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Michael Kagan

*University of Nevada, Las Vegas – William S. Boyd School of Law*

William P. Johnson

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# PERSECUTION IN THE FOG OF WAR: THE HOUSE OF LORDS' DECISION IN *ADAN*

*Michael Kagan\**  
*William P. Johnson\*\**

Of all the words in the international refugee definition,<sup>1</sup> “for reasons of” are possibly the most forgettable. Yet these three words are leading some courts and tribunals to deny asylum to people at risk of the most serious human rights violations when committed in the context of civil war.

International law requires that a refugee have a well-founded fear of being persecuted *for reasons of* race, religion, nationality, political opinion or membership of a particular social group.<sup>2</sup> It is not enough to be at risk of being persecuted, nor is it even enough to be a member of a particular race or religion. There must be a “nexus” between the danger and one of the five Convention-recognized reasons for persecution. In the 1998 decision in *Adan v. Secretary of State for the Home Department*,<sup>3</sup> the House of Lords concluded that a man fleeing clan warfare in Somalia could not meet the nexus test. The House of Lords did not doubt that the man was at risk of serious harm at the hands of a rival clan, but the Lords nonetheless declined to recognize his claim. Because Adan and other members of his clan were found to face no greater danger than members of other clans, he could not convince the Lords that the risk to him was for reasons of clan identity (a form of race or nationality). The decision shows how the interpretation of three simple words can determine whether people who escape from the world’s most vicious wars will be protected as refugees.

In this Article, we argue that the House of Lords’ reasoning in *Adan* was seriously flawed. The House of Lords correctly recognized that evidence that minorities face a heightened risk of being persecuted can be

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\* Michael Kagan (J.D. Michigan 2000) is adjunct assistant professor at the American University in Cairo and legal adviser to the Musa’adeen refugee aid initiative in Cairo, Egypt.

\*\* William P. Johnson (J.D. Michigan 2001) is a law clerk to Justice Russell A. Anderson of the Minnesota Supreme Court. The authors are grateful to the other student participants in the Colloquium, who contributed much of the research upon which this article is based.

1. A refugee is any person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country . . . .” Convention relating to the Status of Refugees, July 28, 1951, art. 1(A)(2), 189 U.N.T.S. 150, 152 [hereinafter *Refugee Convention*].

2. *Id.*

3. *Adan v. Sec’y of State for the Home Dep’t*, [1999] 1 A.C. 293, [1998] 2 W.L.R. 702, [1998] 2 All E.R. 453 (H.L. 1998).

sufficient to show a nexus to a Convention ground. Yet it erred when it went on to hold that *only* differentially at-risk individuals or groups can benefit from refugee status. If a person's risk of being persecuted is causally linked to his or her race, religion, nationality, membership of a particular social group, or political opinion, the nexus requirement is satisfied irrespective of whether the applicant is a member of a minority group that is particularly vulnerable to harm.

### 1. Factual Assumptions

Hassan Hussein Adan fled Somalia with his wife and children in 1988. Adan belonged to both the Isaaq clan and the Habrawal sub-clan. He first applied for asylum in the United Kingdom in 1990.

In 1991, Somalia's President Siad Barre fell from power, leaving the country with essentially no government. After Barre's government dissolved, the Hawiye clan massacred many members of other clans in Mogadishu, including members of Adan's Isaaq clan. In the mid-1990s, the Isaaq became the dominant clan in the self-proclaimed independent region of Somaliland. The Habrawal sub-clan has generally backed Muhamed Ibrahim Egal as president of Somaliland.<sup>4</sup> Very little of this factual context appears in the Lords' decision.<sup>5</sup> The House of Lords showed a reluctance to explore individual complexities, simply adopting the view that "every group seems to be fighting some other group or groups in an endeavour to gain power,"<sup>6</sup> as Lord Slynn wrote in his concurring opinion.

A Special Adjudicator had initially determined that Adan demonstrated a well-founded fear of being persecuted by "members of the armed groups or militias of other clans or alliances"<sup>7</sup> that battled for position in Somalia. However, the Immigration Appeal Tribunal (IAT) determined

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4. See generally U.S. DEP'T OF STATE, SOMALIA: PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS (2000); Danish Immigration Service (Udlændinge Styrelsen), *Report on Minority Groups in Somalia*: Joint British, Danish and Dutch fact-finding mission to Nairobi, Kenya (Dec. 2000) at [http://www.udlst.dk/udlst\\_engelsksjle1/somaliaeng00/inhold.html](http://www.udlst.dk/udlst_engelsksjle1/somaliaeng00/inhold.html); Ken Menkhaus, U.N. High Comm'r on Refugees, *Somalia: A Situation Analysis*, Writenet Paper 07/2000 (2000) at <http://www.reliefweb.int>.

5. Adan tried to argue that he faced a particularly heightened risk because the Habrawal had recently attacked a rival sub-clan, which threatened vengeance. Without explanation, Lord Lloyd resisted exploring the implications of this possibility. He ruled: "I do not consider that this throws doubt on the IAT's conclusion that all sections of society in northern Somalia are equally at risk so long as the civil war continues." *Adan*, [1999] 1 A.C. at 312 (per Lloyd, L.J.).

6. *Id.* (per Slynn, L.J.).

7. *Id.* (per Lloyd, L.J.).

