Refugee Status Appeals Authority decision in *Re GJ*, Refugee Appeal No 1312/93, 1 NLR 387 (RSAA 1995) at 23–34 for an extensive analysis of MPSG.

<sup>6</sup> See (AAT 2019, pp. 19–24) for a brief review of Australia’s approach to MPSG in *Applicant A* and *Applicant S*. But see (Hathaway and Foster 2014, p. 428) for a critique of the *Applicant S* factors.

In 2002, the United Nations High Commissioner for Refugees (“UNHCR”) issued its “Guidelines on International Protection on Membership of a Particular Social Group” (“Guidelines”) to provide guidance to states interpreting and applying this ground. The Guidelines emphasize that MPSG should be interpreted in a manner that evolves with changing societies and international human rights norms (UNHCR 2002, para. 2–3). To prevent protection gaps, the Guidelines put forward a comprehensive definition that incorporates the protected characteristics and social perception approach:

[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 is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights. (UNHCR 2002, para. 11)

The UNHCR’s comprehensive definition has led to its misapplication as a cumulative test in the United States and Europe. The United States, while initially following a protected characteristics approach in *Acosta*, has taken a cumulative approach in recent years. In 2006, the BIA relied on the UNHCR Guidelines to require social visibility as a mandatory element of the MPSG analysis (Hathaway and Foster 2014, p. 430; Marouf 2019, p. 489). In 2014, the BIA clarified that social visibility meant social distinction and added an additional requirement of “particularity” (Marouf 2019, pp. 489–92; Owens 2018, p. 1261), creating a tripartite test requiring a protected characteristic, social distinction, and particularity (Grant 2017, p. 917).<sup>7</sup>

The European Union’s Qualification Directive has similarly been interpreted as requiring a cumulative test (EASO 2016, p. 49). The Qualification Directive (EU 2011) defines MPSG in Article 10(1)(d):

- (d) a group shall be considered to form a particular social group where in particular:
- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
  - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

The Qualification Directive has been criticized as distorting the UNHCR’s approach by proposing a more stringent test that may lead to protection gaps (Hathaway and Foster 2014, p. 432). However, there is no international consensus on which approach is the correct one. The UNHCR’s comprehensive definition recognizes both approaches as valid, without advocating for one approach over the other. While there may not be a need to move towards a single standard, consistency is desirable to prevent protection gaps between countries.

Despite these different interpretive approaches, state practice demonstrates consensus on several aspects of this ground. First, the PSG cannot be defined exclusively by a shared fear of persecution, though such fear may be a relevant factor to determine the group’s visibility (UNHCR 2002, para. 14; Hathaway and Foster 2014, pp. 424–25).<sup>8</sup> Second, the group does not need to be cohesive (UNHCR

<sup>7</sup> The BIA’s social visibility requirement led to a split in the Circuit courts, with the Seventh and Third Circuit rejecting this component as unreasonable in decisions such as *Gatimi v Holder*, 578 F.3d 611 (USCA, 7th Cir 2009) [“It is true that our sister circuits have generally approved ‘social visibility’ as a criterion . . . We just don’t see what work ‘social visibility’ does”] and *Valdiviezo-Galdamez v Attorney General of the United States*, 663 F.3d 582 at 609 (USCA, 3rd Cir 2011) [“the BIA’s requirement that a ‘particular social group’ possesses the elements of ‘social visibility’ and ‘particularity’ is not entitled to Chevron deference. . . . Indeed, we are hard-pressed to understand how the ‘social visibility’ requirement was satisfied in prior cases using the *Acosta* standard”]. For a review of the US approach, see (Marouf 2019, pp. 489–92; Owens 2018, pp. 1259–62; Grant 2017, pp. 904–21; Vogel 2019, pp. 359–61). For the UNHCR’s position rejecting this expanded test, see *Grace v Barr (Attorney General)*, Brief for the UNHCR as Amicus Curiae, No 19-5013 (DC Cir 2019); *OLBD v Barr (Attorney General)*, Brief for the UNHCR as Amicus Curiae, No 18-1816 (1st Cir 2019).

<sup>8</sup> See e.g., *A v Minister for Immigration & Ethnic Affairs*, [1997] HCA 4, (1997) 190 CLR 225, 242: “There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reasons of membership of a particular

2002, para. 15);<sup>9</sup> there is no need to establish a voluntary, associated relationship with the PSG (UNHCR 2002, para. 15; Hathaway and Foster 2014, pp. 425–26; Foster 2012, p. 5). Third, not all members of the group need to be at risk of persecution; a person is not precluded from making a claim if some members of the group are not persecuted where, for example, they hide their shared characteristic or are unknown to or cooperate with the persecutor (UNHCR 2002, para. 17). Fourth, the size of the group is irrelevant (UNHCR 2002, para. 18; Hathaway and Foster 2014, p. 425; Foster 2012, p. 5); the group may be as large as ‘women’ or as small as a family (Hathaway and Foster 2014, p. 425). While there is some degree of discomfort with the large size of some groups because of floodgate concerns, the other Convention grounds similarly may encompass large groups and, therefore, MPSG should not be exceptionally limited (Hathaway and Foster 2014, p. 425). Finally, absent special circumstances, mere membership is not enough to establish MPSG (UNHCR 2002, para. 16; UNHCR 2019, para. 79).

## 2.2. Recognized Categories of Particular Social Group

Decision-makers have recognized many types of PSGs when addressing specific refugee claims, which can be broadly organized into eight categories: gender, sexual orientation, family, age, disability, economic or social class, voluntary association, and former status.<sup>10</sup> These categories illustrate the extent to which States have been willing (or not) to recognize certain types of PSGs, as not all will fit neatly into a single category and must be specific to the claimant’s circumstances. Further, these categories can, and often do, overlap with each other and with other protected grounds in the *Refugee Convention* (UNHCR 2002, para. 4; UNHCR 2019, para. 77).

### 2.2.1. Gender

Most states recognize, to varying degrees, that gender can constitute a PSG. Such claims often focus on ‘women’ or a subset thereof, though similar claims can arise for ‘men’ as a protected group (Foster 2012, p. 40). Decision-makers in North America and Europe have recognized a variety of gender-based claims as constituting PSGs, including forced marriage, domestic violence, abortion, and trafficking (Schoenholtz 2015, p. 110). Gender-based claims also include gender identity.<sup>11</sup>

The protected characteristics approach easily recognizes gender as an innate characteristic (Hathaway and Foster 2014, p. 437; IRB 2018, s. 4.5).<sup>12</sup> While the Qualification Directive requires only “due consideration” be given to gender-related aspects, many European countries recognize gender as a PSG.<sup>13</sup> Several countries also include gender in their domestic legislation or guidelines on refugee protection.<sup>14</sup> New Zealand has gone as far as recognizing ‘women’ as a PSG in several decisions.<sup>15</sup>

---

social group where what is said to unite those persons into a particular social group is their common fear of persecution” cited in (Foster 2012, pp. 5–6).

<sup>9</sup> See e.g., *Minister for Immigration and Multicultural Affairs v Khawar*, (2002) 210 CLR 1, [2002] HCA 14, 33: “cohesiveness may assist to define a group; but it is not an essential attribute of a group. Some particular social groups are notoriously lacking in cohesiveness” cited in (Foster 2012, p. 5).

<sup>10</sup> These categories draw on Foster (2012) comprehensive UNHCR study on MPSG. For other categories, see e.g., ?, s. 4.5 [PSGs recognized in Canadian case law B135-laws-593717; ?, s. 1.5.2.4.2 [PSGs recognized in European case law under the Qualification Directive B125-laws-593717; ?, pp. 29–36 [PSGs recognized in Australian case law B113-laws-593717.

<sup>11</sup> See e.g., *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1297 [finding transgender identity may constitute a PSG].

<sup>12</sup> The first category of PSG in *Ward* recognizes “gender is an innate characteristic and, therefore, women may form a particular social group within the Convention refugee definition” ((IRB 1996, A(III))).

<sup>13</sup> For example, the Netherlands, following the Qualification Directive’s approach, does not recognize ‘women’ alone, while Austria, Belgium, Germany, Spain, and Switzerland have recognized women or a subset of women as a PSG (Hathaway and Foster 2014, p. 437; Foster 2012, p. 41).

<sup>14</sup> For example, Latin American countries including Costa Rica, El Salvador, Guatemala, Mexico, Nicaragua, Paraguay, Uruguay, and Venezuela include gender in their domestic legislation on refugee protection (Hathaway and Foster 2014, p. 438). Countries including Australia, Canada, the United Kingdom, and the United States have guidelines for decision-makers assessing gender-based claims (Boyd 2018, p. 19).

<sup>15</sup> See e.g., *AI (Saudi Arabia)*, [2019] NZIPT 801491 at para. 72 [finding the reason for the claimant’s “predicament is her membership of a particular group which is severely marginalized on a religious, legislative and social level in Saudi Arabia. That particular social group is ‘women.’”]; *AB (Malawi)*, [2015] NZIPT 800672 at para. 83 [finding a real risk of persecution

The social perception approach has had more difficulty in accepting ‘women’ as a social group set apart from society (Foster 2012, p. 46), often leading to inconsistent decisions. Australian decision-makers have rejected gender-based claims such as “young single women” as not distinct from society at large or the group size, such as “Tanzanian women,” as overly broad (Foster 2012, p. 46), while recognizing “single women in India,” “married women in Tanzania,” and “young Somali women” as constituting PSGs (AAT 2019, pp. 34–35). The United States is inconsistent in its approach, with some courts accepting women as a PSG and others rejecting it under the social visibility test (Foster 2012, p. 47; Marouf 2019, p. 514). In Germany and France, decision-makers often focus on whether a narrower subset of women have transgressed societal norms in a way that makes that group visible to society (Foster 2012, pp. 47–48). These decisions are problematic for future claimants because the decision-maker’s precise reasoning and the evidential basis are often unclear, making it challenging for claimants to rely on the jurisprudence for guidance (Foster 2012, p. 48).

The major challenge for claimants making a gender-based claim is the artificial limiting of this category. Decision-makers and advocates are reluctant to recognize ‘women’ as a PSG, preferring to narrow the category based on additional criteria.<sup>16</sup> While refining the group can avoid perceived floodgate concerns, it often leads to complex categories that import unnecessary elements into the description, such as the nature of the harm (Hathaway and Foster 2014, p. 440; Foster 2012, pp. 44–45). For example, in *Re Kasinga*, 21 I&N Dec 357 at 365 (BIA 1996), an important decision on analyzing gender-based claims (Vogel 2019, pp. 361–64), the PSG was described as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>17</sup> In *Ayala Sosa and Others v Canada (Minister of Citizenship and Immigration)*, 2014 FC 428, para. 26–29, the Federal Court upheld the Immigration Board of Canada’s finding that “young, impoverished and uneducated teenagers living in small, gang-riddled communities who refuse to be recruited because of a strongly held political opinion that disagrees with Mara activities” do not constitute a PSG. The Board found that if the characteristics that were not immutable were removed (youth, poverty, and education), the applicant’s claim was based on being targeted.<sup>18</sup> This narrow approach highlights two problems. First, the group may be refined to the point it is solely based on persecution, which runs contrary to the principle that the ground cannot be defined only by the risk of persecution (Hathaway and Foster 2014, p. 411; Foster 2012, p. 45). Second, overly narrow group definitions lead to continuous litigation on the specific category, rather than acknowledging ‘women’ (or ‘men’) as a PSG (Hathaway and Foster 442).

While ‘women’ as a category should, theoretically, suffice because it is firmly established that group size does not matter, a subset of women can be helpful if appropriately delineated. In more recent cases, the common approach has been to define the group as “women of country X” (Hathaway and Foster 2014, p. 441). The United Kingdom House of Lords in *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah*, [1999] UKHL 20, 2 All ER 545, 9–10 (1999) BAILII (“*Shah*”) recognized that “women in Pakistan” as a social group “is neither novel nor heterodox. It is simply a logical application of the seminal reasoning in *Acosta’s case*” under the

---

on “the Convention grounds of political opinion and membership of a particular social group, namely women. Either suffices”. But see *BQ (Pakistan)*, [2015] NZIPT 800675 at para. 45–46 [qualifying the PSG as “Ahmadi women”].

<sup>16</sup> Part of addressing this challenge is educating lawyers not to rely on overly technical descriptions, particularly as the claimant often defines the group which is then narrowed throughout the proceeding (Foster 2012, pp. 42–43).

<sup>17</sup> (Hathaway and Foster 2014, p. 439). In *Fornah v Secretary of State for the Home Department*, [2006] UKHL 46 at para. 26, the House of Lords recognized that “claims based on fear of FGM have been recognized or upheld in courts all [a]round the world.” Recently, the National Asylum Court in France in No 16029780 (CNDA 2017) found that young women who oppose FGM practiced in Nigeria were a PSG. For another example of an overly complex description of the PSG, see *Litvinov v Canada (Secretary of State)*, (1994) 83 FTR 60, para. 11 (TD), describing “new citizens of Israel who are women recently arrived from elements of the former Soviet Union and who are not yet well integrated into Israeli society, despite the generous support offered by the Israeli government, who are lured into prostitution and threatened and exploited by individuals not connected to government, and who can demonstrate indifference to their plight by front-line authorities to whom they would normally be expected to turn for protection.”

<sup>18</sup> This decision may be problematic where age (youth) is considered by some as an immutable characteristic: see Section 2.2.4.

protected characteristics approach; just because some members of the group may avoid persecution does not mean that social group does not exist.<sup>19</sup>

### 2.2.2. Sexual Orientation

Sexual orientation and similarly-situated claims are well-recognized as a PSG in many jurisdictions<sup>20</sup> and have been recognized since at least the 1990s (Lewis and Shuman 2016, p. 1).<sup>21</sup> In some countries, protection for persons based on sexual orientation is incorporated in domestic legislation as an example of a protected status or a standalone ground.<sup>22</sup> The Qualification Directive recognizes that sexual orientation may constitute a PSG, depending on country-specific circumstances.<sup>23</sup>

The protected characteristics approach has long-recognized claims based on an individual's actual or imputed sexuality (Hathaway and Foster 442). Canada was one of the first countries to recognize, under the immutability analysis, homosexuality as a PSG;<sup>24</sup> sexual orientation constitutes a significant proportion of contemporary Canadian refugee claims and are more likely than not to succeed (Rehaag 2017, p. 286). While the jurisprudence largely focuses on homosexuality,<sup>25</sup> decision-makers have resisted a narrow interpretation of sexuality to recognize a broad spectrum of sexual identity, including "lesbian, bisexual, intersex, and transgender applicants" as members of a PSG (Hathaway and Foster 2014, p. 444; Foster 2012, p. 51). However, the success rate for claimants may vary across subsets of sexual minorities (Rehaag 2017, p. 286; Lewis and Shuman 2016, p. 2). Further, decision-makers have accepted 'homosexuals in country X' as a PSG without relying on overly technical definitions that arise in other areas, such as gender-based claims (Foster 2012, p. 50).

Sexual orientation is, to a degree, revealed by an individual's behaviour. While some decision-makers oppose the view that 'discretion' is a relevant consideration (Foster 2012, p. 52; Lewis and Shuman 2016, p. 2), others—particularly those following a social perception approach—suggest that a claimant may be denied refugee protection where they may avoid persecution in their home country by hiding their sexual orientation.<sup>26</sup> However, the UNHCR (2008, para. 32) rejects that individuals should be required to conceal their sexual orientation. The Court of Justice of the European Union (CJEU) in *C-199/12, c-200/12, C201/12 X, Y Z*, 4th Chamber (CJEU 2013) also rejects this view, holding that individuals should not be forced to hide their sexual orientation.

Despite their prominence in the case law, claims based on sexual orientation are particularly challenging because the refugee determination process reduces sexual identity to a "simplistic notion" that requires an individual to act in a certain way (Millbank 2009, pp. 15–16) and prove such acts to the

<sup>19</sup> See also *AS (Iran) v The Secretary of State for the Home Department*, [2017] EWCA Civ 1539 at para. 28 [finding "woman in Iran" could constitute a PSG]; *Fornah v Secretary of State for the Home Department*, [2006] UKHL 46 at para. 55–58 [recognizing women in Sierra Leone could constitute a PSG, but it was possible to define the PSG more precisely as uninitiated (not affected by FGM) women in Sierra Leone]. For a discussion of *Fornah* and other United Kingdom decisions where gender-based PSGs have been found, see (Querton 2012).

<sup>20</sup> For example, there is legislative protection for refugee status based on sexual orientation in Sweden, South Africa, Ireland, and Spain (Hathaway and Foster 2014, pp. 443–44). Despite this longstanding recognition, only a small number of claims are based on sexual orientation (Millbank 2009, p. 4).

<sup>21</sup> See e.g., *Canada (Attorney General) v Ward*, [1993] 2 SCR 689; *Matter of Toboso-Alfonso*, I&N Dec 819 (BIA 1994) [In 1990, the BIA found homosexuality as constituting a PSG. In 1994, the Attorney General ordered that BIA decision to be a precedent].

<sup>22</sup> Homosexuality is incorporated as an example or protected ground in some countries, but in a German decision homosexuality was found not to be distinct enough (Foster 2012, pp. 48–49, 53).

<sup>23</sup> The Qualification Directive (EU 2011, art 30) expressly recognizes sexual orientation may constitute a PSG. This recognition has been affirmed by the CJEU (EASO 2016, pp. 50–51) and by Member States such as France (EASO 2016, p. 51; *Mr O v OFPRA*, No 16014463 (CNDA 2017)).

<sup>24</sup> (Hathaway and Foster 2014, p. 443) referencing *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, p. 739 ["[t]he first category would embrace individuals fearing persecution on such bases as gender, linguistic background, and sexual orientation"].

<sup>25</sup> Homosexuality has been recognized as a protected characteristic in Canada, Belgium, Germany, New Zealand, South Africa, the United Kingdom, and the United States (Foster 2012, pp. 49–50).

<sup>26</sup> France's approach is that if a person hides their sexual identity others cannot perceive it (Foster 2012, pp. 52, 54). But see Hathaway and Foster (2014, p. 445) rejecting this view as behavioural limits should be in accordance with international human rights law and principals.

decision-maker.<sup>27</sup> Claimants often face challenges related to credibility, Western notions and other stereotypes of sexual identity, and that their fear of persecution is sufficiently serious<sup>28</sup> (Rehaag 2017, pp. 263–64; LaViolette 2015, pp. 9–15; Lewis and Shuman 2016, p. 3).<sup>29</sup>

### 2.2.3. Family

The degree to which family is recognized as a PSG depends on the court's interpretative approach. Family has long been recognized as a protected status (Schoenholtz 2015, p. 114) and is "[o]ne of the most visible examples of a particular social group" (UNHCR 2011, p. 87). This category is easily recognized under the protected characteristics approach, as kinship ties are an immutable characteristic (Hathaway and Foster 2014, p. 446; Foster 2012, p. 54). The case law is not as straightforward in countries that apply the social perception test (Foster 2012, p. 55), though several European countries recognize family may constitute a PSG.<sup>30</sup> Family as a PSG has faced significant challenges in the United States. While kinship ties were initially recognized in *Acosta* as an obvious example of a protected group, decision-makers have since found that not every family will meet the social visibility requirement (Foster 2012, p. 55; Owens 2018; Marouf 2019, pp. 507–9). In July 2019, the Attorney General overturned the BIA's decision in *Matter of L-E-A*, 27 I&N Dec 581 (AG 2019), concluding at page 581 of his opinion that while clans may constitute a PSG, "most nuclear families are not inherently socially distinct and therefore do not qualify as 'particular social groups.'" The Attorney General goes on to say—at page 595—that his opinion does not bar family-based claims if the claimant can show the "immediate family carries greater societal import," making it practically more difficult for a claimant to succeed on this ground.

