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Testing Religion: Adjudicating Claims of Religious Persecution Brought by Iranians in the U.S. and Germany

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— Note —

Testing Religion: Adjudicating Claims of Religious Persecution Brought by Iranians in the U.S. and Germany

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INTRODUCTION

As of 2016, the U.N. High Commissioner for Refugees ("UNHCR") counted about 65.6 million individuals globally who had been forcibly displaced.[1] Refugees and asylum-seekers accounted for 25.3 million of this total.[2] Syria continues to be the major source of both refugees and asylum-seekers worldwide.[3] While Turkey, Pakistan, and other developing nations hosted the largest numbers of refugees,[4] Germany was the

1. U.N. High Comm'r for Refugees, Global Trends: Forced Displacement in 2016, 5 (June 19, 2017), http://www.unhcr.org/5943e8a34.pdf [https://perma.cc/84N7-MRY7].

2. *Id.* at 13, 39. While refugees are those accorded protections under the international definition of refugee discussed below, asylum seekers are "people who are seeking international protection but whose refugee status is yet to be determined." *Id.* at 39. The largest contingent of forcibly displaced persons consists of Internally Displaced Persons (IDPs). *Id.* at 35 (estimating that there were 40.3 million IDPs globally at the end of 2016, including 5.5 million new IDPs). Colombia, Syria, and Iraq accommodated the highest number of IDPs, totaling about 17.3 million. *Id.* at 36.

3. *Id.* at 16, 42.

4. *Id.* at 14. Notably, Lebanon and Jordan were the countries with the highest refugee-inhabitant ratio in 2016. *Id.* at 20 (noting that there were "169 refugees for every 1,000 Lebanese" at that time). In the same year, South Sudan was the country with the highest number of refugees per one million

largest recipient of new asylum applications in 2015 and 2016, followed by the U.S.[5]

Just over fifty years ago, on January 31, 1967, an important international document was signed that was meant to address the number of international refugees—the Protocol to the 1951 Convention Relating to the Status of Refugees.[6] While the U.S. did not ratify the Convention,[7] it acceded to the Protocol in 1968.[8] Over a decade later, Congress passed the Refugee Act of 1980 as an amendment to the Immigration and Nationality Act ("INA") of 1952.[9] This amendment not only

U.S. dollars Gross Domestic Product. *Id.* at 21 (noting that the refugee burden "was greatest among the world's poorest countries").

5. *Id.* at 39–40.

6. For the 1951 document, see Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Convention]. For the 1967 document, see Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter Protocol]. On earlier twentieth-century attempts to deal with refugees on an international level, see Claudena M. Skran, *Historical Development of International Refugee Law*, *in* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 3 (Andreas Zimmermann ed., 2011) [hereinafter THE 1951 CONVENTION]. For a brief overview of the roots of asylum law in early modern authors on international law, see Terje Einarsen, *Drafting History of the 1951 Convention and the 1967 Protocol*, *in* THE 1951 CONVENTION, *supra*, at 37, 41–42 (discussing, among others, the approaches of Hugo Grotius, Samuel Pufendorf, and Christian Wolff). Hannah Arendt placed the fruitless attempts to deal with the issue of statelessness and minorities in Europe after World War I in context of the contemporaneous demise of the nation state and the concurrent rise of totalitarianism. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 269–90 (new ed. 1966).

7. Multilateral Treaties Deposited with the Secretary-General, United Nations Treaty Collection ch. V.2, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-2.en.pdf [https://perma.cc/2CFD-FVEU] (last visited Mar. 4, 2018). One explanation that the U.S. Department of State gave as to why the U.S. did not sign the Convention it helped to negotiate was that "all migrants to the United States already received the benefits sought by the convention." SHIRLEY V. SCOTT, INTERNATIONAL LAW, US POWER 175 (2012).

8. Protocol, *supra* note 6; s*ee* MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITARY FUNCTIONS: LIST OF SIGNATURES, RATIFICATIONS, ACCESSIONS, ETC. AS AT 31 DECEMBER 1968, at 96, U.N. Doc. ST/LEG/SER.D/2, U.N. Sales No. E.96.V.5 (1969).

9. *See* Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (2012)); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C. (2012)).

adopted a definition of refugee "virtually identical" to the one set forth in the Convention and slightly modified by the Protocol,[10] but also made this definition the foundation of current U.S. asylum law.[11]

Former West Germany ratified the Convention in 1953[12] and joined the Protocol in 1969.[13] Former East Germany acceded to both the Convention and the Protocol in 1990.[14] Following the formation of the EU, Germany's refugee policy became subordinate to EU directives that are based on the international definition of a refugee.[15] Accordingly, current

10. INS v. Cardoza-Fonseca, 480 U.S. 421, 437 (1987).

11. Refugee Act of 1980 § 208 (codified as amended at 8 U.S.C. § 1158(b)(1)(A) (2012)). The relevant definitional section is *id.* § 201(a) (codified as amended at 8 U.S.C. § 1101(a)(42)(A) (2012)).

12. Gesetz betreffend das Abkommen vom 28. Juli 1951 über die Rechtsstellung der Flüchtlinge [Law on the Convention of July 28, 1951 on the Legal Status of Refugees], Sept. 1, 1953, BGBL II at 559.

13. Bekanntmachung über das Inkrafttreten des Protokolls über die Rechtsstellung der Flüchtlinge [Notice of Entry into Force of the Protocol on the Legal Status of Refugees], Apr. 14, 1970, BGBL II at 194.

14. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1990, at 211 n.2, 227 n.4, U.N. Doc. ST/LEG/SER.E/9, U.N. Sales No. E.91.V.8 (1991).

15. By one of its constitutional treaties, the EU is charged with framing "a common policy on asylum, immigration and external border control" for the EU member states. Treaty on the Functioning of the European Union, art. 67(2), 2016 O.J. (C 202) 1, 73. The EU is committed to formulating this policy according to the 1951 Convention and its 1967 Protocol. *Id.* art. 78(1). Two EU documents in particular are pertinent: The first is the Qualification Directive 2011/95 adopted in December 2011. 2011 O.J. (L 337) 9 (EU) [hereinafter 2011 Qualification Directive]. This regulation recast the earlier directive 2004/83, 2004 O.J. (L 304) 12 (EC). 2011 Qualification Directive, at 9. The second is the Asylum Procedures Directive 2013/32 that was adopted in June 2013 to prescribe further details about the EU-wide procedures for granting and withdrawing the two types of international protection recognized by the EU. 2013 O.J. (L 180) 60 (EU) [hereinafter 2013 Procedures Directive]. This regulation recasts the earlier directive 2005/85, 2005 O.J. (L 326) 13 (EC). 2013 Procedures Directive, at 60. *See also* KAY HAILBRONNER, ASYL- UND AUSLÄNDERRECHT 13–14 (4th ed. 2017) (discussing the interaction between EU and German asylum law); ANDREAS HEUSCH ET AL., DAS NEUE ASYLRECHT 3–5 (2016) (outlining the impact of EU law on current German asylum legislation). For a more detailed discussion of EU asylum law, see Anja Klug, *Regional Developments: Europe*, *in* THE 1951 CONVENTION, *supra* note 6, at 117, 127–37. For a critique of EU asylum law, see James C. Hathaway, *E.U. Accountability to International Law: The Case of Asylum*, 33 MICH. J. INT'L L. 1 (2011).

German law makes this definition the cornerstone of its approach to refugee claims.[16]

The U.S. asylum system and the German refugee system are too vast to compare in their totality within the space available in this Note. Therefore, this Note will focus on basic elements of establishing an asylum or refugee claim that are derived from the shared international definition of refugee. To provide concrete examples of how these elements are interpreted and applied in practice, this Note will consider the fate of Iranians seeking religious asylum in the U.S. and Germany, especially those who became refugees by conversion to Christianity after leaving their home country.[17]

While Iran is not at the epicenter of the current refugee crisis, it is a country that has come to occupy a place in U.S. foreign policy that is quite different from the place it occupies in German foreign policy. Additionally, over the years, Iran has provided a steady stream of applicants who seek religious asylum both in the U.S. and Germany. Finally, while religious asylum claims have generated relatively little litigation in the U.S.,[18] they have recently generated renewed attention in Germany due to an unprecedented wave of conversions by Muslims to Christianity in the wake of the Syrian refugee crisis.[19]

Taking all of these factors together, Iranian applicants for religious asylum seem particularly well-suited to shed light on a fundamental problem in asylum and refugee law, namely, how a disparate evaluation of the situation in the country of origin and a different transposition of the international definition of a refugee into national law impacts individual asylum or refugee claims.

16. *See* Asylgesetz [AsylG] [Asylum Act], Sep. 2, 2008, BGBL I at 1798, as amended by Gesetz zur Umsetzung der Richtlinie 2011/95/EU [Act Transposing Directive 2011/95/EU], Aug. 23, 2013, BGBL I at 3474, § 3(1), https://www.gesetze-im-internet.de/asylvfg_1992/BJNR111260992.html [https://perma.cc/A4SP-P4XY].

17. These refugees are known in international law as refugees *sur place*. U.N. High Comm'r for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶¶ 94–96, U.N. Doc. HCR/1P/4/ENG/REV. 3 (Dec. 2011) (noting that refugees *sur place* are created when circumstances in the applicants' home country change or when the applicants themselves change by taking on a characteristic—e.g., a political opinion or a religion—that qualifies them as refugees).

18. Michael J. Churgin, *Is Religion Different? Is There a Thumb on the Scale in Refugee Convention Appellate Court Adjudication in the United States? Some Preliminary Thoughts*, 51 TEX. INT'L L.J. 213, 219 (2016) (noting that asylum claims based on political opinion and membership in a particular social group were more heavily litigated in the U.S. than religious asylum claims).

19. *See infra* Section II.A.

While it is desirable to have a universal definition of refugee correspond to a common interpretation[20] and a common application of that definition to avoid disparities in treatment of similarly situated applicants,[21] this Note will show that using a common international definition of refugee, without more, has not resulted in similarly situated applicants being treated similarly by the countries where they happen to seek refuge from persecution.

Absent an authoritative international court of refugee and asylum law—or an international refugee agency with the authority to assign refugee quotas to sovereign nations[22]—longstanding national precedent both procedural and substantive in nature within which the international definition is interpreted and applied appears to be an insurmountable hurdle on the path toward similarly treating the similarly situated.[23] Moreover, the case of asylum seekers from Iran appears to show that differences in political and diplomatic relations with the applicants' country of origin have a bearing on how those claims are adjudicated based on disparate assessments of the situation in Iran.

These differences do not mean that U.S. and German high courts cannot, or should not, benefit from each other's jurisprudence on asylum matters in the interest of an operationalization of international refugee law that treats similarly situated applicants similarly.[24] In fact,

20. *See* Jane McAdam, *Interpretation of the 1951 Convention*, *in* THE 1951 CONVENTION, *supra* note 6, at 75 (discussing the meaning of the 1951 Convention in light of the interpretative principles set forth in the 1969 Vienna Convention on the Law of Treaties).

21. JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 3–4 (2d ed. 2014).

22. Christopher Heath Wellman, *Freedom of Association and the Right to Exclude*, *in* DEBATING THE ETHICS OF IMMIGRATION: IS THERE A RIGHT TO EXCLUDE? 127 (Christopher Heath Wellman & Phillip Cole eds., 2011).

23. *See* CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 66–70 (2d ed. 2015) (noting that while U.S. courts interpreting international treaties under U.S. law do look to how other contracting parties construe those treaties, they give significant deference to how the Executive Branch, in conjunction with the Senate, interpret those treaties under the so-called Biden condition).

24. *See, e.g.*, STEPHEN G. BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 243–46 (2015) (finding that concerns about a loss of U.S. sovereignty that he perceives to be at the heart of resistance to judicial cross-referencing of foreign decisions are not based on the actual practice of U.S. courts). For two writers engaging the Associate Justice's book, see Curtis A. Bradley, *The Supreme Court as a Filter Between International Law and American Constitutionalism*, 104 CAL. L. REV. 1567 (2016), and Jenny S. Martinez, *Who's Afraid of International and Foreign Law?*, 104 CAL. L. REV. 1579 (2016). Martinez, while echoing some of Breyer's concerns when she deplored a trend toward judicial isolationism—even hostility toward non-U.S. law—in the U.S., pointed to a

given the absence of effective global institutions able to protect the rights of refugees, national law plays a critically important role in affording refuge to those who have lost the protection of their home countries.[25] This importance of the nation state—and of organizations that have reached a level of political integration on par with the European Union—makes the task of international learning indispensable in order to achieve a more similar treatment of similarly situated people who do not have the luxury of international forum shopping.

As a contribution towards this goal, this Note will proceed in four steps. Part I will discuss the legal framework for reviewing refugee claims based on religious persecution. It will do so by comparing and contrasting the U.N. position on refugee law, U.S. asylum law, and German refugee law as they pertain to those experiencing religious persecution. Part II will briefly highlight the different relations between the U.S. and Iran and Germany and Iran and then investigate by way of example the legal situation of one potential group of asylum seekers in their country of origin—Christians in Iran. Part III—after discussing the respective general frameworks for judicial review of administrative asylum or refugee decisions—will review a number of U.S. and German court decisions reviewing administrative decisions of claims of religious persecution brought by Iranians. The Conclusion will highlight areas of

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dissenting opinion by the late Justice Antonin Scalia that seems pertinent to this Note. *Id.* at 1584 n.37 (citing Olympic Airways v. Husain, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting)). There, Scalia stated that "[w]hen we interpret a treaty, we accord the judgments of our sister signatories 'considerable weight.'" *Husain*, 540 U.S. at 658 (Scalia, J., dissenting) (quoting Air France v. Saks, 470 U.S. 392, 404 (1985)). This approach based on treaty interpretation is fleshed out in Fatma E. Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U. J. INT'L L. & POL. 391 (2013). Justice Ginsburg once described the challenge and promise of international judicial learning like this: "No doubt, we should approach foreign legal materials with sensitivity to our differences and imperfect understanding of the social, historical, political, and institutional background from which foreign opinions emerge. But awareness of our limitations should not dissuade us from learning what we can from the experience and wisdom foreign sources may convey." Ruth Bader Ginsburg, *Foreword to the Third Edition* of DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY, at xi, xii (3d ed. 2012).

25. For Hannah Arendt—based on her own experience of statelessness as a German-born Jew between 1937 and 1950—the plight of European refugees during the years following World War I underscored the impracticable nature of "inherent human rights" which presumably included the right to be granted asylum. As a more pragmatic alternative, she—drawing on Edmund Burke's preference of the "rights of an Englishman" over the "abstraction" of "human rights" he saw play out in the French Revolution—argued for the realization of equal rights for all by means of political organization. ARENDT, *supra* note 6, at 280, 299–302.

agreement and disagreement between U.S. and German law and provide suggestions for a more just system of asylum and refugee adjudication based on the current interaction between national and international law.

I. The Legal Framework for Adjudicating Claims of Religious Persecution

Before analyzing how religiously motivated applicants from Iran fare under U.S. asylum law and German refugee law, this part seeks to describe important elements of the legal framework under which applicants' claims are adjudicated. Since pertinent law in both the U.S. and Germany goes back to the international definition of refugee, this description will include the UNHCR's understanding of this international definition. While the UNHCR's interpretation of the 1951 Convention's definition of refugee is not binding, it still provides an international point of reference for the national utilization of this definition.

A. Some Context for the Framework

The international definition of refugee set forth in the 1951 Convention did not originate in some legal or historical vacuum. It is firmly rooted in the attempts to use international declarations and agreements to deal with the consequences of World War II. In view of the Convention, important components of those attempts were the 1948 Universal Declaration of Human Rights ("UDHR") and the 1966 International Covenant on Civil and Political Rights ("ICCPR").

1. Freedom of Religion and Asylum in the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights

In December 1948, the U.N. General Assembly adopted the UDHR.[26] The UDHR was meant to be a response to the severe human rights violations committed in the course of World War II.[27] The U.N. Commission on Human Rights—established in 1946 and first chaired by Eleanor Roosevelt—was charged with drafting not just a non-binding declaration, but an instrument that would allow the U.N. to intervene in a timely manner to prevent human rights violations like

26. G.A. Res. 217 (III), A Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

27. Johannes Morsink, The Universal Declaration of Human Rights: Origins, Drafting, and Intent 1–3 (1999) (noting that the experiences of World War II were first expressed in the various references to human rights in the U.N. Charter of 1946, which then became the springboard for further activities resulting in the adoption of the UDHR in 1948).

those witnessed just years earlier.[28] But in the changed circumstances of the Cold War, the Commission first drafted no more than the 1948 Declaration.[29] It would take almost two decades of further discussions until the originally intended International Bill of Human Rights was completed, when two binding international human rights covenants were opened for signature in 1966—the ICCPR and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR").[30]

The following UDHR and ICCPR provisions are especially relevant for the topic of this Note: The UDHR declared that "[a]ll human beings are born free and equal in dignity and rights."[31] Therefore, "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[32]

Furthermore, the UDHR declared that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."[33] This article failed to declare a universal right to be granted asylum because the past experiences of the chiefly Jewish refugees from Nazi Germany—often stuck in deadly limbo because no state was required or willing to grant them asylum[34]—were eclipsed by the 500,000

28. *Id.* at 14.

29. *Id.* at 18 (noting that at one point, only the Soviet Union opposed drafting a binding human rights document).

30. *Id.* at 19–20 (noting that this delay gave the UDHR an independent moral stature that resulted in the "phenomenal" growth of binding international human rights instruments).

31. UDHR, *supra* note 26, art. 1. Morsink called this statement "a trumpet call of victory after battle," noting that these "deep truths [were] rediscovered in the midst of the Holocaust." Morsink, *supra* note 27, at 38.

32. UDHR, *supra* note 26, art. 2. Morsink noted that "[m]ore than any other voting bloc the Communists pushed from the very start for the inclusion of clear antidiscrimination language in [article 2 of the UDHR]." Morsink, *supra* note 27, at 93.

33. UDHR, *supra* note 26, art. 14(1). The language adopted replaced the stronger language proposed earlier that would have declared an individual right to asylum. Morsink, *supra* note 27, at 76–79; *see also* Einarsen, *supra* note 6, at 47 (arguing that, while this provision "does not contain a guarantee of formalized asylum or permanent residence in the receiving State," it would be contrary to the "object and purpose" of this article "if a State actively denies a refugee protection from persecution").

34. Illustrative of the plight of Jewish refugees at the time are the events surrounding the S.S. St. Louis in 1939: Having left Germany in May of that year with about 1,000 Jews bound for Cuba, the ship had to return to Europe when neither Cuba nor the U.S. was willing or obligated to grant refuge to these passengers in the months before World War II, handing Hitler a propagandistic victory and resulting in about a quarter of the Jews aboard

Palestinian refugees that were created by the 1948 Israeli-Arab War while the article was being discussed.[35]

Finally, the UDHR expressed "the right to freedom of thought, conscience and religion" in a way that was progressive for its time:[36]

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.[37]

The inclusion of the right to change one's religion resulted in objections from Muslim countries and prompted Saudi Arabia to be one of the eight nations that abstained when the UDHR was brought to a vote at the U.N. General Assembly in 1948.[38]

The ICCPR,[39] as a binding realization of some of the lofty declarations of the UDHR, does not contain the right to seek, enjoy, or be

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the ship being killed in the Holocaust—because the U.S. quotas for German-Austrian immigrants for 1939 had already been filled. Churgin, *supra* note 18, at 214; *Voyage of the St. Louis*, U.S. Holocaust Mem'l Museum, https://www.ushmm.org/wlc/en/article.php?ModuleId=10005267 [https://perma.cc/BL9X-X2JX] (last visited Mar. 13, 2017). Producing masses of poor, burdensome Jewish refugees was part of Nazi Germany's "factual propaganda" aimed at spreading antisemitism everywhere. Arendt, *supra* note 6, at 269.

35. Morsink, *supra* note 27, at 75–79. Based on the Jewish experience under German rule, Joseph Carens posited as criterion for all laws and regulations dealing with refugees today whether they would allow or mandate providing refuge to the Jews persecuted by the Germans. Joseph H. Carens, The Ethics of Immigration 194 (2013). He went on to argue that democratic states have a duty to admit refugees. *Id.* at 195–97.

36. Morsink, *supra* note 27, at 259–261 (noting that the UDHR was progressive for its day in that it placed majority and minority religions on equal footing by making the freedom individual in nature and in that it included the freedom to have no religion).

37. UDHR, *supra* note 26, art. 18.

38. Morsink, *supra* note 27, at 261–62. Morsink also noted that the Greek delegate, like his Muslim counterparts, expressed misgivings about "proselytism" directed at the religious majority, while the delegate from the Philippines stated that, if proselytism was done within the limits of public order, "the free exchange of religious ideas was one of the healthiest signs of freedom and democracy." *Id.* at 262.

39. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. Both East and West Germany ratified the ICCPR in 1973 with reservations; Iran ratified the ICCPR in 1975 without reservations. *Id.* at 172, 293–96. The U.S. ratified the ICCPR in 1992 with reservations. Multilateral Treaties Deposited with the Secretary General: Status as at 31

granted asylum. But, incorporating the broad antidiscrimination language from article 2 of the UDHR,[40] the ICCPR makes granting the right to freedom of thought, conscience, and religion binding on the states that ratified the document.[41] The ICCPR, after quoting article 18 of the UDHR with slight modifications,[42] adds that "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."[43] The ICCPR furthermore provides that a person's "[f]reedom to manifest one's religion or beliefs" may be abridged only by law where necessary "to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[44] Finally, the ICCPR safeguards the rights of parents to raise their children according to their own beliefs and moral convictions.[45]

2. History Meets National Law: Some Recent Developments in the U.S. and Germany

In the years following the ratification of the 1951 Convention and its 1967 Protocol and their initial incorporation into national law, both the U.S. and Germany have faced a number of refugee crises that have left their imprint on these countries' political debates and laws.[46] The most recent formative event for both U.S. and German law is the Syrian refugee crisis that contributed significantly to the currently high level of global refugees, as noted at the beginning of this Note.

a. Recent Developments in the U.S.

Responding to international pressure in late 2015, the U.S. raised the number of Syrian refugees it would accept in the 2016 Fiscal Year—

DECEMBER 1992, at 124, 132, U.N. Doc. ST/LEG/SER.E/11, U.N. Sales No. E.93.V.11 (1993).

40. ICCPR, *supra* note 39, art. 2(1).

41. *Id.* art. 18.

42. *Compare id.* art. 18(1) *with* UDHR, *supra* note 26, art. 18.

43. ICCPR, *supra* note 39, art. 18(2).

44. *Id.* art. 18(3); *see* UDHR, *supra* note 26, art. 29(2).

45. ICCPR, *supra* note 39, art. 18(4); *see* UDHR, *supra* note 26, art. 26(3) (guaranteeing to parents "a prior right to choose the kind of education that shall be given to their children").