[t]hat fighting and the disturbances are indiscriminate and that individuals from all sections of society are at risk of being caught up therein, and that the situation is no worse for members of the Isaaq clan and the Habrawal sub-clan than for the general population and the members of any other clan or sub-clan.<sup>8</sup>

In light of this finding below, Lord Lloyd began his analysis in the lead opinion for the House of Lords with the following question:

Can a state of civil war whose incidents are widespread clan and sub-clan-based killing and torture give rise to well-founded fear of persecution for the purposes of the 1951 Convention and the 1967 Protocol thereto, *notwithstanding that the individual claimant is at no greater risk of such adverse treatment than others* who are at risk in the civil war for reasons of their clan and sub-clan membership?<sup>9</sup>

The Lords decided two issues in *Adan*. The first concerned whether showing past persecution alone can satisfy the “well-founded fear of being persecuted” requirement. When he originally applied for asylum after arriving in Britain in 1990, Adan said he feared persecution by the Somali Government. This government had fallen a year later. The Lords clarified that refugee status determination centers on future risks, which set up the question for which the decision is most significant: did Adan satisfy the nexus requirement of the refugee definition? This article deals only with this second issue.

## 2. Can There be a Risk of “Persecution” in a Civil War?

Lord Lloyd, and Lord Slynn in shorter form, first explained the standards that most often apply in refugee law, and then distinguished those standards from cases arising from civil war.<sup>10</sup> Lord Lloyd acknowledged

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8. Quoted in Court of Appeals Judgment, *Adan v. Secretary of State for the Home Dep't*, [1997] 1 W.L.R. 1107, [1997] 2 All E.R. 723 (Eng. C.A.), 2 B.H.R.C. 65, [1997] Imm. A.R. 251, [1997] I.N.L.R. 1.

9. *Adan*, [1999] 1 A.C. at 308, (per Lloyd, L.J.) (emphasis added).

10. The House of Lords also indicated that it sees civil wars as unique in *R. v. Immigration Appeal Tribunal, ex parte Shah; Islam v. Sec'y of State for the Home Dep't*, [1999] 2 A.C. 629, [1999] 2 W.L.R. 1015, [1999] 2 All E.R. 545 (H.L. 1999). This decision broadened the understanding of persecution and made clear that women fleeing domestic violence can be protected by the Refugee Convention. While recognizing the claims of women who flee beatings and rapes by men in their own families, Lord Hoffmann excluded women who flee beatings and rapes in wartime:

Assume that during a time of civil unrest, women are particularly vulnerable to attack by marauding men, because the attacks are sexually motivated or because they are thought weaker and less able to defend themselves . . . . It may be true to say that women would not fear attack but for the fact that they were women. But I do

that normally a person may be a refugee if he or she faces group-based persecution. He agreed that, were it not for the civil war, a Somali could win refugee status recognition on the basis of a risk confronting his or her clan, even though this could allow large numbers of claimants.<sup>11</sup> Yet Lord Lloyd found it “unappealing” that in a civil war, combatants on both sides could be refugees while those “lucklessly endangered on the sidelines” could not.<sup>12</sup>

Lord Lloyd arrived at “the conclusion that fighting between clans engaged in civil war is not what the framers of the Convention had in mind by the word ‘persecution.’” Both judgments in *Adan* stressed the inapplicability of normal standards of refugee law in a case of clan warfare.<sup>13</sup> The Lords would not have required *Adan* to do more than meet the usual refugee definition had Somalia not been in a state of civil war. Lord Slynn explained:

[T]he individual in the group does not have to show that he has a fear of persecution distinct from, or over and above, that of his group. Thus if in a state two groups exist, A and B, and members of group A threaten to or do persecute members of group B the latter should, other necessary matters being established, be able to claim refugee status. If at the same time members of group B are persecuting or threatening to persecute members of group A the claim should be the same. The position is even stronger if the persecution is not exactly simultaneous but those in power change from time to time so that the persecutors become the persecuted. Looking, however, at the language of the Convention and its object and purpose I do not consider that it applies to those caught up in a civil war when law and order have broken down and where, as in the present case, every group seems to be

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not think that they would be regarded as subject to persecution within the meaning of the Convention. The necessary element of discrimination is lacking.

*Id.* at 654 (per Hoffmann, L.J.).

11. *Adan*, [1999] 1 A.C. at 308 (per Lloyd, L.J.). “[Mr. Pannick for the Home Secretary] accepts further that the persecution of individuals and groups, however large, because of their membership of a particular clan is very likely to be persecution for a convention reason.” *Id.*

12. *Id.* (quoting Simon Brown, L.J. in *Adan*, [1997] 2 All E.R. at 735).

13. It is not entirely clear whether Lords Lloyd and Slynn had the same reasons for thinking that civil wars pose special problems. Lord Slynn said he looked at the language, context, and purpose of the Convention to reach his conclusion, but did not explain what he had found. He seemed to be troubled most by the chaos of civil war, when “every group seems to be fighting some other group or groups.” *Adan*, [1999] 1 A.C. at 302. Lord Lloyd, also without explanation, concluded that the drafters of the Convention did not expect it to apply to “both sides” in a conflict. *Id.* at 308. Despite these differences, both judgments hold that there is a special test for civil war cases because civil wars pose special problems.

fighting some other group or groups in an endeavour to gain power.<sup>14</sup>

Lord Lloyd extrapolated that if the war in Somalia ended with one clan clearly in charge, people like Adan might be able to meet the Convention definition: "If the vanquished are oppressed or ill-treated by the victors, they may well be able to establish a present fear of persecution for a Convention reason."<sup>15</sup>

Lord Lloyd was correct that the Refugee Convention requires a distinction between persecution and "the ordinary incidents of civil war."<sup>16</sup> But in our view he was mistaken to conclude that "fighting between clans engaged in civil war"<sup>17</sup> cannot constitute persecution for reasons of clan identity. Fleeing from civil war alone is not enough to meet the Convention definition, but in some circumstances war-related violence can give rise to a valid claim to refugee status.