What constitutes 'family' may vary depending on the cultural context in which the risk emerged, extending beyond the nuclear family and blood relations (Hathaway and Foster 2014, p. 446). An individual may be at risk of persecution where their family is targeted because of the political, social, or economic activities of a family member, or a relative's sexual identity (Foster 2012, p. 447). Claims where a family member is targeted for revenge or retribution, unconnected from a Convention ground, are more controversial (Hathaway and Foster 2014, p. 447; Foster 2012, p. 56). In several jurisdictions, the claimant will not succeed unless the primary target is at risk based on a Convention

<sup>27</sup> For example, decision-makers have drawn an adverse inference when assessing the credibility of an individual claiming status based on sexual identity that have been involved in a heterosexual relationship. Claimants have faced more difficulties in Australia and the United Kingdom, but less so in Canada and New Zealand. In Canada, the Federal Court has been alive to avoiding simplistic notions of sexual orientation. See e.g., *Leke v Canada*, 2007 FC 848, [2007] FCJ 1108 [the Federal Court overturned a tribunal decision that found it was highly improbable a gay Nigerian man married and had two children for ignoring country-specific evidence on difficulties facing gay men]; *Korienko v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1419 [the Federal Court overturned a tribunal decision that a man's claim of homosexuality was not genuine because he had not had a sexual encounter in years based on the (mistaken) belief that all gay men are promiscuous. The matter was sent back to the tribunal and later overturned on grounds of state protection, not whether he was a member of a PSG]; *Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760 [finding the decision-maker erred, in part, by focusing on whether the claimant was a homosexual rather than the risk he faced because the Nigerian police believed him to be a homosexual]. In Europe, see e.g., *A (C-148/13)*, *B (C-149/13)*, *C (C-150/13)*, Grand Chamber (CJEU 2014) [assessments based solely on homosexual stereotypes does not meet the requirement to consider an individual's personal circumstances], *Case C-473/16*, 3rd Chamber (CJEU 2018) [decision-makers cannot base their decision solely on an expert report assessing an individual's sexual orientation]. In the United States, the Ninth Circuit's decision in *Hernandez-Montiel v Immigration and Naturalization Service*, F 3d 1084 (9th Cir 2000) is precedential for its finding that sexual orientation can be self-defined rather than an immutable characteristic [finding that gay men with female sexual identities constitute a PSG].

<sup>28</sup> The CJEU decision in *C-199/12*, *c-200/12*, *C201/12 X, Y Z*, 4th Chamber (CJEU 2013) held that criminal laws prohibiting homosexuality supports finding that such persons form a PSG, but the existence of such laws is not itself "sufficiently serious" to be an act of persecution. Laws criminalizing homosexuality are not required to determine an individual is persecuted for their sexual orientation: see e.g., *No 399780*, 2nd Chamber (Conseil d'Etat 2017).

<sup>29</sup> For a list of reasons sexual orientation-based claims were rejected in a study of unreported refugee decisions in Canada, the United Kingdom, and the United States, see (Brahmah 2016, p. 564).

<sup>30</sup> See, e.g., *Fornah v Secretary of State for the Home Department*, [2006] UKHL 46 at para. 19–20 [finding there is consensus that membership in a certain family may constitute a PSG]; (Foster 2012, p. 55) [noting Belgium frequently adopts the UNHCR statement that persecution may be based on "an individual's membership of a family or clan engaged in a blood feud"].

ground;<sup>31</sup> this may include claims based on political opinion, but exclude claims arising from criminal matters such as gang affiliation (see Section 2.2.8 for more on gang affiliation). Decision-makers in Australia, Canada, and Germany, and the United States have rejected claims based on family ties where the fear of persecution is not sufficiently tied to a Convention ground for the primary claimant.<sup>32</sup> However, [Hathaway and Foster \(2014, pp. 448–49\)](#) argue that the individual is at risk based on their family status, not the activities of the targeted family member, and to require a claimant to prove the primary target is also being targeted for a Convention ground would impose a stricter criteria on the claimant than is required of other grounds.

An individual may also be at risk from a family member, such as abusive relationships. PSGs based on domestic violence are especially challenging and have been selectively enforced ([Schoenholtz 2015, pp. 111–12](#)).<sup>33</sup> Domestic violence-based claims may fit within gender-based claims, but decision-makers often treat them differently and have been slow to recognize them as a PSG ([Boyd 2018, p. 3](#)). In Canada, while decision-makers tend to define complex groups ([Schoenholtz 2015, p. 112](#)), the Federal Court in *AB v Canada (Citizenship and Immigration)*, 2018 FC 237 at para. 13 recently affirmed that “[i]t is now beyond dispute that gender-based domestic violence may give rise to a refugee claim.”<sup>34</sup> Recently, the United States has seen a shift in its approach to domestic violence-based claims, from the BIA’s 2014 landmark decision in *Matter of A-R-C-G-*, 26 I&N Dec 388 (BIA 2014), recognizing that women fleeing domestic violence can constitute a PSG to the Attorney General’s 2018 decision to overturn *Matter of A-B-*, 27 I&N Dec 316 (AG 2018) on the basis that, *inter alia*, domestic violence will generally not qualify for asylum.<sup>35</sup> Following this decision, the UNHCR submitted amicus curie briefs asserting that *Matter of A-B-* was interpreted wrongly and that a person at risk of domestic violence may constitute a PSG under the protected characteristics approach where their relationship status is immutable because of external factors (religion, culture, legal, etc.) or the social perception test based on cultural stigmas and male dominance.<sup>36</sup>

#### 2.2.4. Age

Age may be recognized as a protected status under the protected characteristics approach because it is an immutable characteristic. While age has been long-recognized in some countries as capable of constituting a PSG,<sup>37</sup> this category is becoming more prominent with the rise in refugee claims by unaccompanied minors and often overlaps with other grounds.<sup>38</sup> This ground received some pushback in the United States based on the logic that age changes over time;<sup>39</sup> however, the UNHCR’s

<sup>31</sup> [Hathaway and Foster \(2014, p. 448\)](#) highlight several examples from the United Kingdom and United States. For a recent example where a person was found to be at risk because of a family member’s actions, see the New Zealand Immigration and Protection Tribunal’s decision in *AC (Venezuela)*, [2019] NZIPT 801438-439 at para. 201 [finding the mother is at risk from groups in Venezuela and Colombia for her political opinion opposing the Venezuelan government, and her son is at risk for MSPG, namely family].

<sup>32</sup> For example, Germany rejected a claimant in the context of a “personal vendetta” and the US rejected “retaliation” as a basis for a claim ([Foster 2012, p. 56](#)).

<sup>33</sup> See ([Boyd 2018](#)) for a recent review of case law on domestic violence-based refugee claims in Australia, Canada, Costa Rica, New Zealand, South Africa, the United Kingdom, and the United States.

<sup>34</sup> But see ([Boyd 2018, p. 14](#)) finding the rejection rate in Canada for domestic violence-based claims is high.

<sup>35</sup> The Attorney General rejected that persecution by non-state actors in relation to domestic violence and gang violence could constitute a PSG. For an extensive review of the United States’ approach to gender-based violence as a PSG and critique of *Matter of A-B-*, see ([Vogel 2019](#)).

<sup>36</sup> See *Grace v Barr (Attorney General)*, Brief for the UNHCR as Amicus Curiae, No 19-5013 at 24-34 (DC Cir 2019; *OLBD v Barr (Attorney General)*), Brief for the UNHCR as Amicus Curiae, No 18-1816 at 24-36 (1st Cir 2019).

<sup>37</sup> For example, Canada, as far back as 1994, recognized minors as a PSG ([Foster 2012, pp. 57–58](#)).

<sup>38</sup> Other examples include: orphaned, abandoned, and illegitimate children; impoverished children; black children; and children that cannot be registered in China for violating the one-child policy ([Hathaway and Foster 2014, pp. 450–51](#); [Foster 2012, pp. 58–59](#); [Schoenholtz 2015, p. 115](#)).

<sup>39</sup> See *Matter of S-E-G- et al*, 24 I&N Dec 579 (BIA 2008) at 583-84 [finding youth is not immutable because it changes over time, but acknowledging that “mutability of age is not within one’s control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual’s

explanation that age is immutable at the relevant time highlights that claims should not be rejected on the basis that age changes (Hathaway and Foster 2014, p. 450; Foster 2012, p. 58).

Age is a particularly relevant ground for young persons, though it can apply to persons in any age category.<sup>40</sup> Decision-makers tend to refer to age categories such as “children” or “youth” that capture the individual’s vulnerability, rather than a precise age (Hathaway and Foster 2014, p. 449; Schoenholtz 2015, p. 115). However, inconsistent decisions highlight the same challenge faced in other areas of balancing between a broad definition while still being sufficiently descriptive.<sup>41</sup>

### 2.2.5. Disability

An individual may be a protected person where persecution is based on a disability. However, there is little case law on this (Hathaway and Foster 2014, p. 451; Foster 2012, p. 61) and those who do argue disability as a PSG have faced difficulties proving that disability-based discrimination amounts to persecution (Conte 2016, pp. 329–30, 335–36) or that their disability is perceived as setting them apart from society (AAT 2019, p. 33). The *Convention on the Rights of Persons with Disabilities* (United Nations 2006b) defines ‘disability’ broadly to encompass long-term physical and intellectual disabilities and illnesses.<sup>42</sup> Decision-makers have interpreted this PSG to include those with impaired vision and hearing, HIV/AIDS, autism, albinism, and mental illness (Foster 2012, p. 62, Hathaway and Foster 2014, p. 452; Crock et al. 2013, pp. 751–53).

A ‘long-term’ disability would be considered immutable under the protected characteristics approach (Crock et al. 2013, p. 751) and disability-based claims have been recognized in Canada.<sup>43</sup> Several jurisdictions that apply the social visibility test have also recognized disability-based claims, such as France and Australia (Foster 2012, p. 83). However, Europe’s Qualification Directive poses a challenge for persons whose disability is immutable but not visible (Conte 2016, p. 341). The United States has also recognized disability as constituting a PSG in several Circuit courts (Kanter and Rosenthal 2018). South Africa has gone as far as including persons with disabilities as a social group in its domestic legislation protecting refugees, though this is an anomaly (Crock et al. 2013, p. 750).

### 2.2.6. Economic or Social Class

Economic or social class may constitute a PSG based on current or past status (Hathaway and Foster 2014, p. 453). Social class is especially relevant in countries that are “highly stratified by reference to clans, tribes, or castes” (Hathaway and Foster 2014, p. 453) or strict cultural norms<sup>44</sup> and has been recognized under the protected characteristics and social perception approaches.<sup>45</sup> Protection

---

age places him within the group, a claim for asylum may be cognizable”. See also *Cece v Holder*, 733 3d 662 (7th Cir 2013) [recognizing a PSG was characterized by several factors, including being young].

<sup>40</sup> Hathaway and Foster (2014, p. 449) find that age is frequently applied in claims by children, though it could apply to the elderly. For an example where the elderly was a relevant PSG, see *RRT Case No 1005628*, [2010] RRTA 822 at para. 37 [finding “elderly Afghan women without male protection” as a PSG].

<sup>41</sup> Foster (2012, pp. 59–60) points to claims described as young males have been rejected as too imprecise, while claims describing young Salvadorian males recruited but refusing to join a gang as too narrow.

<sup>42</sup> The *Convention on the Rights of Persons with Disabilities* (United Nations 2006b, art 1) protects persons with “long-term physical, mental, intellectual or sensory impairments.” See also (Foster 2012, p. 61).

<sup>43</sup> See, e.g., *X v Canada (Immigration and Refugee Board)*, 2001 CanLII 26953 (CA IRB) [finding “disabled minor” as a PSG]; *X (Re)*, 2014 CanLII 90950 (CA IRB) [finding “disabled” (and women) as a PSG]; *X (Re)*, 2012 CanLII 100292 (CA IRB) [finding “intellectual disability” as a PSG]; *Ampong v Canada (Citizenship and Immigration)*, 2010 FC 35 [finding the decision-maker failed to adequately consider discrimination against disabled persons in Ghana and it is possible the claimant may belong to such a PSG].

<sup>44</sup> For example, the Council of State of the Netherlands requested the UNHCR to submit its views on whether women of a “western lifestyle” that do not adhere to religious or cultural norms constitute a PSG under the *Refugee Convention* and the Qualification Directive. The UNHCR (2018, para. 7–18) took the position that women who assert their human rights and are viewed as not adhering to prevailing norms can be a PSG because their beliefs are so fundamental they should not be renounced (satisfying the protected characteristic approach) or they are perceived as different from society (satisfying the social perception approach).

<sup>45</sup> Germany, New Zealand, and the United States have recognized claims based on social groups (Hathaway and Foster 2014, pp. 453–54; Foster 2012, p. 67).

based on economic class is more inconsistent, with claims manifesting from both high and low status. Class-based groups based on economic status, such as professionals in Cambodia, have historically been persecuted.<sup>46</sup>

The Supreme Court of Canada in *Ward* recognized others have been persecuted for their past status imposed on them by the agent of persecution (IRB 2018, s. 4.5), though Canadian courts have generally been unwilling to extend protection where a person fears criminality based on their former status.<sup>47</sup> In the United States and Australia, there is some support for finding wealthy persons targeted by criminal organizations as constituting a PSG.<sup>48</sup> Additionally, individuals in situations of poverty may constitute a class where they cannot practically disassociate from this status, such as the “Haitian poor” (Hathaway and Foster 2014, p. 452; Foster 2012, p. 68).<sup>49</sup> The UNHCR recognizes members’ economic activities may be at the root of persecution where they are an obstacle to government policy (UNHCR 2019, para. 78). Hathaway and Foster (2014, p. 454) find that developments in refugee protection recognizing economic classes mirror international human rights law’s growing recognition that economic class is a protected status.

### 2.2.7. Voluntary Associations

Voluntary associations are controversial as a PSG because a person may disassociate from the group. However, as the second category of PSG in *Ward* indicates, such association may be so fundamental to a person’s identity that they should not be required to change it. The jurisprudence differs depending on the type of association: human rights-related groups such as trade unions and student organizations tend to be recognized as a PSG, while groups based on occupation or wealth are more controversial with inconsistent results.<sup>50</sup> The United States in *Acosta* rejected taxi drivers as a PSG because individuals do not have “a right to work in the job of his choice” (Foster 2012, p. 72). Canada,<sup>51</sup> New Zealand, and the United Kingdom have also rejected occupation-based claims following this line of reasoning (Hathaway and Foster 2014, p. 456). However, changing one’s occupation may be unrealistic for some, and the freedom to choose (or not be unfairly deprived of) one’s work is an internationally protected human right ((United Nations 1966b, art 6(1)); Foster 2012, pp. 71–73). Occupation may also significantly overlap with other grounds, such as political opinion in the context of government employees, members of the military, or police officers (Foster 2012, p. 71).

Group membership based on wealth is similarly inconsistent. While some states accept wealth under the social perception approach, states that follow the protected characteristics approach have typically rejected such claims on the basis that there are no protected private property rights under international law and a person can easily disassociate from such property (Hathaway and Foster 2014,

<sup>46</sup> The persecution of professionals in Cambodia is often cited as a classic example of class-based persecution (Hathaway and Foster 2014, p. 452). For example, *Ram v Minister for Immigration and Ethnic Affairs*, [1995] 57 FCR 565 at 568 described Pol Pot’s regime in Cambodia as a “textbook example” of persecution based on MSPG (AAT 2019, p. 30). Class-based persecution may have motivated the Swedish proposal (Foster 2012, p. 70) and early commentary on international refugee law suggests wealthy targets such as landowners, professions, etc. constitute a PSG of some kind (Schoenholtz 2015, p. 108).

<sup>47</sup> See e.g., *X (Re)*, 2018 CanLII 83464 (CA IRB) at para. 21 and 29 [finding the claimant’s former status as a “small business owner facing criminality in Hungary” does not constitute a PSG].

<sup>48</sup> See e.g., *Tapiero de Orejuela v Gonzales*, 423 F 3d 666 at 672 (7th Cir 2005) [finding the “educated, landowning class of cattle farmers targeted by FARC [Colombian] rebels” constitutes a PSG]; *AATA Case No 1500142*, [2016] AATA 3781 at para. 33 [accepting “a commercially successful wealthy middle-class family in a rural area targeted by cartel gangs for extortion” as a PSG].

<sup>49</sup> See also *Mia v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 14882 (FC) where the court did not oppose the PSG comprised of the poor in Bangladesh, though the claim was rejected on other grounds (IRB 2018, s. 4.5).

<sup>50</sup> For example, in Australia some occupational groups, such as beauty school workers, were found to be a PSG while others, such as tourist industry workers, were not (AAT 2019, pp. 33–34). In the United States, occupation has been rejected as a PSG (Hathaway and Foster 2014, pp. 455–56; Foster 2012, p. 69).

<sup>51</sup> The Federal Court of Canada in *Alvarez v Canada (Citizenship and Immigration)*, 2016 FC 402 upheld the decision-maker’s finding that the claimant’s status as an engineer did not constitute a PSG, though it did not conclude that such a status could never meet the requirements of MSPG. The Court went on to affirm that employment and occupation will generally not raise issues related to human rights or non-discrimination that underpin refugee protection.

p. 458). Consequently, [Hathaway and Foster \(2014, p. 458\)](#) suggest wealth may not be an appropriate category for refugee protection. [Foster \(2012, p. 70\)](#) also notes that few claims turn on the question of wealth as the decision-maker often rejects the claim “on the basis of a lack of nexus, rather than on the discrete issue of PSG analysis.” For example, Canadian decision-makers often reject claims linked to a generalized risk of violence due to (perceived) wealth bearing no nexus to a Convention ground.<sup>52</sup> However, to the extent that wealth overlaps with economic status, protection may be desirable.

#### 2.2.8. Former Status

Former status or association is included as a PSG because a person cannot change his or her history or past experience ([Hathaway and Foster 2014, pp. 458–59](#); [UNHCR 2011, p. 87](#)). This category can include former trafficking victims, child soldiers, civilian witnesses, employees, etc. ([Hathaway and Foster 2014, p. 459](#); [Foster 2012, pp. 64–65](#); [Maystre 2014, p. 984](#); [Schoenholtz 2015, p. 116](#)). For example, former status as a child soldier meets the social perception approach because society generally recognizes children as a group and may be recognized under the protected characteristics approach based on shared experience and age ([Maystre 2014, p. 984](#)).