46. *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 1:3 (2016) (outlining the basic legislative and administrative developments after the adoption of the Refugee Act of 1980 in the U.S.); RICHARD D. STEEL, STEEL ON IMMIGRATION LAW §§ 1:1–1:3 (2016) (outlining the main elements of U.S. immigration law before and after 1952); *see also* ANDREAS DIETZ, AUSLÄNDER- UND ASYLRECHT 25–27 (2016) (chronicling the main waves of immigration to, and emigration from, Germany through the centuries and the legal responses to those waves).

after intensely scrutinizing them under the U.S. Refugee Assistance Program (USRAP)[47]—to 10,000.[48] In the wake of the November 2015 terrorist attack in Paris—where two of the nine perpetrators affiliated with the Islamic State ("IS") had entered Europe possibly posing as refugees from Syria who were only minimally scrutinized when entering the EU via Greece[49]—this decision caused a passionate back-and-forth during the 2016 presidential campaign amongst the Republican candidates vying for their party's nomination to run for the presidency.[50] Some Republican candidates demanded that preference be given to Christian refugees from the countries affected by the IS campaigns,[51]

47. The USRAP was also created by the Refugee Act of 1980 that established a basic quota of 50,000 refugees per year. Refugee Act of 1980, Pub. L. No. 96-212, § 207, 94 Stat. 102, 103–05 (codified as amended at 8 U.S.C. § 1157 (2012)). The relevant definitional section is § 201(a), 94 Stat. at 102–03 (codified as amended at 8 U.S.C. § 1101(a)(42)(B) (2012) (deviating from the international definition of refugee by requiring that the USRAP refugee be "within the country of such person's nationality")). *See also The United States Refugee Admissions Program (USRAP): Consultation & Worldwide Processing Priorities*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 5, 2016), https://www.uscis.gov/humanitarian/refugees-asylum/refugees/united-states-refugee-admissions-program-usrap-consultation-worldwide-processing-priorities [https://perma.cc/L82K-G8LQ]. While those eligible under the USRAP must also qualify as refugees, they are typically referred by the UNHCR and are subject to intense scrutiny *before* leaving their country of nationality. STEEL, *supra* note 46, § 8:4; *Refugee Processing and Security Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 3, 2015), https://www.uscis.gov/refugeescreening [https://perma.cc/GEV4-D3X8]. By contrast, asylum seekers under the INA must have made it to the U.S. 8 U.S.C. § 1158(a)(1) (2012).

48. Haeyoun Park & Rudy Omri, *U.S. Reaches Goal of Admitting 10,000 Syrian Refugees: Here's Where They Went*, N.Y. TIMES (Aug. 31, 2016), https://www.nytimes.com/interactive/2016/08/30/us/syrian-refugees-in-the-united-states.html [https://perma.cc/VS74-YWLC].

49. *Paris Attacks: Who Were the Attackers?*, BBC NEWS (Apr. 27, 2016), http://www.bbc.com/news/world-europe-34832512 [https://perma.cc/M2UJ-WEM4].

50. David Nakamura, *An Angry Obama Upbraids Critics Who Want to Block Refugees from Syria*, WASH. POST (Nov. 18, 2015), https://www.washingtonpost.com/politics/an-angry-obama-upbraids-critics-who-want-to-block-refugees-from-syria/2015/11/18/c2375082-8db9-11e5-acff-673ae92ddd2b_story.html [https://perma.cc/DUP4-TDE6].

51. Julian Hattem, *Obama: "Shameful" to Propose "Religious Test" for Refugees*, HILL (Nov. 16, 2015), http://thehill.com/policy/national-security/260260-obama-hits-bush-refugee-plan-as-not-american [https://perma.cc/LQE9-MZ76].

although—in that majority Muslim region—the bulk of those affected by IS violence and persecution were Muslims.[52]

In January 2017, President Trump closed the U.S. borders to citizens of seven majority Muslim countries—including Iraq and Iran—for 90 days; suspended the USRAP for 120 days; mandated, after resumption of the USRAP, the prioritization of religious-based refugee claims made by applicants who belong to religious minorities in their country of nationality; and barred Syrian nationals—regardless of their religion[53]—from entering the U.S. indefinitely by issuing an Executive Order.[54] The implementation of these provisions was enjoined by a nationwide Temporary Restraining Order issued by the U.S. District Court for the Western District of Washington.[55] The U.S. Court of Appeals for the Ninth Circuit declined to stay the district court's order.[56]

The President then revoked the previous Executive Order and replaced it with a new Executive Order in March 2017, closing U.S. borders to citizens of six majority Muslim countries—including Syria and

52. Abigail Hauslohner & Karen DeYoung, *Draft Executive Order Would Begin 'Extreme Vetting' of Immigrants and Visitors to the U.S.*, WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/world/national-security/draft-executive-order-would-begin-extreme-vetting-of-immigrants-and-visitors-to-the-us/2017/01/25/17a27424-e328-11e6-a547-5fb9411d332c_story.html [https://perma.cc/GL87-2MJ7].

53. President Trump nonetheless cited what he perceived as unfair treatment of Syrian Christians persecuted by the IS under the previous administration's refugee policy as one of the reasons behind the envisioned preferential treatment for members of religious minorities. David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority as Refugees*, BRODY FILE (Jan. 27, 2017), http://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees [https://perma.cc/YFC9-CZ63]. 99% of the more than 12,000 Syrian refugees resettled in the U.S. in 2016 were Muslims—the Syrian population is 93% Muslim—while the overall balance of the USRAP for that year was almost equal between Muslims and Christians. Phillip Connor, *U.S. Admits Record Number of Muslim Refugees in 2016*, PEW RES. CTR. (Oct. 5, 2016), http://www.pewresearch.org/fact-tank/2016/10/05/u-s-admits-record-number-of-muslim-refugees-in-2016/ [https://perma.cc/V6C6-7SBB].

54. Exec. Order 13,769, §§ 3(c); 5(a)–(c), 82 Fed. Reg. 8,977, 8,978–79 (Jan. 27, 2017). Interestingly, the President signed this Order, not at the White House or the Department of Homeland Security, but at the Pentagon. Michael D. Shear & Helene Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html [https://perma.cc/W8GE-76B4].

55. Washington v. Trump, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017).

56. Washington v. Trump, 847 F.3d 1151, 1156 (9th Cir. 2017) (per curiam).

Iran—for at least 90 days, unless they already possessed permission to enter and live in the U.S., and suspending the USRAP for 120 days.[57] These substantive provisions were enjoined by a Temporary Restraining Order issued by the U.S. District Court for the District of Hawaii.[58] The U.S. District Court for the District of Maryland enjoined the first substantive provision, the "travel ban," on the same day.[59]

In May and June 2017, respectively, the government lost its appeals of the Maryland and Hawaii orders.[60] In June 2017, the Supreme Court issued a partial stay for both the Hawaii and Maryland injunctions.[61] In October 2017, the Supreme Court granted certiorari, thereby vacating the judgments below.[62]

Meanwhile, on September 24, 2017, the President issued a proclamation that imposed various levels of limitations on the entry of nationals from seven countries—Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen—after a review conducted by various executive departments pursuant to Executive Order No. 13,780 had identified these countries to be inadequate in their "identity-management and

57. Exec. Order No. 13,780, §§ 1(b)(i), 2(c), 3(a), (b), 6(a), 82 Fed. Reg. 13,209, 13,212–15 (Mar. 6, 2017).

58. Hawai'i v. Trump, 241 F. Supp. 3d 1119, 1123 (D. Haw. 2017). The plaintiffs briefed two statutory claims—that the Executive Order violated the INA's non-discrimination clause, 8 U.S.C. § 1152(a)(1)(A) (2012), and that it disregarded the Congressional scheme set up to determine terrorism-related inadmissibility, 8 U.S.C. § 1182(a)(3)(B) (2012), by overextending the Presidential authority under 8 U.S.C. § 1182(f) (granting the President discretionary power to suspend entry "of any aliens or of any class of aliens" in the national interest)—and three constitutional issues, i.e., violations of the Due Process, Establishment, and Equal Protection clauses. Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order at 24–45, Hawai'i v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017) (No. 1:17-cv-50 DKW–KSC), 2017 WL 6547034. The court assessed the likely success on the merits—the first prong of the standard temporary restraining order analysis—purely on grounds of an Establishment Clause violation. *Hawai'i*, 241 F. Supp. 3d at 1134–39. It did so although it acknowledged that, unlike its predecessor, Exec. Order 13,780 did not "contain any term or phrase that can be reasonably characterized as having a religious origin or connotation." *Id.* at 1134–35.

59. Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 565–66 (D. Md. 2017) (enjoining Exec. Order 13,780, § 2(c)).

60. Hawaii v. Trump, 859 F.3d 741, 756 (9th Cir. 2017); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 572 (4th Cir. 2017).

61. Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2083 (2017) (per curiam).

62. Trump v. Hawaii, 138 S. Ct. 377 (2017) (mem.) (vacating and remanding with instructions to dismiss the challenge because Executive Order 13,780 expired on September 24, 2017); Trump v. Int'l Refugee Assistance, 138 S. Ct. 353 (2017) (mem.) (same).

information-sharing . . . protocols."[63] For instance, the proclamation suspended the entry of Iranian nationals into the U.S. "as immigrants and as nonimmigrants," but granted an exception from this suspension to holders of valid student and exchange-visitor visas.[64]

The Proclamation was blocked by a temporary restraining order issued by the U.S. District Court of Hawaii on October 17, 2017.[65] In December 2017, the U.S. Court of Appeals for the Ninth Circuit affirmed this decision, but limited the scope of the block to "those with a credible bona fide relationship with the United States."[66]

63. Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,163–64, § 1(f)–(h) (Sept. 24, 2017) (discussing Exec. Order No. 13,780, *supra* note 57, § 2(d)–(e)). These suspensions are subject to a semi-annual review process by various executive departments. *Id.* at 45,169–70, § 4.

64. *Id.* at 45,165, § 2(b)(ii).

65. Hawaii v. Trump, 265 F. Supp. 3d 1140, 1145 (D. Haw. 2017) (granting motion for a temporary restraining order because Proclamation 9645 "suffers from precisely the same maladies as [Exec. Order No. 13,780]: it lacks sufficient findings that the entry of more than 150 million nationals . . . would be 'detrimental to the interests of the United States,' . . . [a]nd [the Proclamation] plainly discriminates based on nationality" (citing *Trump*, 859 F.3d at 774, 776–79)).

66. Hawaii v. Trump, 878 F.3d 662, 702 (9th Cir. 2017) (citing *Int'l Refugee Assistance Project*, 137 S. Ct. at 2088), *cert. granted*, 138 S. Ct. 923 (2018). The lower court had changed its original temporary restraining order into a preliminary injunction to make it appealable. *Id.* at 675.

b. Recent Developments in Germany

In 2015, Germany opened its borders[67] to an unprecedented influx of migrants from Syria and other countries, including Iran.[68] This move, first greatly admired and welcomed,[69] now continues to fuel controversy within Germany and Europe.[70] These discussions—involving calls for a centralization of the federal structure of Germany's security agencies[71]—were further intensified by a December 2016 terror attack in

67. While there are no longer any internal borders in the EU, EU member states—under current EU law meant to prevent forum shopping across the EU—must refuse asylum-seekers that enter their territory from safe third countries. HEUSCH ET AL., *supra* note 15, at 113–15 (discussing the basic ideas behind the so-called Dublin Rules governing the mutual responsibilities of EU member states regarding refugees). Since Germany is surrounded by such countries—i.e., other EU member states—it was not permitted to process any asylum applications generated by the current migration from Syria and Northern Africa. For a few months during the summer and fall of 2015, Germany suspended the application of those rules to support EU border nations such as Greece. DIETZ, *supra* note 46, at 172 (arguing that Germany's refusal to abide by the Dublin Rules and turn migrants away from its borders was a trigger of the migrant crisis during the second half of 2015); *see also* Matthew Holehouse et al., *Germany Drops EU Rules to Allow in Syrian Refugees*, TELEGRAPH (Aug. 24, 2015), http://www.telegraph.co.uk/news/worldnews/europe/germany/11821822/Germany-drops-EU-rules-to-allow-in-Syrian-refugees.html [https://perma.cc/6TKS-SV3P]; *Germany Reinstates Dublin Rules for Syrian Refugees*, DW (Nov. 10, 2016), http://www.dw.com/en/germany-reinstates-dublin-rules-for-syrian-refugees/a-18842101 [https://perma.cc/T3FX-4ZQX].

68. *Migrant Crisis: Migration to Europe Explained in Seven Charts*, BBC NEWS (Mar. 4, 2016), http://www.bbc.com/news/world-europe-34131911 [https://perma.cc/4EW5-MVJY]. Ironically, during World War II, tens of thousands of individuals from the Balkans and Greece evaded the advancing German armies by fleeing to camps in the Near East, including Syria. Evan Taparata & Kuang Keng Kuek Ser, *During WWII, European Refugees Fled to Syria*, PRI (Apr. 26, 2016), http://www.pri.org/stories/2016-04-26/what-it-s-inside-refugee-camp-europeans-who-fled-syria-egypt-and-palestine-during [https://perma.cc/A582-Y3EF].

69. The welcome was extended in part because of the German refugee experience in the wake of World War II and at the end of communist East Germany in 1989. Justin Huggler, *Germans Have Been Refugees Before—They See Themselves in These Syrians*, TELEGRAPH (Sept. 4, 2015), http://www.telegraph.co.uk/news/worldnews/europe/germany/11842533/Germans-have-been-refugees-before-they-see-themselves-in-these-Syrians.html [https://perma.cc/G4CS-PSER].

70. Kathleen Schuster, *How the World Sees Germany a Year into the Refugee Crisis*, DW (Aug. 23, 2016), http://www.dw.com/en/how-the-world-sees-germany-a-year-into-the-refugee-crisis/a-19486079 [https://perma.cc/9JPT-ZC4A].

71. Ruth Bender, *German Interior Minister Calls for Security Overhaul After Berlin Christmas Market Attack*, WALL ST. J. (Jan. 3, 2017), http://

Berlin that was perpetrated by a man whose asylum application had been denied, but who had not been deported due to questions over his actual citizenship.[72] In the September 2017 federal elections, the governing coalition was dealt heavy losses especially in Germany's East, while an anti-immigrant party saw a sizeable number of its delegates enter the German parliament for the first time due to voters' lingering dissatisfaction with the 2015 decision to open Germany's borders.[73]

The controversy surrounding religious asylum claims by aliens who convert from Islam to Christianity in Germany was reignited when an Afghan killed a five-year old boy and injured the boy's mother in June 2017. The perpetrator had converted to Christianity while imprisoned for arson in 2012. An administrative court had blocked his deportation to Afghanistan because it found credible his claim that he would face persecution in his home country. Both victims were refugees as well.[74] Moreover, in April 2017, German authorities arrested two suspects—one German translator and one Iranian who worked for the German embassy in Iran—who were accused of helping Iranian asylum-seekers by providing forged documents and coaching them by telling them to convert to Christianity to improve the likelihood of successful applications.[75]

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www.wsj.com/articles/german-interior-minister-calls-for-security-overhaul-after-berlin-christmas-market-attack-1483462292 [https://perma.cc/86WC-N5U4].

72. Alistair Walsh, *Berlin Terrorist Anis Amri Was a Known Drug Dealer*, DW (May 17, 2017), http://www.dw.com/en/berlin-terrorist-anis-amri-was-a-known-drug-dealer/a-38878974 [https://perma.cc/Z573-GUJA]; Bill Chappell, *What We Know About Anis Amri, Suspect in Berlin Market Attack*, NPR (Dec. 22, 2016), http://www.npr.org/sections/thetwo-way/2016/12/22/506587263/what-we-know-about-anis-amri-suspect-in-berlin-market-attack [https://perma.cc/5326-RGA2].

73. *German Election: Merkel Vows to Win Back Right-Wing Voters*, BBC (Sept. 25, 2017), http://www.bbc.com/news/world-europe-41384550 [https://perma.cc/GE55-TNQF]; Noah Barkin, *Incensed over Refugees, East Germans Punish Easterner Merkel*, REUTERS (Sept. 24, 2017), https://www.reuters.com/article/us-germany-election-merkel-east/incensed-over-refugees-east-germans-punish-easterner-merkel-idUSKCN1BZ120 [https://perma.cc/S5HX-46LH].

74. Peter Wenig, *Glaube oder Trick? Wenn Flüchtlinge Christen werden*, BERLINER MORGENPOST (Aug. 27, 2017), https://www.morgenpost.de/politik/article211724473/Glaube-oder-Trick-Wenn-Fluechtlinge-Christen-werden.html [https://perma.cc/5JG2-LUMS]; Andreas Glas & Lisa Schnell, *Arnschwang: Konnten die Behörden wissen, wie gefährlich der Täter war?*, SÜDDEUTSCHE ZEITUNG (June 6, 2017), http://www.sueddeutsche.de/bayern/oberpfalz-arnschwang-konnten-die-behoerden-wissen-wie-gefaehrlich-der-taeter-war-1.3535315 [https://perma.cc/T42Q-NT7E].

75. *German Police Arrest Two for Alleged Human Smuggling*, REUTERS (Apr. 25, 2017), https://www.reuters.com/article/us-germany-migrants/german-

B. The Basic Definition and Benefits of Refugees in International and National Law

After outlining the current legal and historical backdrop and context in which asylum and refugee claims are now being adjudicated, it is time to turn to the laws under which these claims must be made. This section will highlight the international definition of a refugee and where the definition is tied into the national bodies of law in the U.S. and Germany.

International law defines a refugee as anyone 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."[76] The 1951 Convention and the 1967 Protocol require the contracting states to grant certain basic rights to individuals recognized as refugees.[77] While these documents do not require the contracting states to grant refugees asylum or any right of permanent residence, they forbid these states to expel those recognized as refugees "save on grounds of national security or public order"[78] and prohibit them from removing (*refouler*) refugees "in any manner whatsoever to the frontiers of territories where [their] life or freedom would be threatened" on account of the five protected characteristics set forth in the definition of refugee.[79]

police-arrest-two-for-alleged-human-smuggling-idUSKBN17R2CI [https://perma.cc/7MC4-XM9W].

76. Convention, *supra* note 6, art. 1(A)(2). Einarsen deemed this definition to be "the single most important provision of the 1951 Convention and a key to the scope of all its rights and obligations." Einarsen, *supra* note 6, at 49–50. Einarsen also discussed the drafting history of this definition. *Id.* at 53–68. For a discussion of the various international refugee definitions prior to 1951, see Andreas Zimmermann & Claudia Mahler, *Article 1 A, para. 2 (Definition of the Term 'Refugee'/*Définition du Terme 'Réfugié'*)*, *in* THE 1951 CONVENTION, *supra* note 6, at 217, 299–311. The 1951 definition contained the cut-off date of January 1, 1951, which "has lost all of its relevance" for the parties to the 1967 Protocol. *Id.* at 322.

77. For example, non-discrimination, freedom of religion, free access to the courts, access to gainful employment, access to housing and public education, access to administrative assistance, and freedom of movement. Convention, *supra* note 6, arts. 3–4, 16–17, 21–22, 25–26.

78. *Id.* art. 32.

79. *Id.* art. 33(1). Article 33 excepts those who reasonably pose a danger to the host country or have been convicted of a "particularly serious crime." *Id.* art. 33(2).

The U.S. incorporated this definition into federal law[80] and makes those who meet it eligible to be granted asylum on a discretionary basis.[81] Reportedly, "discretionary denials of asylum are 'unusual' and 'exceedingly rare.'"[82] Transposing the Convention's prohibition of *refouler*, U.S. law prohibits expelling aliens to countries where their life or freedom would be threatened on the basis of any of the five protected characteristics.[83]

Germany incorporated this definition into its national law as well,[84] and generally awards refugee status to all those who meet it.[85] While this lack of discretion is an important difference from U.S. law, German law transposes the Convention's prohibition of *refouler* in a way similar to U.S. law.[86]

C. Elements of the Refugee Definition in Detail

Narrowing the focus further, after describing where the international definition of refugee is tied into U.S. and German law, this Note now delves into investigating how the international definition is operationalized in U.S. asylum law and German refugee law. The U.S. Customs & Immigration Services ("USCIS")—the federal agency within

80. 8 U.S.C. § 1101(a)(42)(A) (2012).

81. *Id.* § 1158(b)(1)(A). *See generally* Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J. L. REFORM 595 (2012) (discussing the discretionary nature of granting asylum in the U.S. and arguing that it should be a mandatory form of relief because discretionary relief is an unnecessary additional layer of screening, offers insufficient protection to refugees, and rests on an inherently vague basis). During the drafting discussion leading to the 1948 UDHR, the U.S. chair of the U.N. Human Rights Committee, Eleanor Roosevelt, already asserted that even formulating a non-binding declaration of an individual right to be granted asylum would "raise false hopes" and exceed the U.N.'s powers vis-à-vis sovereign states. MORSINK, *supra* note 27, at 76.

82. Marouf v. Lynch, 811 F.3d 174, 180 (6th Cir. 2016) (quoting Huang v. INS, 436 F.3d 89, 90, 92 (2d Cir. 2006)). *But see* Aschenbrenner, *supra* note 81, at 598–99 (arguing that "it is highly likely" that these appellate opinions overstate "the rarity of discretionary denials" because there is no statistical data available to verify the courts' claims independently).

83. 8 U.S.C. § 1231(b)(3) (2012).

84. *Compare* Asylgesetz [AsylG] [Asylum Act], Sep. 2, 2008, BGBL I at 1798, as amended, § 3(1), https://www.gesetze-im-internet.de/asylvfg_1992/BJNR111260992.html [https://perma.cc/A4SP-P4XY], *with* 2011 Qualification Directive, *supra* note 15, art. 2(d).

85. *Compare* AsylG § 3(4) *with* 2011 Qualification Directive, *supra* note 15, art. 13 ("shall grant refugee status").

86. Aufenthaltsgesetz [AufenthG] [Residency Act], Feb. 25, 2008, BGBl I at 162, as amended, § 60, http://www.gesetze-im-internet.de/aufenthg_2004/BJNR195010004.html [https://perma.cc/H7D7-HXHP].

the Department of Homeland Security charged with adjudicating affirmative asylum claims[87]—distinguishes between establishing that the applicant was or will be persecuted and establishing that the reason for the persecution involved one of the five protected characteristics, such as religion.[88] Using this distinction as a structural clue, this Note will focus on the first part of the definition of refugee by analyzing, first, what is meant by persecution; second, the requirements for establishing past persecution and a "well-founded fear of future persecution;" and third, the requirements for proving the causal nexus between past or future persecution and one of the five protected characteristics requires.

In keeping with the comparative nature of this Note, three positions will be described and compared: that of the U.N., the U.S., and Germany. While the last two positions will be set forth based on their respective national laws and regulations, the position of the U.N. is outlined based on documents published by the UNHCR. While these documents—unlike the 1951 Convention, the 1967 Protocol, or the 1966 ICCPR—do not represent binding international agreements that must inform national legislation and adjudication, their considered position still provides an important international point of reference because the Convention itself requires the parties to cooperate with the UNHCR.[89]

1. Persecution

a. The UNHCR

No universal definition of "persecution" exists.[90] But within the Convention itself, Article 33 provides some hints as to what is meant by the term. Article 33 prohibits the expulsion of refugees to countries where their "life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or

87. ANKER, *supra* note 46, §§ A1:2, A2:1. Defensive asylum applications—filed, e.g., in order to prevent removal from the U.S.—are adjudicated by immigration judges under the Department of Justice's Executive Office of Immigration Review ("EOIR"). *Id.* §§ A1:2, A3:1. The EOIR also oversees the Board of Immigration Appeals ("BIA"), the appellate body reviewing determinations by immigration judges. STEEL, *supra* note 46, § 2:5.

88. U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM ELIGIBILITY PART I: DEFINITION OF REFUGEE; DEFINITION OF PERSECUTION; ELIGIBILITY BASED ON PAST PERSECUTION 15–16 (2009) [hereinafter ELIGIBILITY I], https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Definition-Refugee-Persecution-Eligibiity-31aug10.pdf [https://perma.cc/4S77-NR9P].

89. HATHAWAY & FOSTER, *supra* note 21, at 10 (citing Convention, *supra* note 6, art. 35(1) (requiring state parties to cooperate with the UNHCR to "facilitate its duty of supervising the application of the provisions of this Convention")).