The House of Lords seems to have been led astray by ambiguous statements in some of the leading treatises and summaries of refugee law, which (if taken out of context) suggest there is something special about civil war claims that raises the standard for refugee recognition. These statements in the United Nations High Commissioner for Refugees (UNHCR) Handbook, James Hathaway's treatise, and the European Union's 1995 Joint Position agree that fleeing a civil war does not, on its own, make someone a Convention refugee. For example, the UNHCR Handbook says "[p]ersons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol . . . ."<sup>18</sup> James Hathaway's treatise includes a similar statement: "[I]t was not intended that all those displaced by violent conflict should enjoy refugee status."<sup>19</sup> The same can be said of the European Union's Joint Position on the Definition of the Term "Refugee,"<sup>20</sup> which Lord Lloyd also cited.

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14. *Id.* at 302 (per Slynn, L.J.).

15. *Id.* at 311 (per Lloyd, L.J.).

16. *Id.* at 308 (per Lloyd, L.J.).

17. *Id.*

18. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 39, ¶ 164 (1979) [hereinafter UNHCR HANDBOOK].

19. JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 185 (1991) [hereinafter HATHAWAY, REFUGEE STATUS].

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Reference to a civil war or internal or generalised armed conflict and the dangers which it entails is *not in itself sufficient* to warrant the grant of refugee status. Fear of persecution must in all cases be based on one of the grounds in article 1A of the Geneva Convention and be individual in nature.

While the sections of these sources relied on by Lord Lloyd say that fear of exposure to civil war does not per se give rise to refugee status, they do not say that civil war violence can never be the basis of a Convention refugee claim. On close examination, there is actually consensus among the sources cited by the House of Lords that civil war claims should be judged on the same standards as all other refugee claims.<sup>21</sup> As Guy Goodwin-Gill explains:

The fact of having fled from civil war is not incompatible with a well-founded fear of persecution in the sense of the 1951 Convention. Too often, the existence of civil conflict is perceived by decision-makers as giving rise to situations of general insecurity that somehow exclude the possibility of persecution.<sup>22</sup>

Moreover, while Lord Lloyd cited one sentence of the UNHCR Handbook, he did not discuss the UNHCR's clearer and more recent position on civil war refugees set out in the 1995 Information Note on Article 1 of the 1951 Convention, which explains:

[T]here is nothing in the definition itself which would exclude its application to persons caught up in civil war . . . . [M]any conflicts take place against a political background which may involve serious violations of human rights, including the targeting of particular ethnic or religious groups.<sup>23</sup>

Nor did he discuss the 1998 conclusions of the UNHCR Executive Committee, which express "deep concern about the increasing use of war and violence as a means to carry out persecutory policies against groups targeted on account of their race, religion, nationality, membership of a particular social group, or political opinion."<sup>24</sup>

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Joint Position of The Council of the European Union Defined by the Council on the Basis of Article K.3 of the Treaty on European Union on the Harmonized Application of the Definition of the Term "Refugee" in Article 1 of the Geneva Convention of 28 July 1951 Relating to the Status of Refugees 12105/95, para. 6, 1996 O.J. (L. 63) 5, (cited in *Adan*, [1999] 1 A.C. at 310, per Lloyd, L.J.) (emphasis added).

21. See, e.g., HATHAWAY, REFUGEE STATUS, *supra* note 19, at 185–88 (Hathaway writes, "[w]hile the general proposition is that the victims of war and violence are not by virtue of that fact alone refugees, it is nonetheless possible for persons coming from a strife-torn state to establish a claim to refugee status."). See also G.S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 75–76 (2d ed. 1996); UNHCR HANDBOOK, *supra* note 18, ¶ 164.

22. GOODWIN-GILL, *supra* note 21, at 75. See also U.N. High Comm'r for Refugees, Information Note on Article 1 of the 1951 Convention, ¶ 5 [hereinafter UNHCR Information Note] available at [www.unhcr.ch](http://www.unhcr.ch).

23. UNHCR Information Note, *supra* note 22, ¶ 5.

24. U.N. High Comm'r for Refugees Executive Comm. Conclusion No. 85 (XLIX), *Conclusion on International Protection*, ¶ c (1998) [hereinafter EXCOM Conclusion No. 85] available at [www.unhcr.ch](http://www.unhcr.ch).

International law requires that a treaty's interpretation be governed by analysis of its text, context, and purpose.<sup>25</sup> A treaty's drafting history is relevant to confirm the text, context, and object and purpose, to resolve ambiguity, or to prevent a "manifestly absurd or unreasonable" result.<sup>26</sup> Aside from citing treatises and the UNHCR Handbook, the House of Lords engaged in very little examination of the text, context, and object and purpose of the Refugee Convention. Lord Lloyd asserted, without explanation, that the Convention's framers did not have civil war in mind. In fact, the drafting history confirms that war and violence can, in some circumstances, produce valid refugee claims. As Hathaway argues, "the Refugee Convention was conceived as a response to the victims of war."<sup>27</sup> In one of the early refugee law treatises, Nehemiah Robinson also describes the background to the Convention in a way that suggests that victims of wars precipitated the drafting of the Refugee Convention:

The great changes in the political and social structure in Europe, which principally followed in the tidal wake of the cataclysmic breakdown of the centuries-old Russian and Turkish empires, resulted in a mass exodus of persons who were refugees from the new regimes. They were mostly Russians and Armenians, whose total figure amounted to a million persons. The later establishment of the Fascist regime in Italy resulted in tens of thousands of Italian refugees while the Civil War in Spain added hundreds of thousands of Spanish refugees. The creation of the Nazi regime in Germany and the occupation by Nazi Germany of other regions—the Saar, Austria, Sudetenland and the Protectorate—resulted in a new wave of refugees.<sup>28</sup>

The proposals offered during the drafting of the refugee definition show that the delegates clearly understood that the new Convention would embrace war refugees. It is true that the drafting Committee rejected the definition proposed by the United States, which would have explicitly included as refugees those persecuted on account of one of the Convention grounds, *or* who belonged to one of several named categories of war victims,<sup>29</sup> adopting instead a general definition open to a

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25. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340, 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

26. *Id.*, arts. 31(1), 32.

27. HATHAWAY, REFUGEE STATUS, *supra* note 19, at 185.

28. NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES—ITS HISTORY, SIGNIFICANCE AND CONTENTS, 1 (Institute of Jewish Affairs, World Jewish Congress 1952).

29. U.N. ESCOR, Ad Hoc Committee on Statelessness and Related Problems, *United States: Memorandum on the Definition Article of the Preliminary Draft Convention Relating*



variety of circumstances.<sup>30</sup> But delegates gave no indication at all that war refugees should be excluded from this general definition. Indeed, the Israeli representative at the 1951 Conference of Plenipotentiaries carefully noted that fleeing hostilities alone is not enough “unless they were otherwise covered by Article 1 of the Convention.”<sup>31</sup> This qualification shows that the drafters conceived that people who flee hostilities could be Convention refugees under at least some circumstances.<sup>32</sup>

### 3. The Nexus Problem

Why, then, did the House of Lords conclude that Mr. Adan was not a refugee? For Lord Lloyd, the problem presented in Adan’s case was not really so much an issue of whether or not harms faced in context of civil war could amount to “persecution,” but rather whether the risk of harm could be said to be “for reasons of” a Convention ground. “What then is the critical factor which distinguishes persecution from the ordinary incidents of civil war?” he asked.<sup>33</sup> The answer, he determined, is the absence of differential impact:

In a state of civil war between clans an asylum seeker must be able to show that he is at greater risk of ill-treatment than other members of his clan<sup>34</sup> . . . .

. . . .

In other words, he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare.<sup>35</sup>

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*to the Status of Refugees (and Stateless Persons) (E/AC. 32/2)* at 1–2, U.N. Doc. E/AC.32/L.4 (1950).

30. U.N. ESCOR, Ad Hoc Committee on Statelessness and Related Problems, 6th mtg., at 2, U.N. Doc E/AC.32/SR.6 (1950).

The Chairman [of the Ad Hoc Committee on Statelessness and Related Problems] observed that the Committee had to decide whether the definition of the term ‘refugee’ . . . should be confined to general terms or whether it should be a detailed statement of the various categories of refugees to whom the convention would apply.

*Id.*

31. United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 6, U.N. Doc. A/CONF.2/SR.22, at 6 (1951) (Statement by Mr. Robinson of Israel).

32. See IVOR C. JACKSON, *THE REFUGEE CONCEPT IN GROUP SITUATIONS* 76 (1999).

33. *Adan v. Sec’y of State for the Home Dep’t*, [1999] 1 A.C. 293, 308 (per Lloyd, L.J.), [1998] 2 W.L.R. 702, [1998] 2 All E.R. 453 (H.L. 1998).

34. *Id.*

35. *Id.* at 311 (per Lloyd L.J.).

Lord Lloyd relied extensively on Hathaway's treatise,<sup>36</sup> which argues that "the mere fact that the conflict escaped is based on religion or politics is not relevant unless persons of a particular religion or political perspective are differentially at risk."<sup>37</sup> Since the Immigration Appeal Tribunal had concluded that Somalis belonging to all or most clans were all equally at risk, Lord Lloyd found that Adan was not a refugee.<sup>38</sup> However, Lord Lloyd did not articulate the differential risk comparison as advocated by the sources upon which he relied. Lord Lloyd appeared to require Adan to show risk above that faced by *other members of his own clan*.<sup>39</sup> The approach outlined by Hathaway would have only required Adan to show that his clan was more at risk *than the general population*.<sup>40</sup> This is a critical distinction to make, since a refugee may be persecuted for reasons of his or her group identity, so that the risk of persecution may be equally high for all members of a particular religious or racial group.

The nexus requirement has been difficult to interpret in part because it has not always been clear to courts why it exists. While there is little doubt that the "for reasons of" clause delimits the beneficiary class of persons able to show a well-founded fear of being persecuted, there is considerable disagreement about the principled basis for the delimitation.<sup>41</sup> One way of understanding the nexus requirement is to suppose that only members of minority groups are eligible for refugee status. In this view, refugees must have a well-founded fear of being persecuted for reasons of minority status, understood in terms of marginal political, social, and economic power.<sup>42</sup> The logic behind the "minority protection thesis" is that the Convention was designed to provide surrogate protection for those who have been fundamentally disfranchised from their national community: "[T]he beneficiaries of refugee law have always been defined to exclude those who enjoy the

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36. HATHAWAY, REFUGEE STATUS, *supra* note 19.