This category can be challenging for individuals associated with groups that have a criminal aim: a current member may not be protected because criminality is not fundamental to a person’s identity nor is there a right to pursue criminal activity, while a former member cannot change that status ([Hathaway and Foster 2014, p. 459](#)). Decision-makers have sometimes distinguished between where a person joined the group voluntarily or forcibly, more readily recognizing protection for the latter ([Hathaway and Foster 2014, p. 459](#); [Foster 2012, p. 66](#)). Further, claims based on former status are less likely to succeed in jurisdictions that follow the social perception approach ([Foster 2012, p. 66](#)). Even within jurisdictions, there are often divergent views. For example, three Circuit courts in the United States have found former gang membership can constitute a PSG, while two Circuit courts have rejected it ([Quintero 2018, pp. 230–31](#)).

Claims based on former or perceived gang membership are gradually becoming common. The UNHCR’s recent intervenor submission in *Grace v Barr (Attorney General)*, Brief for the UNHCR as Amicus Curiae, No 19-5013 at 27–28 (DC Cir 2019) affirmed its position that persons at risk of gang violence and persons who have refused to join a gang may constitute a PSG. Individuals have asserted that the risk of gang-based violence for rejecting recruitment, refusing to pay extortion, or even being perceived as a gang member due to visible identifiers, can constitute a PSG ([Schoenholtz 2015, pp. 116–17](#)). These increasingly frequent claims are controversial and have been met with only limited success in Australia, Canada, the United Kingdom, and the United States ([Schoenholtz 2015, pp. 117–18](#)).

This category is problematic when decision-makers subjectively consider who is ‘worthy’ of protection based on past experiences ([Foster 2012, p. 66](#)). However, the *Refugee Convention* permits exclusion for reasons of serious criminality and where such protection creates a danger for the host state (([United Nations 1951, art 1F\(b\), 33\(2\)](#)); [Hathaway and Foster 2014, p. 460](#); [Foster 2012, p. 66](#)). A proper interpretation should not focus on the subject matter of the claim, but rather separate analyses of MPSTG and reasons for exclusion ([Hathaway and Foster 2014, p. 460](#); [Foster 2012, p. 67](#)).

---

<sup>52</sup> See e.g., *Étienne v Canada (Citizenship and Immigration)*, 2007 FC 64 at para. 15 [finding a person who gains wealth or wins the lottery does not constitute a PSG]; *Saint Hilaire v Canada (Citizenship and Immigration)*, 2010 FC 178 at para. 17 [finding a person’s (perceived) wealth associated with past business success does not constitute a PSG]; *Navaneethan v Canada (Citizenship and Immigration)*, 2015 FC 664 at para. 53 [finding a person’s (perceived) wealth in Sri Lanka because of family in Canada is not a PSG. The Court stated that “[t]he [Federal] Court has consistently held that perceived wealth does not, without more, constitute membership in a particular social group”].

### 2.3. Other Refugee Law Instruments

The *Refugee Convention* is the foundational, but not sole, refugee law instrument. Three regional instruments have extended the ‘refugee’ definition to enhance protection. The 1966 *Bangkok Principles on Status and Treatment of Refugees* (“*Bangkok Principles*”), a non-binding treaty adopted by the Asian-African Legal Consultative Organization, defines a refugee as a person who fears persecution on the grounds of “race, colour, religion, nationality, ethnic origin, gender, political opinion, or membership of a particular social group” (AALCO 1966, art 1). This adds three protected groups—colour, ethnic origin, and gender—to the five mirrored in the *Refugee Convention*. The *Bangkok Principles* further extends ‘refugee’ to include persons “who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order” is compelled to seek refuge (AALCO 1966, art 2). The 1969 *Convention on the Specific Aspects of Refugee Problems in Africa* adopts the same grounds of persecution as listed in the *Refugee Convention*, but extends protection on the same grounds as the *Bangkok Principles*.<sup>53</sup> Lastly, the 1984 *Cartagena Declaration on Refugees*, a non-binding treaty with considerable moral authority in Latin America (Goodwin-Gill and McAdam 2007, p. 38), recommends the *Refugee Convention* definition include “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”<sup>54</sup>

### 3. Protected Groups in International Human Rights Law

Since general human rights law has had an important impact on issues associated with refugees, notably the prohibition against *refoulement* (the removal of a person to a country where this person might be subjected to persecution, torture or inhuman or cruel punishment or treatment),<sup>55</sup> it is useful to set out some general principles of international human rights law (“IHLR”) and examine how far they shed light on the question of protected groups as part of the provisions dealing with non-discrimination in human rights treaties. This is of especial relevance as some recent jurisprudence in the United Kingdom has indicated that the *Refugee Convention* grounds are based on this concept of non-discrimination.<sup>56</sup> While historically the concept of human rights had emerged in a fragmentary manner at the domestic level in primarily West European and North American states before the Second World War, the horrors of that war provided an impetus for the international community to begin devising a comprehensive international regime to protect basic human rights. The first steps in this direction were 1945 *Charter of the United Nations* (“*UN Charter*”) (United Nations 1945b) and the 1948 *Universal Declaration for Human Rights* (“*UDHR*”) (United Nations 1948b). The *UN Charter* mentions “international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”<sup>57</sup> as one of the main purposes of the United Nations while the *UDHR*, albeit non-binding, provides some more detail in thirty articles as to what these fundamental human rights entail. Interestingly, the *UDHR* does not refer to protected groups in the article dealing with refugees<sup>58</sup> but mentions a large number of groups as examples in its general article dealing with fundamental rights, namely race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>59</sup>

<sup>53</sup> OAU 1966, art I(1)–(2). For a historical overview of this definition, see (Jackson 1999, pp. 191–94).

<sup>54</sup> (UNHCR 1984, s III(3)). For a historical overview of this definition, see (Goodwin-Gill and McAdam 2007, p. 38).

<sup>55</sup> See (Burson and Cantor 2016, pp. 1–24).

<sup>56</sup> See (Cantor 2016, pp. 390–91). For a general overview of non-discrimination in international law, see (Farrior 2015).

<sup>57</sup> Articles 1(3), while articles 13(b), 55(c) and 76(c) refer to the same groups (United Nations 1945b).

<sup>58</sup> “Everyone has the right to seek and to enjoy in other countries asylum from persecution” ((United Nations 1948b, art. 14(1)).

<sup>59</sup> Article 2, with article 16 dealing with the right to marry refers to race, nationality and religion (United Nations 1948b).

### 3.1. International Human Rights Instruments

Following these initial steps to protect human rights in the sense of creating inalienable individual rights against the power of the state and the collective rights within that state,<sup>60</sup> two universal (as in with global reach) general (as in covering a bundle of rights) human rights treaties were created on 16 December 1966: the *International Covenant on Civil and Political Rights* (“ICCPR”) (United Nations 1966a) and the *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”) (United Nations 1966b). Both these treaties include articles prohibiting certain behaviour-based distinctions related to protected groups, which is the same iteration as set out in the UDHR<sup>61</sup> or limited subsets of this general category.<sup>62</sup>

Some of the core rights found in these universal, general, and binding international instruments have been fleshed out and developed by the United Nations in treaties protecting either specific human rights or specific categories of persons. Within the first category of treaties, protecting specific human rights, the *International Convention on the Elimination of All Forms of Racial Discrimination* of 21 December 1965, which has protected groups based on race, colour, descent, or national or ethnic origin ((United Nations 1966c, art 1(1))), should be mentioned as well as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 10 December 1984<sup>63</sup> and the *Convention for the Protection of All Persons from Enforced Disappearance* of 20 December 2006.<sup>64</sup> Treaties to protect specific categories of persons include the *Convention on the Elimination of All Forms of Discrimination against Women* of 18 December 1979,<sup>65</sup> the *Convention on the Rights of the Child* of 20 November 1989,<sup>66</sup> the *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* of 18 December 1990,<sup>67</sup> and the *Convention on the Rights of Persons with Disabilities* of 13 December 2006.<sup>68</sup>

In addition to these universal conventions, which were negotiated under the United Nations auspices, the International Labour Organization (“ILO”), a specialized United Nations agency, has also been very active in the field of human rights. The ILO has adopted 189 conventions in the area of labour standards, of which eight are considered to be fundamental ones (ILO n.d.). Of these fundamental conventions, only three—the 1951 *Equal Remuneration Convention*, the 1957 *Abolition of Forced Labour Convention*, and the 1958 *Convention concerning Discrimination in Respect of Employment and Occupation*—refer to protected groups.<sup>69</sup>

<sup>60</sup> (OHCHR 2008, p. 3). For a brief description of first-generation rights (civil and political rights), second generation rights (economic, social and cultural rights) and third generation rights (solidarity or group rights), see (Kälin and Künzli 2009, pp. 31–32).

<sup>61</sup> ICCPR, articles 2(1) and 26, of which the first one is general while the second refers to equality before the law, which mirror the text of article 2 of the UDHR and the ICCPR as well as general article 2(2) in the ICESCR.

<sup>62</sup> ICCPR article 4(1), referring to public emergencies, prohibits discrimination on the ground of race, colour, sex, language, religion or social origin and article 24(1), referring to children, prohibits discrimination based on race, colour, sex, language, religion, national or social origin, property or birth.

<sup>63</sup> Note this treaty does not refer to protected groups (United Nations 1984).

<sup>64</sup> This convention says in article 13(7), dealing with extradition, the following: “Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group, or that compliance with the request would cause harm to that person for any one of these reasons.” (United Nations 2006a).

<sup>65</sup> Note this Convention has no reference to protected groups (United Nations 1979a).

<sup>66</sup> This Convention uses the same language regarding protected groups in its preamble and general article 2(1) as was used in the UDHR, the ICCPR, and the ICESCR (United Nations 1989).

<sup>67</sup> This Convention uses the same language regarding protected groups in its general articles 1(1) and 7 as was used in the UDHR, the ICCPR, and the ICESCR and the previously mentioned Convention (United Nations 1990).

<sup>68</sup> This Convention uses the same language regarding protected groups in its preambular paragraph (p) as was used in the UDHR, the ICCPR, the ICESCR and the two previously mentioned Conventions (United Nations 2006b).

<sup>69</sup> The preamble to the *Equal Remuneration Convention* refers to discrimination based on sex (ILO 1951). Article 1(e) of the *Abolition of Forced Labour Convention* states that forced or compulsory labour “as a means of racial, social or national or religious discrimination” should be suppressed (ILO 1957). Article 1(a) of the *Convention concerning Discrimination in Respect of Employment and Occupation* defines discrimination based on “race, colour, sex, religion, political opinion, national extraction or social origin” (ILO 1958).

### 3.2. Regional Human Rights Instruments

Not only have human rights come within the important purview of global institutions, most regions have undertaken steps to address the protection of individuals by introducing general human rights treaties or binding instruments for specific subject matters. This has happened in Africa, the Americas, the Middle East, Asia, and especially, Europe.

In Africa, the *African Charter on Human and Peoples' Rights* (“ACHR,” also known as the “Banjul Charter”) was adopted on 26 June 1981<sup>70</sup> by the Organization of African Unity, known as the African Union, since 9 July 2002. Four other human rights instruments in place are the 1969 *Convention Governing the Specific Aspects of Refugee Problems in Africa*;<sup>71</sup> the 1990 *African Charter on the Rights and Welfare of the Child*;<sup>72</sup> the 2003 *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*;<sup>73</sup> and the 2009 *African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa* (the “Kampala Convention”).<sup>74</sup>

In the Americas, the most important human rights treaty is the *American Convention on Human Rights* (“ACHR”) of 22 November 1969, adopted by the Organization of American States.<sup>75</sup> There are six other human rights treaties in this region, two general<sup>76</sup> and four dealing with specific categories of human rights, namely torture,<sup>77</sup> forced disappearance,<sup>78</sup> violence against women<sup>79</sup> and discrimination against persons with disabilities.<sup>80</sup>

In the Middle East, the Council of the League of Arab States adopted the *Arab Charter of Human Rights* on 15 September 1994<sup>81</sup> while in Asia, the Association of Southeast Asian Nations (ASEAN) adopted a *Human Rights Declaration* on 19 November 2012.<sup>82</sup>

In Europe, the most important regional human rights treaty in terms of its impact on the practice of States is the *European Convention of Human Rights* (“ECHR”),<sup>83</sup> which was adopted by the Council of

<sup>70</sup> The preamble and general article 2 use the same language as the *UDHR*, the *ICCPR*, *ICESCR* and the *Convention on the Rights of the Child* (OAU 1981).

<sup>71</sup> It uses the same definition of refugee with the same protected groups as the *Refugee Convention* in articles I(1) and IV (OAU 1969).

<sup>72</sup> It uses the same language as the *UDHR* in general article 3 (OAU 1990).

<sup>73</sup> It uses the same language regarding protected groups as the *UDHR* in its preamble (African Union 2003).

<sup>74</sup> Note it has no reference to protected groups (African Union 2009).

<sup>75</sup> It uses virtually the same language as the *UDHR* but changes the last category from “any other status” to “any other social condition” in general article 1(1); it refers to a more limited set of protected group in articles 13(5) (dealing with hate propaganda and mentioning *race*, color, *religion*, language, or national origin); article 22(8) (dealing with deportation and referring to *race*, nationality, *religion*, social status, or political opinions) and article 27(1) (dealing with suspension of guarantees and referring to *race*, color, sex, language, *religion* or social origin) (OAS 1969).

<sup>76</sup> *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (OAS 1999a), which repeats the ACHR-protected groups in its general article 3, while the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* (OAS 1990) does not reference protected groups.

<sup>77</sup> *Inter-American Convention to Prevent and Punish Torture* (OAS 1985) with no reference to protected groups.

<sup>78</sup> *Inter-American Convention on Forced Disappearance of Persons* (OAS 1994a) with no reference to protected groups.

<sup>79</sup> *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (OAS 1994b) with a reference to class, race or ethnic group, income, culture, level of education, age or religion in the preamble while general article 9 states “With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.”

<sup>80</sup> *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities* (OAS 1999b), with no reference to protected groups.

<sup>81</sup> It repeats the wording of the *UDHR* in general article 2 while adding at the end “and without any discrimination between men and women” (League of Arab States 1994).

<sup>82</sup> Article 1 for the most part repeats the wording of the *UDHR* but does not mention colour, replaces “sex” with “gender” and “property” with “economic status,” and adds “age” and “disability” while deleting “other status” (ASEAN 2012). There is also a 2007 *Declaration on the Protection and Promotion of the Rights of Migrant Workers* (ASEAN 2007) and a 2013 *Declaration on the Elimination of Violence against Women and Elimination of Violence against Children* (ASEAN 2013), but neither refer to protected groups.

<sup>83</sup> General article 14 has a list of protected groups, which is similar to the one in the *UDHR* but adds “association with a national minority” (Council of Europe 1950); article 14 has been the subject of a large body of jurisprudence by the European Court of Human Rights, which has resulted in the inclusion of additional categories under the heading “other status”, specifically gender identity and sexual orientation, see (European Union Agency for Fundamental Rights, the European

Europe<sup>84</sup> on 4 November 1950. Apart from this overarching treaty, the Council of Europe has been responsible for a large body of human rights protection resulting in the issuance of another 22 treaties in this field, of which nine are protocols to the ECHR dealing with procedural matters, while the other 13 deal with specific human rights issues (such as social rights, torture, minority protection, biomedicine, trafficking in human beings and migration) or with the protection of specific persons (such as the protection of children in general as well as protection of children against sexual exploitation and the protection of women against violence).<sup>85</sup>

### 3.3. Observations

An overview of the references to protected groups is captured in Table 1. The vertical axis represents geographical distribution and the horizontal axis is arranged according to subject matter divided into six parts: the total number of human rights treaties examined; the number of treaties with a reference to protected groups (PGs); the number of treaties where the references to protected groups are of an aspirational nature in the sense that they are not connected to a specific obligation but appear either in the preamble or the general article(s) of the treaty; the number of articles with a reference to protected groups in aspirational articles; the number of treaties with references in articles with substantive obligations; and the number of articles with a reference to protected groups in substantive obligations.

**Table 1.** Treaties with reference to protected groups.

Scope	Total Treaties	Treaties with PGs	Treaties with Aspirational PGs	Articles with Aspirational PGs	Treaties with Substantive PGs	Articles with Substantive PGs
Global	19	12	9	10	2	4
Regional						
Europe	24	10	8	8	-	-
Americas	7	3	3	3	1	3
Africa	5	4	3	3	1	2
Asia	3	1	1	1	-	-
Middle East	1	1	1	1	-	-
<b>Total</b>	<b>59</b>	<b>31</b>	<b>25</b>	<b>26</b>	<b>4</b>	<b>9</b>

The last two columns could benefit from more analysis. The four treaties with substantive articles in respect to protected groups are the *ICCPR* (dealing with equality before the law, public emergencies and children) and the *Enforced Disappearance Convention* (dealing with extradition) at the global level,

---

Court of Human Rights and the Council of Europe 2018, pp. 155–228). The *ECHR* initially provided for narrower protection against discrimination limited to the enjoyment of a Convention right. *Protocol 12* (Council of Europe 2000) creates a general prohibition against discrimination by replacing “enjoyment of rights and freedoms set forth in this Convention” with “enjoyment of any right set forth by law” in general article 1.

<sup>84</sup> The Council of Europe was established in 1949 with a view of working towards European integration; it has 47 members.

<sup>85</sup> A list of all the treaties can be found on the Council of Europe’s website (Council of Europe n.d.). The protected groups are mentioned in seven of the 13 substantive treaties: race, colour, sex, religion, political opinion, national extraction or social origin (preamble of the 1961 *European Social Charter* (Council of Europe 1961)); race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status (1996 *Revised European Social Charter* (Council of Europe 1996b)); ethnic, cultural, linguistic or religious identity (*Framework Convention for the Protection of National Minorities*, general article 6(2) (Council of Europe 1995)); sex, religion, race, colour or national or ethnic origin (1997 *European Convention on Nationality*, general article 5(1) (Council of Europe 1997b)); genetic heritage (1997 *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*, general article 11 (Council of Europe 1997a)); sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (2005 *Convention on Action against Trafficking in Human Beings*, general article 3 (Council of Europe 2005a)); sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, state of health, disability or other status (2007 *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, general article 2 (Council of Europe 2007)); sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status (2011 *Convention on Preventing and Combating Violence against Women and Domestic Violence*, general article 4(3) Council of Europe 2011).

and the *ACHR* (dealing with hate propaganda, deportation and suspension of guarantees) and the *Convention Governing the Specific Aspects of Refugee Problems in Africa* (dealing with refugees) at the regional level.

In terms of wording, of the nine articles which have a reference to protected groups in their substantive articles, the following language is used:

- *ICCPR* article 2 dealing with equality before the law: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;
- *ICCPR* article 4 dealing with public emergencies: race, colour, sex, language, religion or social origin;
- *ICCPR* article 24 dealing with children: race, colour, sex, language, religion, national or social origin, property or birth;
- *Enforced Disappearance Convention* article 7 dealing with extradition: sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group;
- *ACHR* article 13 dealing with hate propaganda: race, colour, religion, language, or national origin;
- *ACHR* article 22 dealing with deportation: race, nationality, religion, social status, or political opinions;
- *ACHR* article 27 dealing with suspension of guarantees: race, colour, sex, language, religion or social origin;
- *Convention Governing the Specific Aspects of Refugee Problems in Africa* article 1 defining “refugee” and article 4 dealing with non-discrimination: race, religion, nationality, membership of a particular social group or political opinion.