90. U.N. High Comm'r for Refugees, *supra* note 17, ¶ 51, at 13.

political opinion."[91] Since the same protected characteristics are listed here as in the refugee definition quoted above, the UNHCR regards threats to the applicants' "life or freedom" because of any one of the protected characteristics—along with similarly severe violations of human rights—as "persecution" within the meaning of the Convention.[92]

While threats to a person's life and freedom and "other serious violations of human rights"—either by state or non-state actors[93]—inherently possess an objective severity that qualifies them as "persecution," other "prejudicial actions or threats" may be severe enough to generate a subjective fear of persecution in an individual applicant.[94] Moreover, it is also possible to establish persecution cumulatively, that is, based on "various measures not in themselves amounting to persecution . . . ."[95]

Accordingly, while disparate treatment is not in itself persecution, it amounts to persecution if it either is inherently severe enough—e.g., by imposing "serious restrictions" on a person's right to practice his or her religion—or has a persecutory effect, either cumulatively or subjectively, for a particular applicant.[96] Similarly, prosecution is not in itself persecution, unless it is based either on laws that violate "accepted human rights standards" or on generally applicable laws that are ap-

91. Convention, *supra* note 6, art. 33(1).

92. U.N. High Comm'r for Refugees, *supra* note 17, ¶ 51, at 13 (noting that "it may be inferred that a threat to life or freedom on account of [one of the protected characteristics] is *always* persecution" and that "[o]ther serious violations of human rights" would be as well (emphasis added)). This definitional nexus is even clearer in Article 31 of the Convention. Convention, *supra* note 6, art. 31(1) (discussing "refugees . . . coming directly from a territory where *their life or freedom was threatened in the sense of article 1*" (emphasis added)).

93. State actors are mainly in view as agents of persecution, but non-state actors qualify as well, "if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." U.N. High Comm'r for Refugees, *supra* note 17, ¶ 65, at 15 (providing the example of a sizeable faction of the population that is religiously intolerant).

94. *Id.* ¶ 52, at 13; *see* Zimmermann & Mahler, *supra* note 76, at 353–54 ("The object and purpose of the term 'persecution' as the linchpin of the refugee definition lies in the protection of the human dignity of an individual . . . . Since . . . any human rights violation might . . . lead to refugee status, it is the severity of the human rights violation that is of crucial importance."). Moreover, they suggest that "violations of some rights might more easily substantiate a refugee claim than others." *Id.* at 354.

95. U.N. High Comm'r for Refugees, *supra* note 17, ¶ 53, at 13.

96. *Id.* ¶¶ 54–55, at 14.

plied in a discriminatory manner, such as by meting out excessive punishment to persons having one of the five protected characteristics.[97]

In keeping with the UDHR and the ICCPR, persecution on religious grounds may specifically involve the prohibition of belonging to a certain religious community, worshiping in public, or receiving religious instruction.[98] It may also involve serious discrimination because of engaging—or not engaging—in certain religious practices.[99] As stated earlier, the severity of the sanctions—either individually or cumulatively—is what qualifies them as persecution.[100] Moreover, it is vital to consider the importance of the practice threatened by persecutory conduct for the individual practitioner to establish whether the threatened conduct rises to the level of persecution.[101]

Persecution may be carried out by both state and non-state actors.[102] Given that governments are presumed to be the guardians of the basic human rights of all the people living within their territory,[103]

97. *Id.* ¶¶ 56–59, at 14.

98. *Id.* ¶ 72, at 16. *See supra* notes 33–45 and accompanying text (discussing the pertinent provisions of the UDHR and the ICCPR).

99. U.N. High Comm'r for Refugees, supra note 17, ¶ 72, at 16.

100. U.N. High Comm'r for Refugees, *Guidelines on International Protection: Religion-Based Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees*, ¶ 16, U.N. Doc. HCR/GIP/04/06 (Apr. 28, 2004); *see* Zimmermann & Mahler, *supra* note 76, at 386 (noting that international law—e.g., the ICCPR, as discussed *supra* note 44—permits restrictions of the exercise of the right of religious freedom under generally applicable laws); *see also* Christian Walter, *Article 4 (Religion/*Religion*)*, *in* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL, *supra* note 6, at 657, 667 (noting that the impact of the 1951 Convention's own protection of refugees' religious freedom is "rather limited" because the document merely established the "national treatment standard" which, in repressive states, "will not suffice for adequate protection").

101. U.N. High Comm'r for Refugees, *supra* note 100, ¶ 16.

102. U.N. High Comm'r for Refugees, *supra* note 17, ¶ 65, at 15. Four different scenarios are possible: The state conducts persecution; the state condones persecution; the state tolerates persecution; the state refuses, or is unable, to offer meaningful protection. Zimmermann & Mahler, *supra* note 76, at 358.

103. ANKER, *supra* note 46, § 4:8. Early twentieth-century international refugee definitions, while dealing with the issue on a country-by-country basis as new refugee crises materialized, commonly featured a reference to the absence of government protection. *See* Skran, *supra* note 6, at 9, 11, 27, 30. Similarly, Christopher Wellman has proposed a modified version of the traditional concept of state sovereignty dating back to the 1648 Peace of Westphalia where a state "is legitimate only if it adequately protects the human rights of its constituents and respects the rights of all others," Nazi Germany being an obvious example of an illegitimate regime. Wellman, *supra* note 22, at 16.

a key determination in this context is whether the government in the applicants' country of origin is either unwilling or unable "to offer effective protection" from persecutory conduct by non-state actors.[104]

b. U.S. Law

Neither the INA nor the applicable agency regulations define persecution.[105] This uncertainty or "flexibility" created by the statutory and regulatory void is filled by administrative and judicial case law that, in general terms, calls for findings of an absence of state protection and "severe harm."[106] Accordingly, applicants must show more than that the harm experienced or feared "is sufficiently serious to amount to persecution."[107] They must also demonstrate that the persecutor was either a state actor or a non-state actor the government in their country of origin is "unable or unwilling to control."[108]

The U.S. has adopted an objective definition of harm,[109] which means that applicants need not prove that the persecutor acted with a

104. U.N. High Comm'r for Refugees, *supra* note 17, ¶ 65, at 15. This is also why the international refugee definition requires would-be refugees to establish that they are "unable or . . . unwilling to avail [themselves] of the protection of [their] country [of origin]." Convention, *supra* note 6, art. 1(A)(2); *see* U.N. High Comm'r for Refugees, *supra* note 17, ¶¶ 97–101, at 20 (discussing the meaning of the terms "unable" and "unwilling" in reference to protection available or denied in the applicants' countries of nationality or, in the case of stateless refugees, to their countries of habitual residence).

105. ANKER, *supra* note 46, § 4:4.

106. *Id.* (noting that while persecution is a "flexible concept," it requires "findings of failure of state protection and severe harm" (citing Vasili v. Holder, 732 F.3d 83, 90 (1st Cir. 2013))).

107. ELIGIBILITY I, *supra* note 88, at 15.

108. *Id.* at 16, 43–47 (citing Kasinga, 21 I. & N. Dec. 357, 365 (BIA 1996)). On the increasing relevance of non-state agents of persecution since the 1951 Convention's drafting and the lagging legal response of Western countries, see Andrew I. Schoenholtz, *The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century*, 16 CHI. J. INT'L L. 81, 92–107 (2015). According to a recent statutory definition, a non-state actor is "a nonsovereign entity that (A) exercises significant political and territorial control; (B) is outside the control of a sovereign government; and (C) often employs violence in pursuit of its objectives." Frank R. Wolf International Religious Freedom Act, Pub. L. No. 114-281, § 3(3), 130 Stat 1426, 1428 (2016) (to be codified at 22 U.S.C. § 6402(11)).

109. *See* Zimmermann & Mahler, *supra* note 76, at 373–74 (noting that the 1951 Convention focuses on "an objective assessment of the underlying reasons for persecution, rather than . . . on the subjective motivation of the respective persecutor").

"punitive" or "malignant" intent to harm them.[110] Thus, it is not determinative whether the persecutor intended the applicants to experience certain conduct as harm, but whether a reasonable person would consider such conduct as serious harm.[111] This harm can take a variety of forms, from torture to severe economic disadvantage.[112] The seriousness of the harm may be established by showing cumulative instances of inherently lesser harms.[113]

The International Religious Freedom Act of 1998 ("IRFA")[114] defines both "particularly severe violations of religious freedom" and "vio-

110. ELIGIBILITY I, *supra* note 88, at 16 (citing *Kasinga*, 21 I. & N. Dec. at 365; Pitcherskaia v. INS, 118 F.3d 641, 646 (9th Cir. 1997)). This is analogous to the single-intent approach to battery that does not require an intent to harm the victim, only an intent to touch that is objectively offensive or harmful to the victim. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS §§ 102–03 (AM. LAW INST., Tentative Draft No. 1, 2015) ("The actor need not intend to cause harm or offense to the other."); Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1066–70 (2006) (contrasting single-intent and dual-intent approaches to battery); *accord Pitcherskaia*, 118 F.3d at 647; *see also* Fisher v. I.N.S., 79 F.3d 955, 961 (9th Cir. 1996) (noting that the BIA typically defines the "extreme concept" of persecution as "the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive"). This meaning goes back to the dictionary definition of the term. Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969).

111. *Pitcherskaia*, 118 F.3d at 647. At the same time, USCIS deems it important to consider the "unique circumstances of the individual." ELIGIBILITY I, *supra* note 88, at 21 (noting that treatment that may easily be bearable by a healthy individual may prove deadly to an elderly or sickly person).

112. ELIGIBILITY I, *supra* note 88, at 22–43 (discussing human rights violations, discrimination, arrests and detentions, economic harm, psychological harm, sexual harm, coercive population control, and harm to third parties).

113. *Id.* at 20–21 (noting that while a single act may constitute persecution, several less severe acts taken together may rise to the required severity as well).

114. Pub. L. No. 105-292, 112 Stat. 2787 (codified as amended in scattered sections of 22 U.S.C. (2012)).

lations of religious freedom."[115] Asylum officers should consider these definitions when adjudicating claims of religious persecution.[116]

The "particularly severe violations of religious freedom" listed in the IRFA correspond to the severe human rights violations already discussed and are incorporated into USCIS's adjudication practice accordingly.[117] General "violations of religious freedom" under the IRFA also include lesser acts such as arbitrary prohibitions, arbitrary registration requirements, and other restrictions imposed on religious practices.[118] Such lesser acts "may constitute persecution, depending on the circumstances."[119]

When reviewing claims of religiously motivated persecution, it may be necessary to assess the "importance or centrality of the [sanctioned] practice in the religion or to the individual applicant,"[120] unless the ap-

115. 22 U.S.C. § 6402(11), (13) (2012). In the December 2016 amendment to the IRFA, paragraph (11) was redesignated as paragraph (13) and paragraph (13) was redesignated as paragraph (16); paragraph (13) was amended to include persecution involving atheists. Frank R. Wolf International Religious Freedom Act, Pub. L. No. 114-281, §§ 3(1), (5), 130 Stat 1426, 1427–28 (2016) (to be codified at 22 U.S.C. § 6402). The pertinent lesson in the USCIS Asylum Officer Basic Training Course Participant Workbook already incorporates "an individual's failure or refusal to observe a religion" as protected under "religion." U.S. CITIZENSHIP & IMMIGRATION SERVS., THE INTERNATIONAL RELIGIOUS FREEDOM ACT (IRFA) AND RELIGIOUS PERSECUTION CLAIMS 12 (2009) [hereinafter RELIGIOUS PERSECUTION CLAIMS], https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Intl-Religious-Freedom-Act-31aug10.pdf [https://perma.cc/CKA3-MSGC].

116. *See* RELIGIOUS PERSECUTION CLAIMS, *supra* note 115, at 21 (noting that the "range of violations listed in IRFA is instructive for determining persecution under the INA").

117. *Compare* 22 U.S.C. § 6402(11) (2012), *with* ELIGIBILITY I, *supra* note 88, at 22, *and* RELIGIOUS PERSECUTION CLAIMS, *supra* note 115, at 24 (noting that "[i]n most instances, the serious forms of mistreatment categorized in IRFA . . . will constitute persecution").

118. *See* 22 U.S.C. § 6402(13)(A) (2012) (listing "arbitrary prohibitions on, restrictions of, or punishment for" certain religious conduct such as "assembling for peaceful religious activities," "speaking freely about one's religious beliefs;" "changing one's religious beliefs;" and "raising one's children in the religious teachings and practices of one's choice"); *cf. id.* § 6402(13)(B) (listing a number of examples of more severe sanctions imposed "on account of an individual's religious belief or practice," ranging from detention to rape and execution).

119. RELIGIOUS PERSECUTION CLAIMS, *supra* note 115, at 24.

120. *Compare id.* at 25 (noting that "forced compliance with laws that fundamentally are abhorrent to a person's deeply held religious convictions may constitute persecution" (citing Fatin v. INS, 12 F.3d 1233, 1242 (3d Cir. 1993) ("An example of such conduct might be requiring a person to renounce his or her religious beliefs or to desecrate an object of religious

plicants can show that conversion to a different religion is subject to severe penalties.[121] But U.S. authorities may not require applicants to forego practicing their beliefs in public to avoid religious persecution, since being forced to practice one's beliefs underground is itself a form of persecution that "is contrary to our basic principles of religious freedom and the protection of religious refugees."[122]

c. German Law

The Asylum Act defines acts of persecution both as to their severity and their specific form. The severity of these acts must be such that they "constitute a severe violation of basic human rights," especially the right to life; the prohibition of torture, slavery, and forced labor; and the common legal principle of *nulla poena sine lege*.[123]

The critical level of severity can be reached either by the specific nature or repetition of those acts or by an accumulation of various measures.[124] Specific examples of persecutory conduct—perpetrated ei-

importance . . . only if directed against a person who actually possessed the religious beliefs or attached religious importance to the object in question."))), *with* ELIGIBILITY I, *supra* note 88, at 21 (highlighting the general importance of considering "the feelings [and] opinions . . . of the applicant").

121. RELIGIOUS PERSECUTION CLAIMS, *supra* note 115, at 28 (citing Bastanipour v. INS, 980 F.2d 1129, 1132–33 (7th Cir. 1992)).

122. *Id.* at 26 (quoting Zhang v. Ashcroft, 388 F.3d 713, 719 (9th Cir. 2004)).

123. *Compare* Asylgesetz [AsylG] [Asylum Act], Sep. 2, 2008, BGBL I at 1798, as amended, § 3(1)(a)–(b), https://www.gesetze-im-internet.de/asylvfg_1992/BJNR111260992.html [https://perma.cc/A4SP-P4XY], *with* 2011 Qualification Directive, *supra* note 15, art. 9(1)(a)–(b), *and* COUNCIL OF EUROPE, 1950 EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS art. 15(2), www.echr.coe.int/Documents/Convention_ENG.pdf [https://perma.cc/CWS4-5RSW]. *See* HEUSCH ET AL., *supra* note 15, at 21–22 (distinguishing between the "emergency-resistant" human rights set forth in the Asylum Act based on the European Convention and those human rights that may be limited by law in times of public emergency threatening the existence of a state without automatically constituting persecution). Religion, while recognized as protected, "central," and "foundational," is not one of those "emergency-resistant" human rights. *See, e.g.*, BVerwG, Mar. 5, 2009, 10 C 51.07, ¶ 13, http://www.bverwg.de/entscheidungen/pdf/050309U10C51.07.0.pdf [https://perma.cc/SUX5-6P9X]. Otherwise permissible limitations of human rights—including religious liberty—may constitute persecution, for example, if they are applied disproportionately or discriminatorily. HAILBRONNER, *supra* note 15, at 413.

124. *Compare* AsylG § 3a(1)(a)–(b) *with* 2011 Qualification Directive, *supra* note 15, art. 9(1)(a)–(b). *See also* HEUSCH ET AL., *supra* note 15, at 22–23 (noting that the cumulative principle is an innovation in German refugee jurisprudence derived from EU law).

ther by state or non-state actors operating within the boundaries of the applicant's country of origin[125]—include acts of physical or mental violence; legal or administrative measures that either are facially discriminatory or are applied in a discriminatory fashion; or prosecution or punishment that is disproportionate or discriminatory.[126] The subjective motivation of the persecutor is irrelevant.[127]

d. Summary

The definition of persecution embraced by the UNHCR, the U.S., and Germany—despite the absence of a binding international definition—is very similar. It requires severe mistreatment, but allows asylum-seekers to show that their treatment reaches this level cumulatively. Common to all three regimes is the fact that both state and non-state actors qualify as potential agents of persecution. At least for the U.S. and Germany, it is irrelevant whether the persecutor meant to harm the applicants.

Subjective considerations on the part of the applicants—such as how important a proscribed religious practice is to the individual seeking asylum—are also discussed in German law. German law, however, is centered on the complex notion of "religious identity" when establishing well-founded fear, the topic of the following section.

2. Well-founded Fear

a. The UNHCR

The UNHCR defines "well-founded fear"[128] as having a subjective component, "fear," and an objective component, "well-founded," and holds that the inquiry into a refugee's claim of persecution should focus on the applicants' statements, not on the situation in their country of origin.[129]

125. *Compare* AsylG § 3c *with* 2011 Qualification Directive, *supra* note 15, art. 6.

126. *Compare* AsylG § 3a(2) *with* 2011 Qualification Directive, *supra* note 15, art. 9(2). These acts have in common that they are deliberate and targeted conduct; they are not simply incidental to war and natural disasters. DIETZ, *supra* note 46, at 137; HAILBRONNER, *supra* note 15, at 417.

127. BVerfG, 2 BvR 153/96, ¶ 23, Aug. 5, 1998, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1998/08/rk19980805_2bvr015396.html [https://perma.cc/27YK-2XUT].

128. This expression was added to the 1951 Convention "to express that a person has either been actually a victim of persecution or can show good reason why he fears persecution." Zimmermann & Mahler, *supra* note 76, at 337 (internal quotation marks omitted) (citation omitted).

129. U.N. High Comm'r for Refugees, *supra* note 17, ¶¶ 37–38, at 11. *But see* James C. Hathaway & William S. Hicks, *Is There a Subjective Element in the Refugee Convention's Requirement of "Well-Founded Fear"?*, 26 MICH.

Investigating the subjective element requires assessing the applicants' personality and, at times, their credibility, to establish whether "the predominant motive for [their] application is fear."[130] Investigating the objective element requires assessing statements made by the applicants in view of "the relevant background situation," including the conditions in their country of origin.[131] The objective element is satisfied if the applicants can reasonably show that the situation in their country of origin was or would be "intolerable" for them because of the reasons stated in the definition of refugee.[132] Determinations of a future threat may require applicants to demonstrate that people like them have been persecuted, how the laws of their country of origin are applied, or that they are prominent or outspoken members of the community that may more likely become victims of persecution than obscure, quiet members of that same community.[133]

Importantly, while internal relocation as an alternative to claiming refugee status abroad "is not explicitly referred to" in the 1951 international definition of a refugee, this question may "arise as part of the refugee status determination process."[134] A legitimate internal reloca-

J. INT'L. L. 505 (2005) (arguing that the review of refugee claims under the 1951 Convention should abandon the traditional subjective-objective approach and be limited to objective factors, as required by the Convention itself); Zimmermann & Mahler, *supra* note 76, at 338 (noting that both "object and purpose of the 1951 Convention . . . support[] an interpretation of the notion of 'well-founded fear' as forward-looking expectation of risk based on objective reasons for such fear" (citing Hathaway & Hicks, *supra*, at 509)). This objective-only position was already advocated by Atle Grahl-Madsen in 1966. 1 ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 174 (1966) ("In fact, . . . the frame of mind of the individual hardly matters at all.").

130. U.N. High Comm'r for Refugees, *supra* note 17, ¶¶ 40–41, at 11–12.

131. *Id.* ¶ 42, at 12.

132. *Id.*

133. *Id.* ¶ 43, at 12; *see also* Zimmermann & Mahler, *supra* note 76, at 341 (noting that the "drafting history of the 1951 Convention does not provide any guidance" as to "what degree of risk is necessary in order to determine the existence of a well-founded fear of persecution").

134. U.N. High Comm'r for Refugees, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, ¶ 2, U.N. Doc. HCR/GIP/03/04 (July 23, 2003); *see also* Zimmermann & Mahler, *supra* note 76, 445–49 (discussing the relatively recent, but now essential (in most jurisdictions) inquiry into whether applicants for refugee status had an internal-relocation alternative in light of the fact that "it is not self-evident" from the wording of the refugee definition that such an inquiry be conducted); HATHAWAY & FOSTER, *supra* note 21, at 332 ("[C]onsideration of internal protection aligns comfortably with the overarching object and purpose of the Refugee Convention, that being to

tion option should meet two basic criteria: First, the area in question must be one "where there is no risk of a well-founded fear of persecution."[135] Second, those who experience persecution in one part of the country "could reasonably be expected to establish him/herself and live a normal life" in that area.[136] Both criteria must be assessed "over time," that is, not only at the time when the applicants fled their country of origin in the past, but also in a "forward-looking" manner to evaluate "whether the proposed area provides a meaningful alternative in the future."[137]

As observed at the beginning of this Note, a large number of people are currently classified as "internally displaced."[138] Although these individuals may enjoy some basic level of international assistance, their mere presence in a given country should not be construed to mean that

provide surrogate international protection only where the national protection of one's own country is not available.").

135. U.N. High Comm'r for Refugees, *supra* note 134, ¶ 6. Whether this criterion is met is established in a "relevance analysis." *Id.* ¶¶ 7, 9–21. For a critique of this criterion based on where to locate the analysis of whether an internal relocation alternative exists within the language of the refugee definition, see HATHAWAY & FOSTER, *supra* note 21, at 333, 335–42 (arguing that the analysis should be based in the definition's "state protection" language, not in its "well-founded fear" language).

136. U.N. High Comm'r for Refugees, *supra* note 134, ¶ 6. Whether this criterion is met is established in the "reasonableness analysis." *Id.* ¶¶ 7, 22–30; *see also* U.N. High Comm'r for Refugees, *supra* note 17, ¶ 91, at 19 (noting that an internal-relocation alternative should not derail a refugee claim "if under all the circumstances it would not have been reasonable to expect [the applicant] to [take advantage of it]"). For a critique of the reasonableness criterion as providing too "fungible" a protection, see HATHAWAY & FOSTER, *supra* note 21, at 333 (basing this critique on the requirement of state protection within the applicants' country of origin).

137. U.N. High Comm'r for Refugees, *supra* note 134, ¶ 8. This paragraph addresses some of the concerns voiced by commentators on earlier formulations that remained ambivalent as to the point in time that would be determinative for establishing a reasonable, safe in-country alternative. *See, e.g.*, Zimmermann & Mahler, *supra* note 76, at 449–50 (faulting the UNHCR Handbook for giving the impression that determinative for the inquiry into internal flight alternatives are the conditions existing when the applicants left their country of origin and arguing that establishing instead the time of assessment as the "decisive point in time in refugee status determination" is also supported by the *nonrefoulement* provision of the 1951 Convention). The alternative to the UNHCR's two-pronged approach formulated by Hathaway and Foster looks to the future when assessing whether a safe in-country alternative is actually available. HATHAWAY & FOSTER, *supra* note 21, at 361.

138. *See supra* note 2.

there is a safe and reasonable internal-relocation alternative for would-be refugees.[139]

In the case of *sur place* claimants on religious grounds, the critical determination is whether the claimants' actions—e.g., their conversion or apostasy—are likely to come to the attention of the local agents of persecution and how these actions will likely be viewed by such agents in their country of origin.[140] If these agents will likely remain ignorant of the claimants' activities or disregard them as opportunistic, a well-founded fear cannot be established.[141]

b. U.S. Law

Applicants who can demonstrate by a preponderance of credible evidence[142] that they were persecuted in the past create a rebuttable presumption of well-founded fear of future persecution.[143] In the absence of past persecution, applicants also need to establish a well-founded fear of future persecution by a preponderance of the evidence.