37. *Id.* at 187.

38. *Adan*, [1999] 1 A.C. at 312 (per Lloyd, L.J.).

39. Lord Lloyd explained: "He must be able to show what Mr. Pannick calls a differential impact. In other words, he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare." *Id.* at 311 (per Lloyd, L.J.). Earlier, as explained by Lord Lloyd, Mr. Pannick had argued for the Secretary of State that "[i]n a state of civil war between clans an asylum-seeker must be able to show that he is at greater risk of ill-treatment than other members of his clan. There must, he said, be a differential impact." *Id.* at 308.

40. See HATHAWAY, REFUGEE STATUS, *supra* note 19, at 185-87.

41. See U.N. ESCOR, 11th Sess., 158th mtg., at 13, U.N. Doc. E/AC.7/SR.158 (1950).

42. Hathaway has argued this as a proper understanding of the delimitation. See James C. Hathaway, *Is Refugee Status Really Elitist? An Answer to the Ethical Challenge*, in EUROPE AND REFUGEES: A CHALLENGE? 79 (Jean-Yves Carlier and Dirk Vanheule eds., 1997) [hereinafter, Hathaway, *Is Refugee Status Really Elitist?*].

basic entitlements of membership in a national community . . . .”<sup>43</sup> By this analysis, the nexus component of the Refugee Convention definition requires fundamental marginalization or disfranchisement of a minority group in a way that distinguishes its members from other persons at risk of being persecuted.<sup>44</sup> However, the minority protection approach carries significant risks. Requiring that refugee status be reserved for marginalized minority groups can easily lead to a mistaken insistence that the minority group in question must face a greater risk of being persecuted than other minority groups. This error by the House of Lords in *Adan* amounts to a requirement that the particular group to which the applicant belongs be ‘targeted’ or ‘singled out’ for persecution. The reasoning in *Adan* leaves open the possibility that when multiple groups in a state are persecuted, none might qualify for refugee status because none can show a differential impact.

It is important also to ask whether there is a good reason to construe the Refugee Convention’s “for reasons of” clause as limiting refugee status to the members of minority groups. Approached from an abstract ethical or empirical basis, there may indeed be good reasons for delimiting refugee status based on minority protection.<sup>45</sup> For example, Clair Apodaca recently presented empirical data demonstrating that “[t]he sectors of the population singled out for human rights violations are often ethnic, religious or linguistic minorities.”<sup>46</sup> She also states that “human rights abuses provide the immediate impetus for refugee flight.”<sup>47</sup> The logic of the minority protection thesis infers a relationship between these observations, reasoning that because minorities are most likely to be marginalized by those in power, minority status is an ethical and logical way to interpret the delimitation implicit in the nexus requirement.

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43. HATHAWAY, *REFUGEE STATUS*, *supra* note 19, at 135. Atle Grahl-Madsen and Deborah Anker support this analysis of the Convention’s membership principle. Grahl-Madsen first articulated the connection between refugees and their national community when he wrote that “[i]t is characteristic of the situation of political refugees that the normal mutual bond of trust, loyalty, protection, and assistance between an individual and the government of his home country has been broken (or simply does not exist) . . . .” 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 79 (1966). Anker further developed this concept, stating that “the refugee is fundamentally marginalized; she is unable to enjoy basic rights or vindicate them through change or restructuring from within her society.” DEBORAH ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 267 (1999).

44. *See* HATHAWAY, *REFUGEE STATUS*, *supra* note 19, at 135.

45. *See* Hathaway, *Is Refugee Status Really Elitist?*, *supra* note 42, at 79–88. “[T]he lack of a meaningful stake in domestic governance that frequently distinguishes minorities from others in the society of origin does give a particular urgency to their need to seek asylum abroad.” *Id.* at 86.

46. *See* Clair Apodaca, *Human Rights Abuses: Precursor to Refugee Flight?*, 11 J. REFUGEE STUD. 80, 85 (1998).

47. *Id.* at 80.

Application of the minority protection thesis to interpret the Convention's nexus requirement nonetheless poses practical difficulties for decisionmakers. These difficulties can result in inconsistency within and among jurisdictions and risk the rejection of legitimate refugee claims for reasons attributable to a simple misunderstanding of who actually is a minority. There is a great deal of debate about what makes a group a minority. Observers at the U.N. Working Group on Minorities recently recognized that the definition of "minority" is constantly evolving, such that it might never be possible to produce a consistent meaning of the term.<sup>48</sup> Consequently, there are varying and competing definitions of "minority," and these variations lead to confusion in applying the minority protection thesis. Francesco Capotorti has fashioned a definition of "minority" from the case law of the Permanent Court of International Justice, government proposals, and discussions within the Human Rights Committee. For purposes of Article 27 of the International Covenant on Civil and Political Rights (ICCPR),<sup>49</sup> Capotorti defines minorities as groups

that are *numerically inferior* to the rest of the population of a State; that are in a *non-dominant position*; whose members—nationals of the State of residence—possess ethnic, religious or linguistic *characteristics differing* from those of the rest of the population; and that show—if only implicitly—a sense of *solidarity*, directed toward preserving their culture, traditions, religion or language.<sup>50</sup>

Capotorti's definition, however, differs from that advanced by proponents of the minority protection thesis in refugee law who do not focus on numerical inferiority and group solidarity. Capotorti's definition, if used to inform the minority protection thesis, would dramatically restrict the class of persons fleeing civil war who would qualify for asylum. While the minority protection thesis in refugee law defines "minority" in broader terms, focusing on exclusion from power,

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48. *Prevention of Discrimination Against and the Protection of Minorities: Report of the Working Group on Minorities on its Sixth Session*, U.N. Sub-Commission on the Promotion and Protection of Human Rights, 52d Sess., Agenda Item 8, ¶ 34, U.N. Doc. E/CN.4/Sub.2/2000/27 (2000).

49. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967).

50. Capotorti proposed the definition in a study commissioned by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. FRANCESCO CAPOTORTI, *STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES* ¶ 568, U.N. Doc. E/CN4/Sub.2/384/Rev.1, U.N. Sales No. E.78.XIV.1 (1999) (emphasis added). This definition has achieved the most widespread recognition in regard to Article 27 of the ICCPR. MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 487 (1993).

regardless of numbers,<sup>51</sup> this special meaning is not always recognized by courts attempting to apply the approach. A related practical difficulty is that decisionmakers may bring preconceived notions to the concept of minority that impair their ability to utilize it equitably in determining refugee status. There is a further risk that a decisionmaker may project his or her moral judgment onto a minority group, valuing some groups over others by refusing to recognize a group as a minority group.

Equally important, as a matter of law, there are reasons to doubt the salience of the minority protection thesis. A close examination of the text, context, and objects and purposes of the Refugee Convention reveals that limiting refugee protection to minority groups would be inappropriate. The term “minority” does not appear anywhere in the text of the Refugee Convention, as it does in the ICCPR and other human rights instruments. Justice Wilcox’s opinion in the Australian decision *Minister for Immigration and Multicultural Affairs v. Abdi* neatly summarizes the argument against reading a delimitation based on minority status into the Refugee Convention:

[O]nce it is established that a person is at risk of being killed or tortured in a war by reason of clan membership, in circumstances where that is one of the objectives of the war, one might properly ask what further degree of danger or exposure needs to be established before the required nexus with a Convention reason is made out? Given the purpose of the Convention . . . it is difficult to see the reason why a ‘second tier’ of ‘differential’ or super-added persecution should be imposed on an applicant for refugee status . . . . There is no basis for the imposition of this additional requirement of differential treatment either in the language or objectives of the Convention.<sup>52</sup>

The Convention requires only that a risk of being persecuted be for reasons of race, religion, nationality, political opinion, or membership of a particular social group. To demand also that a person be a member of a minority group would, in effect, amount to the creation of an additional exclusion clause in the Convention.

The drafting history of the Convention also argues against the minority protection approach. Early refugee treaties named specific groups of

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51. For example, both definitions agree that white South Africans are not a minority group because, despite their numerical inferiority, they are in a dominant political, economic, cultural, and social status. However, the definitions diverge for black South Africans. According to the minority protection thesis in refugee law, black South Africans are a minority group because of their non-dominant position. Yet, by Capotorti’s definition their numerical superiority precludes them from being called a minority, even under the oppression of apartheid.

52. *Minister for Immigration and Multicultural Affairs v. Abdi*, (1999) 162 A.L.R. 105, 115–16 (Austl.).

at-risk minorities.<sup>53</sup> International instruments of that era were addressed to the needs of specifically named, at-risk groups, all the members of which were entitled to claim refugee status.<sup>54</sup> During the drafting of the 1951 Refugee Convention, however, proposals to continue the practice of identifying refugees by naming specific minority groups were rejected.<sup>55</sup> In particular, the United States' proposal to include those who were persecuted on account of one of the Convention grounds, *or* who belonged to one of the enumerated categories of groups based on their ethnicity or nationality, was ultimately rejected.<sup>56</sup> Even if the drafters had the protection of minorities in mind—and in fact most of the discrimination they knew was discrimination against minorities—they did not take the affirmative step to *limit* refugee status to minorities.

#### 4. The Relevance of “Differential Impact”

Establishing that a refugee applicant's political, ethnic, or social group faces a differential risk provides circumstantial evidence that the claimant's civil or political status contributes to his or her risk “of being persecuted.” Differential impact is useful to uncover a nexus between the asylum seeker's predicament and a Convention ground when a persecutor gives no direct indications of motive but the abuse falls disproportionately on a minority or some other group.<sup>57</sup> Evidence of differential risk may be sufficient to establish nexus, but it is not legally

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53. See generally ROBINSON, *supra* note 28. These named minority groups included, among others, people of Russian origin with political convictions fundamentally at odds with the ruling Bolsheviks, Armenians settled in Turkey, Assyro-Chaldeans who had fled Greece, Ruthinians who had fled Galicia, Montenegrins living in France, and Jews living in Bukowina, Bessarabia, and Transylvania. See James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920–1950*, 33 INT'L & COMP. L.Q. 348, 350–55 (1984).

54. Hathaway identifies three phases of development of the international refugee definition that precede the Refugee Convention. The first phase (1920–35) reflects a juridical perspective, in that the refugees were identified by their membership in a group of persons effectively deprived of state protection. The second phase (1935–39) embodied a social perspective, reflecting a social approach to the refugee definition, which helped both *de facto* and *de jure* victims of loss of state protection. The third period (1938–50) marked a significant change in the concept of refugee that reflected an individualist approach in what Hathaway calls the individualist perspective. HATHAWAY, *REFUGEE STATUS*, *supra* note 19, at 2–6.