Looking at the protected groups mentioned in these articles, it is apparent that the articles in the global treaties have the broadest reach in the sense that none of their regional counterparts go beyond the number and type of protected groups mentioned in the global treaties. At the global level, the *ICCPR* article dealing with equality before the law has the most extensive reach in the three articles of that treaty whereas the *Enforced Disappearance Convention*, while more limited in its scope, has added the notion of “ethnic group” and refers to “particular social group” as opposed to “social origin”. Interestingly, this latter treaty, which is fairly recent, uses wording similar to the *Refugee Convention* but adds “sex” and “ethnic origin.” It should also be noted that the two conventions dealing with immigration issues, such as refugees (the *Convention Governing the Specific Aspects of Refugee Problems in Africa*) or deportation (the *American Convention on Human Rights*) use language that is either identical or very similar to the language in the *Refugee Convention*.

#### 4. Protected Groups in Transnational Criminal Law

Transnational criminal law (TCL) covers the indirect suppression by international law through domestic criminal law of criminal activities that have actual or potential transboundary effects. TCL is enforced by prosecution in domestic courts, although the source of this enforcement lies in the obligations contained in multilateral suppression treaties (Currie and Rikhof 2013, pp. 10–20, 325–26).

There is a total of 33 TCL treaties, 14 of which refer to protected groups, again as with IHRL, as part of non-discriminatory provisions. This includes 19 international anti-terrorism conventions, seven of which have a reference to protected groups, usually couched in the article dealing with extradition with the following language: “a request for the extradition of an alleged offender, pursuant to this Convention, shall not be granted if the requested State Party has substantial grounds for believing that the request for extradition for an offence set forth in article 1 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political

opinion.”<sup>86</sup> A similar provision can also be found in the 1988 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* ((United Nations 1988b, art. 6(6))), the 2000 *United Nations Convention against Transnational Organized Crime* (United Nations 2000d, art. 14), and the 2003 *United Nations Convention against Corruption* (United Nations 2003, art. 15), while the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid* refers to race, sex, language or religion in its preamble (United Nations 1973b).

There have also been three regional TCL treaties with references to protected groups, primarily in the area of the prevention of terrorism, namely in the Americas<sup>87</sup> and Europe.<sup>88</sup> Treaties dealing with the same subject matter in Africa, Asia and the Middle East do not have such a reference.<sup>89</sup>

## 5. Protected Groups in International Humanitarian Law

International humanitarian law (IHL) has regulated the conduct of states and armed groups during armed conflict since 1856. The most important IHL conventions are the four 1949 *Geneva Conventions* (ICRC (1949a, 1949b, 1949c, 1949d)) and their two 1977 *Additional Protocols* (ICRC (1977a, 1977b)). The *Fourth Geneva Convention* (ICRC 1949d), dealing with the protection of civilians, is the most extensive in terms of protected groups, which are mentioned on three occasions: article 3, dealing with fundamental guarantees in non-international armed conflicts;<sup>90</sup> article 13, which is the general article with respect to the part of the Convention regulating the general protection of populations;<sup>91</sup> and article 27, dealing with territories.<sup>92</sup> As well, article 31 of the *First Geneva Convention* (ICRC 1949a), dealing with the return of sick and wounded members of the armed forces, also includes protected groups.<sup>93</sup>

*Additional Protocol I* (ICRC 1977a) contains two references to protected groups, namely in article 9, dealing with the general field of application of the part dealing with the wounded, sick and shipwrecked

<sup>86</sup> See article 9 of the 1979 *International Convention Against the Taking of Hostages* (United Nations 1979b); article 12 of the 1997 *International Convention for the Suppression of Terrorist Bombings* (United Nations 1997); article 15 of the 1999 *International Convention for the Suppression of the Financing of Terrorism* (United Nations 1999); article 16 of the 2005 *International Convention for the Suppression of Acts of Nuclear Terrorism* (United Nations 2005), while article XIII of the 2010 *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft* (ICAO 2010b) updated its text to: “race, religion, nationality, ethnic origin, political opinion or gender”, which was also done in article 10(3) of the 2005 *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (IMO 2005). A list of all terrorism treaties can be found on the United Nations Office on Drugs and Crime’s online database (UNODC n.d.).

<sup>87</sup> Article 14 of the 2002 *Inter-American Convention against Terrorism* (OAS 2002), dealing with mutual legal assistance, refers to race, religion, nationality, ethnic origin, or political opinion.

<sup>88</sup> Article 21(1) of the 2005 *Convention on the Prevention of Terrorism* (Council of Europe 2005b), dealing with extradition, refers to race, religion, nationality, ethnic origin or political opinion. Articles 4(2) and 5(2) of the 2003 *Additional Protocol to the Convention on Cybercrime, concerning the Criminalisation of Acts of a Racist and Xenophobic Nature committed through Computer Systems* (Council of Europe 2003) respectively deal with racist and xenophobic motivated threats and racist and xenophobic motivated insults due to race, colour, descent or national or ethnic origin, as well as religion.

<sup>89</sup> In Africa, see the 1999 *Convention on the Prevention and Combatting of Terrorism* (OAU 1999). In the Middle East, see the *Arab Convention for the Suppression of Terrorism* (League of Arab States 1998). In Asia, see the SAARC (*South Asian Association for Regional Cooperation*) *Regional Convention on Suppression of Terrorism* (SAARC 1987).

<sup>90</sup> Article 3(1), which has the same text in the other three Conventions, says: “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria” (ICRC (1949a, 1949b, 1949c, 1949d)). A different text (sex, race, nationality, religion, political opinions, other similar criteria) can also be found in article 12, dealing with humane treatment, of the *First Geneva Convention* (ICRC 1949a), which deals with the wounded, sick and shipwrecked member of armed forces and the *Second Geneva Convention* (ICRC 1949b), which deals with the wounded, sick and shipwrecked member of armed forces at sea.

<sup>91</sup> “The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war” (ICRC 1949d, art. 13). This article can also be found in the *Third Geneva Convention* (ICRC 1949c, art 16) dealing with the treatment of prisoners of war.

<sup>92</sup> “Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion” ((ICRC 1949d, art. 27(3))).

<sup>93</sup> “The selection of personnel for return under Article 30 shall be made irrespective of any consideration of race, religion or political opinion” ((ICRC 1949a, art. 31(1))).

and 75 dealing with fundamental guarantees. *Additional Protocol II (ICRC 1977b)* has one reference, namely in article 2, dealing with the general field of application. All three have the same wording.<sup>94</sup>

## 6. Protected Groups in International Criminal Law

There is a conceptual difference between international criminal law (ICL) and TCL. The most accepted approach with respect to ICL is that it refers to conduct that is prohibited under international law itself, and it is international law that provides for individual liability. The enforcement of this area of law manifests itself either directly, when international institutions apply international criminal law, or indirectly, when states bring perpetrators before national courts through the application of extended forms of jurisdiction, primarily universal jurisdiction (Currie and Rikhof 2013, pp. 10–20, 325–26). The international crimes of aggression, genocide, war crimes, and crimes against humanity are the foremost examples of crimes that are enforced through both direct and indirect means.

The earliest ICL instruments are the 1945 *Nuremberg Charter (United Nations 1945a)*, the 1946 *Charter for the Tokyo Tribunals (United States 1946)* and the 1948 *Genocide Convention (United Nations 1948a)*, which recognized that certain groups, which had been victimized as a result of certain characteristics, should be given protection. The first two instruments indicated that the tribunals had jurisdiction to prosecute persons involved in persecution on political, racial or religious grounds (the latter only in the *Nuremberg Charter*) as a crime against humanity,<sup>95</sup> while the *Genocide Convention* extended its reach to national, ethnical, racial or religious groups for the international crime of genocide (United Nations 1948a, art. 2).

ICL underwent a rapid growth in the nineties with the establishment of the International Criminal Tribunals for the former Yugoslavia (“ICTY”) in 1993 and Rwanda (“ICTR”) in 1994, which contained definitions of both genocide ((United Nations 1993, art. 4(2)); United Nations 1994b, art. 2) and crimes against humanity ((United Nations 1993, art. 5(h)); (United Nations 1994b, art. 3(h))) with the same wording as the post-Second World War instruments. Two internationalized tribunals, the Special Court for Sierra Leone (“SCSL”) in 2002 and the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) in 2004,<sup>96</sup> of which only the latter contained the crime of genocide in its founding document with again the same wording as in the *Genocide Convention*, expanded slightly on the list of protected groups in crimes against humanity in that the SCSL Statute added ethnic origin (United Nations 2002, art. 2(h)), while the ECCC document added ethnic and national origin (National Assembly of Cambodia 2001, arts. 4, 5). The most recent iteration of ICL<sup>97</sup> is the 1998 *Rome Statute of the International Criminal Court (“Rome Statute”)*, which still contains the same definition of genocide (United Nations 1998, art. 6) but has added a number of new categories to the protected groups in the crimes constituting a crime against humanity to now include: political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law ((United Nations 1998, art. 7(1)(h))).

<sup>94</sup> “[R]ace, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria” (ICRC 1977a, art. 9(1), 75(1)); (ICRC 1977b, art. 2(1)).

<sup>95</sup> Article 6(c) of the *Nuremberg Charter (United Nations 1945a)* and article 5(c) of the *Charter for the Tokyo Tribunal (United Nations 1948a)*, which omitted the reference to religious grounds.

<sup>96</sup> They are internationalized in a number of aspects: first, they are the result of an agreement between the United Nations and the country where the tribunal is based; second, the funding is provided for the most part by the international community; third, the personnel of all the organs of these institutions are a mix of local and international employees. There have been other internationalized institutions, but they are of less importance as their statutes are derived from the two main ones while the jurisprudence emanating from them have been of less precedential value. For more information about these institutions, see (Currie and Rikhof 2013, pp. 219–25).

<sup>97</sup> There is the *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (“Malabo Protocol”)*, which was adopted in 2014 but it does not add any new categories of protected groups for either genocide or crimes against humanity in its articles 28(B) and (C) (African Union 2014); moreover, it is not yet in force.

### 6.1. Persecution as a Crime Against Humanity and Protected Groups

Persecution is one of the 11 crimes recognized as a crime against humanity in the *Rome Statute*.<sup>98</sup> In order for any of these crimes to amount to a crime against humanity it needs to be shown, as a minimum, that they were committed in a systematic and widespread fashion and that the targets of these crimes were part of civilian population (([United Nations 1998](#), art. 7(1))).

The crime of persecution is defined by ICTY and ICTR jurisprudence as an act or omission that discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law and was carried out deliberately with the intention to discriminate on one of the grounds listed in their statutes.<sup>99</sup> An act or omission is considered discriminatory when a victim is targeted because of his or her membership in a group defined by the perpetrator on a political, racial, or religious basis.<sup>100</sup> Conceptually, persecution in ICL and refugee law can be seen as two sides of the same coin in that in refugee law, victims are protected from state action, while in ICL, the perpetrators of persecution, most often on behalf of a state, are the subject of ICL; it is certainly not inconceivable that the same event can result in reactions by both areas of law.<sup>101</sup>

The *Rome Statute* has both narrowed and broadened the crime of persecution in article 7(h). It has been broadened by extending the groups which can be victimized while narrowing it by insisting that this crime is only justiciable if it has been committed in connection to another crime in the *Statute*, or in the words of the *Statute*:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.<sup>102</sup>

Most recently, the definition of persecution has been the subject of debate at the International Law Commission, the United Nations legal thinktank. In the Commission's Fourth Report on Crimes against Humanity, the Special Rapporteur indicated that:

<sup>98</sup> The other crimes, listed in articles 7(1)(a) to (k) of the *Rome Statute* ([United Nations 1998](#)), are: murder, extermination, enslavement, deportation, imprisonment, torture, sexual offences, enforced disappearance, apartheid and inhumane acts. The *Rome Statute* includes one other article with a reference to protected groups, namely article 21 regarding applicable law, which says the application and interpretation of law must be without distinction on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status, but there is no jurisprudence with respect to these protected groups ([United Nations 1998](#)).

<sup>99</sup> Judgment, *Krnjelac* (IT-97-25-A), Appeals Chamber, 17 September 2003, para. 185; Judgment, *Nahimana et al.*, (Media) (ICTR-99-52-A), Appeals Chamber, 28 November 2007, para. 985; Judgment, *Gotovina et al.* (IT-06-90-T), Trial Chamber, 15 April 2011, para. 1802; Judgment, *Lukić* (IT-98-32/1-A), Appeals Chamber, 4 December 2012, para. 455; Judgement, *Kaing Guek Eav alias Duch* (Case File 001/18-07-2007-ECCC/SC), Supreme Court Chamber, 3 February 2012, para. 236–40; *Šainović et al.* (IT-05-87-A), Appeals Chamber, 23 January 2014, para. 579. Ethnicity has also been accepted as a ground in the ICTY jurisprudence, see Judgment, *Stanišić and Župljanin* (IT-08-91-T), Trial Chamber, 27 March 2013, para. 68; Judgment, *Nyiramasuhuko et al.* (ICTR-98-42-A), Appeals Chamber, 14 December 2015, para. 2129, 2138; Judgment, *Karadžić* (IT-95-5/18-T), Trial Chamber, 24 March 2016, para. 497; Judgment, *Mladić* (IT-09-92-T), Trial Chamber, 22 November 2017, para. 3228; Judgment, *Prlić et al.* (IT-04-74-A), Appeals Chamber, 29 November 2017, para. 422; Judgment, *Case 002/02* (Case File No. 002/19-09-2007/ECCC/TC), Trial Chamber, 16 November 2018, para. 713.

<sup>100</sup> Judgment, *Popović et al.* (IT-05-88-T), Trial Chamber, 10 June 2010, para. 967; Judgement, *Kaing Guek Eav alias Duch* (Case File 001/18-07-2007-ECCC/SC), Supreme Court Chamber, 3 February 2012, para. 272–77; Judgment, *Dorđević* (IT-05-87/1-A), Appeals Chamber, 27 January 2014, para. 876; Judgement, *Case 002/01* (Case File No. 002/19-09-2007/ECCC/TC), Trial Chamber, 7 August 2014, para. 427–33 (for the notion of political group, see para. 430); Judgment, *Karadžić* (IT-95-5/18-T), Trial Chamber, 24 March 2016, para. 500; Judgment, *Case 002/01* (Case File No. 002/19-09-2007-ECCC/SC), Supreme Court Chamber, November 23, 2016, para. 667–80; Judgment, *Case 002/02* (Case File No. 002/19-09-2007/ECCC/TC), Trial Chamber, 16 November 2018, para. 714, 718, 720–21.

<sup>101</sup> See below note 124 for further explanation; see also generally ([Acevedo 2017](#); [Oosterveld 2014](#); [Maystre 2014](#)).

<sup>102</sup> This definition is found in article 7(1)(h), while article 7(2)(g) says: “‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity” ([United Nations 1998](#)). See Decision on the Confirmation of Charges, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (CC-01/09-02/11), Pre-Trial Chamber II, 23 January 2012, para. 282–83.

With respect to the first half of the subparagraph, a group of twenty special rapporteurs and an independent expert, representing a wide array of subject areas, urged that the grounds for persecution set forth at the beginning of subparagraph (h)—which currently reads “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law”—be expanded and updated so as to include persecution on grounds of language, social origin, age, disability, health, sexual orientation, gender identity, sex characteristics and indigenous, refugee, statelessness or migratory status. (Murphy 2019, para. 60)

## 6.2. Genocide and Protected Groups

Genocide refers to the commission of very serious crimes with the intent to destroy a national, ethnical, racial or religious group (United Nations 1998, art. 6). It can be seen as an extreme form of persecution, in that every form of genocide is also a crime against humanity but for the latter, there is no need to show to intention to destroy a group (Currie and Rikhof 2013, p. 134).

The “group” in question must be “a national, ethnical, racial or religious” one. In delineating the protected groups in this way, the intention of the drafters of the *Genocide Convention* appears to have been to “cover only stable groups into which human beings are born without an (easy) way out,” and genocide against political and social groups was explicitly excluded (Currie and Rikhof 2013, pp. 114–15).<sup>103</sup> The ICTR’s decision in *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, para. 512–515, offered useful definitions: a ‘national group’ is “a collection of people who are perceived to share a legal bond of common citizenship, coupled with reciprocity of rights and duties”; an ‘ethnic group’ is “a group whose members share a common language or culture”; a ‘racial group’ is a group “based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors”; and a ‘religious group’ is a group “whose members share the same religion, denomination or mode of worship.”<sup>104</sup>

In terms of proving as fact the existence of the group and which category(ies) it falls under, the test appears to be a mixed objective/subjective one,<sup>105</sup> though a fair amount of weight is given to the subjective view of either the victim or the perpetrator—that is, did either the victim or the perpetrator, or both, view the victim as “belonging to a group slated for destruction.”<sup>106</sup> However, the preference appears to be to evaluate the question on the basis of both the subjective and the objective evidence in each individual case.<sup>107</sup> The International Court of Justice has held that the group must be defined positively, in a manner based on the characteristics of the group itself, and not negatively (e.g.,

<sup>103</sup> See also ECtHR, *Vasiliauskas v. Lithuania*, Application no. 35343/05, 22 October 2015, para. 170–75.

<sup>104</sup> Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, para. 512–15. See also ECtHR, *Drelingas v. Lithuania*, Application no. 28859/16, 12 March 2019, para. 101–7 for the proposition that a partisan group in the late forties can be a national group.

<sup>105</sup> This seems a similar test as the social perception test used for membership in a social group (see above) but there is no evidence that the ICTR judges were aware or intended to rely on refugee law when determining this approach.

<sup>106</sup> Judgment, *Rutaganda* (ICTR-96-3-T), Trial Chamber, 6 December 1999, para. 56; Judgment, *Semanza* (ICTR-97-20-T), Trial Chamber, 15 May 2003, para. 317; Judgment, *Gacumbitsi*, (ICTR-2001-64-T), Trial Chamber, 17 June 2004, para. 254; Warrant of Arrest Issued by Pre-Trial Chamber I, Separate and Partly Dissenting Opinion of Judge Anita Ušacka *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber, 4 March 2009, para. 23.

<sup>107</sup> Judgment, *Brđanin* (IT-99-36-T), Trial Chamber, 1 September 2004, para. 684. See also on this point Judgment, *Gacumbitsi* (ICTR-2001-64-A), Appeals Chamber, 7 July 2006, para. 39–40; Judgment, *Blagojević et al.* (IT-02-60-A), Appeals Chamber, 9 May 2007, para. 123; Judgment, *Seromba* (ICTR-2001-66-I), Trial Chamber, 13 December 2006, para. 320; and Judgment, *Nahimana et al. (Media)* (ICTR-99-52-A), Appeals Chamber, 28 November 2007, para. 523–25 and 561.