Excluded in principle from having such a well-founded fear are those applicants who could avoid persecution by relocating internally within their country of origin.[144] But this requirement of internal relocation applies only "if under all the circumstances it would be reasonable to expect the applicant to do so."[145] This reasonableness requirement does not require the applicants to show that they would face persecution everywhere in their country of origin. Instead, the inquiry

139. U.N. High Comm'r for Refugees, *supra* note 134, ¶¶ 31–32.

140. U.N. High Comm'r for Refugees, *supra* note 100, ¶ 35; *see also* HATHAWAY & FOSTER, *supra* note 21, at 79–80 (noting that *sur place* applications should not be given a second-rate status but should simply be examined based on whether the claimants' actions abroad could become known to potential persecutors in their country of origin and whether the risk created thereby "is both sufficiently serious . . . and based on an actual or imputed Convention ground").

141. U.N. High Comm'r for Refugees, *supra* note 100, ¶ 36.

142. The burden-of-proof and credibility provisions in 8 U.S.C. § 1158(b)(1)(B) were added by the REAL ID Act of 2005, enacted as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, div. B, tit. I, § 101(a)(3), 119 Stat. 231, 303 (codified as amended at 8 U.S.C. § 1158 (2012)).

143. 8 C.F.R. § 208.13(b)(1) (2016); *see* U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM ELIGIBILITY PART II: WELL-FOUNDED FEAR 26 (2009) [hereinafter ELIGIBILITY II], https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Well-Founded-Fear-31aug10.pdf [https://perma.cc/U66K-QRM9].

144. 8 C.F.R. § 208.13(b)(2)(ii).

145. *Id.*

focuses on factors such as "other serious harm," "ongoing civil strife within the country," a country's infrastructure as well as "geographical limitations" and "social and cultural constraints."[146] Absent a reasonable internal-relocation alternative, establishing "well-founded fear" requires applicants to prove the subjective element of fear of persecution in their country of origin due to one or more of the five protected characteristics and the objective element of a "reasonable possibility of suffering such persecution" in their country of origin.[147]

As for the subjective element mentioned in the previous paragraph,[148] the fear of persecution experienced by the applicant must be genuine.[149] Moreover, while this fear does not have to be the applicant's only motivation, it must be the "primary motivation for requesting refuge."[150] As for the objective element, the regulation's "reasonable possibility" requirement is a standard of proof lower than the "more likely than not" standard required in other immigration proceedings.[151] To meet this standard, applicants must establish "facts that would lead a reasonable person in similar circumstances to fear persecution."[152]

146. *Id.* § 208.13(b)(3).

147. *Id.* § 208.13(b)(2); *see* ELIGIBILITY II, *supra* note 143, at 4–5; U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM ELIGIBILITY PART IV: BURDEN OF PROOF, STANDARDS OF PROOF, AND EVIDENCE 11–12 (2006) [hereinafter ELIGIBILITY IV], https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Burden-of-Proof-Standards-Proof-Evidence-31aug01.pdf [https://perma.cc/23JT-3GGX].

148. *See also* ANKER, *supra* note 46, § 2:6 (discussing the pros and cons of even having a subjective element at this juncture). For a broader discussion, see generally Hathaway & Hicks, *supra* note 129 (arguing that the review of asylum claims should abandon the traditional bipartite approach and be limited instead to objective factors); *see also* HATHAWAY & FOSTER, *supra* note 21, at 92 (arguing that the bipartite approach is "neither desirable . . . nor defensible . . . .").

149. Acosta, 19 I. & N. Dec. 211, 211 (BIA 1985) (defining fear as "a genuine apprehension or awareness of danger in another country"); *see* ELIGIBILITY II, *supra* note 143, at 4.

150. *Acosta*, 19 I. & N. Dec. at 211.

151. ELIGIBILITY II, *supra* note 143, at 5 (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (noting that a one-in-ten chance of persecution would lead to a "well-founded fear of being persecuted")). The Supreme Court noted that the comparatively low standard of proof for "fear" for asylum purposes has to do with the discretionary nature of asylum and the mandatory nature of withholding and deferral of removal. *Cardoza-Fonseca*, 480 U.S. at 443–44.

152. ELIGIBILITY II, *supra* note 143, at 5 (citing, inter alia, Guevara Flores v. INS, 786 F.2d 1242, 1249 (5th Cir. 1986); Mogharrabi, 19 I. & N. Dec. 439, 448 (BIA 1987)).

The Board of Immigration Appeals (BIA)[153]—in its 1987 *Mogharrabi* opinion[154]—developed a four-pronged test to distinguish the statutorily required "well-founded fear" from mere "irrational apprehension."[155] To prove that their fear of persecution is well-founded, applicants must produce credible evidence that meets the following four criteria: (1) They must possess—or be believed to possess—one of the five protected characteristics, e.g., hold certain religious views or engage in certain religious practices.[156] (2) The "persecutor is aware or could become aware" that they possess—or are believed to possess—one of the five protected characteristics.[157] (3) "[T]he persecutor has the capability to persecute" them.[158] (4) "[T]he persecutor has the inclination to persecute" them,[159] demonstrated, e.g., by regularly enforcing persecutory laws that ban religious practices or conversions.[160]

Appellate courts do not seem to have widely adopted *Mogharrabi*'s four criteria. *Mogharrabi* only intended these factors as "useful guidelines" to assist in the assessment as to whether the real standard embraced by that opinion was met, i.e., that "a reasonable person in [the applicant's] circumstances would fear persecution."[161] After some criti-

153. *See supra* note 87.

154. *Mogharrabi*, 19 I. & N. Dec. at 446–47; *see* R-A-, 22 I. & N. Dec. 906, 942–43 (BIA 2001) (referring to the four *Mogharrabi* criteria as exemplifying the BIA's "longstanding analysis of the elements that must be present" to establish a fear of persecution). The *Mogharrabi* elements have been modified to adopt to early criticism of the test. The modification affects the first and third prongs, dropping *Mogharrabi*'s requirement that a persecutor seek to overcome the protected characteristics by means of *punishment*. Kasinga, 21 I. & N. Dec. 357, 365 (BIA 1996); *see* ELIGIBILITY II, *supra* note 143, at 6–7 (citing Pitcherskaia v. INS, 118 F.3d 641, 647–48 (9th Cir. 1997)); ELIGIBILITY I, *supra* note 88, at 16. USCIS also uses this test to evaluate claims made by *sur place* refugees. ELIGIBILITY II, *supra* note 143, at 20.

155. *See* Blanco-Comarribas v. INS, 830 F.2d 1039, 1042 (9th Cir. 1987).

156. ELIGIBILITY II, *supra* note 143, at 6.

157. *Id.* at 6–7.

158. *Id.* at 7.

159. *Id.*

160. HATHAWAY & FOSTER, *supra* note 21, at 130 (cautioning that even a persecutory law that is not regularly enforced may still result in serious harm on account of a protected characteristic, for example, by exposing the person to blackmail and private law enforcement based on an at least perceived unwillingness of the government to protect the victim).

161. Mogharrabi, 19 I. & N. Dec. 439, 445–46 (BIA 1987) (quoting Guevara Flores v. INS, 786 F.2d 1242, 1249 (5th Cir. 1986)).

cal reference to *Mogharrabi*'s four factors, mainly in the 1990s,[162] courts typically demand that an applicant's fear be "both subjectively genuine and objectively reasonable" to constitute "well-founded fear."[163]

Mogharrabi would not disagree with this two-pronged test. The structure of the *Mogharrabi* opinion shows that the BIA's unified formula, despite its echoes of the negligence standard in tort law—"a reasonable person in the applicant's circumstances"—does not exclude the consideration of the applicant's subjective fear. This is because the opinion appreciatively discusses a number of appellate court opinions that espouse a variation of the subjective-objective formula.[164] Eventually, *Mogharrabi* settled on the Fifth Circuit's reasonable person formulation, which the Fifth Circuit meant to incorporate the subjective and objective prongs of the test.[165] And while the four criteria themselves show no consideration for the applicant's mental state, they are clearly not meant to represent the entire extent of the inquiry. But, as *Mogharrabi* maintains, any subjective considerations come into play after the objective basis of that fear has been established by "credible, direct, and specific evidence."[166]

162. *See, e.g.*, Pitcherskaia v. INS, 118 F.3d 641, 647–48 (9th Cir. 1997). For a more recent, and positive, reference to *Mogharrabi*, see Kyaw Zwar Tun v. INS, 445 F.3d 554, 565, 569–71 (2d Cir. 2006) (quoting the four criteria and then employing the parts of the test particularly relevant to the specific facts of the case, which involved a Burmese national who became active in the Burmese pro-democracy movement while in the U.S.).

163. *See, e.g.*, Granados v. U.S. Attorney Gen., 578 F. App'x 866, 870–71 (11th Cir. 2014) (quoting Ruiz v. U.S. Attorney Gen., 440 F.3d 1247, 1257 (11th Cir. 2006) (per curiam)); *see also* Bathula v. Holder, 723 F.3d 889, 898 n.27 (7th Cir. 2013) (quoting Bolante v. Mukasey, 539 F.3d 790, 794 (7th Cir. 2008)). According to the Seventh Circuit, the objective prong requires the applicants to "present *specific*, *detailed* facts showing a good reason" for their fear of persecution. *Bolante*, 539 F.3d at 794 (quoting Ahmed v. Ashcroft, 348 F.3d 611, 618 (7th Cir. 2003)).

164. *Mogharrabi*, 19 I. & N. Dec. at 443–45 (discussing Cardoza-Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987); Diaz-Escobar v. INS, 782 F.2d 1488 (9th Cir. 1986); Yousif v. INS, 794 F.2d 236 (6th Cir. 1986); *Guevara Flores*, 786 F.2d at 1242).

165. *Mogharrabi*, 19 I. & N. at 444–45 (quoting *Guevara Flores*, 786 F.2d at 1249).

166. *Id.* at 444 (quoting *Cardoza-Fonseca*, 767 F.2d at 1453; *Diaz-Escobar*, 782 F.2d at 1492). *Compare* 8 U.S.C. § 1158(b)(1)(B)(ii) (2012) (requiring that the applicant's testimony in general "is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee" within the statutory definition), *with Cardoza-Fonseca*, 767 F.2d at 1453 (quoting Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984)).

The Supreme Court's decision in *INS v. Cardoza-Fonseca*[167] makes evaluating the BIA's *Mogharrabi* opinion—and balancing the subjective and objective elements of "well-founded fear"—difficult. The Court, on the one hand, requires the "subjective mental state of the alien" to be considered "to some extent."[168] On the other hand, it declares that there should be an "obvious focus on the individual's subjective beliefs."[169]

Evidently, under this imprecise guidance, not every "two-pronged approach" accounting for the subjective and objective elements of "well-founded fear" will look the same: For instance, one panel of the Ninth Circuit criticized *Mogharrabi* as unresponsive to the Supreme Court's *Cardoza-Fonseca* opinion.[170] While the panel claimed that the Supreme Court demanded the "primary focus" of the inquiry to be "on the subjective state of mind of the petitioner,"[171] the Supreme Court's opinion lacks this clarity.[172] Hence, another panel of the Ninth Circuit found *Mogharrabi*'s formulation of the reasonable person standard to be "not inconsistent" with the Supreme Court's decision and a two-pronged approach.[173]

While applicants must show that their subjective fear is genuine, they need not show that they would be persecuted individually to establish that their fear is well-founded. Instead, they must show, first, that there is a "pattern or practice" in their country of origin that subjects "a group of persons similarly situated to the applicant" to persecution for one or more of the five protected characteristics and, second, that the applicant is included in, or identified with, that group in a way that makes the applicant's fear of future persecution reasonable.[174] In other words, applicants must show that they share one or more of the five

167. 480 U.S. 421 (1987).

168. *Id.* at 430–31.

169. *Id.* at 431.

170. Valle-Zometa v. INS, No. 88-7174, 1990 WL 208725, at *3 (9th Cir. Dec. 5, 1990).

171. *Id.*

172. *See* STEEL, *supra* note 46, § 8:8 (noting that *Cardoza-Fonseca* "did not determine with precision what would establish a well-founded fear").

173. Cuadras v. INS, 910 F.2d 567, 570 (9th Cir. 1990); *see also* HATHAWAY & FOSTER, *supra* note 21, at 93–95 (discussing a number of foreign jurisdictions that, applying the dual subjective-objective standard prevalent in the U.S., have turned establishing the subjective element into a "threshold question").

174. 8 C.F.R. § 208.13(b)(2)(iii) (2016); *see also* RELIGIOUS PERSECUTION CLAIMS, *supra* note 115, at 27–28 (noting that "mere membership in a religious community" will ordinarily not suffice to establish an applicant's eligibility for religious asylum but also emphasizing that an individual need not prove individual persecution "if she shows that she is included in a group that suffers a pattern or practice of persecution").

protected characteristics with those who are persecuted in a given country on account of those characteristics.[175]

c. German Law

Under German law, reviewing claims of a well-founded fear of future persecution on account of religion takes place in three basic steps:[176]

First, a court must evaluate the objective—qualitative or quantitative[177]—cumulative aspect of the severity of the threat to the applicant's physical integrity, life, or physical liberty, e.g., by means of degrading treatment or punishment: How severe are the threats the applicants face? If the applicant claims to be exposed to criminal prosecution for a proscribed religious practice, the court needs to review the actual practice of prosecution in the applicant's country of origin for someone in the applicant's position: A prohibition that is not apparently enforced provides no grounds for a significant risk of persecution.[178]

Second, a court must evaluate the subjective aspect of the severity of the threatened infraction on the applicant's religious liberty. Here, courts should review the special importance of the proscribed religious practice to the applicants' "religious identity," unless mere membership in a religious community already causes persecution.[179] In other words, how important is the proscribed conduct to the applicants? While the practices of their religious community can provide circumstantial evi-

175. ELIGIBILITY II, *supra* note 143, at 9 (citing Meguenine v. INS, 139 F.3d 25, 29 (1st Cir. 1998) (rejecting the claims of an apolitical health care worker from Algeria that healthcare workers face persecution, where the record showed that only healthcare workers who are opponents of Islamic fundamentalists faced persecution)).

176. *See* BVerwG, Feb. 20, 2013, 10 C 23.12, http://www.bverwg.de/entscheidungen/pdf/200213U10C23.12.0.pdf [https://perma.cc/A6A2-C5DQ]; HAILBRONNER, *supra* note 15, at 423–25; *see also* Uwe-Dietmar Berlit, *Aktuelle Rechtsprechung zum Flüchtlingsrecht*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT—EXTRA, Feb. 15, 2017, at 1, 15–16, http://rsw.beck.de/rsw/upload/NVwZ/NVwZ-Extra_2017_04.pdf [https://perma.cc/GH28-U2PC] (discussing current German refugee jurisprudence on religious converts).

177. BVerwG, 10 C 23.12, ¶¶ 35–37; *see also* Asylgesetz [AsylG] [Asylum Act], Sep. 2, 2008, BGBL I at 1798, as amended, § 3a(1), https://www.gesetze-im-internet.de/asylvfg_1992/BJNR111260992.html [https://perma.cc/A4SP-P4XY].

178. BVerwG, 10 C 23.12, ¶ 28.

179. *Id.* ¶¶ 21, 33, 41 (distinguishing between persecution due to the applicant's membership in a religious community and due to the applicant's "deliberate conduct" (*willensgesteuertes Verhalten*)). *But see infra* note 223 (noting that the UNHCR distinguishes three elements of "religion" of which "identity" is only one that may or may not be present in a "sincerely" religious person).

dence here, the decisive inquiry aims at establishing how the individual applicants live their beliefs and whether the proscribed exercise of the applicants' beliefs is indispensable for them personally according to their understanding of their beliefs.[180]

"Religious identity" is an admittedly complex term.[181] The current Presiding Justice of the refugee-and-asylum-law panel of the Federal Administrative Court locates the meaning of the term somewhere between a quasi-static, fateful-irreversible entity that is independent of one's own experiences, actions, and decisions and some attitude that can be changed at will on short notice.[182]

The term "religious identity"—employed to give meaning to "religion" in the context of the other protected characteristics under the Convention[183]—seems to be derived from German jurisprudence's

180. *Id.* ¶ 29.

181. Uwe Berlit, *Aktuelle Rechtsprechung des BVerwG zum Asyl- und Flüchtlingsrecht*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT—EXTRA, June 15, 2015, at 1, 2, http://rsw.beck.de/rsw/upload/NVwZ/NVwZ-Extra_2015_12.pdf [https://perma.cc/7CTF-6T9J].

182. *Id.* Similarly, Reinhard Marx rejected the older, "static" understanding of "identity" in favor of a dynamic one that "aims at the public and the community and includes activities of the individual." Reinhard Marx, *Schutz der Religionsfreiheit im Flüchtlingrecht*, *in* GRENZÜBERSCHREITENDES RECHT—CROSSING FRONTIERS 217, 224 (Georg Jochum et al. eds., 2012). Concretely, Marx thought of "religious identity" as comprising "freedom of conscience," including the freedom to act on one's conscience, and "a tendency toward something that is pre-established, independent of the will," such as religious traditions, rituals, and symbols that shape adherents of a particular religion and create in them a disposition to act in a certain, predictable way. *Id.* at 224–25 (citing CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 95 (1973)). Geertz's model does not necessarily seem to capture the "essence" of religion, but rather seems to be based on Aristotle's understanding of ethics where habitual virtues, created by constantly acting in virtuous ways, are dispositions to act virtuously under all circumstances; *see also* Richard Kraut, *Aristotle's Ethics*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2016), https://plato.stanford.edu/archives/spr2016/entries/aristotle-ethics [https://perma.cc/G6DV-CARY].

183. The common genus of the five protected characteristics was described by the Federal Administrative Court—based on the events during and after World War II that gave rise to the 1951 Convention—as "human characteristics and behaviors . . . that, according to historical experience, represented, and continue to represent, the most frequent and decisive points of contact and reference for the suppression and persecution of those who are different and think differently." BVerwG, Mar. 15, 1988, 9 C 278.86, ¶ 16, https://www.jurion.de/urteile/bverwg/1988-03-15/bverwg-9-c-27886/ [https://perma.cc/2RE8-E9TH]. Against the historical backdrop, a certain understanding of the characteristics of nationality and race are given controlling weight for the interpretation of the other three characteristics. *Id.* ¶¶ 17–18 (construing homosexuality as a protected characteristic in

traditional distinction between an inner core area of religious liberty, that is essential for the religious identity of the individual and that may not be restricted without constituting persecution, and an external aspect of this freedom that may be restricted because it is not essential for one's "religious identity."[184] The inner aspect of the freedom of religion includes the freedom to have or not to have a religious belief; the ability to change this belief; and the freedom to profess one's religion individually and collectively within the confines of one's own religious community. The external aspect includes the freedom to practice one's beliefs publicly.[185]

In 2012, this distinction was overturned by the EU's Court of Justice. The court thereby expanded the area that may be essential for one's "religious identity"—and, thus, relevant for refugee status determinations—to include public manifestations of one's religious beliefs, so long as they are "of particular importance to the person concerned in order to preserve his religious identity."[186]

As the above-cited Presiding Justice understands this EU decision, it highlights that, while "religious identity" is a subjective notion,[187] it

analogy to race and nationality as "fateful," "inescapable," "immutable," not subject to the whims of the applicants as "mere inclination" (citing, among others, GRAHL-MADSEN, *supra* note 129, at 217 (grouping "race, nationality, membership in a social group, and—in certain respects—religion" together as reasons "beyond the control of the individual"))). *But see* Marx, *supra* note 182, at 221 (arguing that such a static understanding of the protected characteristics negates human autonomy in the interest of administrative efficiency).

184. BVerwG, Dec. 9, 2010, 10 C 19.09, ¶ 20, http://www.bverwg.de/entscheidungen/pdf/091210B10C19.09.0.pdf [https://perma.cc/8VCL-PS9K].

185. *Id.* ¶ 27; *see also* ANTJE VON UNGERN-STERNBERG, RELIGIONSFREIHEIT IN EUROPA 248–49 (2008) (discussing the background of this distinction between the applicants' private religious sphere, the *forum internum*, and the public exercise of their religion in the *forum externum* based on cases).

186. Joined Cases C-71 & 99/11, Bundesrepublik Deutschland v. Y & Z, ¶¶ 62–63, 70, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0071&from=EN [https://perma.cc/5E22-JXY4].

187. *See* UNGERN-STERNBERG, *supra* note 185, at 233–34 (discussing the transition from an "objective," or institutional, to a "subjective," or individual, understanding of the constitutional provisions regarding the freedom of belief and the free exercise of religion set forth in Germany's Constitution, the Basic Law); *see* GRUNDGESETZ [GG] [BASIC LAW], art. 4(1)–(2), *translation at* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf [https://perma.cc/NMW9-T5TA]; *see also* DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 538–66 (3d ed. 2012) (discussing key aspects of the constitutional status of religion and religious communities based on extensive quotations from seminal decisions by the Federal Constitutional Court).

is "more than intellectual arbitrariness in the deliberate selection of proposals that endow life with transcendental meaning (*transzendentale Sinnstiftungsangebote*)."[188] The very notion of "identity" implies "the binding character" that the sanctioned religious conduct at issue has for the applicant.[189] While the demands on the importance of a given practice for one's religious identity should not be overextended—e.g., by requiring applicants to prove that they would "suffer an internal breakdown or at least severe psychological damage" if forced to abstain from a particular religious practice—the practice must nonetheless be "indispensable" for the applicants.[190]

Since "religious identity" is an internal reality, it can only be established based on the applicant's statements and by drawing inferences from external evidence.[191] Courts, therefore, are required to engage in quite extensive fact-finding to establish the religious self-understanding of the applicant, both in the country of origin and in Germany, before a decision can be made.[192] The standard of proof the applicant must meet here is what the court describes as "the complete conviction of the court." [193] This is also called the "normal standard of

188. Berlit, *supra* note 181, at 3.

189. *Id.*

190. *Id.* (paraphrasing BVerwG, Feb. 20, 2013, 10 C 23.12, ¶ 30, http://www.bverwg.de/entscheidungen/pdf/200213U10C23.12.0.pdf [https://perma.cc/A6A2-C5DQ] (noting that the religious practice at bar must be "a central element of [the applicants'] religious identity and, in this sense, indispensable [for them]")).

191. BVerwG, 10 C 23.12, ¶ 31.

192. *Id.* In 2015, the Federal Administrative Court rejected the claim that, based on the peculiar way German law recognizes some religious communities, statements made by ministers of such communities as to the sincerity of an applicant's religious beliefs should be dispositive. BVerwG, Aug. 25, 2015, 1 B 40.15, http://www.bverwg.de/entscheidungen/pdf/250815B1B40.15.0.pdf [https://perma.cc/RD7X-DKJX]; *see* KOMMERS & MILLER, *supra* note 187, at 538–39 (outlining the basic constitutional framework of the relationship between the state and the various religious communities in Germany).