55. See Ad Hoc Committee on Statelessness and Related Problems, *supra* note 30.

56. See *supra* note 29 and accompanying text.

57. UNHCR provides this guide:

It is appreciated . . . that many conflicts take place against a political background, which may involve serious violations of human rights, including the targeting of particular ethnic or religious groups. In a situation of internal armed conflict, the aims of the warring parties, including a government's need to protect itself, do not justify the use of indiscriminate shelling or bombardment, torture or arbitrary punishment against certain sectors of the population. Such acts may be considered, therefore, as giving rise to refugee status under the 1951 Convention.

UNHCR Information Note, *supra* note 22, ¶ 8.

required in all cases. When direct evidence is available that a persecutor chooses victims for reasons of a Convention ground, there is no reason to ask for circumstantial evidence as well.

Yet, to decide whether a risk of being persecuted was “for reasons of” a Convention ground, the House of Lords in *Adan* relied exclusively on differential impact analysis. Only with such an absolutist analytical approach could the Lords have concluded that Adan was at risk of “clan-based killing,” but not at risk of being persecuted for reasons of clan membership. In using differential risk as the one and only test of nexus in a civil war case, the Lords relied upon a misreading of Hathaway’s treatise. While the Lords used differential impact as the sole test for nexus, Hathaway would have alternatively allowed Adan to show that violence was directed at his particular social subgroup, though all Somalis might suffer from the same degree of violence.<sup>58</sup> Hathaway’s formulation of differential impact in civil war cases developed from a statement by the Israeli delegate during the drafting of the Convention explaining that the Convention requires differential *victimization*: “The text . . . obviously did not refer to refugees from natural disasters, for it was difficult to imagine that fires, flood, earthquake or volcanic eruptions, for instance, *differentiated between their victims* on the grounds of race, religion, or political opinion.”<sup>59</sup> Following this statement, the real focus is whether there is evidence of “differential victimization,” which may be demonstrated by differential risk, differential impact, or otherwise.

Differential victimization is substantially broader than differential impact. It includes situations where one race is more at risk than other races—in other words, cases of differential impact. But it also includes situations where the agent of persecution differentiates between victims, choosing to inflict harm for reasons of race. Thus, as Hathaway explains, “persons may be differentially at risk where the civil war or violence is directed at a particular social subgroup.”<sup>60</sup> This would include cases where clan militias target the members of rival clans, because the militias differentiate between their victims, even if clan warfare is so widespread that nearly every person is at risk.

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58. HATHAWAY, REFUGEE STATUS, *supra* note 19, at 187–88 (advocating a comparison with the general population, not with the claimant’s own group).

59. U.N. GAOR, CONFERENCE OF PLENIPOTENTIARIES, *supra* note 31 (Statement by Mr. Robinson of Israel) (emphasis added); *see also* HATHAWAY, REFUGEE STATUS, *supra* note 19, at 185.

60. HATHAWAY, REFUGEE STATUS, *supra* note 19, at 187.

### 5. Civil War Claims After *Adan*

Even courts that have tried to follow the alternative approach of the *Adan* decision have in practice avoided applying the most flawed aspects of its reasoning. For example, in *R. (on the application of Duman) v. Secretary of State for the Home Department*, Judge Collins reached the following conclusion:

[*Adan*] made it clear that there must be a Convention basis for the persecution that exists, so that, for example, people caught up in a civil war, who suffer, not because of anything political or, on any other Convention ground, but merely because they happen to be in the wrong place at the wrong time, are not entitled to the protection of the Geneva Convention.<sup>61</sup>

Similar reasoning was invoked to refuse the refugee claim of a Sierra Leonean in *R. v. Secretary of State for the Home Department, ex parte Sourbah*.<sup>62</sup> The court rejected the suggestion that the general situation in Sierra Leone justified refugee status, even though “butchery and other outrages” were occurring in the country.<sup>63</sup> While relevant, that was not enough by itself to qualify for refugee status anybody who did not wish to return to Sierra Leone: “[T]he question is not simply whether there is a fear or a well-founded fear, but whether there is a well-founded fear of persecution for a Convention reason.”<sup>64</sup> The court then explained *Adan*’s holding as a rule that civil war alone is not enough:

The existence of civil unrest or civil war in a country does not in itself qualify those who have left the country, such as the applicant, for refugee status . . . .

. . .

[*Adan*] shows clearly that the existence of civil unrest and even atrocities in Sierra Leone cannot in itself establish the existence of refugee status on the part of an applicant. An applicant must

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61. *R. (on the application of Duman) v. Sec’y of State for the Home Dep’t*, [2001] E.W.C.H. Admin. 168 ¶ 10, CO/2908/00 (Q.B. 2001). The court in *Duman* was considering the application of a claimant from Turkey who was of Kurdish ethnicity and an Alevi Muslim. *Id.* para. 1. The court drew a distinction between situations where the state is *unwilling* to prevent persecution and situations where it is *unable* to prevent persecution, when the persecution is committed by non-state actors. *Id.* ¶¶ 9–10. The court found that it is not always easy (but not necessarily impossible) to establish in such circumstances that any persecution that occurs is for a Convention reason and cited *Adan* to support that proposition. *See id.*

62. *R. v. Sec’y of State for the Home Dep’t, ex parte Sourbah*, [1999] Imm. A.R. 452, CO/3754/97 (Q.B. Div’l Ct. 1999).

63. *Id.* at 455.

64. *Id.*



still show that he has a well-founded fear of persecution for a Convention reason.<sup>65</sup>

British courts have thus viewed *Adan* as a simple reiteration of the rule that civil war alone is not enough to win refugee status.