“the ‘non-Serb’ population”).<sup>108</sup> Only a person belonging to one or more of the four types of groups mentioned in the preamble of the above definition would fall within the class of victims.<sup>109</sup>

While the definition of genocide, including the categories of victim groups, has not changed in the statutes of the international tribunals or the International Criminal Court (([United Nations 1993](#), art. 4(2)); [United Nations 1994b](#), art. 2; [United Nations 1998](#), art. 6), the implementation of the *Rome Statute* at the domestic level presents quite a different picture. In a number of the 70 states which enacted legislation to implement the *Rome Statute*, more categories have been added.<sup>110</sup> Extreme examples of this are France and Burkina Faso (where the legislation adds to the definition of genocide, in addition the ones in the *Rome Statute*, any group that is defined by an arbitrary characteristic) and Canada (which refers to an identifiable group of persons) ([CICC 2017](#), p. 28). Other countries have changed their legislation in a less dramatic manner by adding other specific protected groups in addition to the traditional ones of national, ethnical, racial or religious groups. Table 2 reflects the protected groups included in domestic legislation prohibiting genocide.<sup>111</sup>

<sup>108</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, 196; see also Judgment, *Stakić* (IT-97-24), Trial Chamber, 22 March 2006, para. 16–36; Judgment, *Popović et al.* (IT-05-88-T), Trial Chamber, 10 June 2010, para. 809; Judgment, *Tolimir* (IT-05-88/2-T), Trial Chamber, 12 December 2012, para. 735.

<sup>109</sup> Judgment, *Krstić* (IT-98-33), Trial Chamber, 2 August 2001, para. 554–57 and 575–80 makes is clear that the destruction of groups with other characteristics than the ones mentioned in the definition does not amount to genocide; see also Judgment, *Stakić* (IT-97-24), Trial Chamber, 22 March 22, para. 23–24 and Judgment, *Nahimana et al.*, (Media) (ICTR-99-52-A), Appeals Chamber, 28 November 2007, para. 496–97; regarding the issue of groups in the *Genocide Convention* in a historical context see also the ECtHR cases of *Vasiliauskas v. Lithuania*, Application no. 35343/05, 22 October 2015 and *Drėlingas v. Lithuania*, Application no. 28859/16, 12 March 2019.

<sup>110</sup> In a survey of the legislation of 51 countries, it can be observed that the following 28 countries did not change any of the protected groups: Argentina, Australia, Bangladesh, Belgium, Brazil, Burundi, Comoros, Democratic Republic of the Congo (DRC), Germany, Iraq, Kenya, Malta, Israel, Mauritius, Nauru, Netherlands, New Zealand, Portugal, Republic of Korea, Samoa, Senegal, Spain, Suriname, South Africa, Trinidad and Tobago, Turkey, Uganda, UK; of these Iraq, Israel and Turkey have not ratified the ICC Statute while Turkey also deleted the ethnic component. In addition, eight other countries made changes to this existing iteration of protected groups: Bolivia, Paraguay, Peru, Honduras and Guatemala deleted racial group while El Salvador and Costa Rica deleted ethnic group and Nicaragua and omitted both racial and national groups. As a result of this survey, which includes the countries mentioned in the text and this footnote, a total 51 countries have been examined, of which 47 have ratified the *Rome Statute* and have enacted implementation statutes while four countries, which have not ratified the *Rome Statute*, have also enacted genocide legislation, namely Ethiopia, Iraq, Israel and Turkey ([CICC 2017](#)).

<sup>111</sup> For details, see the Coalition of the International Criminal Court’s case matrix on implementation of the *Rome Statute* ([CICC 2017](#)), the Legal Tools Database’s list of national criminal jurisdictions ([Legal Tools Database n.d.](#)), and the Library of Congress’s chart of jurisdictions that punish genocide, crimes against humanity, and/or war crimes ([Library of Congress 2016](#)).

**Table 2.** Countries that have added specific protected groups to the four in the Genocide Convention.

Country	Political Group	Social Group	Colour	Membership in Union	Gender	Sexual Orientation	Culture	Age	Disability	Health	Conscience
Uruguay	x	x		x	x	x	x	x	x	x	
Ecuador					x	x		x		x	x
Colombia	x										
Panama	x										
Costa Rica	x										
Peru		x									
Paraguay		x									
Poland		x									
Switzerland	x	x									
Estonia	x	x									
Ethiopia <sup>112</sup>	x		x								
Lithuania <sup>113</sup>	x	x									

## 7. Observations with Respect to International Law

In total, 110 international and regional instruments have been examined, 60 of which mention protected groups (31 IHRL, 14 TCL, 6 IHL and 9 ICL) and of which 30 treaties refer to those groups in substantive articles (4, 11, 6 and 9, respectively). These 110 documents include 59 IHLR instruments, 33 TCL instruments, six IHL instruments, nine ICL instruments, and three refugee law instruments,<sup>114</sup> including the *Refugee Convention*. A full list of the instruments and protected groups, divided by area of law, can be found in Appendix A, Tables A1–A5. Looking comprehensively at protected grounds in all the instruments, it is clear the protected grounds in the *Refugee Convention* are appropriate but may not be adequate. There are 29 categories of protected groups set out in the various instruments, as listed in Appendix B. The most common categories, defined as those that are present in more than 50% of the instruments with protected grounds, are race, religion, nationality, political opinion, ethnic origin, colour, and sex. Of these, the first four grounds are protected under the *Refugee Convention*. Ethnic origin is not explicitly protected, but the UNHCR does provide some guidance to the effect that nationality should be understood as broader than citizenship to include ethnic and linguistic groups (UNHCR 2019, para. 74). Similarly, colour could also fall under an existing category, namely race, but otherwise would possibly qualify under MPSG as both immutable under the protected characteristics approach and a visible distinction setting a person apart from society under the social perception approach. In most circumstances, sex or gender appear to be used interchangeably, but in one treaty, sex is listed alongside gender.<sup>115</sup> However, the MPSG analysis demonstrated claims based on gender can encompass gender as biological sex and gender identity. Notably, the *Bangkok*

<sup>113</sup> The legislation was not a result of ICC implementation but already passed in 1992 and amended in 2003. See ECtHR, *Vasiliauskas v. Lithuania*, Application no. 35343/05, 22 October 2015, para. 50 and ECtHR, *Drelingas v. Lithuania*, Application no. 28859/16, 12 March 2019, para. 58.

<sup>112</sup> Ethiopia has not ratified the *Rome Statute* but has conducted a number of genocide cases using its Criminal Code with this definition of genocide in section 269 (Library of Congress 2016).

<sup>114</sup> The *Convention Governing the Specific Aspects of Refugee Problems in Africa* is counted as an IHRL instrument, not a refugee law instrument, for analytical purposes to avoid double-counting.

<sup>115</sup> The *Convention on Preventing and Combating Violence against Women and Domestic Violence* (Council of Europe 2011, art. 4(3)) lists sex and gender, as well as sexual orientation, in the same list of protected groups.

*Principles* add only these three categories—ethnic origin, colour, and sex (listed as gender)—to the list of protected groups.

Additionally, protected groups based on social origin, language, birth, ‘other’ status, economic status, and property were recognized in at least 10 or more instruments. The first three categories may already be sufficiently captured by an existing protected group in the *Refugee Convention*. Social origin is comparable to MPSG; adding ‘social origin’ as a standalone ground would be superfluous. As noted above, language (or linguistic group) may fall under nationality and, alternatively, has been recognized as an example of a PSG in *Ward*.<sup>116</sup> Similarly, birth may be recognized under nationality or, at the least, be viewed as immutable under the protected characteristics approach of MPSG. The ‘other’ status provides broad protection to similarly situated groups; while the *Refugee Convention* does not contain a similar catch-all provision, MPSG is a flexible category and a broader ‘other’ category may not serve the overarching purpose of protecting identifiable groups against persecution.

The final two categories, economic status and property, are more problematic. Economic-based claims have faced significant challenges in domestic jurisprudence. Claimants have been successful where they were unable to disassociate from their economic status, but less so where the claim is based on wealth or property ownership. Wealth is a protected ground in all the IHL treaties and its variants are recognized in several IHRL statutes.<sup>117</sup> The *Rome Statute* does not define persecution with respect to wealth, but states that the applicable law must be interpreted and applied consistently with internationally recognized human rights, without adverse distinction on grounds including, *inter alia*, wealth (([United Nations 1998](#), art. 21(3))). However, as few claims are based on wealth or property, it may be premature to say that economic-based claims are categorically excluded from protection.

IHRL does not appear to be the most useful reference point for expanding protected groups. First, most of the protected groups appear in aspirational articles and, as such, do not have a great deal of precedent value. Second, the reference to protected groups in the small number of substantive articles, while typically broader than in refugee law, are usually in the nature of the negative obligation of non-discrimination addressed at states implementing the provisions of the treaties in question in the sense that a positive obligation has to be implemented upon ratification and that this positive obligation cannot be limited by discriminatory practices; the fact that every such article contains a reference to protected groups indicates that certain obligations are or have been prone to such discriminatory practices and the purpose of the provision is to ensure it does not continue. The reference to protected groups in the *Refugee Convention* has a different purpose: it is part of the ‘refugee’ definition and, as such, must be established by the person seeking asylum in another state in a typically more private setting where a decision-maker determines whether a person positively belongs to that group. The fact that at the time of the negotiations of the *Refugee Convention* there was already a human rights instrument with a broad category of protected groups, together with the desire of the drafters not to have too wide a circle of protected groups in order not to open the definition to possible abuse, likely indicates that the drafters were aware of larger possible categories of protected groups but deliberately decided to frame the groups more narrowly ([Zimmermann 2011](#), pp. 309–11; [Weis 1990](#), p. 8).

However, having made this general observation, it is rather striking that one substantive article bearing resemblance to the refugee situation uses language that broadens the number of protected groups, though not drastically so. This is the case with the *Enforced Disappearance Convention* ([United](#)

<sup>116</sup> Linguistic background may also be recognized under MPSG, see: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 739.

<sup>117</sup> Variants such as economic position, fortune, income, etc. can be found in the following instruments: *Convention on the Protection of the Rights of all Migrant Workers and Members of their Families* ([United Nations 1990](#)); *African Charter on Human and Peoples’ Rights (Banjul Charter)* ([OAU 1981](#)); *African Charter on Human and People’s Rights on the Rights of Women in Africa* ([African Union 2003](#)); *African Charter on the Rights and Welfare of the Child* ([OAU 1990](#)); *American Convention on Human Rights* ([OAS 1969](#)); *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* ([OAS 1999a](#)); *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women* ([OAS 1999b](#)); *Arab Charter of Human Rights* ([League of Arab States 1994](#)); *ASEAN Human Rights Declaration* ([ASEAN 2012](#)).

[Nations 2006a](#), art. 13(7)), where the article dealing with extradition adds ‘sex’ and ‘ethnic group’ and refers to ‘particular social group’ as opposed to ‘social origin’:

Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group, or that compliance with the request would cause harm to that person for any one of these reasons.

The purpose of this article is similar to that of the non-*refoulement* provision in the *Refugee Convention* ([United Nations 1951](#), art. 33), namely that persons who might have committed an offence related to forced disappearance will not be subject to a foreign prosecution if that prosecution will be carried out for discriminatory reasons. The *Refugee Convention* does not allow for the removal of a refugee if that person would face a threat to their life on account of belonging to a protected group (with the same reference to protected groups as in its definition of persecution). If a human rights treaty prohibits a removal for a criminal prosecution and refers to an expanded iteration of protected groups, the question can be asked whether such an expansion would also be desirable for another human rights treaty, the *Refugee Convention*, especially if the expansion is modest, adding sex and ethnic group to the five pre-existing groups.

This argument has even more force when considering the provisions with respect to protected groups in TCL and IHL treaties. Almost all 14 TCL treaties that have articles mentioning protected groups deal with the same topic—extradition—and while most are couched in the same language as the *Refugee Convention*, two more recent conventions, the 2005 *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* ([IMO 2005](#), art. 10) and the 2010 *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft* ([ICAO 2010b](#), art. XIII), have updated their text to “race, religion, nationality, ethnic origin, political opinion or gender”, which mirrors the language in the *Enforced Disappearance Convention*.

While IHL does not have a mention of protected groups in the area of extradition, it is striking that already in 1949 all four *Geneva Conventions* mandated, in common article 3, that persons not taking part in hostilities should be treated “humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.” This is broader than other articles in these conventions dealing with non-combatants, such as civilians or prisoners of war, where the adverse distinction is worded even more narrowly than the *Refugee Convention*, namely “race, nationality, religion or political opinion”, which mirrors the development in refugee law between the text of the *Statute of the International Refugee Organization* and the *Refugee Convention* by not referring to social group. However, by the time the *Geneva Conventions* were supplemented by the 1977 *Additional Protocols*, the number of protected groups had been expanded to “race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria” in all three provisions. The fact that IHL, which deals with the regulation of the most serious human rights violations in times of war, originally mirrored the number of protected groups for non-combatants to a smaller number than the *Refugee Convention* but saw fit to expand due to the new needs in the theatre of war, bears reflection for an instrument applicable primarily to peacetime.

While IHRL, TCL, and IHL can provide some assistance to a possible broader understanding of protected groups in the refugee context, the situation with ICL is different. Historically, the number of protected groups were already narrower than even those in the refugee definition. This had to do with the fact that ICL has a purpose different from both IHRL and refugee law, namely prosecuting individuals for international crimes; at the time, ICL was a new approach in international law and there was a desire to proceed cautiously since this area of international law was treading even more intensely in the realm of sovereignty than IHRL for two reasons: first, IHRL would be applicable at that time only if accepted internally by states who had signed the human rights treaties, while ICL would apply whether or not a state whose nationals were subject to prosecutions would agree; second,

the opprobrium attached to prosecutions was of a higher degree as in almost all cases in the post-Second World War era, the persons on trial were representative of odious state behaviour. The difference between IHRL and refugee law, on the one hand, and ICL on the other, with respect to persecution was explained in an early ICTY case.<sup>118</sup> Note, however, that this explanation deals more with the level of persecution than the notion of protected groups.

As ICL has specifically dealt with the notion of persecution, both directly as a crime against humanity and indirectly as genocide, and since the protected groups for these two crimes have grown dramatically since the Second World War and the reasons for the justification to have the protected groups related to those crimes be narrower than the protected groups in the *Refugee Convention* has not changed, it would be logical to seriously examine the protected groups in the *Refugee Convention* and bring them at a minimum in line with the listings in ICL to include ethnic origin, cultural, and gender/sex.

## 8. Conclusions

The *Refugee Convention* is the primary international instrument protecting refugees and, in 1951, was one of the first instruments to recognize protected groups. Nearly 70 years later, the number of international and regional instruments protecting persons from discrimination across a broad range of categories has grown dramatically. A review of IHRL, TCL, IHL, and ICL reveals that four of the protected groups enumerated in the *Refugee Convention*—race, religion, nationality, and political opinion—reflect the core categories recognized in other instruments. The fifth group—membership of a particular social group—is a flexible ground that can encompass similar protections as those found in other areas of international law. Domestic jurisprudence shows that MPSG may be used for categories that are less prevalent in international instruments, including age<sup>119</sup> and disability,<sup>120</sup> and may go further than other instruments, such as recognizing family as a PSG and, though not universally accepted, recognizing victims of domestic and gang violence as a PSG.

In conclusion, the enumerated grounds in the *Refugee Convention* may already protect, or at least have the potential to protect, many of the groups protected under other international law regimes. MPSG is a flexible category, and beneficial for its ability to evolve in line with contemporary refugee claims while not expanding the definition so much that the *Refugee Convention's* purpose is frustrated. However, examining other areas of international law shows that the notion of protected groups has resulted in consistent and detailed definitions, which could lead to a better appreciation of both the flexibility and the limitations of the parameters of protected groups in the refugee definition. Of the areas discussed, namely ICL, IHRL, IHL and TCL, the first two are the most promising, IHRL because

<sup>118</sup> “The Trial Chamber finds, however, that these cases cannot provide a basis for individual criminal responsibility. It would be contrary to the principle of legality to convict someone of persecution based on a definition found in international refugee law or human rights law. In these bodies of law, the central determination to be made is whether the person claiming refugee status or likely to be expelled or deported has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”. The emphasis is more on the state of mind of the person claiming to have been persecuted (or to be vulnerable to persecution) than on the factual finding of whether persecution has occurred or may occur. In addition, the intent of the persecutor is not relevant. The result is that the net of “persecution” is cast much wider than is legally justified for the purposes of imposing individual criminal responsibility. The definition stemming from international refugee law or human rights law cannot therefore be followed here.”, Judgment, Kupreskić (IT-95-16), Trial Chamber, 14 January 2000, § 589; see also UNHCR, Summary Conclusions, Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law, Arusha, Tanzania, 11–13 April 2011 at para. 13–21.

<sup>119</sup> *Universal Declaration for Human Rights* (United Nations 1948b); *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (United Nations 1990); *Convention on the Rights of Persons with Disabilities* (United Nations 2006b); *ASEAN Human Rights Declaration* (ASEAN 2012); *Convention on Preventing and Combating Violence against Women and Domestic Violence* (Council of Europe 2011).

<sup>120</sup> *Universal Declaration for Human Rights* (United Nations 1948b); *Convention on the Rights of the Child* (United Nations 1989); *ASEAN Human Rights Declaration* (ASEAN 2012); *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* (Council of Europe 2007); *Convention on Preventing and Combating Violence against Women and Domestic Violence* (Council of Europe 2011).

of its affinity in terms of its purpose of human rights protection, which is similar to the underlying purpose of refugee law while ICL is very useful since its origins in the area of protected group were very narrow because of its subject matter of criminal prosecutions but which has recently expanded and gone beyond refugee law in this aspect. Amending the refugee definition to include other groups, particularly those additional grounds identified in ICL and IHRL, either as novel categories (such as culture or colour) or as a justification for a broader approach where refugee jurisprudence has seen a narrowing of the relevant concepts (such as ethnic origin or gender/sex) may be desirable to provide greater protection and consistent decision-making, assuming that the political context is conducive to such an approach.

**Author Contributions:** Conceptualization, J.R. and A.G.; Investigation, J.R. and A.G.

**Funding:** This research received no external funding.

**Conflicts of Interest:** The authors declare no conflict of interest.

## Appendix A

The below tables identify all international and regional instruments that were reviewed, including those that did not contain any protected grounds. The tables are divided by area of law: international refugee law, international human rights law, transnational criminal law, international humanitarian law, and international criminal law.

**Table A1.** International Refugee Law Instruments.

Instrument	Article	Protected Grounds
1951 Convention relating to the Status of Refugees <sup>121</sup>	1	race, religion, nationality, membership of a particular social group, or political opinion
	33	race, religion, nationality, membership of a particular social group, or political opinion
1966 Bangkok Principles on Status and Treatment of Refugees	1	race, colour, religion, nationality, ethnic origin, gender, political opinion, or membership of a particular social group
1969 Convention Governing the Specific Aspects of Refugee Problems in Africa <sup>122</sup>	1	race, religion, nationality, membership of a particular social group, or political opinion
1984 Cartagena Declaration on Refugees <sup>123</sup>	3	race, religion, nationality, membership of a particular social group, or political opinion

<sup>123</sup> Art. 3 incorporates the *Refugee Convention* by reference (does not explicitly state the protected grounds).