193. BVerwG, 10 C 23.12, ¶ 30. Berlit concedes that this high standard of proof creates "enormous problems of proof." Berlit, *supra* note 181, at 3. *See* VERWALTUNGSGERICHTSORDNUNG [VWGO] [CODE OF ADMINISTRATIVE COURT PROCEDURE], as amended, § 108(1), https://www.gesetze-im-internet.de/bundesrecht/vwgo/gesamt.pdf [https://perma.cc/6GZW-YKET]; BVerwG, Dec. 9, 2010, 10 C 19.09, ¶ 43 http://www.bverwg.de/entscheidungen/pdf/091210B10C19.09.0.pdf [https://perma.cc/8VCL-PS9K]. The pertinent provision of the German Code of Civil Procedure and of the Code of Criminal Procedure are almost identically worded as their administrative counterpart. *See* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], as amended, § 286(1), https://www.gesetze-im-internet.de/bundesrecht/zpo/gesamt.pdf [https://perma.cc/UK5V-CGV9]; STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], as

proof" (*Regelbeweismaß*),[194] which German courts describe as the level of proof that, after the judge's free evaluation of the evidence presented, silences doubts in the judge's mind without ruling them out completely.[195]

If the applicants did not engage in the proscribed religious practice in their country of origin because of a well-founded fear of persecution, this is not evidence of the fact that the practice at issue is not of special importance to their religious identity, since they may have abstained from those practices because they feared persecution.[196] But if the applicants, while living in Germany, do not engage in the religious practices proscribed in their country of origin, this is evidence that the proscribed practice is not really central to the applicant's religious identity, unless the applicants produce convincing reasons for not engaging in these practices in Germany.[197] If the applicants do engage in such practices while living in Germany, the court must then review whether these practices are especially important for the applicant in order to preserve their religious identity or whether they engaged in these practices only to be recognized as a refugee.[198] Evidently, this is a particularly relevant inquiry in the case of *sur place* refugees, for which German law provides expressly.[199]

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amended, § 261, https://www.gesetze-im-internet.de/bundesrecht/stpo/gesamt.pdf [https://perma.cc/63QA-XT6N]; *see also* Kevin M. Clermont, *Standards of Proof Revisited*, 33 VT. L. REV. 469, 471 (2009) (noting that civil-law countries "apply the same or a very similar standard in noncriminal cases as they do in criminal cases").

194. HOLGER JÄCKEL, DAS BEWEISRECHT DER ZPO 146 (2009) (discussing the meaning of this term of art).

195. *See, e.g.*, BVerwG, Feb. 8, 2011, 10 B 1.11, ¶ 8, http://www.bverwg.de/entscheidungen/pdf/080211B10B1.11.0.pdf [https://perma.cc/TLW6-QT8F] (noting that under VWGO, § 108(1), "the court must not demand irrefutable certainty, but may be satisfied in truly doubtful cases with a degree of certainty sufficient for practical life that silences doubts even if they cannot be completely ruled out"); HEUSCH ET AL., *supra* note 15, at 152–53. For a comparative-law perspective on the German view of standards of proof within the civil-law tradition, see Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243 (2002).

196. BVerwG, 10 C 23.12, ¶ 31.

197. *Id.*

198. *Id.*

199. *Compare* Asylgesetz [AsylG] [Asylum Act], Sep. 2, 2008, BGBL I at 1798, as amended, § 28(1a), https://www.gesetze-im-internet.de/asylvfg_1992/BJNR111260992.html [https://perma.cc/A4SP-P4XY], *with* 2011 Qualification Directive, *supra* note 15, art. 5(1)–(2) (providing for *sur place* refugees that well-founded fear of persecution may be based on events occurring after the applicants left their country of origin, "especially also on

Third, German courts must evaluate the "real risk" of persecution. Since a refugee's fear of persecution has to be "well founded," the court needs to review whether the applicant faces a "real risk" (*beachtliche Wahrscheinlichkeit*) of being persecuted for the proscribed public religious practice.[200] Courts here should not only engage in a quantifying process that considers the objective likelihood of persecution.[201] Considering the totality of circumstances—including the severity of the feared sanction[202]—courts should also take a qualitative view that weighs everything from the perspective of a reasonable person in the situation of the applicant: Given the evidence before the court, would a reasonable person fear persecution?[203] The court must be fully con-

the alien's conduct that is an expression and continuation of a conviction or orientation that already existed in the country of origin"), *and* Zimmermann & Mahler, *supra* note 76, 332 (noting that, under current EU law, "[c]ontinuity provides an indication as to the credibility of the applicant, but does not constitute a requirement for recognition as a refugee as such"). The applicable EU directive provides that the applicant's individual assessment should also consider "whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions" for qualifying as a refugee. 2011 Qualification Directive, *supra* note 15, art. 4(3)(d). But, importantly, the goal of this inquiry is "to assess whether those activities would expose the applicant to persecution or serious harm if returned to [their] country [of origin]." *Id.* German law continues to make continuity a requirement for applications for political asylum. AsylG § 28(1); HAILBRONNER, *supra* note 15, at 420–21.

200. BVerwG, 10 C 23.12, ¶ 32.

201. *Id.*

202. BVerwG, Nov. 5, 1991, 9 C 118.90, ¶ 18, https://www.jurion.de/de/document/fullview/0:128292/ [https://perma.cc/W2NJ-QGH8] (noting that it makes a significant difference if the expected sanction is a month in prison or the death penalty).

203. BVerwG, 10 C 23.12, ¶ 32. The court here referenced its own precedent, BVerwG, 9 C 118.90, ¶ 18 (citing approvingly the U.S. Supreme Court's *Cardoza-Fonseca* opinion and holding that a reasonable person, rejecting a mere theoretical possibility of persecution, may have a well-founded fear of persecution, even if the likelihood of persecution is less than 50 percent); *see* HAILBRONNER, *supra* note 15, at 416. For a German administrative court decision espousing the reasonable-person standard as early as 1959, see Zimmermann & Mahler, *supra* note 76, at 341 n.367. Unfortunately, this decision—VG Ansbach, Mar. 25, 1959, 3719 II/58—was destroyed at the end of the retention period. E-mail from Norbert Schneider, Head Registry Clerk, Administrative Court Ansbach, to author (Feb. 7, 2017, 07:38 EST) (on file with author). A translation of the opinion's critical wording is found in GRAHL-MADSEN, *supra* note 129, at 174 ([W]ell-founded fear . . . exist[s] when a reasonable person would draw the conclusion from external facts that he would be subject to persecution in his home country." (quotation marks omitted)). Grahl-Madsen provided three other examples from 1960s German courts referring to the reasonable person standard, but found those less

vinced that a reasonable person would.[204] While evidence of past persecution creates a rebuttable presumption that the applicants will also be subject to persecution in their country of origin in the future,[205] the rebuttal will succeed if the likelihood of future persecution is less than a "real risk."[206]

Part of the totality of the circumstances to be assessed under German law to establish a "real risk" of persecution are two additional, related elements: First, the possibility of protection against persecution by non-state actors; second, the possibility of internal protection against persecution. First, just as German law recognizes non-state actors of persecution, it also recognizes non-state actors of protection who may obviate the need to seek refuge outside the applicants' country of origin.[207] To do so, these non-state actors of protection must provide

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helpful since they did not provide any external points of reference for the reasonableness of the fear. *Id.* at 174–75.

204. BVerwG, Feb. 8, 2011, 10 B 1.11, ¶¶ 7–8, http://www.bverwg.de/entscheidungen/pdf/080211B10B1.11.0.pdf [https://perma.cc/TLW6-QT8F] (citing VERWALTUNGSGERICHTSORDNUNG [VwGO] [CODE OF ADMINISTRATIVE COURT PROCEDURE], as amended, § 108(1), https://www.gesetze-im-internet.de/bundesrecht/vwgo/gesamt.pdf [https://perma.cc/6GZW-YKET]); *see also* Kathrin Groh, *Zur Aufhebung von Asyl- und Flüchtlingsanerkennungen im Geflecht von völker- und europarechtlichen Verpflichtungen*, 29 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK 1, 5 (2009), http://www.zar.nomos.de/fileadmin/zar/doc/Aufsatz_ZAR_09_01.pdf [https://perma.cc/R36S-3VKW] ("Agencies and courts need not be convinced that the applicant was actually afraid (*sich tatsächlich gefürchtet hat*), but must be convinced that he would have been justified in being afraid (*sich fürchten durfte*).").

205. BVerwG, 10 C 23.12, ¶¶ 17, 21; BVerwG, Apr. 27, 2010, 10 C 5.09, ¶¶ 19–23, http://www.bverwg.de/entscheidungen/pdf/270410U10C5.09.0.pdf [https://perma.cc/3EJD-7YVL] (discussing the—here unaltered—2004 predecessor of the 2011 Qualification Directive, *supra* note 15, art. 4(4) (noting that past persecution or past threat of persecution directed at the applicants "is a serious indication of the applicant's well-founded fear of persecution . . . unless there are good reasons to consider that such persecution . . . will not be repeated")); BVerwG, June 1, 2011, 10 C 25.10, ¶¶ 21–22, http://www.bverwg.de/entscheidungen/pdf/010611U10C25.10.0.pdf [https://perma.cc/GKQ2-UNF4]; *see* DIETZ, *supra* note 46, at 138; HAILBRONNER, *supra* note 15, at 416–17.

206. BVerwG, 10 C 5.09, ¶ 23 (noting that the lowered standard of probability German courts had used for applicants subject to past persecution was overruled by EU law in the refugee context). The lowered standard of probability is still in effect in domestic law governing applications for political asylum under GG, art. 16, which is not affected by EU law. DIETZ, *supra* note 46, at 129; HEUSCH ET AL., *supra* note 15, at 11–12.

207. *Compare* Asylgesetz [AsylG] [Asylum Act], Sep. 2, 2008, BGBL I at 1798, as amended, § 3d(1)–(2), https://www.gesetze-im-internet.de/asylvfg_

would-be refugees access to quasi-state protection, which means in a basic sense that the protection against persecution they offer cannot be ineffective or only temporary in nature.[208] To meet this requirement, any actor of protection must take "suitable steps" to prevent persecution, for example, by means of effective legal regulations providing for the detection, prosecution, and punishment of persecutory conduct.[209]

Second, applicants will not be recognized as refugees[210] if they—at the time their applications are adjudicated[211]—have a safe and reasonable option of protection against persecution within their country of

1992/BJNR111260992.html [https://perma.cc/A4SP-P4XY], *with* 2011 Qualification Directive, *supra* note 15, art. 7(1)(b).

208. *Compare* AsylG § 3d(2) *with* 2011 Qualification Directive, *supra* note 15, art. 7(2). *See also* 2011 Qualification Directive, *supra* note 15, art. 4(3)(c) (listing some relevant "personal circumstances of the applicant," including "background, gender and age").

209. 2011 Qualification Directive, *supra* note 15, art. 7(2). While this functional approach to protection mirrors nicely the persecution side of the equation and has been invoked in court, questions remain as to its practicability and its fidelity to the international definition of a refugee. HATHAWAY & FOSTER, *supra* note 21, at 289–92. Questions about this approach's fidelity to the definition of a refugee are underscored by the fact that German and EU law directly refer to this definition. *Compare* AsylG § 3(1)(2)(a) *with* 2011 Qualification Directive, *supra* note 15, art. 2(d). While the international definition of a refugee is broad enough to accommodate state and non-state persecutors because it is indeterminate at this point—it merely speaks of "being persecuted"—it is determinate as to the actors of protection by speaking expressly, and exclusively, of "the protection of that country," not merely of protection *in* that country. This is in keeping with the definition's precedent. *See supra* note 103.

Hailbronner argues that allowing for non-state actors that meet relatively demanding standards to qualify as actors of protection—for example, international organizations controlling at least a substantial portion of the applicants' country of origin—is in keeping with the principle of surrogacy that forms the basis of the international refugee law. HAILBRONNER, *supra* note 15, at 428. But he does not address the international definition of a refugee itself, which assumes the surrogacy of states in the protection of refugees, not that of states and non-state actors such as tribes.

210. *See* DIETZ, *supra* note 46, 140 (noting that the existence of an internal alternative to seeking refuge abroad does not deny the fact of persecution elsewhere in the country, but simply negates the recognition as refugee abroad based on the principle of surrogacy in refugee protection (citing BVerwG, Jan. 19, 2009, 10 C 52.07, ¶ 29, https://www.jurion.de/urteile/bverwg/2009-01-19/bverwg-10-c-5207/ [https://perma.cc/LP4Z-FXY6])).

211. *Compare* AsylG § 3e(2) ("Bei der Prüfung der Frage . . . .") *with* 2011 Qualification Directive, *supra* note 15, art. 8(2) ("In examining whether . . . ."). *See* HAILBRONNER, *supra* note 15, at 429; HEUSCH ET AL., *supra* note 15, at 34.

origin.[212] In general, decision-makers are required to consider both the general conditions in a safe part of the country and the personal circumstances of the applicants.[213] When evaluating the possibility of internal protection, it would be unreasonable to expect applicants to move to a safe part of their country of origin where they would not be able to meet a minimum level of subsistence (*Existenzminimum*).[214] This low level of subsistence may be met by earning a living, even in the informal economy and below the applicants' qualifications—though not in criminal ventures or under conditions of general illegality—or by receiving humanitarian aid.[215]

d. Summary

The UNHCR, the U.S., and Germany evaluate whether an applicant has a well-founded fear of persecution by considering subjective and objective factors. The UNHCR emphasizes the subjective factor by looking for a genuine fear of persecution. U.S. law, due to ambivalent Supreme Court precedent, is somewhat unclear as to how to balance subjective and objective factors, but generally follows the UNHCR in requiring the subjective factor to be met by a showing of the applicants' genuine fear, while the objective factor covers such things as the potential persecutors' knowledge of the applicants' protected characteristic and their ability and willingness to engage in persecutory conduct.

German law alters the subjective prong from an inquiry into the genuineness of the applicants' fear into an inquiry into the centrality of the proscribed practices for the applicants' "religious identity," where this identity is of a semi-static nature and, thus, not totally at the whim of the applicants. As noted earlier,[216] UNHCR and USCIS also prescribe an inquiry into the importance of a particular religious belief or practice for the applicants when assessing whether a certain conduct qualifies as

212. *Compare* AsylG § 3e(1) *with* 2011 Qualification Directive, *supra* note 15, art. 8(1). *See also* HEUSCH ET AL., *supra* note 15, at 33 (noting that, within the European context, the concept of internal protection was first developed by German courts and later adopted in EU directives and national legislation).

213. *Compare* AsylG § 3e(2) *with* 2011 Qualification Directive, *supra* note 15, art. 8(2).

214. BVerwG, May 29, 2008, 10 C 11.07, ¶¶ 31–32, http://www.bverwg.de/entscheidungen/pdf/290508U10C11.07.0.pdf [https://perma.cc/D4V9-CVLW]; *see* HAILBRONNER, *supra* note 15, at 432.

215. BVerwG, Feb. 1, 2007, 1 C 24.06, ¶¶ 11–12, http://www.bverwg.de/entscheidungen/pdf/010207U1C24.06.0.pdf [https://perma.cc/X6JU-CQNS]; *see* HAILBRONNER, *supra* note 15, at 430; HEUSCH ET AL., *supra* note 15, at 34.

216. *See supra* notes 101, 120 and accompanying text.

persecution, but at least USCIS does not do so within a broader inquiry into the applicants' "religious identity."

Unlike U.S. asylum law, German law requires all three elements—the objective, the subjective, and the qualitative element—to be established to the complete conviction of the court, the normal standard of proof for all German trials. But as in U.S. asylum law, the individual probability of persecution grounding the qualitative assessment of a well-founded fear may be established based on the reasonable person standard and may be present even if persecution would be less likely to occur than not. This is somewhat surprising since the U.S. Supreme Court justified this lower standard of probability not only based on differences in the statutory text but also by observing that, under U.S. law, asylum is a discretionary grant, while withholding of removal—requiring the higher standard of a preponderance of evidence—is not. Under German law, as seen above, refugee protection is generally a right for all who meet the statutory refugee definition.

Finally, while the UNHCR, U.S. law, and German law provide for internal protection in the applicants' country of origin as a hurdle on the path to recognition as refugee, only German law allows for non-state actors to qualify as protectors against persecution.

3. Establishing a Causal Nexus Between (the Fear of) Persecution and Religion

The nexus requirement—expressed by the "for reasons of" language found in the international refugee definition[217]—links the applicants' claimed persecution to one of the five protected characteristics under the 1951 Convention. Applicants qualify as refugees only if they can establish the existence of this nexus. This means that after establishing that they will endure persecution or have endured persecution and that they have a well-founded fear of such persecution, applicants need to show two additional things: First, they share one of the five protected characteristics.[218] And second, they will be persecuted because of that characteristic.

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217. *See supra* note 76 and accompanying text.

218. These five characteristics, according to Hathaway & Foster, "embody multiple manifestations of a single idea: fundamental socio-political disenfranchisement defined by reference to core norms of non-discrimination law." Hathaway & Foster, *supra* note 21, at 390–91; *see also id.* at 427 (offering an alternative to the identity-based definition of the genus common to the five characteristics by defining them as evolving "grounds on which a person may be discriminated against by society" (citing the joined decision Islam v. Sec'y of State for the Home Dep't Immigration Appeal Tribunal & R v. Ex Parte Shah, [1999] UKHL 20, [1999] 2 AC 629, at 656 (Lord Hope of Craighead) (appeal taken from Eng.), http://www.bailii.org/uk/cases/UKHL/1999/20.html [https://perma.cc/T7F3-ZH8T])).

a. The UNHCR

i. Establishing Religion

In the case of religiously motivated refugee claims, the UNHCR recognizes "[c]redibility [as] a central issue."[219] This is especially true in case of *sur place* refugees, that is, in the case of those who become refugees while being outside of their country of origin, for example, because of actions taken by those seeking recognition as refugees, such as converting to a religion that is persecuted in their country of origin.[220] In the case of the latter, "a rigorous and in depth examination of the circumstances and genuineness of the conversion will be necessary,"[221] unless it can be established that a religious belief or practice will be imputed to the claimant by agents of persecution.[222]

This examination, however, should not be carried out by administering a test on the religious knowledge of the claimants: There are different forms of religion requiring more or less detailed knowledge to be formative for one's understanding of religion.[223] Knowledge varies widely based on the gender or level of education of the claimants.[224] There is no necessary correlation between a person's detailed knowledge and

219. U.N. High Comm'r for Refugees, *supra* note 100, ¶ 28.

220. *Id.* ¶ 34; *see also* U.N. High Comm'r for Refugees, *supra* note 17, ¶¶ 94–96, at 19 (defining refugees *sur place*).

221. U.N. High Comm'r for Refugees, *supra* note 100, ¶ 34.

222. *Id.* ¶ 9; *see also* HATHAWAY & FOSTER, *supra* note 21, at 88–89 (discussing how to address the risk that a claimant may seek to manipulate the system by "self-serving actions" and arguing that such claims "should be assessed on the basis of the usual criteria" because, while the mental state of the claimants is not decisive, "the reaction of the home country . . . is critical"); Zimmermann & Mahler, *supra* note 76, at 333–34 (noting that, while some have rejected *sur place* claims made in bad faith, others, including the UNHCR, have focused on what would happen to the fraudulent applicants, fraudulent or not, in their country of origin).

223. U.N. High Comm'r for Refugees, *supra* note 100, ¶¶ 5–8, 29. The document expressly distinguishes three elements of "religion" that may be present individually or in some combination, i.e., "a) religion as belief (including non-belief); b) religion as identity; c) religion as a way of life." *Id.* ¶ 5. "Identity" here is understood "less as a matter of theological beliefs than membership of a community that observes . . . common beliefs, rituals, traditions, ethnicity, nationality, or ancestry" and may go with "a sense of belonging" to that "particular group or community." *Id.* ¶ 7. *But see supra* notes 179–195 and accompanying text (discussing the importance of "religious identity" for adjudicating *all* refugee claims based on religious persecution in Germany).

224. *Id.* ¶¶ 30–31.

the sincerity of that person's belief or conversion.[225] There is also the possibility that claimants may be "coached" on religious knowledge prior to the examination.[226] The better alternative, in the case of *sur place* applicants, is to ask open-ended questions that allow applicants to set forth their motivations for converting and the effect conversion had on their lives.[227]

ii. Establishing Nexus

Refugees are those who have a well-founded fear that they will be persecuted because of one or more of the five protected characteristics, i.e., race, religion, nationality, membership of a particular social group, or political opinion.[228] This means that the protected characteristic "must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause."[229] Accordingly, persons fleeing civil war in their countries of origin "are not normally considered refugees," but civil war may result in persecution within the definition of the 1951 Convention.[230]

225. *Id.* ¶ 29.

226. *Id.* ¶ 35.

227. *Id.*

228. U.N. High Comm'r for Refugees, *supra* note 17, ¶ 66, at 15–16.

229. U.N. High Comm'r for Refugees, *Guidelines on International Protection: Gender-Related Persecution under the Context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees*, ¶ 20, U.N. Doc. HCR/GIP/02/16 (May 7, 2002).

230. U.N. High Comm'r for Refugees, *supra* note 17, ¶ 164–65, at 33 (noting that whether claimants are effectively protected against persecution within their countries of origin is an important consideration when evaluating refugee claims by those fleeing civil war). Persecution may be established, for example, if one party's way of waging war includes systematically killing, or threatening with death, persons having protected characteristics. Eric Fripp, *Inclusion of Refugees from Armed Conflict: Combatants and Ex-combatants*, *in* REFUGE FROM INHUMANITY? WAR REFUGEES AND INTERNATIONAL HUMANITARIAN LAW 128, 139 (David James Cantor & Jean-François Durieux eds., 2014). Fripp also notes that armed conflict poses the risk of being both over-inclusive and under-inclusive in how the Convention's refugee definition is applied. *Id.* at 132–33; *see also* Vanessa Holzer, *Persecution and the Nexus to a Refugee Convention Ground in Non-International Armed Conflict: Insights from Customary International Humanitarian Law*, *in* REFUGE FROM INHUMANITY? WAR REFUGEES AND INTERNATIONAL HUMANITARIAN LAW, *supra*, at 101, 110 (noting that "the material scope of persecution is not narrower in armed conflict than in times of peace").

The exclusion of those fleeing war or famine from the international refugee definition is open to moral challenge. For example Joseph Carens has argued

As far as religion is concerned, refugees are those who fear that they will be persecuted because they exercise—or are believed to exercise[231]—their freedom of thought, conscience, and religion, as this freedom is defined in article 18 of the ICCPR.[232] Given the broad definition of this freedom that, as seen above, includes atheism, religion is not a one-dimensional matter, but may include the aspects of belief (convictions and values), identity (belonging to a like-minded community), and practice (way of life, interaction with world and, religious observances).[233] Accordingly, exercising this particular freedom may take a variety of forms. And it does not matter whether claimants belong to the religious minority or majority in their country of origin.[234]

b. U.S. Law

Once applicants have established that they were persecuted, or fear that they will be persecuted, they must show that they possess at least one protected characteristic and that they were, or will be, persecuted because of that protected characteristic. This means, for example, that facing the hardships and dangers that are incidental to civil war is, by itself, not a sufficient reason to qualify as a refugee under current U.S. asylum law.[235]

i. Establishing Religion

The congressional findings prefacing the International Religious Freedom Act (IRFA) of 1998 invoke the definition of religious freedom

that "what is most important is the severity of the threat to basic human rights and the degree of risk rather than the source or character of the threat." CARENS, *supra* note 35, at 201. Consequently, he believes that "the Convention embodies a misplaced set of priorities." *Id.* For a rejoinder, see Wellman, *supra* note 22, at 123, who acknowledges a nation's duty to help refugees, but posits that this duty can be fulfilled either by opening one's door to refugees or by assisting refugees in their country of origin.

231. U.N. High Comm'r for Refugees, *supra* note 100, ¶¶ 9, 31.

232. U.N. High Comm'r for Refugees, *supra* note 17, ¶¶ 71–72, at 16; *see supra* Section I.A.1 (discussing the relevant portions of the ICCPR).

233. U.N. High Comm'r for Refugees, *supra* note 100, ¶¶ 5–8.

234. *Id.* ¶ 12.