While minority protection is one means of advancing the linkage between the “for reasons of” clause and non-discrimination law,<sup>66</sup> an alternative approach is to read the nexus clause as extending protection to *all persons* at risk because of a protected characteristic, whether or not they are members of a minority group, and whether or not singled out. This alternative is referred to as a ‘simple impact’ approach. Unlike the minority protection thesis, which requires a comparison between the claimant’s risk and that faced by the overall population, the simple impact approach is non-comparative. It requires only a link between the claimant’s predicament and a Convention ground.

Many governments, decisionmakers, and the UNHCR have embraced a simple impact approach. This is consistent with recognizing that minority groups are not the only people targeted for discriminatory harms for reasons of race, religion, nationality, social group membership, or political opinion.<sup>67</sup> In the specific context of civil war

65. *Id.* at 456. The court acknowledged that *Adan* requires that in situations of civil war an applicant must show fear of persecution for a Convention reason over and above the ordinary risks of clan warfare, or at least over the ordinary risks of whatever civil unrest there existed in the country. Yet the court did not rely on the absence of differential impact to deny the application, and concluded by stating that the findings on credibility were “ultimately decisive of the case.”

66. See *R. v. Immigration Appeal Tribunal, ex parte Shah*; *Islam v. Sec’y of State for the Home Dep’t*, [1999] 2 A.C. 629, [1999] 2 W.L.R. 1015, [1999] 2 All E.R. 545 (H.L. 1999). Lord Hoffmann explained:

[I]n the context of a human rights instrument, discrimination means making distinctions which principles of fundamental rights regard as inconsistent with the right of every human being to equal treatment and respect.

...

It is because [the nexus grounds] are either immutable or part of the individual’s fundamental right to choose for himself that discrimination on such grounds is contrary to principles of human rights.

*Id.* at 651.

67. One recent example is the civil war in former Yugoslavia. Before the war, the territory of Bosnia and Herzegovina was almost equally divided among Roman Catholic Croats, Muslim Bosnians, and Orthodox Bosnian Serbs. The war was fought with the help of Serbia and Croatia, but the balance of power was not always dramatically tilted against the Bosnian Muslims. In 1992, the Bosnian Army, composed mostly of Muslims, was joined by the paramilitaries of Bosnian Croats. Ulrike Davy, *Refugees From Bosnia and Herzegovina: Are they Genuine?*, 18 SUFFOLK TRANSNAT’L L. REV. 53, 58 (1995). However, this dynamic changed throughout the war. Bosnian Serbs could flee to Serbia, and Croats could flee to Croatia, but there is evidence that refugees were turned away from both places, despite their ethnic and religious affinity. There is also evidence of an agreement between the Croat and Serb leaders to split Bosnia between them.

claims, governments, courts, and the UNHCR have suggested that the background or purpose of the civil conflict may provide the required evidence of nexus to a Convention ground. This approach has been most comprehensively advocated in the Canadian Guidelines on Civilian Non-Combatants Fearing Persecution and related case law. The Canadian Guidelines reinforce the use of a non-comparative approach, citing *Salibian v. Canada (Minister of Employment and Immigration)*:

A situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated, or, even, by all citizens on account of a risk of persecution based on one of the reasons stated in the definition.<sup>68</sup>

The Federal Court of Australia's decision in *Abdalla v. Minister for Immigration and Multicultural Affairs* echoes this approach: "Much will depend on the purposes for which the war is being fought. For example, if it is fought to eliminate or punish members of another clan, it may amount to 'persecution' for a Convention reason."<sup>69</sup> Similarly, the UNHCR Executive Committee recognizes that some wars are conducted as a means of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion.<sup>70</sup>

For future courts to avoid the pitfalls of the *Adan* case, decisionmakers need a clear understanding of exactly how the nexus requirement delimits the refugee definition. The House of Lords helpfully endorsed differential impact as one way to meet the requirement, but there is no sound legal basis for making it the sole test of nexus. The words "for reasons of" should instead be understood to require only that there be some link between the risk of being persecuted, and race, religion, nationality, membership of a particular social group, or political opinion. As framed in the *Michigan Guidelines*<sup>71</sup> on Nexus to a Convention Ground:

A fear of being persecuted is for reasons of a Convention ground whether it is experienced as an individual, or as part of a group.

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68. IMMIGRATION AND REFUGEE BOARD OF CANADA, CIVILIAN NON-COMBATANTS FEARING PERSECUTION IN CIVIL WAR SITUATIONS (March 7, 1996), available at <http://www.irbc.cn>. See also *Salibian v. Canada (Minister of Citizenship and Immigration)*, [1990] 3 F.C. 250.

69. *Abdalla v. Minister for Immigration and Multicultural Affairs*, (1998) 1017 F.C.A., 51 A.L.D. 11 (Austl.).

70. EXCOM Conclusion No. 85, *supra* note 24.

71. James C. Hathaway, *Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT'L L. 207, 210 (2002).

Thus, evidence that persons who share the applicant's race, religion, nationality, membership of a particular social group, or political opinion are more at risk of being persecuted than others in the home country is a sufficient form of circumstantial evidence that a Convention ground was a contributing factor to the risk of being persecuted. There is, however, no requirement that an applicant for asylum be more at risk than other persons or groups in his or her country of origin. The relevant question is instead whether the Convention ground is causally connected to the applicant's predicament, irrespective of whether other individuals or groups also face a well-founded fear of being persecuted for the same or a different Convention ground.<sup>72</sup>

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72. *Id.* ¶¶ 15–16.