<sup>122</sup> Also listed under Table 2, International Human Rights Law Instruments.

<sup>121</sup> Excludes art. 3 (the Convention shall be applied without discrimination as to race, religion, or country of origin).

**Table A2.** International Human Rights Law Instruments.

Instrument	Article	Protected Grounds
1945 Charter of the United Nations	1(3)	race, sex, language, or religion
	13(b)	race, sex, language, or religion
	55(c)	race, sex, language, or religion
	76(c)	race, sex, language, or religion
1948 Universal Declaration for Human Rights	2	race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status
1966 International Covenant on Civil and Political Rights	2(1)	race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status
	4(1)	race, colour, sex, language, religion or social origin
	24(1)	race, colour, sex, language, religion, national or social origin, property or birth
1966 International Covenant on Economic, Social and Cultural Rights	26	race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status
	2(2)	race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status
1966 International Convention on the Elimination of All Forms of Racial Discrimination	Preamble	race, sex, language, religion, colour, national origin, ethnic origin
	1(1)	race, colour, descent, or national or ethnic origin
1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	N/A	
2006 Convention for the Protection of All Persons from Enforced Disappearance	13(7)	sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group
1979 Convention on the Elimination of All Forms of Discrimination Against Women	N/A	
1989 Convention on the Rights of the Child	Preamble	race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status
	2(1)	race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status
1990 Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	1(1)	sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status
	7	sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status
2006 Convention on the Rights of Persons with Disabilities	Preamble (p)	race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status
	Preamble	Race, creed, sex
1958 Convention concerning Discrimination in Respect of Employment and Occupation	1(a)	race, colour, sex, religion, political opinion, national extraction or social origin
1948 Freedom of Association and Protection of the Right to Organise Convention (No. 87) (ILO 1948)	N/A	
1949 Right to Organise and Collective Bargaining Convention (No. 98) (ILO 1949)	N/A	
1930 Forced Labour Convention (No. 29) (ILO 1930)	N/A	

Table A2. Cont.

Instrument	Article	Protected Grounds
1957 Abolition of Forced Labour Convention (No. 105)	1	racial, social, national or religious
1973 Minimum Age Convention (No. 138) (ILO 1973)	N/A	
1999 Worst Forms of Child Labour Convention (No. 182) (ILO 1999)	N/A	
1951 Equal Remuneration Convention (No. 100)	1	sex
1981 African Charter on Human and Peoples' Rights (Banjul Charter)	Preamble	race, ethnic group, color, sex, language, religion or political opinions
	2	race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status
1969 Convention Governing the Specific Aspects of Refugee Problems	I(1)	race, religion, nationality, membership of a particular social group or political opinion
	IV	race, religion, nationality, membership of a particular social group or political opinions
2003 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa	Preamble	race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status
1990 African Charter on the Rights and Welfare of the Child	3	race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status
2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa	N/A	
1969 American Convention on Human Rights	1(1)	race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition
	13(5)	race, color, religion, language, or national origin
	22(8)	race, nationality, religion, social status, or political opinions
	27(1)	race, color, sex, language, religion, or social origin
1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights	3	race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition
1990 Protocol to the American Convention on Human Rights to Abolish the Death Penalty	N/A	
1985 Inter-American Convention to Prevent and Punish Torture	N/A	
1994 Inter-American Convention on Forced Disappearance	N/A	
1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women <sup>124</sup>	Preamble	class, race or ethnic group, income, culture, level of education, age or religion
1999 Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities	N/A	
1994 Arab Charter of Human Rights	2	race, colour sex, language, religion, political opinion, national or social origin, wealth, birth or other status, and without any discrimination between men and women
2012 ASEAN Human Rights Declaration	2	race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status
2007 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers	N/A	

Table A2. Cont.

Instrument	Article	Protected Grounds
2013 ASEAN Declaration on the Elimination of Violence against Women and Elimination of Violence against Children	N/A	
1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights)	14	sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status
1952 Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe 1952)	N/A	
1963 Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe 1963)	N/A	
1983 Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe 1983)	N/A	
1984 Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe 1984)	N/A	
1994 Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe 1994)	N/A	
2000 Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms	1	sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status
2002 Protocol 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe 2002)	N/A	
2004 Protocol 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe 2004b)	N/A	
2013 Protocol 15 to the European Convention for the Protection of Human Rights and Fundamental Freedoms <sup>125</sup> (Council of Europe 2013a)	N/A	
2013 Protocol 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe 2013b)	N/A	
1961 European Social Charter	Preamble	race, colour, sex, religion, political opinion, national extraction or social origin
1996 Revised European Social Charter	V(E)	race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status
1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Council of Europe 1987)	N/A	
1995 Framework Convention for the Protection of National Minorities	4	national minority
	6	ethnic, cultural, linguistic or religious identity
1992 European Charter for Regional or Minority Languages (Council of Europe 1992a)	N/A	
1996 European Convention on the Exercise of Children's Rights (Council of Europe 1996a)	N/A	
1997 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine)	11	Genetic heritage

Table A2. Cont.

Instrument	Article	Protected Grounds
1977 European Convention on the Legal Status of Migrant Workers (Council of Europe 1977)	N/A	
1992 European Convention on the Participation of Foreigners in Public Life at the Local Level (Council of Europe 1992b)	N/A	
1997 European Convention on Nationality	5(1)	sex, religion, race, colour or national or ethnic origin
2005 Convention on Action against Trafficking in Human Beings	3	sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status
2007 Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse	2	sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, state of health, disability or other status
2011 Convention on Preventing and Combating Violence against Women and Domestic Violence	4(3)	sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status

Table A3. Transnational Criminal Law Instruments.

Instrument	Article	Protected Grounds
1979 International Convention Against the Taking of Hostages	9	race, religion, nationality, ethnic origin or political opinion
1988 Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (United Nations 1988a)	N/A	
1997 International Convention for the Suppression of Terrorist Bombings	12	race, religion, nationality, ethnic origin or political opinion
1999 International Convention for the Suppression of the Financing of Terrorism	15	race, religion, nationality, ethnic origin or political opinion
2005 International Convention for the Suppression of Acts of Nuclear Terrorism	16	Race, religion, nationality, ethnic origin or political opinion
2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (ICAO 2010b)	XIII	race, religion, nationality, ethnic origin, political opinion or gender
2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation	10(3)	race, religion, nationality, ethnic origin, political opinion or gender
1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances	6(6)	race, religion, nationality or political opinions
2000 United Nations Convention against Transnational Organized Crime	14	sex, race, religion, nationality, ethnic origin or political opinions

<sup>125</sup> Not yet in force.

<sup>124</sup> Excludes art. 9 (Parties taking special account of women's vulnerability due to their race, ethnic background, status as migrants, refugees or displaced persons, pregnancy, disabled, minor age, elderly, socioeconomically disadvantaged, affected by armed conflict, deprived of freedom).

Table A3. Cont.

Instrument	Article	Protected Grounds
2003 United Nations Convention against Corruption	15	sex, race, religion, nationality, ethnic origin or political opinions
2002 Inter-American Convention Against Terrorism	14	race, religion, nationality, ethnic origin, or political opinion
2005 Convention on the Prevention of Terrorism	21(1)	race, religion, nationality, ethnic origin or political opinion
1999 Organization for African Unity, Convention on the Prevention and Combatting of Terrorism	N/A	
1998 Arab Convention for the Suppression of Terrorism	N/A	
1987 South Asian Association for Regional Cooperation, Regional Convention on Suppression of Terrorism	N/A	
1970 Convention for the Suppression of Unlawful Seizure of Aircraft (United Nations 1970)	N/A	
1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (ICAO 1988)	N/A	
2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (ICAO 2010a)	14	race, religion, nationality, ethnic origin, political opinion or gender
1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (United Nations 1973a)	N/A	
1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (IMO 1988)	N/A	
1994 Convention on the Safety of United Nations and Associated Personnel (United Nations 1994a)	N/A	
2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime <sup>126</sup> (United Nations 2000c)	N/A	
2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Crime <sup>127</sup> (United Nations 2000b)	N/A	
2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (United Nations 2001)	N/A	
1961 Single Convention on Narcotic Drugs (United Nations 1961)	N/A	
1971 Convention on Psychotropic Substances (United Nations 1971)	N/A	
1972 Protocol Amending the Single Convention on Narcotic Drugs (United Nations 1972)	N/A	
1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (United Nations 1956)	N/A	

Table A3. Cont.

Instrument	Article	Protected Grounds
1973 International Convention on the Suppression and Punishment of the Crime of Apartheid	Preamble	race, sex, language, religion, colour, national origin
2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (United Nations 2000a)	N/A	
2001 Convention on Cybercrime (Budapest Convention) (Council of Europe 2001)	N/A	
2003 Additional Protocol to the Convention on Cybercrime, concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems	4(1)	race, colour, descent or national or ethnic origin, religion
	5(1)	race, colour, descent or national or ethnic origin, religion
1982 United Nations Convention on the Law of the Sea (United Nations 1982)	N/A	

Table A4. International Humanitarian Law Instruments.

Instrument	Article	Protected Grounds
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (Geneva Convention I)	3	race, colour, religion or faith, sex, birth or wealth, or any other similar criteria
	12	sex, race, nationality, religion, political opinions, or any other similar criteria
	31	race, religion, political opinion
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (Geneva Convention II)	3	race, colour, religion or faith, sex, birth or wealth, or any other similar criteria
	12	sex, race, nationality, religion, political opinions, or any other similar criteria
Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (Geneva Convention III)	3	race, colour, religion or faith, sex, birth or wealth, or any other similar criteria
	16	race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria
Geneva Convention Relative to the Protection of Civilian Persons in Times of War of 12 August 1949 (Geneva Convention IV)	3	race, colour, religion or faith, sex, birth or wealth, or any other similar criteria
	13	race, nationality, religion or political opinion
	27	race, religion, political opinion
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (Additional Protocol 1)	9	race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria
	75	race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 (Additional Protocol II)	2	race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria

<sup>127</sup> But see Art. 19(2) (“measures shall be consistent with internationally-recognized principles of non-discrimination”).

<sup>126</sup> But see Art. 14(2) (“measures shall be consistent with internationally-recognized principles of non-discrimination”).

**Table A5.** International Criminal Law Instruments.

<b>Instrument</b>	<b>Article</b>	<b>Protected Grounds</b>
1945 Charter of the International Military Tribunal (Nuremberg Charter)	6(c)	political, racial or religious grounds
1946 Charter of the International Military Tribunal for the Far East (Tokyo Tribunal)	5(c)	political or racial grounds
1949 Convention on the Protection and Punishment of the Crime of Genocide (Genocide Convention)	2	national, ethnical, racial or religious group
	6	national, ethnical, racial or religious
1998 Rome Statute of the International Criminal Court (Rome Statute)	7(1)(h)	political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law
	21	gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status
1993 Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute)	4(2)	national, ethnical, racial or religious
	5(h)	political, racial and religious
1994 Statute of the International Tribunal for Rwanda (ICTR Statute)	2	national, ethnical, racial or religious
	3(h)	political, racial and religious
2002 Statute of the Special Court for Sierra Leone (SCSL Statute)	2(h)	political, racial, ethnic or religious
2001 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (ECCC Statute)	4	national, ethnical, racial or religious
	5	political, racial, and religious
2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights <sup>128</sup>	28(B)	national, ethnical, racial or religious
	28(C)	political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law

## Appendix B

The below protected groups are recognized in one or more international or regional instruments. There are many instances where the word used to describe the protected group is inconsistent but generally applies to the same category, such as “religion” and “faith.” Where possible, the protected groups have been consolidated and additional terms are identified in brackets.

### *List of Protected Groups*

- Race (Racial)
- Religion (Religious; Religious Identity; Faith; Conviction; Creed)
- Nationality (National; National Origin)
- Ethnic Origin (Ethnic Group; Ethnical)
- Social Origin (Social Status)
- Political Opinion (Political; Political or Other Opinion)
- Economic Status (Economic Position; Wealth; Fortune; Income)
- Gender (Gender Identity; No Discrimination between Men and Women)

<sup>128</sup> Not yet in force.

- Sex
- Sexual Orientation
- Cultural
- Colour
- Language (Linguistic)
- Age
- Birth
- Property
- Disability (Disabled)
- Other Status (Other Similar Criteria; Other Grounds; Any Other Social Condition)
- Citizenship (Citizen; Migrant; Refugee)
- Membership of a Particular Social Group
- Marital Status
- Class
- Descent
- Association with a National Minority (National Minority)
- National Extraction
- Indigenous Origin
- Education (Level of Education)
- Health (State of Health)
- Genetic Heritage

## References

### *Jurisprudence—International.*

CJEU.

*C-199/12, c-200/12, C201/12 X, Y Z*, 4th Chamber (CJEU 2013).

*Case C-473/16*, 3rd Chamber (CJEU 2018).

*A (C-148/13), B (C-149/13), C (C-150/13)*, Grand Chamber (CJEU 2014).

ECCC.

Judgement, *Case 002/01* (Case File No. 002/19-09-2007/ECCC/TC), Trial Chamber, 7 August 2014, para. 427–33.

Judgment, *Case 002/01* (Case File No. 002/19-09-2007-ECCC/SC), Supreme Court Chamber, 23 November 2016, para. 667–80.

Judgment, *Case 002/02* (Case File No. 002/19-09-2007/ECCC/TC), Trial Chamber, November 16, 2018, para. 714, 718, 720–21.

Judgement, *Kaing Guek Eav alias Duch* (Case File 001/18-07-2007-ECCC/SC), Supreme Court Chamber, 3 February 2012, para. 236–40.

ECtHR.

*Drėlingas v. Lithuania*, Application no. 28859/16, March 12, 2019, para. 101–7.

*Vasiliauskas v. Lithuania*, Application no. 35343/05, October 22, 2015, para. 170–75.

ICC.

Decision on the Confirmation of Charges, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (CC-01/09-02/11), Pre-Trial Chamber II, 23 January 2012, para. 282–83.

Warrant of Arrest Issued by Pre-Trial Chamber I, Separate and Partly Dissenting Opinion of Judge Anita Ušacka *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber, 4 March 2009, para. 23.

ICJ.

Judgment, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 26 February 2007, para. 196.

#### ICTR.

Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, para. 512–15.  
 Judgment, *Gacumbitsi* (ICTR-2001-64-A), Appeals Chamber, 7 July 2006, para. 39–40.  
 Judgment, *Nahimana et al., (Media)* (ICTR-99-52-A), Appeals Chamber, 28 November 2007, para. 985.  
 Judgment, *Nyiramasuhiko et al.* (ICTR-98-42-A), Appeals Chamber, 14 December 2015, para. 2129, 2138.  
 Judgment, *Rutaganda* (ICTR-96-3-T), Trial Chamber, 6 December 1999, para. 856.  
 Judgment, *Semanza* (ICTR-97-20-T), Trial Chamber, 15 May 2003, para. 317.  
 Judgment, *Seromba* (ICTR-2001-66-I), Trial Chamber, 13 December 2006, para. 320.

#### ICTY.

Judgment, *Blagojević et al.* (IT-02-60-A), Appeals Chamber, 9 May 2007, para. 123.  
 Judgment, *Brđanin* (IT-99-36-T), Trial Chamber, 1 September 2004, para. 684.  
 Judgment, *Đorđević* (IT-05-87/1-A), Appeals Chamber, 27 January 2014, para. 876.  
 Judgment, *Gotovina et al.* (IT-06-90-T), Trial Chamber, 15 April 2011, para. 1802.  
 Judgment, *Karadžić* (IT-95-5/18-T), Trial Chamber, 24 March 2016, para. 497.  
 Judgment, *Krnojelac* (IT-97-25-A), Appeals Chamber, 17 September 2003, para. 185.  
 Judgment, *Krstić* (IT-98-33), Trial Chamber, 2 August 2001, para. 554–57, 575–80.  
 Judgment, *Lukić* (IT-98-32/1-A), Appeals Chamber, 4 December 2012, para. 455.  
 Judgment, *Mladić* (IT-09-92-T), Trial Chamber, 22 November 2017, para. 3228.  
 Judgment, *Prlić et al.* (IT-04-74-A), Appeals Chamber, 29 November 2017 para. 422.  
 Judgment, *Popović et al.* (IT-05-88-T), Trial Chamber, 10 June 2010, para. 809 and 967.  
 Judgment, *Šainović et al.* (IT-05-87-A), Appeals Chamber, 23 January 2014, para. 579.  
 Judgment, *Stanišić and Župljanin* (IT-08-91-T), Trial Chamber, 27 March 2013, para. 68.  
 Judgment, *Stakić* (IT-97-24), Trial Chamber, 22 March 2006, para. 23–24 and 816–36.  
 Judgment, *Tolimir* (IT-05-88/2-T), Trial Chamber, 12 December 2012, para. 735.

### ***Jurisprudence—National.***

#### Australia.

*A v Minister for Immigration & Ethnic Affairs*, [1997] HCA 4, (1997) 190 CLR 225 AustLII.  
*AATA Case No 1500142*, [2016] AATA 3781.  
*Minister for Immigration and Multicultural Affairs v Khawar*, (2002) 210 CLR 1, [2002] HCA 14.  
*Ram v Minister for Immigration and Ethnic Affairs*, [1995] 57 FCR 565.  
*RRT Case No 1005628*, [2010] RRTA 822.

#### Canada.

*AB v Canada (Citizenship and Immigration)*, 2018 FC 237.  
*Alvarez v Canada (Citizenship and Immigration)*, 2016 FC 402.  
*Ampong v Canada (Citizenship and Immigration)*, 2010 FC 35.  
*Ayala Sosa and Others v Canada (Minister of Citizenship and Immigration)*, 2014 FC 428.  
*Canada (Attorney General) v Ward*, [1993] 2 SCR 689.  
*Étienne v Canada (Citizenship and Immigration)*, 2007 FC 64.  
*Hernandez v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1297.  
*Korienko v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1419.  
*Leke v Canada*, 2007 FC 848, [2007] FCJ 1108.  
*Litvinov v Canada (Secretary of State)*, (1994) 83 FTR 60 (TD).  
*Mia v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 14882 (FC).  
*Navaneethan v Canada (Citizenship and Immigration)*, 2015 FC 664.  
*Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760.  
*Saint Hilaire v Canada (Citizenship and Immigration)*, 2010 FC 178.

*X (Re)*, 2012 CanLII 100292 (CA IRB).  
*X (Re)*, 2014 CanLII 90950 (CA IRB).  
*X (Re)*, 2018 CanLII 83464 (CA IRB).  
*X v Canada (Immigration and Refugee Board)*, 2001 CanLII 26953 (CA IRB).