235. U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM ELIGIBILITY PART III: NEXUS AND THE FIVE PROTECTED CHARACTERISTICS 74–76 (2009), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Nexus-the-Five-Protected-Characteristics-31aug10.pdf [https://perma.cc/34A4-UKCZ] [hereinafter ELIGIBILITY III] (noting that applicants must invariably establish that they were targeted by violence—which may well be related to civil war—because of at least one of the protected characteristics).

found in the UDHR and the ICCPR without initially defining religion.[236] The 2016 amendment to the IRFA defined the freedom protected by these international documents broadly, so as to cover "theistic and non-theistic beliefs and the right not to profess or practice any religion."[237]

In keeping with the invoked international documents, this protected freedom covers certain practices, such as worship, speaking freely about one's religious beliefs, changing one's beliefs, possessing religious literature, and raising one's children in the belief of one's choice.[238] The 2016 Amendment to the IRFA adds to the list of protected practices "not professing a particular religion, or any religion."[239]

Due to, or despite, the broad scope of the definition of religious belief under U.S. law, "[c]redibility determinations, which are always difficult, can be particularly complex in religious persecution cases."[240] To determine whether an applicant "adopted a belief system solely for the purposes of trying to obtain asylum," "[a]djudicators may need to judge the sincerity of the applicant's claimed religious beliefs," but not "the validity of the belief system itself."[241]

Accordingly, the "legitimacy of religion" is not scrutinized as closely as, for example, the related protected characteristic of "membership in a social group," since only the latter requires a showing of "a characteristic that it is either immutable or is so fundamental to individual

236. 22 U.S.C. § 6401(a)(2)–(3) (2012). The international documents referenced here have been discussed above. *See supra* notes 26–45 and accompanying text.

237. Frank R. Wolf International Religious Freedom Act, Pub. L. No. 114-281, § 2(a)(1), 130 Stat 1426, 1427 (2016) (to be codified at 22 U.S.C. § 6401(a)(3)). Section 2(a)(3) specifically adds "the specific targeting of non-theists, humanists, and atheists because of their beliefs" as an equivalent to "religious persecution." *Id.* (to be codified at 22 U.S.C. § 6401(a)(6)). Section 3(5)(B)(i) adds "conscience [and] non-theistic views" as equivalent to "religious belief or practice." *Id.* at 1428 (to be codified at 22 U.S.C. § 6402(16)(B)).

238. 22 U.S.C. § 6402(13)(A) (2012).

239. Section 3(5)(A)(ii), 130 Stat. at 1428 (to be codified at 22 U.S.C. § 6402(16)(A)(iv)).

240. RELIGIOUS PERSECUTION CLAIMS, *supra* note 115, at 13; *see also* 8 U.S.C. § 1158(b)(1)(B)(iii) (listing congressionally-suggested factors to be considered when assessing applicants' credibility "[c]onsidering the totality of the circumstances[] and all relevant factors," if their testimony needs corroboration).

241. RELIGIOUS PERSECUTION CLAIMS, *supra* note 115, at 13–14; *see also* ANKER, *supra* note 46, § 2:7 (noting that *sur place* refugees were formerly met with greater scrutiny as "bootstrap refugees" if they had created the risk of future persecution by their own activities).

identity or conscience that a person ought not be required to change."[242] Moreover, the investigation of an applicant's sincerity of belief should not unduly rely on quizzes of religious knowledge.[243] Additionally, variances from an adjudicator's preconceived notions of the way a given religious belief should be practiced should not, without more, lead to adverse sincerity determinations.[244] Finally, even if the conversion was found to be insincere, it may still cause the applicant to be persecuted

242. Lozano-Zuniga v. Lynch, 832 F.3d 822, 827 (7th Cir. 2016) (quoting Cece v. Holder, 733 F.3d 662, 669 (7th Cir. 2013)). The Seventh Circuit's distinction in the *Lozano–Zuniga* opinion is somewhat surprising since the BIA's *Acosta* ruling—cited by the Circuit three years prior in *Cece*—was about establishing the meaning of the somewhat vague term "membership in a social group" by applying the interpretive principle of *ejusdem generis* after describing the genus common to the first four characteristics as follows: "Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985).

    The fact that the Seventh Circuit declined to follow the BIA's *Acosta* opinion in holding religion to the same stringent identity-based standard as membership in a social group reflects what appears to be a consensus of appellate courts to cite *Acosta* for what it says on social groups, not for what it says about the other four characteristics, since *Acosta* was about group membership, not, for example, religion. In addition to *Cece*, see, for example, Rodas-Orellana v. Holder, 780 F.3d 982, 990–91 (10th Cir. 2015) (discussing the evolution of the *Acosta* standard since 1985). It also reflects the Seventh Circuit's long-standing tradition of overturning the BIA for adjudicating religious asylum claims based on what Churgin called the "Mindszenty model"—named after Joseph Cardinal Mindszenty, the Catholic Primate of Hungary who publicly opposed the Communist takeover of Hungary after World War II and was convicted in a show trial in 1949—that involved a highly visible Christian identity and a conscious, unwavering public commitment to it. Churgin, *supra* note 18, at 218–21 (discussing Bastanipour v. INS, 980 F.2d 1129 (7th Cir. 1992)).

243. *See, e.g.*, Rizal v. Gonzales, 442 F.3d 84, 90 (2d Cir. 2006) (rejecting "expressly . . . the rationale that a certain level of doctrinal knowledge is necessary in order to be eligible for asylum on grounds of religious persecution," while not discounting the need for testing such knowledge where it would tend to prove or disprove specific factual claims made by the applicant); *see also* RELIGIOUS PERSECUTION CLAIMS, *supra* note 115, at 14 (citing *Cosa*, 543 F.3d at 1070; Iao v. Gonzales, 400 F.3d 530, 534 (7th Cir. 2005)).

244. Huang v. Gonzales, 403 F.3d 945, 949 (7th Cir. 2005) (holding that the lower court's decision was "not [made on] a proper basis for an adverse credibility finding" in a case about a Chinese applicant's claims that a portion of the record was "based entirely on either the [immigration] judge's personal beliefs or some perceived common knowledge about the [applicant's Catholic] religion").

in his country of origin if sent back there, depending on what conduct potential persecutors deem worthy of persecution.[245]

Thus, analyzing religious sincerity in the asylum context is recognized as a peculiar endeavor. While U.S. courts engage in assessing the sincerity of religious belief in a variety of other legal contexts,[246] the situation of religious asylum seekers is not entirely identical to determinations for the purposes of domestic law, where belief is linked to recognizing, not a potential for persecution, but legal privilege and accommodation under the First Amendment in an orderly manner and in a limited number of situations.[247] An agent of persecution in another

245. *See, e.g.*, *Bastanipour*, 980 F.2d at 1133 (remanding the case of an Iranian convert to Christianity by urging adjudicators to be concerned more about what would happen to the applicant before a religious court in Iran than about whether his purported conversion was sincere); Najafi v. INS, 104 F.3d 943, 948 (7th Cir. 1997) (summarizing the circuit's *Bastanipour* ruling as "shift[ing] the focus of the immigration judge from Indianapolis to Iran"); Kyaw Zwar Tun v. INS, 445 F.3d 554, 570–71 (2d Cir. 2006) (remanding the case of a Burmese pro-democracy activist by noting that the statutory protection against persecution is not limited to persecution due to actual political beliefs, since even political beliefs adopted self-servingly to gain asylum can still lead to real persecution).

246. The Supreme Court has addressed the issue in a variety of circumstances. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 185 (1965) (noting that, in the context of conscientious objection based on religious belief, the truth of the underlying belief cannot be questioned, only "whether it is 'truly held'"). Sincerity of belief has been described as "the most difficult of all forms of credibility for a trial court to determine." 2 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 7:15 (4th ed. 2009) (citing Reed v. Faulkner, 653 F. Supp. 965, 971 (N.D. Ind. 1987) (arguing that determining the sincerity of a religious belief is more demanding than establishing the credibility of a trial witness and requires investigating whether there is some—though not perfect—congruence between the professed beliefs and the conduct and statements of the plaintiff)). Mushlin provides a number of mostly negative factors to help establish the sincerity of a prisoner's claim of religion. *Id.* Others have suggested a relatively simple two-factor test: Is there a material incentive to claim religious belief? Is there congruence between claimed beliefs and behavior? Ben Adams & Cynthia Barmore, Recent Development, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 62–63 (2014); *see also* Michael Kagan, *Refugee Credibility Assessment and the "Religious Imposter" Problem: A Case Study of Eritrean Pentecostal Claims in Egypt*, 43 VAND. J. TRANSNAT'L L. 1179, 1206–21 (2010) (discussing the origins of the "sincerity" test, its application in religion-based refugee claims, and its weaknesses).

247. In the domestic context, testing a claimant's sincerity serves—in a limited number of situations—as an accepted limitation on accessing such privilege. Without such limitation, a political community governed by laws may well be impossible. *See, e.g.*, 2 MUSHLIN, *supra* note 246, § 7:15 ("Without a requirement of a showing of sincerity, the First Amendment would become . . . 'a limitless excuse for avoiding all unwanted legal obligations.'"). While being recognized as a refugee is also the first step

part of the world may not care about the sincerity of someone's beliefs or practices, but may simply impute these beliefs or practices with or without objective justification, which would render the applicants' religious knowledge or sincerity practically irrelevant.[248]

ii. Establishing Religion as "One Central Reason" of Persecution

Since the REAL ID Act of 2005, 8 U.S.C. § 1158 requires applicants to show that they are refugees in the statutory sense.[249] They must show that one of the five protected characteristics of a refugee "was or will be at least one central reason for persecuting the applicant."[250] Compared to a 2004 bill containing narrower language,[251] the statute allows for mixed-motive applications and turns the attention away from trying to establish the exact motivation of the persecutor.[252] It also provides a more demanding standard in comparison to case law prior to 2005 that required the applicant only to show that the persecution

toward a domestic legal privilege—i.e., asylum or withholding of removal—it is also a protective measure benefiting those who, without such protection, may well suffer an unacceptable deprivation of basic human rights, including the rights to life and freedom, at the hands of actors concerned about enforcing outward conformity, not scrutinizing inner motives.

248. RELIGIOUS PERSECUTION CLAIMS, *supra* note 115, at 17 (quoting Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992) (noting that the critical question in the case of an Iranian convert to Christianity was not whether the claimant "believes the tenets of Christianity in his heart of hearts or . . . is acting opportunistically," but what would "matter to an Iranian religious judge")). Kagan, drawing on *Bastanipour* to fashion his "eyes of the persecutor test" to replace the sincerity test, argued that, "[s]ince the persecutor . . . cannot know an asylum seeker's genuine beliefs, inquiring about the applicant's genuine beliefs accomplishes nothing" and that "the adjudicator should [instead] focus on observable factors that trigger persecution . . . ." Kagan, *supra* note 246, at 1222, 1224. But *Bastanipour* does not say the applicant's inner motivation never matters to a persecutor, but simply directs adjudicators to establish what matters to potential persecutors and to evaluate an applicant's claim accordingly. For example, apostasy is not a strict-liability offense in Iran. *See infra* Part II.

249. *See supra* note 142 and accompanying text (discussing amendments to this section by the REAL ID Act).

250. 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

251. The 2004 bill required that at least one of the protected characteristics "was or will be the central motive for persecuting the applicant." ANKER, *supra* note 46, § 5:12 (quoting 9/11 Recommendations Implementation Act, H.R. 10, 108th Cong. § 3007(a)(2) (2004)).

252. *See* ANKER, *supra* note 46, § 5:12; ELIGIBILITY III, *supra* note 235, at 5–6 (referencing J-B-N- & S-M-, 24 I. & N. Dec. 208 (BIA 2007); S-P-, 21 I. & N. Dec. 486 (BIA 1996); Fuentes, 19 I. & N. Dec. 658 (BIA 1988)).

"was or would be motivated in part" by one of the five protected characteristics.[253]

The BIA interpreted the statutory nexus language to mean that at least one of the five protected characteristics of the applicant[254] "cannot be incidental, tangential, superficial, or subordinate to another reason for harm."[255] In 2009, the U.S. Court of Appeals for the Third Circuit took issue with the inclusion of "subordinate" in the BIA's formulation.

253. *J-B-N- & S-M-*, 24 I. & N. Dec. at 211 (summarizing *S-P-* regarding the standard before the REAL ID Act). The BIA maintains that the standard applied in its previous case law "has not been radically altered by the amendments." *Id.* at 214. *But see* Parussimova v. Mukasey, 555 F.3d 734, 740 (9th Cir. 2009) ("[T]he plain meaning of the phrase 'one central reason' indicates that the REAL ID Act places a more onerous burden on the asylum applicant than the 'at least in part' standard we previously applied.").

Anjum Gupta has proposed an alternative nexus model by drawing on U.S. civil rights and tort law to modify the older BIA standard. Anjum Gupta, *Nexus Redux*, 90 IND. L.J. 465 (2015). Specifically, she has suggested that courts should clarify the nexus requirement by allowing the applicant to establish a prima-facie case by showing that the protected characteristic "led to (or would lead to) the persecution." *Id.* at 504. Under a familiar burden-shifting model, the government would then have to rebut the applicant's prima-facie case by showing "that, even absent the protected trait, the persecution would have occurred for some other non-protected reason." *Id.* at 505. If the government was able to show that there were other reasons for persecutory conduct affecting the applicant, the applicant could rebut this showing by demonstrating that (a) the persecution would occur even without the reason proffered by the government; (b) the likelihood of persecution was increased by the applicant's protected characteristic; or (c) the severity of the persecution increased because of that characteristic. *Id.* at 507. While Gupta discussed one objection to her model, *id.* at 509–12, she did not address what seems to be a key objection: The statutory language in the INA is more demanding than the civil-rights statute she extrapolated on because that the latter is more akin to the older BIA standard *Parussimova* found less demanding than the REAL ID Act's amendment of the INA. *Compare* 8 U.S.C. § 1158(b)(1)(B)(i) (2012) ("[W]as or will be at least one central reason for persecuting the applicant . . . ."), *with* 42 U.S.C. § 2000e-2(m) (2012) ("[W]as a motivating factor . . . , even though other factors also motivated the practice . . . ."). In other words, while Gupta's new nexus model is not without merit, a decision-maker's discretion here is severely curtailed by the INA. *See* HATHAWAY & FOSTER, *supra* note 21, at 386–88 (cautioning against importing causation models from other areas of the law but finding the proximity between refugee law and non-discrimination law fruitful for settling nexus issues in refugee law).

254. *See* ELIGIBILITY III, *supra* note 235, at 7–8 (citing INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992) (noting that in a case alleging persecution on account of political opinion, the "persecution [has to occur] on account of the *victim's* political opinion, not the persecutor's")).

255. *J-B-N- & S-M-*, 24 I. & N. Dec. at 214; *see* ELIGIBILITY III, *supra* note 235, at 6.

It noted that while the BIA correctly rejected requiring the applicant to show that the protected characteristic was the "dominant" reason for persecution,[256] the BIA's rule actually required as much, namely, that the protected characteristic could not be a "subordinate" reason.[257] The appeals court held instead that a persecutor may have a variety of "central" motives—and some may even be irrelevant for asylum purposes—when persecuting the applicant that need not be arranged into a hierarchy with the protected characteristic coming out on top.[258]

Evidence for such central, non-tangential motivation may be either direct or circumstantial.[259] Circumstantial evidence may be provided by showing that the persecutor acts against those who share the applicant's protected characteristic—for example, based on country condition reports[260]—or by showing that an applicant was arrested soon after participating in a protected activity.[261]

The proof of causation in cases involving laws of general applicability can be "challenging."[262] Basically, prosecution under generally applicable laws does not amount to persecution, as long as those laws are actually generally applied.[263] Prosecution under generally applicable laws must not serve as a disguise for persecution.[264] For in-

256. That would have been the standard if the 2004 bill had been enacted. *See supra* note 251.

257. Ndayshimiye v. Attorney Gen., 557 F.3d 124, 129–30 (3d Cir. 2009).

258. *Id.* at 129.

259. Eligibility III, *supra* note 235, at 11–12.

260. While information by the Department of State may be provided and consulted in all cases, such information must be consulted in cases of religiously motivated persecution. 22 U.S.C. §§ 6402(2), 6471 (2012) (requiring that the Department of State's Annual Report on International Religious Freedom to Congress serve as a "resource" for immigration judges and asylum officers where religious motivated persecution is at issue). There is no exact regulatory counterpart to this requirement. *But see* 8 C.F.R. § 208.1(b) (2017) (requiring that asylum officers be provided "information concerning the persecution of persons in other countries" in coordination with the Department of State); § 208.11(a)–(b) (authorizing discretionary requesting and providing Department of State information regarding "individual cases or types of claims under consideration"); Religious Persecution Claims, *supra* note 115, at 8.

261. *See* Religious Persecution Claims, *supra* note 115, at 12–13.

262. *Id.* at 29.

263. *Id.* (quoting Chang v. INS, 119 F.3d 1055, 1060 (3d Cir. 1997)); *see also* Long Hao Li v. Attorney Gen., 633 F.3d 136, 151 (3d Cir. 2011) (reasoning based on *Chang* that, since the alleged law of general applicability at issue was not fairly administered, it was not a generally applicable law).

264. *Chang*, 119 F.3d at 1060–61 (noting that, while the asylum statute must not be interpreted so as to make the U.S. a haven for common criminals, there

stance, laws targeting "particular religious beliefs and practices generally are not neutral in intent"—and hence not generally applicable laws—especially when they mete out harsh punishment.[265] In a country where civil or criminal law is based on religious law, it is more difficult to establish the motive of a state actor.[266] "Mixed motives" might exist, but so long as the applicants can show that their real or imputed religion was, or likely will be, a central motive, they have established a causal nexus between a protected characteristic and either past or future persecution.[267]

c. German Law

To obtain refugee status under German law, applicants must establish that they were persecuted on account of one of the five protected characteristics by the 1951 Convention, such as religion.[268] Those simply fleeing civil war or violence unmotivated by the protected characteristics may be afforded the less generous benefits of surrogate protection.[269]

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is nothing to suggest that "fear of prosecution under laws of general applicability may never provide the basis for asylum or withholding of deportation," since the statute does not distinguish between lawful and lawless persecution); *see also* ELIGIBILITY III, *supra* note 235, at 76–79 (providing guidance to asylum officers on how to distinguish illegitimate persecution on account of protected characteristics from legitimate prosecution of crime).

265. RELIGIOUS PERSECUTION CLAIMS, *supra* note 115, at 29, 31 (citing *Chang*, 119 F.3d at 1061 (holding that an analogous law directly targeting the protected characteristic of political opinion "may provide the basis for asylum" if the lawful punishment "is sufficiently extreme to constitute persecution"); Ghebremedhin v. Ashcroft, 385 F.3d 1116, 1120, *amended on procedural grounds*, 392 F.3d 241 (7th Cir. 2004) (holding that subjecting religiously motivated draft evaders to harsher punishment than other draft evaders amounted to persecution on account of religion); *see also* ELIGIBILITY III, *supra* note 235, at 77 ("Prosecution for the crime of attending religious services could constitute persecution on account of religion.").

266. ELIGIBILITY III, *supra* note 235, at 20–21.

267. *Id.* at 20.

268. *Compare* Asylgesetz [AsylG] [Asylum Act], Sept. 2, 2008, BGBL I at 1798, as amended, § 3(1)(1), https://www.gesetze-im-internet.de/asylvfg_1992/BJNR111260992.html [https://perma.cc/A4SP-P4XY], *with* 2011 Qualification Directive, *supra* note 15, art. 10(1)(b).

269. *Compare* AsylG § 4(1)(3) *with* 2011 Qualification Directive, *supra* note 15, arts. 15(c); 18. *See* HEUSCH ET AL., *supra* note 15, at 46–49; *see also* HAILBRONNER, *supra* note 15, at 437–38, 448–52 (discussing the benefits granted to individuals recognized as refugees and the benefits of those granted subsidiary or surrogate protection).

i. Establishing Religion

Discussing in some detail the five reasons for persecution included in the definition of refugee—i.e., race, religion, nationality, membership of a social group, political convictions—the Asylum Act provides that "religion" includes theistic, non-theistic, and atheistic beliefs; solitary or communal participation in formal worship in private or in public; and other religious acts or expressions of viewpoints, including personal or communal conduct based on or mandated by a given religious belief.[270] Furthermore, membership of a social group can also have a religious dimension because group members may share a characteristic or belief so fundamental to their identity or conscience that they should not be forced to renounce it.[271]

Importantly, the Act states that when assessing whether an applicant has a well-founded fear of persecution, it is irrelevant whether the applicant actually possesses certain religious or social characteristics leading to persecution if persecuting state or non-state actors impute these characteristics to the applicant.[272]

As discussed earlier, binding precedent directs German courts to conduct individual credibility determinations, centered on the complex term "religious identity," in the context of assessing whether applicants possess a well-founded fear of persecution.[273] No specific protocol of questions may be prescribed here because, as noted, the judge must establish whether a religious practice leading to persecution is a central aspect of the applicants' "religious identity" in a free inquiry.[274]

ii. Establishing Nexus

In keeping with the applicable EU Directive, the German Asylum Act simply requires that a causal nexus exist between acts of perse-

270. *Compare* AsylG § 3b(1)(2) *with* 2011 Qualification Directive, *supra* note 15, art. 10(1)(b). The notion of religion expressed in these sections has been described as "comprehensive." HAILBRONNER, *supra* note 15, at 422.

271. *Compare* AsylG § 3b(1)(4)(a) *with* 2011 Qualification Directive, *supra* note 15, art. 10(1)(d).

272. *Compare* AsylG § 3b(2) *with* 2011 Qualification Directive, *supra* note 15, art. 10(2).

273. *See supra* notes 179–199 and accompanying text.

274. VERWALTUNGSGERICHTSORDNUNG [VwGO] [CODE OF ADMINISTRATIVE COURT PROCEDURE], as amended, § 108(1), https://www.gesetze-im-internet.de/bundesrecht/vwgo/gesamt.pdf [https://perma.cc/6GZW-YKET]). The reasons for the decision must be set forth in the opinion that must be based on facts and proofs that were before the parties. *Id.* § 108(2).

cution and at least one the five protected characteristics set forth in the statutory definition of a refugee.[275]

d. Summary

The UNHCR, the U.S., and Germany require applicants to establish both that they possess a protected characteristic and that they are persecuted because of this characteristic to qualify as refugees. But where U.S. law expressly requires the protected characteristic to be "one central" reason of actual or feared persecution, neither the UNHCR nor German law does so, instead applying a test that is virtually identical to the pre-REAL ID Act standard in the U.S.

The U.S. does not appear to apply any heightened or attenuated standard of proof when it comes to assessing the sincerity of the religious beliefs held by an applicant. German law applies its regular, high standard of proof in this area of inquiry where U.S. courts appear to tread rather lightly, for example, by expressly declining to require the showing that the applicants' religious belief is an immutable or fundamental characteristic of their "identity." At the same time, the UNHCR, the U.S., and Germany recognize that protected characteristics may be imputed by agents of persecution which would establish a nexus without proving the applicants' sincerity of belief.

While the U.S. does not reference "(religious) identity" in the context of assessing the sincerity of belief of religious asylum seekers, and while the UNHCR uses "religion as identity" as one aspect of religion that may or may not be present in a given applicant, German law makes the inquiry into whether a sanctioned religious practice is a

275. *Compare* AsylG § 3a(3) *with* 2011 Qualification Directive, *supra* note 15, art. 9(3). *See* HAILBRONNER, *supra* note 15, at 414 (noting that under German law, a given protected characteristic need not be the central or sole cause of persecution). It should be noted that German law discusses the targeted, intentional nature of persecutory conduct when defining persecution—not when establishing nexus—to distinguish persecutory conduct from general disadvantages incurred due to natural disaster or war. *See supra* notes 126–127 and accompanying text. This important distinction is overlooked in HATHAWAY & FOSTER, *supra* note 21, at 369. Thus, the German approach is identical to the "'one factor' or 'one reason' test of causation" preferred by Hathaway and Foster. *Id.* at 387–90 (noting the German Federal Administrative Court as one international authority, among others). *See* BVerwG, Nov. 24, 2009, 10 C 24.08, ¶ 16, http://www.bverwg.de/entscheidungen/pdf/241109U10C24.08.0.pdf [https://perma.cc/Z84S-RYWX] ("[A]t least in part because of characteristics relevant for asylum . . . ." (*zumindest auch wegen asylerheblicher Merkmale*) (referencing BVerwG, July 25, 2000, 9 C 28.99, ¶ 14, https://www.jurion.de/urteile/bverwg/2000-07-25/9-c-28_99 [https://perma.cc/6YGS-KMM5] ("[A]t any rate in part because of a characteristic relevant for asylum . . . ." (*jedenfalls auch wegen eines asylerheblichen Merkmals*))).

central part of the applicants' "religious identity" a cornerstone of adjudicating religious asylum claims.

II. IRAN, IRANIAN REFUGEES, AND THE LEGAL SITUATION OF CHRISTIANS IN IRAN

A. Iran and Iranian Refugees in the U.S. and Germany

In the years after 1951, the U.S. and Germany have transposed international refugee law into their national bodies of law in different ways. During that time, their relations with Iran have also taken different trajectories.[276] Despite recent appeals to common values shared by the U.S. and Germany,[277] the countries' current relations to Iran make it appear as if the U.S. and Germany see two very different countries. For example the U.S. lists Iran as a state sponsor of terrorism;[278] tries to bar Iranian citizens from even entering the U.S.;[279]

276. For an overview of milestones in the deteriorating relations between the U.S. and Iran after 1953—including the CIA-assisted coup against Prime Minister Mossadegh over oil in August 1953, U.S. support for the shah's repressive secret police, the Iran hostage crisis, and the Iran-Contra Affair—see NIKKI R. KEDDIE, MODERN IRAN 128–130, 134–35, 248–51, 258 (2006). *See also* CHRISTOPHER DE BELLAIGUE, PATRIOT OF PERSIA 200–52 (2012) (recounting the U.S. involvement in the British plan to overthrow Mossadegh and the events in August 1953 resulting in Mossadegh's ouster); PETER GRIES, THE POLITICS OF AMERICAN FOREIGN POLICY 190 (2014) (observing that the 1979–81 Iran hostage crisis and its extensive media coverage shattered Americans' benign Orientalist fantasies about the Middle East and, instead, cemented the link between terrorism, Iran, and Islam in the minds of many).

For an overview of the generally more positive relations between Germany and Iran, see generally Oliver Bast, *Germany I: German-Persian Diplomatic Relations*, ENCYCLOPÆDIA IRANICA (Feb. 7, 2012), http://www.iranicaonline.org/articles/germany-i [https://perma.cc/XN49-JDMG].

277. See, for example, the statements made by Germany's then foreign minister, Sigmar Gabriel, when he visited the U.S. in early February 2017. Patricia Zengerle & Sabine Siebold, *U.S., Germany Must Stick to Shared Values like Religious Freedom—Gabriel*, REUTERS (Feb. 3, 2017), http://www.reuters.com/article/uk-usa-trump-germany-idUSKBN15H23G [https://perma.cc/5C2T-RBBF].

278. *State Sponsors of Terrorism*, U.S. DEP'T OF STATE, https://www.state.gov/j/ct/list/c14151.htm [https://perma.cc/999J-WBNR] (last visited Jan. 27, 2017).

279. *See supra* Section I.A.2(a). While the bar is currently bogged down in federal courts, lifting the bar would require Iran to supply "certain information" deemed necessary by the Secretary of Homeland Security to adjudicate visa applications submitted by Iranians. Exec. Order No. 13,780, *supra* note 57, §§ 2(b), (d)–(e). Observers consider it "unlikely" that the Iranian government would actually cooperate with the U.S. and provide this

lists Iran as a "country of particular concern" for religious-freedom violations;[280] provides separate categories under the USRAP for certain members of religious minorities in Iran;[281] and maintains no direct diplomatic relations with Iran.[282] Meanwhile, Germany enjoys regular diplomatic, economic, and political ties to Iran.[283]

During the time following World War II, there have been a number of Iranians who, after having entered the U.S., converted to Christianity, and then requested asylum on religious grounds.[284] Among those who entered Germany during the last two years amidst the Syrian

information. Saeed Kamali Dehghan, *Trump Travel Ban Will Hit Iranian Critics of Regime Hardest, Analysts Warn*, GUARDIAN (Mar. 9, 2017), https://www.theguardian.com/us-news/2017/mar/09/trump-travel-ban-iranian-students-critics [https://perma.cc/D7CG-SHJM].

280. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT 44 (2017), http://www.uscirf.gov/sites/default/files/2017.USCIRFAnnualReport.pdf [https://perma.cc/6679-JUB3]. Being on this list means that the U.S. Secretary of State designated Iran—so designated since the list's inception in 1999—as one of currently ten "countries whose governments either engage in or tolerate 'particularly severe' violations of religious freedom," including torture, prolonged detention without charge, or abductions. *Id.* at 9, 12.

281. Churgin, *supra* note 18, at 215 (referencing the 1989 Lautenberg Amendment). The Lautenberg Amendment was extended until Sept. 30, 2018, by the Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 7034(*l*)(5), 132 Stat. 348, 895 (to be codified at 8 U.S.C. § 1157 note (Establishing Categories of Aliens for Purposes of Refugee Determinations (requiring the Attorney General to establish "one or more categories of aliens who are or were nationals and residents of the Islamic Republic or Iran who, as members of a religious minority in Iran, share common characteristics that identify them as targets of persecution in that state on account of race, religion, nationality, membership in a particular social group, or political opinion")). Nonetheless, the Department of Homeland Security denied admission to about 100 Iranian Christians in February 2018. Press Release, USCIRF Concerned by Denial of Lautenberg Refugees from Iran, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM (Feb. 23, 2018), http://www.uscirf.gov/news-room/press-releases/uscirf-concerned-denial-lautenberg-refugees-iran [https://perma.cc/5UWH-AY5W]; Miriam Jordan, *Spurned by U.S. and Facing Danger Back Home, Iranian Christians Fear Worst*, N.Y. TIMES (Mar. 1, 2018), https://www.nytimes.com/2018/03/01/us/iranian-christian-refugees.html [https://perma.cc/V3B3-5YF3].

282. "On April 7, 1980, the United States broke diplomatic relations with Iran, and on April 24, 1981, the Swiss Government assumed representation of U.S. interests in Tehran. Iranian interests in the United States are represented by the Government of Pakistan." *U.S. Relations with Iran*, U.S. DEP'T OF STATE, https://www.state.gov/r/pa/ei/bgn/5314.htm [https://perma.cc/YMD4-EXJF] (last visited Feb. 27, 2017).

283. *See* Bast, *supra* note 276 (outlining over 400 years of interactions between the Germans and Persians).

284. *See infra* Section III.B.1 (discussing concrete examples).

refugee crisis, there is also a significant number of young Iranians.[285] Some of those recent arrivals had secretly been Christians in Iran; others became Christians in Germany.[286] While becoming Christian initially seemed to have increased the probability of their being recognized as refugees,[287] the sheer volume of conversions and the changing attitudes toward asylum seekers appear to have significantly decreased German authorities' willingness to regard these conversions as legitimate and, thus, as valid reasons for recognizing them as refugees.[288]

B. The Legal Situation of Christians in Iran

About 1 percent of the Iran's population of roughly 80 million consists of non-Muslims.[289] Christians are believed to be the second largest non-Muslim population group after the Baha'i.[290] Those who attend Christian worship must register with the state, and only those who are so registered may attend worship or enter church premises.[291] Most

285. *See, e.g.*, Phillip Connor, *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, PEW RES. CTR. (Aug. 2, 2016), http://www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/ [https://perma.cc/YSK4-J3KW].

286. *See* Laura Kasinof, *A New Home and a New Religion in Germany*, ATLANTIC (Oct. 14, 2016), http://www.theatlantic.com/international/archive/2016/10/christian-refugee-iran-germany-merkel/504092/ [https://perma.cc/B54U-BWT7].

287. *Id.*

288. Astrid Prange, *Is Conversion a Reason for Asylum?*, DW (Dec. 24, 2016), http://www.dw.com/en/is-conversion-a-reason-for-asylum/a-36903701 [https://perma.cc/RTL3-7JUS]; Von Sabine Menkens, *Das Glücksspiel bedrohter Christen in Deutschland*, DIE WELT (Dec. 23, 2016), http://hd.welt.de/politik-edition/article160529667/Das-Gluecksspiel-bedrohter-Christen-in-Deutschland.html [https://perma.cc/2W2F-J4SB] (noting that while early in 2016 most applications of recent converts were granted, the approval rate by December 2016 had dropped to 10%, turning the process into a gamble for applicants). Meanwhile, the statistics for the first half of 2017 for all asylum seekers—regardless of country of origin and claimed ground—suggest that one in two negative BAMF decisions are challenged in court and that one in four of those challenges succeeds, at significant cost for the BAMF. *Deutschland liegt bei Asylentscheidungen vorn*, DW (Dec. 4, 2017), http://www.dw.com/de/deutschland-liegt-bei-asylentscheidungen-vorn/a-41636737 [https://perma.cc/2LQV-3JD6].

289. U.S. DEP'T OF STATE, IRAN 2016 INTERNATIONAL RELIGIOUS FREEDOM REPORT 2 (2017), https://www.state.gov/documents/organization/269134.pdf [https://perma.cc/6TMT-BTPJ].

290. *Id.* at 3 (estimating the number of Baha'i at about 300,000 and that of Christians at about 285,000, although some estimate that there could be up to 1,000,000 Christians in Iran).

291. *Id.* at 4–5.

Christians belong to the historic ethnic churches of the Armenians and Assyrians.[292] But a growing number of "restless" Iranian youths join Christian groups with roots in Western Europe and the U.S., at least in part to express their opposition to the Iranian government.[293]

The Constitution of Iran[294] provides that Iran's official religion is Shi'a Islam.[295] According to article 13 of the same document, "Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education."[296] Moreover, the Constitution provides that "the government of

292. *See id.* at 3.

293. Perry Chiaramonte, *Underground Church Movement Grows in Iran Despite Regime's Efforts*, FOX NEWS (Nov. 28, 2016), http://www.foxnews.com/world/2016/11/28/underground-church-movement-grows-in-iran-despite-regimes-efforts.html [https://perma.cc/2P2E-ZN4E] (noting that for youth searching for an alternative to the state and its religion, "[w]estern culture and the Christian church [are] very appealing"). It is a "public secret" in Iran that its surface of Islamic religiosity is not an indicator of Iranians' true beliefs. ROXANNE VARZI, WARRING SOULS 147 (2006). Varzi also notes the long history of maintaining a public persona distinct from one's private life and beliefs as a matter of survival in Iran, going back to the Muslim-Arab conquest of Persia. *Id.* at 146. For a snapshot of Iranian youth's counterculture that flaunts a Westernized ethos and prefers an apolitical, quietist outlook on Islam, see Pardis Mahdavi, *Iran's Green Movement in Context*, *in* CULTURAL REVOLUTION IN IRAN 13–26 (Annabelle Sreberny & Massoumeh Torfeh eds., 2013); Roula Khalaf, *Iran's 'Generation Normal,'* FIN. TIMES (May 29, 2015), https://www.ft.com/content/b110ec2e-04b0-11e5-95ad-00144feabdc0 [https://perma.cc/W6ZL-6KDN]. For a narrative exploration of Iran's contradictory inside-outside cultures and the role of young Iranians in them, see generally NICHOLAS JUBBER, DRINKING ARAK OFF AN AYATOLLAH'S BEARD (2010).

294. *See* KEDDIE, *supra* note 276, at 246–48 (discussing the historical and political background of the Iranian constitution in post-revolutionary Iran as well as the constitution's major tenets).

295. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 12; *translation at Iran—Constitution*, INT'L CONST. L., http://www.servat.unibe.ch/icl/ir000000_.html [https://perma.cc/WN37-6986] (last visited Jan. 9, 2017). This translation, while unofficial, is also featured on the official website of Iran's Ministry of Interior. *Constitution*, MINISTRY OF INTERIOR, https://www.moi.ir/Portal/Home/Default.aspx?CategoryID=3F0B662E-3527-4107-98EE-D58FF64C8B0C [https://perma.cc/K9LF-BRVH] (last visited Jan. 9, 2017).

296. *Iran—Constitution*, *supra* note 295, art. 13. These religious minorities are represented in the Islamic Consultative Assembly. *Id.* art. 64(2). Consequently, religions such as the Baha'i have no rights under the Iranian Constitution which means, for example, that Baha'is "are banned from all government employment . . . [,] cannot receive compensation for injur[ies]

the Islamic Republic of Iran and all Muslims are duty-bound to treat non-Muslims in conformity with ethical norms and the principles of Islamic justice and equity, and to respect their human rights."[297] But it also cautions that "[t]his principle applies to all who refrain from engaging in conspiracy or activity against Islam and the Islamic Republic of Iran."[298]

Moreover, Iran's Constitution contains heady—though not boundless—language about "the exalted dignity and value of man, and his freedom coupled with responsibility before God."[299] "[E]quity, justice, political, economic, social, and cultural independence, and national solidarity are secured by recourse to . . . negation of all forms of oppression, both the infliction of and the submission to it, and of dominance, both its imposition and its acceptance."[300]

While these provisions sound quite positive for those who are not Shi'ite Muslims, "the limits of the law" and "the responsibility before God" are rather tight in practice. First, as far as Christians are concerned, Iranian officials do not recognize the need to establish new churches, but contend that the needs of Iran's Christians are met.[301] Second, converting Muslims to non-Muslim religions is punishable by death.[302]

Third, Iran's Constitution does not grant Muslim citizens the right to join a non-Muslim religious community by conversion, or to have no religious beliefs.[303] Under specific circumstances, traditional Islamic jurisprudence may view leaving the Muslim community to constitute apostasy (*irtidād*), for which the punishment fixed by the Islamic legal tradition (*ḥadd*, plural *ḥudūd*) is death.[304] Iran's Islamic Penal Code

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or crimes committed against them and cannot inherit property." U.S. DEP'T OF STATE, *supra* note 289, at 7. Moreover, "government-sponsored public denunciations of Bahais continued to increase steadily" as reported in 2016. *Id.* at 20.

297. *Iran—Constitution*, supra note 295, art. 14.

298. *Id.*

299. *See id.* art. 2(6) (addressing the foundational beliefs of the Islamic Republic of Iran).

300. *Id.* art. 2(6)(c).

301. Ahmed Shaheed (Special Rapporteur), *Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran*, ¶ 71, U.N. Doc. A/71/418 (Sept. 30, 2016).

302. U.S. DEP'T OF STATE, *supra* note 289, at 4.

303. *Id.*

304. *See generally* IRAN HUMAN RIGHTS DOCUMENTATION CTR., APOSTASY IN THE ISLAMIC REPUBLIC OF IRAN 4–8 (2014), www.iranhrdc.org/files.php?force&file=reports_en/Apostasy_in_the_Islamic_Republic_of_Iran_104287928.pdf [https://perma.cc/S9EJ-83ML] (discussing the various

("IPC") does not contain a specific provision banning apostasy.[305] But, recognizing *ḥadd* as one of the four main categories of punishment,[306] the Code refers in its *ḥadd* section to the Iranian Constitution's incorporation article regarding religious law left uncodified.[307] This consti-

elements constituting apostasy in sharia law on the basis of the Quran and the oral traditions (*hadith*)). On the sharia concept of *ḥadd*, see generally RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY 53–64 (2005).

305. Although an inclusion was discussed in 2008, apostasy was not included in the 2012 revision of Iran's penal code. THE LAW LIBRARY OF CONGRESS, GLOB. LEGAL RESEARCH CTR., LAW CRIMINALIZING APOSTASY IN SELECTED JURISDICTIONS 7 (2014) [hereinafter APOSTASY LAW], https://www.loc.gov/law/help/apostasy/apostasy.pdf [https://perma.cc/2Z9J-JGU7]. For the wording of the 2008 proposal, see *Iran's New Apostasy Law: New Penal Code Mandates Death for Converts*, IRANIAN CHRISTIANS FOR RELIGIOUS FREEDOM, https://web.archive.org/web/20140828214107/http://www.madeye18.com/index.php?option=com_content&view=article&id=97:irans-new-apostasy-law&catid=31:news-english&Itemid=62 [https://perma.cc/ML65-7QBN] (last visited Jan. 10, 2017). *But see* Nader Entessar, *Criminal Law and the Legal System in Revolutionary Iran*, 8 B.C. THIRD WORLD L.J. 91, 97 (1988) (claiming that in 1988, Iran's criminal code contained a provision banning apostasy).

306. QĀNUNI MUJĀZĀTI ISLĀMĪ [ISLAMIC PENAL CODE] Tehran 1392 [2013], art. 14. The translation of the first two books of the code is available online. IRAN HUMAN RIGHTS DOCUMENTATION CTR., NEW ISLAMIC PENAL CODE OF THE ISLAMIC REPUBLIC OF IRAN—BOOKS ONE AND TWO (2013), www.iranhrdc.org/files.php?force&file=pdf_en/Iranian_Codes/Translation_of_the_new_Penal_Code_Book_1and2___507475863.pdf [https://perma.cc/J8HP-25HJ]. The IPC defines *ḥadd* (plural *ḥudūd*) as "a punishment for which the grounds for, type, amount and conditions of execution are specified in holy Shari'a." *Id.* art. 15.

307. IRAN HUMAN RIGHTS DOCUMENTATION CTR., *supra* note 306, art. 220; *see also* Entessar, *supra* note 305, at 95 (noting that under the supremacy of traditional Islamic law (*sharīᶜa*), the task of Iranian legislators and judges in principle is not to "originate any laws" but "simply to codify and apply the *shari'a*" (emphases omitted)); *Iran—Constitution*, *supra* note 295, art. 4 ("All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria."); *cf.* PETERS, *supra* note 304, at 176–77 (discussing whether this and similar provisions found in modern Islamic criminal codes violate the international human-rights standard of *nulla poena sine lege*). This, however, does not mean that Islamic law can never change. For example, contemporary Iran, building on the teachings of Ruhollah Khomeini, appears to rely mostly on procedural safeguards to the Islamic nature of its laws: Since—according to article 94 of Iran's constitution—all legislation enacted by the legislature must be reviewed by the Guardian Council consisting of legal experts, all legislation that passes this review is deemed compliant with the constitutionally required "Islamic criteria," even if it appears devoid of any particularly "Islamic" content. Robert Gleave, *Iran, Islamic Law in*, *in* THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY (Stanley N.

tutional article provides: "In case of the absence of any such [codified] law, [the judge] has to deliver his judgement [sic] on the basis of authoritative Islamic sources and authentic *fatwa*."[308]

There is no reason to doubt that these statutory and constitutional provisions apply to what "authoritative Islamic sources" teach on apostasy. But assessing the realistic danger for those Iranians accused of apostasy should not end after establishing the fact that the death penalty is seen as the proper punishment for apostates in "authoritative Islamic sources." Avoiding unrealistic, one-dimensional, and potentially biased caricatures of foreign legal systems for the sake of well-intentioned advocacy requires a contextualization that establishes the elements of the offense of apostasy, that is, the circumstances under which this penalty may be imposed.[309] While this contextualization, as shown below, tends to mitigate concerns regarding the death penalty in apostasy cases, it is worth noting that the Iranian justice system in general does not receive high marks from international observers.[310]

The IPC provides some general guidance that appears to be applicable, especially in the case of a *ḥadd* not defined in the Code itself.[311] This guidance—echoing the judicial precepts of "authentic Islamic

Katz ed., 2009) (ebook); *see also* WAEL B. HALLAQ, SHARĪᶜA: THEORY, PRACTICE, TRANSFORMATIONS 486–93 (2009) (discussing the transformation of traditional *sharīᶜa* law in 20th-century Iran and concluding that, under Khomeini's theory of the supremacy of the State over traditional Islamic law, "the great majority of laws adopted before and *after* the Revolution were Western in inspiration and content, and they remain so"). On the basic principles of Khomeini's political ideas, see KEDDIE, *supra* note 276, at 192–93.

308. *Iran—Constitution*, *supra* note 295, art. 167. The article goes on to exhort judges, noting that a judge, "on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgement [sic]." *Id.*

309. *See, e.g.*, Marra Guttenplan, Note, *Granting Asylum to Persecuted Afghan Western Women*, 12 CARDOZO J.L. & GENDER 391, 411 (2005) (noting that, in Afghanistan and Iran, "apostasy is a capital crime" without discussing the elements of this crime). It is important to recognize that apostasy is not a strict-liability offense in Islamic law. *See infra* notes 311–315.

310. *See, e.g.*, U.S. DEP'T OF STATE, IRAN 2015 HUMAN RIGHTS REPORT 2–3, 10–11 (2015), https://www.state.gov/documents/organization/253135.pdf [https://perma.cc/Y9TV-H5MF] (noting "numerous reports" of extrajudicial killings carried out by the government or its agents with impunity; stating that, while the law does not make apostasy a capital offense, "courts handed down capital punishments for similar charges;" and detailing that arbitrary arrests are "commonly used . . . to impede alleged antiregime activities" and the judiciary is not really an independent branch of the government).

311. *See generally* IRAN HUMAN RIGHTS DOCUMENTATION CTR., *supra* note 306, arts. 217–20.

sources"—shows, for one, that apostasy is not a strict-liability offense but requires several mental elements. Accordingly, defendants can be subject to *ḥadd* only if they have knowledge, intention, meet "the requirements for criminal responsibility," and are aware of the criminality of their conduct under the applicable legal standards.[312] Importantly, if the defendants claim they lacked the requisite mental elements of the crime, these allegations are to be accepted without further evidence, if "there is the likelihood of veracity of the claim."[313] Moreover, if the defendants repent before the commission of the offense is proved and the judge is convinced of the sincerity of the repentance, the applicable *ḥadd* is not to be imposed.[314] Thus, obtaining a conviction for apostasy and other offenses calling for *ḥadd* is quite a demanding task when compared with other crimes.[315]

While judicial convictions and executions for apostasy are very rare in Iran,[316] extrajudicial killings of those identified as apostates from

312. *Id.* art. 217. Knowledge here refers to "knowledge . . . about the subject of the offense," intent refers to the "intention to commit the criminal conduct." *Id.* art. 144. The general conditions of criminal responsibility are sanity, pubescence, and freedom. *Id.* art. 140. The age of maturity is set at nine lunar years for girls and fifteen lunar years of boys. *Id.* art. 147. Coercion, as the opposite of the requisite freedom, is a defense if it was "unbearable." *Id.* art. 151. Finally, while ignorance of the law is generally not recognized as a defense, it is a defense where, as in the case of *ḥadd*, traditional jurisprudence so provides. *Id.* art. 155; *see* PETERS, *supra* note 304, at 19–24 (discussing these general mental state requirements for criminal responsibility); HALLAQ, *supra* note 307, at 319 (noting that apostates must "have acted willingly (*mukhtār*), and no element of coercion could be present").

313. IRAN HUMAN RIGHTS DOCUMENTATION CTR., *supra* note 306, art. 218; *see* PETERS, *supra* note 304, at 21–23 (discussing the sharia doctrine of uncertainty (*shubha*) according to the *ḥadīth* of Mohammad, "[w]ard off the fixed punishments [*ḥudūd*] from the Muslims on the strength of *shubha* as much as you can" (quoting *Bulūgh al-Marām* (Attainment of the Objective) by Ibn Ḥajar al-ᶜAsqalānī (1372–1448)); *see also* HALLAQ, *supra* note 307, 311–12 (discussing the reasons for "[t]he extreme economy with which the *ḥudūd* were invoked" in traditional Islamic law).

314. *Id.* arts. 114, 220; *see* PETERS, *supra* note 304, at 27 (discussing the classic background of this defense "that does not fit in Western theories of criminal law.").

315. *See* Silvia Tellenbach, *Crime and Punishment in Islamic Law*, *in* THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY, *supra* note 307 (noting "important differences in proof and procedure" between crimes against the rights of man and crimes against the rights of God—most *ḥadd* penalties were imposed on crimes Islamic jurists considered to be violations of the rights of God—and observing that "[m]any of them seem to be devised to avoid the severe *ḥadd* penalties").