#### France.

*Ourbih*, Conseil d'Etat SSR, Dec 171858, 23 June 1997.  
*Mr O v OFPRA*, No 16014463 (CNDA 2017).  
*No 399780*, 2nd Chamber (Conseil d'Etat 2017).

#### New Zealand.

*AB (Malawi)*, [2015] NZIPT 800672.  
*AC (Venezuela)*, [2019] NZIPT 801438-439.  
*AI (Saudi Arabia)*, [2019] NZIPT 801491.  
*AT (Zimbabwe)*, [2015] NZIPT 800798.  
*BQ (Pakistan)*, [2015] NZIPT 800675.  
*Re GJ*, Refugee Appeal No 1312/93, 1 NLR 387 (RSAA 1995).

#### United Kingdom.

*Applicant S v Minister for Immigration and Multicultural Affairs*, [2004] HCA 25, 217 CLR 387.  
*AS (Iran) v The Secretary of State for the Home Department*, [2017] EWCA Civ 1539.  
*Fornah v Secretary of State for the Home Department*, [2006] UKHL 46.  
*Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah*, [1999] UKHL 20, 2 All ER 545 (1999) BAILII.

#### United States.

*Cece v Holder*, 733 F 3d 662 (7th Cir 2013).  
*OLBD v Barr (Attorney General)*, Brief for the UNHCR as Amicus Curiae, No 18-1816 (1st Cir 2019).  
*Gatimi v Holder*, 578 F 3d 611 (USCA, 7th Cir 2009).  
*Grace v Barr (Attorney General)*, Brief for the UNHCR as Amicus Curiae, No 19-5013 (DC Cir 2019).  
*Hernandez-Montiel v Immigration and Naturalization Service*, F 3d 1084 (9th Cir 2000).  
*Matter of A-B-*, 27 I&N Dec 316 (AG 2018).  
*Matter of A-R-C-G-*, 26 I&N Dec 388 (BIA 2014).  
*Matter of L-E-A-*, 27 I&N Dec 581 (AG 2019).  
*Matter of S-E-G- et al.*, 24 I&N Dec 579 (BIA 2008).  
*Matter of Toboso-Alfonso*, I&N Dec 819 (BIA 1994).  
*Re Acosta*, 19 I&N, Dec 211 (BIA 1986).  
*Re Kasinga*, 21 I&N Dec 357 (BIA 1996).  
*Tapiero de Orejuela v Gonzales*, 423 F 3d 666 (7th Cir 2005).  
*Valdiviezo-Galdamez v Attorney General of the United States*, 663 F.3d 582 (USCA, 3rd Cir 2011).

### **International and Regional Instruments**

Asian-African Legal Consultative Organization (AALCO). 1966. *Bangkok Principles on the Status and Treatment of Refugees*. 40th Sess. Text Adopted 24 June 2001. Available online: <http://www.aalco.int/final%20text%20of%20bangkok%20principles.pdf> (accessed on 23 August 2019).

African Union. 2003. *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*. CAB/LEG/66.6. Entered into Force 25 November 2005. Available online: <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> (accessed on 23 August 2019).

African Union. 2009. *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*. Entered into Force 6 December 2012. Available online: <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa> (accessed on 23 August 2019).

- African Union. 2014. *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*. Text Adopted 27 June 2014. Available online: [https://au.int/sites/default/files/treaties/36398-treaty-0045\\_-\\_protocol\\_on\\_amendments\\_to\\_the\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_e-compressed.pdf](https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e-compressed.pdf) (accessed on 22 August 2019).
- Association of Southeast Asian Nations (ASEAN). 2007. *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*. Text Adopted 23 January 2007. Available online: [https://asean.org/?static\\_post=asean-declaration-on-the-protection-and-promotion-of-the-rights-of-migrant-workers](https://asean.org/?static_post=asean-declaration-on-the-protection-and-promotion-of-the-rights-of-migrant-workers) (accessed on 23 August 2019).
- Association of Southeast Asian Nations (ASEAN). 2012. *ASEAN Human Rights Declaration*. Text Adopted 18 November 2012. Available online: <https://asean.org/asean-human-rights-declaration/> (accessed on 23 August 2019).
- Association of Southeast Asian Nations (ASEAN). 2013. *ASEAN Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children*. Available online: [https://www.ohchr.org/Documents/Issues/Women/WG/ASEANdeclarationVaW\\_violenceagainstchildren.pdf](https://www.ohchr.org/Documents/Issues/Women/WG/ASEANdeclarationVaW_violenceagainstchildren.pdf) (accessed on 24 August 2019).
- Council of Europe. 1950. *European Convention for the Protection of Human Rights and Fundamental Freedoms*. ETS 5. Entered into Force 3 September 1953. Available online: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf) (accessed on 23 August 2019).
- Council of Europe. 1952. *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*. ETS 9. Entered into Force 18 May 1954. Available online: <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/009> (accessed on 23 August 2019).
- Council of Europe. 1961. *European Social Charter*. ETS 35. Entered into Force 26 February 1965. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035> (accessed on 23 August 2019).
- Council of Europe. 1963. *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than Those Already Included in the Convention and in the First Protocol Thereto*. ETS 46. Entered into force 2 May 1968. Available online: <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/046> (accessed on 23 August 2019).
- Council of Europe. 1977. *European Convention on the Legal Status of Migrant Workers*. ETS 93. Entered into Force 1 May 1983. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/093> (accessed on 23 August 2019).
- Council of Europe. 1983. *Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of Death Penalty*. ETS 114. Entered into Force 1 March 1985. Available online: <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/114> (accessed on 23 August 2019).
- Council of Europe. 1984. *Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*. ETS 117. Entered into Force 1 November 1988. Available online: <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/117> (accessed on 23 August 2019).
- Council of Europe. 1987. *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. ETS 126. Entered into Force 1 February 1989. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/126> (accessed on 23 August 2019).
- Council of Europe. 1992a. *European Charter for Regional or Minority Languages*. ETS 148. Entered into Force 1 March 1998. Available online: <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/148> (accessed on 23 August 2019).
- Council of Europe. 1992b. *European Convention on the Participation of Foreigners in Public Life at the Local Level*. ETS 144. Entered into Force 1 May 1997. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/144> (accessed on 23 August 2019).
- Council of Europe. 1994. *Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*. ETS 155. Entered into Force 1 November 1998. Available online: <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/155> (accessed on 23 August 2019).
- Council of Europe. 1995. *Framework Convention for the Protection of National Minorities*. ETS 157. Entered into Force 1 February 1998. Available online: <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/157> (accessed on 23 August 2019).

- Council of Europe. 1996a. *European Convention on the Exercise of Children's Rights*. ETS 160. Entered into Force 1 July 2000. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/160> (accessed on 23 August 2019).
- Council of Europe. 1996b. *Revised European Social Charter*. ETS 163. Entered into Force 1 July 1999. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163> (accessed on 23 August 2019).
- Council of Europe. 1997a. *Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*. ETS 164. Entered into Force 1 December 1999. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164> (accessed on 23 August 2019).
- Council of Europe. 1997b. *European Convention on Nationality*. ETS 166. Entered into Force 1 March 2000. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/166> (accessed on 23 August 2019).
- Council of Europe. 2000. *Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms on the Prohibition of Discrimination*. ETS 177. Entered into Force 1 April 2005. Available online: <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/177> (accessed on 23 August 2019).
- Council of Europe. 2001. *Convention on Cybercrime*. ETS No 185. Entered into Force 1 July 2004. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185> (accessed on 22 August 2019).
- Council of Europe. 2002. *Protocol 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances*. ETS 187. Entered into Force 1 July 2003. Available online: <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/187> (accessed on 23 August 2019).
- Council of Europe. 2003. *Additional Protocol to the Convention on Cybercrime, concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems*. ETS No 189. Entered into Force 1 March 2006. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/189> (accessed on 22 August 2019).
- Council of Europe. 2004a. *Recommendation Rec(2004)9 of the Committee of Ministers to Member States on the Concept of 'Membership of a Particular Social Group' (MPSG) in the context of the 1951 Convention Relating to the Status of Refugees*. Rec(2004)9. 890th Mtg. Text adopted 30 June 2004. Available online: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805dc829](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805dc829) (accessed on 23 August 2019).
- Council of Europe. 2004b. *Protocol 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Amending the Control System of the Convention*. CETS 194. Entered into Force 1 June 2010. Available online: <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/194> (accessed on 23 August 2019).
- Council of Europe. 2005a. *Council of Europe Convention on Action against Trafficking in Human Beings*. CETS 197. Entered into Force 1 February 2008. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197> (accessed on 23 August 2019).
- Council of Europe. 2005b. *Council of Europe Convention on the Prevention of Terrorism*. CETS No 196. Entered into Force 1 June 2007. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/196> (accessed on 22 August 2019).
- Council of Europe. 2007. *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*. CETS 201. Entered into Force 1 July 2010. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201> (accessed on 23 August 2019).
- Council of Europe. 2011. *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*. CETS 210. Entered into Force 1 August 2014. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210> (accessed on 23 August 2019).
- Council of Europe. 2013a. *Protocol 15 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*. CETS 213. Opened for Signature 24 June 2013. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213> (accessed on 23 August 2019).
- Council of Europe. 2013b. *Protocol 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*. CETS 214. Entered into Force 1 August 2018. Available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214> (accessed on 23 August 2019).

- International Civil Aviation Organization (ICAO). 1988. *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*. 1589 UNTS 474. Entered into Force 6 August 1989. Available online: <https://www.un.org/ruleoflaw/files/Conv7-english.pdf> (accessed on 22 August 2019).
- International Civil Aviation Organization (ICAO). 2010a. *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*. Entered into Force 1 July 2018. Available online: [https://sherloc.unodc.org/res/cld/treaties/definitions/treaty/convention-on-the-suppression-of-unlawful-acts-relating-to-international-civil-aviation-2010\\_html/Beijing\\_convention\\_2010.pdf](https://sherloc.unodc.org/res/cld/treaties/definitions/treaty/convention-on-the-suppression-of-unlawful-acts-relating-to-international-civil-aviation-2010_html/Beijing_convention_2010.pdf) (accessed on 22 August 2019).
- International Civil Aviation Organization (ICAO). 2010b. *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*. Text Adopted 10 September 2010. Available online: [https://www.icao.int/secretariat/legal/Docs/beijing\\_protocol\\_multi.pdf](https://www.icao.int/secretariat/legal/Docs/beijing_protocol_multi.pdf) (accessed on 22 August 2019).
- International Committee of the Red Cross (ICRC). 1949a. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949*. 75 UNTS 31. Entered into Force 21 October 1950. Available online: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument> (accessed on 22 August 2019).
- International Committee of the Red Cross (ICRC). 1949b. *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949*. 75 UNTS 85. Entered into Force 21 October 1950. Available online: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/370?OpenDocument> (accessed on 22 August 2019).
- International Committee of the Red Cross (ICRC). 1949c. *Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949*. 75 UNTS 135. Entered into Force 21 October 1950. Available online: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/375?OpenDocument> (accessed on 22 August 2019).
- International Committee of the Red Cross (ICRC). 1949d. *Geneva Convention Relative to the Protection of Civilian Persons in Times of War of 12 August 1949*. 75 UNTS 287. Entered into Force 21 October 1950. Available online: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/380> (accessed on 22 August 2019).
- International Committee of the Red Cross (ICRC). 1977a. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977*. 1125 UNTS 3. Entered into Force 7 December 1978. Available online: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470> (accessed on 22 August 2019).
- International Committee of the Red Cross (ICRC). 1977b. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977*. 1125 UNTS 609. Entered into Force 7 December 1978. Available online: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument> (accessed on 22 August 2019).
- International Labour Organization (ILO). 1930. *Convention concerning Forced or Compulsory Labour*. No 29, 14th Sess. Entered into Force 1 May 1932. Available online: [https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C029](https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C029) (accessed on 23 August 2019).
- International Labour Organization (ILO). 1948. *Convention Concerning Freedom of Association and Protection of the Right to Organise*. No 87, 31st Sess. Entered into Force 4 July 1950. Available online: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100\\_ILO\\_CODE:C087:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100_ILO_CODE:C087:NO) (accessed on 23 August 2019).
- International Labour Organization (ILO). 1949. *Convention Concerning the Application of Principles of the Right to Organise and to Bargain Collectively*. No 98, 32nd Sess. Entered into Force 18 July 1951. Available online: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C098](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098) (accessed on 23 August 2019).
- International Labour Organization (ILO). 1951. *Equal Remuneration Convention*. No 100, 34th Sess. Entered into Force 23 May 1953. Available online: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C100](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100) (accessed on 23 August 2019).
- International Labour Organization (ILO). 1957. *Convention Concerning the Abolition of Forced Labour*. No 105, 40th Sess. Entered into Force 17 January 1959. Available online: [https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C105](https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105) (accessed on 23 August 2019).
- International Labour Organization (ILO). 1958. *Convention concerning Discrimination in Respect of Employment and Occupation*. No 111, 42nd Sess. Entered into Force 15 June 1960. Available online: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C111](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111) (accessed on 23 August 2019).

- International Labour Organization (ILO). 1973. *Convention concerning Minimum Age for Admission to Employment*. No 138, 58th Sess. Entered into Force 19 June 1976. Available online: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C138](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C138) (accessed on 23 August 2019).
- International Labour Organization (ILO). 1999. *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*. No 182, 87th Sess. Entered into Force 19 November 2000. Available online: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C182](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182) (accessed on 23 August 2019).
- International Maritime Organization (IMO). 1988. *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*. 1678 UNTS 304. Entered into Force 1 March 1992. Available online: <https://treaties.un.org/pages/showDetails.aspx?objid=08000002800b9af3> (accessed on 22 August 2019).
- International Maritime Organization (IMO). 2005. *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*. LEG/CONF.15/21. Text Adopted 14 October 2005. Available online: <https://www.refworld.org/docid/49f58c8a2.html> (accessed on 22 August 2019).
- League of Arab States. 1994. *Arab Charter of Human Rights*. Text Adopted 15 September 1994. Available online: <https://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/ArabCharter.aspx> (accessed on 23 August 2019).
- League of Arab States. 1998. *The Arab Convention for the Suppression of Terrorism*. Text Adopted 22 April 1998. Available online: <https://www.legal-tools.org/en/browse/record/c78c50/> (accessed on 22 August 2019).
- National Assembly of Cambodia. 2001. *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*; NS/RKM/1004/006. Text as Amended 27 October 2004. Available online: [https://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf) (accessed on 22 August 2019).
- Organization of American States (OAS). 1969. *American Convention on Human Rights*. 1144 UNTS 123. Entered into Force 18 July 1978. Available online: <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f10e1> (accessed on 23 August 2019).
- Organization of American States (OAS). 1985. *Inter-American Convention to Prevent and Punish Torture*. OASTS 67. Entered into Force 28 February 1987. Available online: <https://www.oas.org/juridico/english/treaties/a-51.html> (accessed on 23 August 2019).
- Organization of American States (OAS). 1990. *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*. OASTS 73. Text Adopted 8 June 1990. Available online: <https://www.oas.org/juridico/english/treaties/a-53.html> (accessed on 23 August 2019).
- Organization of American States (OAS). 1994a. *Inter-American Convention on Forced Disappearance*. OASTS 68. Entered into Force 28 March 1996. Available online: <https://www.oas.org/juridico/english/treaties/a-60.html> (accessed on 23 August 2019).
- Organization of American States (OAS). 1994b. *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*. 33 ILM 1534. Entered into Force 5 March 1995. Available online: <https://www.oas.org/juridico/english/treaties/a-61.html> (accessed on 23 August 2019).
- Organization of American States (OAS). 1999a. *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*. OASTS 69. Entered into Force 16 November 1999. Available online: <https://www.oas.org/juridico/english/signs/a-52.html> (accessed on 23 August 2019).
- Organization of American States (OAS). 1999b. *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities*. AG/RES.1608. Entered into Force 14 September 2001. Available online: <https://www.oas.org/juridico/english/treaties/a-65.html> (accessed on 23 August 2019).
- Organization of American States (OAS). 2002. *Inter-American Convention Against Terrorism*. AG/RES 1840. Text Adopted 2 June 2002. Available online: [https://www.oas.org/xxxiiga/english/docs\\_en/docs\\_items/AGres1840\\_02.htm](https://www.oas.org/xxxiiga/english/docs_en/docs_items/AGres1840_02.htm) (accessed on 22 August 2019).
- Organization for African Unity (OAU). 1969. *Convention Governing the Specific Aspects of Refugee Problems in Africa*. 1001 UNTS 45. Entered into Force 20 June 1974. Available online: <https://au.int/en/treaties/oau-convention-governing-specific-aspects-refugee-problems-africa> (accessed on 23 August 2019).
- Organization of African Unity (OAU). 1981. *African Charter on Human and Peoples' Rights*. 1520 UNTS 217. Entered into Force 21 October 1986. Available online: <https://au.int/en/treaties/african-charter-human-and-peoples-rights> (accessed on 23 August 2019).

- Organization of African Unity (OAU). 1990. *African Charter on the Rights and Welfare of the Child*. CAB/LEG/153/Rev.2. Entered into Force 29 November 1999. Available online: <https://au.int/en/treaties/african-charter-rights-and-welfare-child> (accessed on 23 August 2019).
- Organization of African Unity (OAU). 1999. *OAU Convention on the Prevention and Combating of Terrorism*. Entered into Force 6 December 2002. Available online: <https://au.int/en/treaties/oau-convention-prevention-and-combating-terrorism> (accessed on 22 August 2019).
- South Asian Association for Regional Cooperation (SAARC). 1987. *SAARC Regional Convention on Suppression of Terrorism*. Text Adopted 4 November 1987. Available online: <https://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf> (accessed on 22 August 2019).
- United Nations High Commissioner for Refugees (UNHCR). 1984. *Cartagena Declaration on Refugees. Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, November 22*. Available online: <https://www.refworld.org/docid/3ae6b36ec.html> (accessed on 21 August 2019).
- United Nations. 1945a. *Charter of the International Military Tribunal—Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*. 82 UNTS 279. Text Adopted 8 August 1945. Available online: <https://www.refworld.org/docid/3ae6b39614.html> (accessed on 22 August 2019).
- United Nations. 1945b. *Charter of the United Nations*. CAN TS 1945 No 7. Entered into Force 24 October 1945. Available online: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=I-1&chapter=1&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&clang=_en) (accessed on 23 August 2019).
- United Nations. 1948a. *Convention on the Prevention and Punishment of the Crime of Genocide*. 78 UNTS 277. Entered into Force 12 January 1951. Available online: <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf> (accessed on 22 August 2019).
- United Nations. 1948b. *Universal Declaration of Human Rights*. GA Res 217A (III), UNAGOR, 3rd Sess, Supp No 13. Text Adopted 10 December 1948. Available online: <https://www.un.org/en/universal-declaration-human-rights/> (accessed on 23 August 2019).
- United Nations. 1951. *Convention Relating to the Status of Refugees*. 189 UNTS 137. Entered into Force 22 April 1954. Available online: <https://www.unhcr.org/1951-refugee-convention.html> (accessed on 23 August 2019).
- United Nations. 1956. *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*. 266 UNTS 3. Entered into Force 30 April 1957. Available online: [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XVIII-4&chapter=18&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVIII-4&chapter=18&Temp=mtdsg3&clang=_en) (accessed on 22 August 2019).
- United Nations. 1961. *Single Convention on Narcotic Drugs, 1961*. 520 UNTS 151. Entered into Force 13 December 1964. Available online: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-15&chapter=6&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-15&chapter=6&lang=en) (accessed on 22 August 2019).
- United Nations. 1966a. *International Covenant on Civil and Political Rights*. 999 UNTS 171. Entered into Force 23 March 1976. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en) (accessed on 23 August 2019).
- United Nations. 1966b. *International Covenant on Economic, Social and Cultural Rights*. 993 UNTS 3. Entered into Force 3 January 1976. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en) (accessed on 23 August 2019).
- United Nations. 1966c. *International Convention on the Elimination of All Forms of Racial Discrimination*. 660 UNTS 195. Entered into Force 4 January 1969. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en) (accessed on 23 August 2019).
- United Nations. 1969. *Vienna Convention on the Law of Treaties*. 1155 UNTS 331. Entered into Force 27 January 1980. Available online: [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en) (accessed on 23 August 2019).
- United Nations. 1970. *Convention for the Suppression of Unlawful Seizure of Aircraft*. 870 UNTS 105. Entered into Force 14 October 1971. Available online: <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280112834> (accessed on 22 August 2019).
- United Nations. 1971. *Convention on Psychotropic Substances*. 1019 UNTS 175. Entered into Force 16 August 1976. Available online: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-16&chapter=6](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-16&chapter=6) (accessed on 22 August 2019).

- United Nations. 1972. *Protocol Amending the Single Convention on Narcotic Drugs*. 976 UNTS 3. Entered into Force 8 August 1975. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-17&chapter=6&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-17&chapter=6&clang=_en) (accessed on 22 August 2019).
- United Nations. 1973a. *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*. 1035 UNTS 167. Entered into Force 20 February 1977. Available online: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-7&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-7&chapter=18&clang=_en) (accessed on 22 August 2019).
- United Nations. 1973b. *International Convention on the Suppression and Punishment of the Crime of Apartheid*. 1015 UNTS 243. Entered into Force 18 July 1976. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-7&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-7&chapter=4&clang=_en) (accessed on 22 August 2019).
- United Nations. 1979a. *Convention on the Elimination of All Forms of Discrimination Against Women*. 1249 UNTS 13. Entered into Force 3 September 1981. Available online: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en) (accessed on 23 August 2019).
- United Nations. 1979b. *International Convention Against the Taking of Hostages*. 1316 UNTS 205. Entered into Force 3 June 1983. Available online: <https://treaties.un.org/doc/db/Terrorism/english-18-5.pdf> (accessed on 22 August 2019).
- United Nations. 1982. *United Nations Convention on the Law of the Sea*. 1833 UNTS 3. Entered into Force 16 November 1994. Available online: [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en) (accessed on 22 August 2019).
- United Nations. 1984. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. 1465 UNTS 85. Entered into Force 26 June 1987. Available online: [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=en) (accessed on 23 August 2019).
- United Nations. 1988a. *Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation*. 1678 UNTS 221. Entered into Force 1 March 1992. Available online: <https://treaties.un.org/doc/Publication/UNTS/Volume%201678/v1678.pdf> (accessed on 22 August 2019).
- United Nations. 1988b. *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. 1582 UNTS 95. Entered into Force 11 November 1990. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-19&chapter=6&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en) (accessed on 22 August 2019).
- United Nations. 1989. *Convention on the Rights of the Child*. 1577 UNTS 3. Entered into Force 2 September 1990. Available online: [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en) (accessed on 23 August 2019).
- United Nations. 1990. *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. 2220 UNTS 3. Entered into Force 1 July 2003. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-13&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&clang=_en) (accessed on 23 August 2019).
- United Nations. 1993. *Statute of the International Criminal Tribunal for the Former Yugoslavia (as Amended on 17 May 2002)*. SC Res 827, UNSCOR, 48th Sess, 3217th Mtg. Text Adopted 25 May 1993. Available online: [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf) (accessed on 22 August 2019).
- United Nations. 1994a. *Convention on the Safety of United Nations and Associated Personnel*. 2051 UNTS 363. Entered into Force 15 January 1999. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-8&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-8&chapter=18&clang=_en) (accessed on 22 August 2019).
- United Nations. 1994b. *Statute of the International Criminal Tribunal for Rwanda (as Amended on 13 October 2006)*. SC Res 955, UNSCOR 49th Sess, 3453rd Mtg. Text Adopted 8 November 1994. Available online: [https://unictr.irmct.org/sites/unictr.org/files/legal-library/100131\\_Statute\\_en\\_fr\\_0.pdf](https://unictr.irmct.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf) (accessed on 22 August 2019).
- United Nations. 1997. *International Convention for the Suppression of Terrorist Bombings*. 2149 UNTS 256. Entered into Force 23 May 2001. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-9&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-9&chapter=18&clang=_en) (accessed on 22 August 2019).
- United Nations. 1998. *Rome Statute of the International Criminal Court*. 2187 UNTS 90. Entered into Force 1 July 2002. Available online: <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf> (accessed on 22 August 2019).
- United Nations. 1999. *International Convention for the Suppression of the Financing of Terrorism*. 2178 UNTS 197. Entered into Force 10 April 2002. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-11&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&clang=_en) (accessed on 22 August 2019).

- United Nations. 2000a. *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*. 2171 UNTS 227. Entered into Force 18 January 2002. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-c&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en) (accessed on 22 August 2019).
- United Nations. 2000b. *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Crime*. 2241 UNTS 507. Entered into Force 28 January 2004. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-b&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&clang=_en) (accessed on 22 August 2019).
- United Nations. 2000c. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*. 2237 UNTS 319. Entered into Force 25 December 2003. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en) (accessed on 22 August 2019).
- United Nations. 2000d. *United Nations Convention against Transnational Organized Crime*. 2225 UNTS 209. Entered into Force 29 September 2003. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en) (accessed on 22 August 2019).
- United Nations. 2001. *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime*. 2326 UNTS 208. Entered into Force 3 July 2005. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-c&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-c&chapter=18&clang=_en) (accessed on 22 August 2019).
- United Nations. 2002. *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute)*. 2178 UNTS 138. Entered into Force 12 April 2002. Available online: <http://www.rscsl.org/Documents/scsl-statute.pdf> (accessed on 22 August 2019).
- United Nations. 2003. *United Nations Convention against Corruption*. 2349 UNTS 41. Entered into Force 14 December 2005. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVIII-14&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-14&chapter=18&lang=en) (accessed on 22 August 2019).
- United Nations. 2005. *International Convention for the Suppression of Acts of Nuclear Terrorism*. 2445 UNTS 89. Entered into Force 7 July 2007. Available online: <https://treaties.un.org/doc/db/Terrorism/english-18-15.pdf> (accessed on 22 August 2019).
- United Nations. 2006a. *Convention for the Protection of All Persons from Enforced Disappearance*. 2716 UNTS 3. Entered into Force 23 December 2010. Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-16&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&clang=_en) (accessed on 23 August 2019).
- United Nations. 2006b. *Convention on the Rights of Persons with Disabilities*. 2515 UNTS 3. Entered into Force 3 May 2008. Available online: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4) (accessed on 23 August 2019).
- United States. 1946. *Charter of the International Military Tribunal for the Far East*. TIAS 1589. Signed in Tokyo on 19 January 1946, Amended 26 April 1949. Available online: [https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3\\_1946%20Tokyo%20Charter.pdf](https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf) (accessed on 22 August 2019).

## Secondary Sources

- Australian Appeals Tribunal (AAT). 2019. *Guide to Refugee Law in Australia, Chapter 5: Refugee Grounds and Nexus*. Available online: <https://www.aat.gov.au/guide-to-refugee-law-in-australia> (accessed on 13 September 2019).
- Acevedo, Juan Pablo Pérez-León. 2017. The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses. *Anuario Mexicano de Derecho Internacional* 17: 145–86. [CrossRef]
- Aleinikoff, Alexander. 2003. Protected Characteristics and Social Perceptions: An Analysis of the Meaning of ‘Membership of a Particular Social Group’. In *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*. Edited by Erika Feller, Volker Türk and Frances Nicholson. Cambridge: Cambridge University Press, pp. 263–311.
- Boyd, Maddie. 2018. Refuge from Violence: A Global Comparison of the Treatment of Domestic Violence Asylum Claims. *Berkeley La Raza Law Journal* 29: 1–26.
- Braimah, Tim. 2016. Same-Sex Oriented Persons as Members of a Particular Social Group: What’s Non-Discrimination Got to do With It? *International Journal of Legal Research* 2: 553–76.

- Burson, Bruce, and David James Cantor. 2016. Introduction: Interpreting the Refugee Definition via Human Rights Standards. In *Human Rights and the Refugee Definition, Comparative Legal Practice and Theory*. Edited by Bruce Burson and David James Cantor. Leiden: Brill Nijhoff, pp. 1–24.
- Cantor, David James. 2016. Defining Refugee: Persecution, Surrogacy and the Human Rights Paradigm. In *Human Rights and the Refugee Definition, Comparative Legal Practice and Theory*. Edited by Bruce Burson and David James Cantor. Leiden: Brill Nijhoff, pp. 349–95.
- Coalition for the International Criminal Court (CICC). 2017. Implementing the Rome Statute of the International Criminal Court. Available online: [http://www.coalitionfortheicc.org/sites/default/files/cicc\\_documents/implementing\\_rome\\_statute.pdf](http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/implementing_rome_statute.pdf) (accessed on 24 August 2019).
- Conte, Carmine. 2016. What about Refugees with Disabilities? The Interplay between EU Asylum Law and the UN Convention on the Rights of Persons with Disabilities. *European Journal of Migration and Law* 18: 327–49. [CrossRef]
- Council of Europe. n.d. Human Rights Treaties. Available online: <https://www.humanrights.ch/en/standards/ce-treaties/> (accessed on 24 August 2019).
- Crock, Mary, Christine Ernst, and Ron McCallum. 2013. Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities. *International Journal of Refugee Law* 24: 735–64. [CrossRef]
- Currie, Robert, and Joseph Rikhof. 2013. *International & Transnational Criminal Law*, 2nd ed. Toronto: Irwin Law, pp. 10–20, 114–15, 134, 219–25, 325–26.
- European Asylum Support Office (EASO). 2016. Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis. Available online: <https://www.easo.europa.eu/sites/default/files/QIP%20-%20JA.pdf> (accessed on 13 September 2019).
- European Union (EU). 2011. *Council Directive 2011/95/EU of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast)*. OJ L 337/9. Available online: <https://www.refworld.org/docid/4f197df02.html> (accessed on 21 August 2019).
- European Union Agency for Fundamental Rights, the European Court of Human Rights and the Council of Europe. 2018. *Handbook on European Non-Discrimination Law, 2018 Edition*. pp. 155–228. Available online: [https://www.echr.coe.int/Documents/Handbook\\_non\\_discrim\\_law\\_ENG.pdf](https://www.echr.coe.int/Documents/Handbook_non_discrim_law_ENG.pdf) (accessed on 15 September 2019).
- Farrior, Stephanie. 2015. *Equality and Non-Discrimination under International Law*. New York: Routledge, vol. II.
- Foster, Michelle. 2012. The ‘Ground with the Least Clarity’: A Comparative Study of Jurisprudential Developments relating to ‘Membership of a Particular Social Group’. In *United Nations High Commissioner for Refugees. Legal and Protection Policy Research Series* 25: 1–76.
- Goodwin-Gill, Guy, and Jane McAdam. 2007. *The Refugee in International Law*, 3rd ed. Oxford: Oxford University Press.
- Grant, Helen P. 2017. Survival of only the Fittest Social Groups: The Evolutionary Impact of Social Distinction and Particularity. *University of Pennsylvania Journal of International Law* 38: 895–940.
- Hathaway, James C., and Michelle Foster. 2014. *The Law of Refugee Status*, 2nd ed. Cambridge: Cambridge University Press.
- International Labour Organization (ILO). n.d. “Conventions and Recommendations”. Available online: <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (accessed on 24 August 2019).
- Immigration and Refugee Board of Canada (IRB). 1996. *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*. Available online: <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx> (accessed on 20 August 2019).
- Immigration and Refugee Board of Canada (IRB). 2018. *Interpretation of the Convention Refugee Definition in the Case Law*. Available online: <https://irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef.aspx#table> (accessed on 20 August 2019).
- Jackson, Ivor C. 1999. *The Refugee Concept in Group Situations*. The Hague, London and Boston: Martinus Nijhoff Publishers, pp. 191–94.
- Kälin, Walter, and Jörg Künzli. 2009. *The Law of International Human Rights Protection*. Oxford: Oxford University Press, pp. 31–32.

- Kanter, Arlene, and Eric Rosenthal. 2018. The Right of People with Disabilities to Asylum and Protection from Deportation on the Grounds of Persecution or Torture Related to their Disability. SSRN. Available online: [https://www.researchgate.net/publication/327294523\\_The\\_Right\\_of\\_People\\_with\\_Disabilities\\_to\\_Asylum\\_and\\_Protection\\_from\\_Deportation\\_on\\_the\\_Grounds\\_of\\_Persecution\\_or\\_Torture\\_Related\\_to\\_Their\\_Disability#pf6](https://www.researchgate.net/publication/327294523_The_Right_of_People_with_Disabilities_to_Asylum_and_Protection_from_Deportation_on_the_Grounds_of_Persecution_or_Torture_Related_to_Their_Disability#pf6) (accessed on 16 September 2019).
- LaViolette, Nicole. 2015. Canadian Appellate Level Decisions Dealing with Refugee Claims Based on Sexual Orientation and Gender Identity—Listed According to the Definition of a Convention Refugee. SSRN. Available online: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2594937](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2594937) (accessed on 14 September 2019).
- Legal Tools Database. n.d. “National Criminal Jurisdiction”. Available online: [https://www.legal-tools.org/en/browse/itfolder/0\\_24914/#results](https://www.legal-tools.org/en/browse/itfolder/0_24914/#results) (accessed on 24 August 2019).
- Lewis, Rachel, and Amy Shuman. 2016. Asylum, Challenges Faced by Sexual Minorities. In *Wiley Blackwell Encyclopedia of Gender and Sexuality*. Edited by Nancy A. Naples, Renee C Hoogland, Maithree Wickramasinghe and Wai Ching Angela Wong. New York: John Wiley & Sons.
- Library of Congress. 2016. Genocide, Crimes Against Humanity, and War Crimes Jurisdiction. Available online: <https://www.loc.gov/law/help/genocide/chart.php> (accessed on 24 August 2019).
- Marouf, Fatma. 2019. Becoming Unconventional: Constricting the Particular Social Group Ground for Asylum. *North Carolina Journal of International Law* 44: 487–518.
- Maystre, Magali. 2014. The Interaction between International Refugee Law and International Criminal Law with respect to Child Soldiers. *Journal of International Criminal Justice* 12: 975–96. [CrossRef]
- Millbank, Jenni. 2009. ‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determination. *International Journal of Refugee Law* 21: 1–33. [CrossRef]
- Murphy, Sean D. 2019. *Fourth Report on Crimes Against Humanity*. International Law Commission: 71st Sess, 18 February 2019. UN Doc A/CN.4/725. Available online: <http://legal.un.org/docs/?symbol=A/CN.4/725> (accessed on 24 August 2019).
- United Nations Office of the High Commissioner for Human Rights (OHCHR). 2008. *Fact Sheet No 32, Human Rights, Terrorism and Counter-Terrorism*. Available online: <https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> (accessed on 24 August 2019).
- Oosterveld, Valerie. 2014. Gender at the Intersection of International Refugee Law and International Criminal Law. *Journal of International Criminal Justice* 12: 953–74. [CrossRef]
- Owens, Robert B. 2018. What is a Social Group in the Eyes of the Law? Knowledge Work in Refugee-Status Determination. *Law & Social Inquiry* 43: 1257–78.
- Querton, Christel. 2012. The Interpretation of the Convention Ground ‘Membership of a Particular Social Group’ in the Context of Gender-Related Claims for Asylum: A Critical Analysis of the Tribunal’s Approach in the UK. *Refugee Law Initiative*. Working Paper No 3. Available online: [https://sas-space.sas.ac.uk/4690/5/RLI\\_Working\\_Paper\\_No.3.pdf](https://sas-space.sas.ac.uk/4690/5/RLI_Working_Paper_No.3.pdf) (accessed on 14 September 2019).
- Quintero, Claudia B. 2018. Ganging Up on Immigration Law: Asylum Law and the Particular Social Group Standard—Former Gang Members and Their Need for Asylum Protections. *University of Massachusetts Law Review* 13: 192–233.
- Rehaag, Sean. 2017. Sexual Orientation in Canada’s Revised Refugee Determination System: An Empirical Snapshot. *Canadian Journal of Women and the Law* 29: 259–89. [CrossRef]
- Schoenholtz, Andrew I. 2015. The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century. *Chicago Journal of International Law* 16: 81–126.
- United Nations High Commissioner for Refugees (UNHCR). 2002. *Guidelines on International Protection: “Membership of a Particular Social Group” within the context of Article 1A(2) of the 1951 Convention as/or its 1967 Protocol Relating to the Status of Refugees*. HCR/GIP/02/02. Available online: <https://www.unhcr.org/3d58de2da.pdf> (accessed on 20 August 2019).
- United Nations High Commissioner for Refugees (UNHCR). 2008. *UNHCR Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity*. Geneva: UNHCR.
- United Nations High Commissioner for Refugees (UNHCR). 2011. *UNHCR Resettlement Handbook*. Geneva: UNHCR.

- United Nations High Commissioner for Refugees (UNHCR). 2018. Submission by the Office of the United Nations High Commissioner for Refugees in case numbers 201701423/1/V2, 201704575/1/V2 and 201700575/1/V2 before the Council of State. No. 19-5013. Available online: <https://www.refworld.org/docid/5c001b0a4.html> (accessed on 16 September 2019).
- United Nations High Commissioner for Refugees (UNHCR). 2019. *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*. Revised February. Geneva: UNHCR.
- United Nations Office on Drugs and Crime (UNODC). n.d. "Sharing Electronic Resources and Laws on Crime; Treaties". Available online: <https://sherloc.unodc.org/cld/v3/sherloc/treaties/index.html#?mv=treaties&v=results> (accessed on 24 August 2019).
- Vogel, Theresa A. 2019. Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence. *University of Michigan Journal of Law Reform* 52: 343–435.
- Weis, Paul. 1990. The Refugee Convention, 1951: The Travaux Préparatoires analysed with a Commentary by Dr Paul Weis. United Nations High Commissioner for Refugees. Available online: <https://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html> (accessed on 16 September 2019).
- Zimmermann, Andreas. 2011. *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*. Oxford: Oxford University Press.



© 2019 by the authors. Licensee MDPI, Basel, Switzerland. This article is an open access article distributed under the terms and conditions of the Creative Commons Attribution (CC BY) license (<http://creativecommons.org/licenses/by/4.0/>).