316. This may be an indication that Iranian courts actually follow the sharia law on apostasy. Only one case is known where, in 1990, Christian pastor Hossein

Islam due to their conversion to Christianity are reportedly more common.[317] Moreover, due to the proximity of apostasy to crimes against the state such as treason,[318] and because those liable of *ḥadd* enjoy significant procedural protections, Christians and other religious dissenters may instead be convicted of spying for the U.S. or engaging in other subversive activities.[319] Even where no convictions ensue, the U.S. Department of State reported that Muslim converts to Christianity in particular "continued to experience disproportionate levels of arrests . . . and high levels of harassment and surveillance."[320]

Soodmand was convicted of apostasy and executed. IRAN HUMAN RIGHTS DOCUMENTATION CTR., *supra* note 304, at 31–32.

317. *See* APOSTASY LAW, *supra* note 305, at 7 (referencing reports of extrajudicial killings of Protestant pastors); *see also* IRAN HUMAN RIGHTS DOCUMENTATION CTR., *supra* note 304, at 14–15 (deploring the lesser penalties imposed on a person who kills another who has committed a capital offense such as apostasy and citing one senior cleric who believed that "anyone has the right to kill an apostate" even without the permission of a religious judge).

318. *See* HALLAQ, *supra* note 307, at 319 (noting that in cultures built upon religion, "apostasy is in some way equivalent to high treason in the modern nation-state"). Belief in the one God of Islam is the principal foundation of the Islamic Republic of Iran. *Iran—Constitution*, *supra* note 295, art. 2(1). Accordingly, renouncing this belief is seen as undermining the basis of the Islamic state.

319. A case from December 2016 involved a Pentecostal church in Iran. The government seized a compound used for youth retreats owned by the church since 1974 because the church allegedly had ties to the CIA. *Protestant Church Property Confiscated in Iran by Khamenei-Supervised Organization*, INT'L CAMPAIGN FOR HUM. RTS. IN IRAN (Dec. 19, 2016), https://www.iranhumanrights.org/2016/12/church-siege-tehran/ [https://perma.cc/V6KP-H26U]. Other cases involved members of a "house church"—i.e., a more informal gathering of Christians in the private residence of a member—who were charged with "crimes against national security," and an imprisoned female convert who was charged with "propaganda against the Islamic regime and collusion intended to harm national security." U.S. DEP'T OF STATE, *supra* note 289, at 12–13. Generally speaking, for 2015, the Department of State reported that "[t]he authorities often arrested members of unrecognized churches for operating illegally in private homes or on charges of supporting and accepting assistance from enemy countries." *Id.* at 13.

320. U.S. DEP'T OF STATE, *supra* note 289, at 11. This includes arrests for drinking communion wine, raids of private homes, closing of churches offering religious services in the Persian language, and restrictions on possessing and publishing religious materials such as bibles. *Id.* at 12–13, 16. About ninety Christians were either "in prison, detained, or awaiting trial because of their religious . . . activities" as of December 2016. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *supra* note 280, at 47.

III. JUDICIAL REVIEW OF RELIGIOUS ASYLUM CLAIMS BY IRANIANS IN THE U.S. AND GERMANY

A. General Rules for Judicial Review of Administrative Asylum Decisions

1. U.S. Law

Those who are lawfully present in the U.S. and whose affirmative asylum application is denied by USCIS may ordinarily try to remedy this unfavorable outcome by submitting a new affirmative application.[321] Those who have been ordered removed from the U.S. and whose defensive asylum application has been denied by an immigration judge may appeal this denial with the BIA.[322] Once a final removal order is issued by the BIA, an applicant for asylum may file a petition to have a federal appeals court review the order.[323] Service of the petition no longer stays the removal of an alien by default.[324]

Appellate courts may also review the "constitutional claims or questions of law" raised by the petitioner[325] which are reviewed under the de novo standard.[326] Courts give a certain amount of deference to agency interpretation of the statutes the agency administers under the test outlined in *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*[327]

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321. ANKER, *supra* note 46, § A2:42.

322. *Id.* § A4:1.

323. 8 U.S.C. § 1252(b)(1)–(2) (2012). These judicial review provisions go back to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 306(a)(2), 110 Stat. 3009-546, 3009-607 (codified at 8 U.S.C. § 1252(b) (2012)). IIRIRA repealed the previous judicial review section enacted in 1961. *Compare* § 306(b), 110 Stat. at 3009-612, *with* Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5, 75 Stat. 650, 651–53 (codified at 8 U.S.C. § 1105a (1964)). For a discussion of the limitations imposed on judicial review by IIRIRA and their precedent in earlier U.S. immigration law, see generally Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1419–38, 1466–67 (1997).

324. 8 U.S.C. § 1252(b)(3)(B) (2012) (providing that a court may order a stay). The repealed provision provided for a stay as the default provision, *Id.* § 1105a(a)(3) (providing some exceptions).

325. *Id.* § 1252(a)(2)(D).

326. *See, e.g.*, Upatcha v. Sessions, 849 F.3d 181, 184 (4th Cir. 2017) (citing Turkson v. Holder, 667 F.3d 523, 527 (4th Cir. 2012)).

327. 467 U.S. 837, 844–45 (1984); *see, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 446–48 (1987); Rivas v. U.S. Attorney Gen., 765 F.3d 1324, 1328 (11th Cir. 2014); *see also* Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233, 240 (1998) (noting that

The appellate court decides the petition only based on the pertinent administrative record.[328] Findings of fact are conclusive "unless any reasonable adjudicator would be compelled to conclude to the contrary."[329] The discretionary decision whether to grant asylum is conclusive "unless manifestly contrary to law and an abuse of discretion."[330]

Given the different scope of judicial review depending on whether an issue of fact or of law is involved, it is important to determine which of the reviewed issues are questions of fact and which are questions of law.[331] Commonly, credibility determinations are reviewed deferentially as questions of fact.[332] Some appellate courts have held that "questions of law" are strictly questions of statutory construction,[333] while others

deference does not mean the absence of de novo review of agency interpretation).

328. *Id.* § 1252(b)(4)(A).

329. *Id.* § 1252(b)(4)(B). Lenni Benson argued that despite the change in language from 1961 to 1996, the standard of review for questions of fact actually remained the same. Benson, *supra* note 327, at 239–40. This early claim is supported by a number of recent decisions from the Fourth Circuit and other circuits. *See, e.g.*, Rodriguez-Mercado v. Lynch, 809 F.3d 415, 417–18 (8th Cir. 2015); Aldana-Ramos v. Holder, 757 F.3d 9, 14 (1st Cir. 2014) (citing INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992)); Cordova v. Holder, 759 F.3d 332, 337 (4th Cir. 2014) (citing Ai Hua Chen v. Holder, 742 F.3d 171, 178 (4th Cir. 2014) (quoting 8 U.S.C. § 1252(b)(4)(B) (2012))); Djadjou v. Holder, 662 F.3d 265, 273 (4th Cir. 2011) (quoting *Elias-Zacarias*, 502 U.S. at 481); Khan v. Holder, 584 F.3d 773, 776 (9th Cir. 2009)(stating that questions of fact are reviewed under the substantial evidence standard); Ramaj v. Gonzales, 466 F.3d 520, 527 (6th Cir. 2006) (same).

330. 8 U.S.C. § 1252(b)(4)(D) (2012). This provision appears to echo the pertinent provision of the Administrative Procedure Act (APA). 5 U.S.C. § 706(2)(A) (2012) (directing reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

331. *See* ANKER, *supra* note 46, § 6:47 (discussing the differences in how appellate courts interpret "questions of law" under 8 U.S.C. § 1252(a)(2)(D)); see also the discussion of the legislative history behind this statutory provision in Xiao Ji Chen v. U.S. Dep't of Justice, 471 F.3d 315, 324–28 (2d Cir. 2006) (holding that the "ambiguous" term "question of law" likely includes not only the interpretation but also the application of the law, although it is not limitless so as to include all questions "having any legal dimension," including evidentiary questions).

332. *See, e.g.*, Secaida-Rosales v. INS, 331 F.3d 297, 307 (2d Cir. 2003), *superseded on other grounds by* REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (overturning *Secaida-Rosales* to the extent that it conflicted with the Act's credibility provisions codified at 8 U.S.C. § 1158(b)(1)(B)(iii)).

333. Adame v. Holder, 762 F.3d 667, 672 (7th Cir. 2014).

have held that they also include the application of law to undisputed facts, i.e., mixed questions of law and fact.[334] Some appellate courts have held that nexus questions are questions of fact,[335] while others have held that they are mixed question of fact and law.[336]

2. German Law

Within two weeks of receiving the rejection of the application by the German refugee agency, Bundesamt für Migration und Flüchtlinge ("BAMF"), an applicant may file an appeal with the administrative court of first instance having jurisdiction in the matter, Verwaltungsgericht ("VG").[337] The court then investigates the matter de novo.[338]

Filing the appeal stays the deportation only in case of admissible but unfounded applications, unless the application was manifestly unfounded.[339] If the appeal succeeds, the court, since it lacks the power to recognize the applicants as refugees, obligates the agency to recognize the applicants as such.[340]

334. Ramadan v. Gonzales, 479 F.3d 646, 648 (9th Cir. 2007) (quoting Pullman–Standard v. Swint, 456 U.S. 273, 289 n.19 (1982)).

335. Cordova v. Holder, 759 F.3d 332, 341 (4th Cir. 2014) (noting that the review of questions of law is *de novo*, but with the appropriate *Chevron* deference).

336. Islamovic v. INS, 217 F. App'x 68, 69 (2d Cir. 2007) (reviewing the agency's nexus determination under the substantial-evidence standard normally applied in questions of fact, despite the Second Circuit's 2006 *Chen* decision); *see also supra* note 331 and accompanying text.

337. *Compare* Asylgesetz [AsylG] [Asylum Act], Sept. 2, 2008, BGBL I at 1798, as amended, § 74(1), https://www.gesetze-im-internet.de/asylvfg_1992/BJNR111260992.html [https://perma.cc/A4SP-P4XY], *with* 2013 Procedures Directive, *supra* note 15, art. 46.

338. *Compare* VERWALTUNGSGERICHTSORDNUNG [VWGO] [CODE OF ADMINISTRATIVE COURT PROCEDURE], as amended, § 86, https://www.gesetze-im-internet.de/bundesrecht/vwgo/gesamt.pdf [https://perma.cc/6GZW-YKET]), *with* 2013 Procedures Directive, *supra* note 15, art. 46(3). *See* HEUSCH ET AL., *supra* note 15, at 151–52. This generous review standard—in addition to the BAMF's decision to decide cases quickly, i.e., after superficial review and with unqualified translators—has led to a significant backlog of asylum cases in the courts. As of July 2017, over 283,000 asylum cases were pending before administrative courts. *Tausende Flüchtlinge klagen gegen ihren Asylbescheid*, ZEIT ONLINE (Sept. 18, 2017), http://www.zeit.de/politik/deutschland/2017-09/bamf-fluechtlinge-asylklagen-verwaltungsgerichte-ueberlastung [https://perma.cc/HA5Q-2948].

339. *Compare* AsylG § 75(1) *with* AsylG § 38(1). *See* HAILBRONNER, *supra* note 15, at 460.

340. AsylG § 24(2); HAILBRONNER, *supra* note 15, at 460; VWGO §§ 42, 113(1); BVerwG, Mar. 29, 1996, 9 C 116.95, ¶ 13, https://www.jurion.de/urteile/bverwg/1996-03-29/9-c-116_95/ [https://perma.cc/6NB4-W9UQ].

If the administrative court determines that the application was manifestly inadmissible or manifestly unfounded, no further appeals are allowed.[341] In all other cases, the administrative court with appellate jurisdiction, Oberverwaltungsgericht ("OVG"), may grant a discretionary appeal only if the case is of a fundamental nature; is materially based on a deviation from mandatory authority; or has certain procedural defects.[342]

3. Summary

U.S. and German law provides for judicial review of agency determinations. But while U.S. law limits judicial review in a variety of ways—for example, by binding the reviewing courts to the administrative record and prescribing a generally deferential posture—German courts review agency decisions de novo. This includes the investigation of the facts at issue by the court. German administrative trial courts, thus, need not engage in the perennial preoccupation of U.S. courts, i.e., determining whether a given issue is a question of fact or of law or of both fact and law.

B. Judicial Review: Evaluating the Applicants' Credibility and Assessing the Situation in Iran

1. U.S. Courts

Judicial review of final agency determinations naturally covers a wide range of substantive and procedural issues. This Note will discuss only a limited number of cases reviewing the BIA's assessment of the conditions in Iran for Christian converts and the BIA's credibility determinations since these, as will be seen, are closely related in practice

341. *See* AsylG § 78(1).

342. See AsylG § 78(2)–(3). Thus, for the requested appeal to be granted, it is not sufficient for the decision to be clearly erroneous or factually or legally difficult, as in regular appeals to the intermediate administrative court (Oberverwaltungsgericht). Instead, the Act's legal appeals provisions apply the higher hurdles for revision by the Federal Administrative Court already to the intermediate court. *Compare* VwGO, § 124(2), *with* VwGO, § 132(2). In German procedural law, the basic distinction between appeal ("Berufung") and revision ("Revision") consists in that on appeal, the reviewing court examines the lower court's factual and legal determinations, while on revision, the reviewing court typically only reviews the decision for errors of law. *Compare* VwGO, § 128 (appeal), *with* VwGO, § 137 (revision). AsylG § 78(2) expressly excludes a revision of the decision of the court of first instance by the appellate court. Thus, if the intermediate administrative court grants the applicant's motion for appeal, it must review the factual and legal bases of the lower court's decision.

and reflect the tension between a subjective and an objective emphasis when reviewing asylum applications discussed earlier.[343]

a. Najafi v. INS

In *Najafi v. INS*,[344] the U.S. Appeals Court for the Seventh Circuit remanded to the BIA the case of an Iranian who had filed for asylum and withholding of deportation in May 1993 to avert deportation to Iran after he was no longer a legal resident in the U.S.[345] Najafi was born a Muslim in Iran. He had come to the U.S. on a student visa in 1978.[346] In 1984, he was introduced to Christianity in the U.S. and converted to Christianity in 1989.[347] Najafi alleged "well-founded fear" on account of his conversion to Christianity.[348]

The court agreed with Najafi that the immigration judge erred by focusing on the genuineness of Najafi's conversion.[349] Instead of asking the subjective question of whether Najafi had really converted, the court asked the objective question of whether Najafi would be viewed and treated as an apostate in Iran.[350] The court wrote: "To assess a well-founded fear of persecution [in Najafi's case], we need to know how the ordinary apostate . . . is treated in Iran. With this information, we will be able to approximate Najafi's situation if returned to Iran."[351] Conceding that "true belief is not readily justiciable," the court noted "our task is theoretically easier," in that the decisive question here is

343. *See supra* notes 167–173 and accompanying text.

344. 104 F.3d 943 (7th Cir. 1997).

345. *Id.* at 944–45.

346. *Id.* at 945.

347. *Id.*

348. *Id.* at 947. Najafi also alleged well-founded fear on account of his family's past political alignment with the shah and his membership in a social group. *Id.* The court "readily dismissed" these claims. *Id.* at 948.

349. *Id.*

350. *Id.*; *see* Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1997) (faulting the BIA opinion for not considering "what would count as conversion in the eyes of an Iranian religious judge, which is the only thing that *would* count so far as the danger to Bastanipour is concerned"); Bahadori v. U.S. INS, No. 90-70500, 1991 WL 224031, at * 4 (9th Cir. Oct. 30, 1991) (noting that, in the case of an Iranian petition of mixed religious ancestry—Muslim father, Catholic mother—the BIA had "failed to consider whether Iranian authorities might impute a Moslem [sic] identity to Bahadori" and that the Ninth Circuit had "held that an alien may establish a threat of persecution based upon ideas imputed to the alien by others"). On the situation of religious minorities, especially Christians in Iran, see *supra* Part II.

351. *Najafi*, 104 F.3d at 948; *see Bastanipour*, 980 F.2d at 1133 ("We do not know what Iran does to ordinary apostates.").

"what would count as conversion in the eyes of an Iranian Religious Judge."[352] Therefore, the court was "not as concerned with the heart of the convert, but rather [required] some bonafide indicia of apostasy which would matter to the Iranian authorities."[353]

Accordingly, the court urged Najafi to point the immigration judge to evidence that "any activity necessary to the convert could trigger persecution in Iran."[354] The immigration judge, in turn, "should be satisfied with the sincerity of the alien's new religious commitment."[355] The central standard for evaluating any evidence "is whether this evidence might result in a prosecution for apostasy."[356]

Apparently, Najafi had claimed that sharia law made apostasy a capital crime and pointed to some news reports on punishment for apostasy "throughout the Islamic world."[357] The court, though not tasked to weigh the evidence, commented that this was "not overwhelming evidence that he personally, as an ordinary apostate, would be in peril if returned to Iran."[358]

b. Refahiyat v. U.S. Department of Justice INS

The U.S. Court of Appeals for the Tenth Circuit, in *Refahiyat v. U.S. Department of Justice INS*,[359] employed a two-pronged analysis of the well-founded-fear claim of Refahiyat who found himself in a situation similar to Najafi: Refahiyat also had come to the U.S. as a student.[360] To avoid deportation after his legal stay in the U.S. had ended, he, too, applied for asylum and withholding of deportation, stating that he feared persecution also for religious reasons because he was "not a practicing Muslim."[361] The application was denied because Refahiyat was found not to have shown a well-founded fear of

352. *Najafi*, 104 F.3d at 949.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.* at 948.

358. *Id.* In a footnote, the court observed that "the death penalty on the books alone carries weight in establishing a fear of persecution," but went on to state that "an alien's claim would be strengthened by evidence that proved apostates are actively persecuted." *Id.* at 948 n.5. *But see* Bastanipour v. INS, 980 F.2d 1129, 1133 (7th Cir. 1997) (holding that already being under the threat of the death penalty for apostasy is enough for fear of persecution to be well founded).

359. 29 F.3d 553 (10th Cir. 1994).

360. *Id.* at 554.

361. *Id.* at 555.

persecution.[362] While the denial was appealed with the BIA, Refahiyat claimed that he had recently converted to the Mormon Church and should therefore be given asylum as a practicing Christian.[363] The BIA denied the appeal.[364]

The Tenth Circuit reviewed Refahiyat's petition based on the Ninth Circuit's test for well-founded fear.[365] This test distinguishes between a subjective, "fear," and an objective, "well-founded," component where the petitioner must first support "a reasonable fear that the petitioner faces persecution" based on "credible, direct, and specific evidence in the record" before the court considers whether he has a subjective fear of persecution.[366] The court affirmed the BIA's decision because Refahiyat argued "in a conclusive fashion" that he will be persecuted because he is a member of the Mormon Church.[367]

c. Toufighi v. Mukasey

In *Toufighi v. Mukasey*,[368] the U.S. Court of Appeals for the Ninth Circuit upheld a removal decision by the BIA. This opinion shows—in the different ways the majority and the dissent framed the issue—how focusing on an applicant's credibility instead of reviewing the conditions in the country of origin can lead to opposite results in adjudicating asylum claims.

Toufighi had entered the U.S. as a non-immigrant visitor but had remained in the U.S. beyond the six months authorized by his visa.[369] At his removal hearing before the immigration judge, he claimed that he, born a Muslim, had become a Christian and, therefore, feared persecution because of his apostasy if removed to Iran.[370]

The immigration court, while finding Toufighi's testimony generally credible, held that Toufighi had not actually converted to Christianity and was merely alleging his conversion "as a vehicle for him to apply for political asylum in the United States."[371] The immigration court, ex-

362. *Id.* at 556.

363. *Id.*

364. *Id.*

365. *Id.* at 557 (quoting Aguilera–Cota v. INS, 914 F.2d 1375 (9th Cir. 1990)).

366. *Id.*; *see also supra* notes 164–166 and accompanying text.

367. *Refahiyat*, 29 F.3d at 557–58 ("Merely asserting that one is aligned with a minority religion is not sufficient to establish a prima facie case of religious persecution.").

368. 538 F.3d 988 (9th Cir. 2008).

369. *Id.* at 990.

370. *Id.*

371. *Id.* at 990–91.

pressing its "very deep concern as to the genuineness [of Toufighi's] claimed conversion," noted in particular that Toufighi "apparently knows very little about the 'Bible' that he studied"—allegedly on a regular basis—and could not "even name the 12 apostles of Jesus Christ."[372] This was apparently Toufighi's decisive shortcoming for the immigration court, since the court understood Christianity to begin "with the life and teachings of Jesus Christ in the New Testament" where "the 12 apostles have some of the most important, if not the most important, writings of Christianity."[373] Accordingly, there were "serious doubts" as to Toufighi's conversion "when he cannot even given the names of the 12 apostles of Jesus Christ."[374]

The Ninth Circuit held that the BIA did not abuse its discretion when it affirmed the BIA's denial of Toufighi's motion to reopen his case[375] because Toufighi had not presented any new evidence with his motion to reopen to corroborate the genuineness of his conversion.[376] The court also rejected Toufighi's attempts to reframe the immigration judge's "deep concerns" about the genuineness of Toufighi's conversion.[377]

Judge Berzon based her dissent on two grounds: First, she asserted that the BIA and the majority "misunderstood what the [immigration judge] actually said about Toufighi's conversion."[378] Second, the BIA and the majority, as a consequence of this misunderstanding, "entirely failed to consider whether circumstances have changed with regard to

372. *Id.*

373. *Id.* at 991.

374. *Id.*

375. Toufighi had filed a timely appeal of the immigration judge's decision, but had failed to file the requisite supporting brief, which is why the BIA dismissed his appeal. *Id.* Instead of leaving the U.S. voluntarily as promised, he filed a motion to reopen his case, claiming that changed conditions in Iran warranted the reopening of his claim. The BIA denied his motion, holding that Toufighi's evidence—"some general news articles"—did not establish that he would be directly affected by any changes described in the articles. *Id.* at 992.

376. *Id.* at 994.

377. *Id.* The court also noted that it did not have jurisdiction to overrule the immigration judge's original order denying Toufighi's application for asylum and withholding of removal, since Toufighi, as noted earlier, did not file a timely appeal to that order, so that only the BIA's denial of Toufighi's motion to reopen was before the Ninth Circuit. *Id.* at 995.

378. *Id.* at 998 (Berzon, J., dissenting).

how Iran treats apostates."[379] On the first ground, Judge Berzon pointed out that the immigration judge had not found "that Toufighi had not converted, only that his conversion was not *spiritually* genuine."[380] She then pointed out that persecution can take place based on actual beliefs or based on imputed beliefs,[381] arriving at this conclusion: "[T]he question is not what Toufighi believes but what Iran understands him to believe—or, more accurately, *not* to believe."[382] In the words of Judge Berzon, "the sincerity of Toufighi's belief has no direct bearing on the question whether he will be persecuted based on imputed religious beliefs."[383]

2. German Courts

a. Iranian Couple I Case

In the 2016 *Iranian Couple I Case*,[384] the administrative court in Stuttgart reviewed the negative decision of the BAMF regarding the refugee-status application of an Iranian couple who claimed that political activity in Iran critical of the Iranian government had resulted in arrests and mistreatment during the arrest.[385] In May 2013, after legally obtaining Iranian passports, the couple flew from Tehran to Germany via Istanbul.[386] While in Germany, the couple got in touch with a Christian minister and other Christians and began to read the bible.[387] Both were baptized in a Persian service in July 2014.[388]

In June 2015, the BAMF rejected the couple's application for refugee status.[389] The BAMF provided two reasons: First, the fact that the couple obtained passports and could leave Iran legally showed that the

379. *Id.* (noting that Toufighi had "submitted documents demonstrating that the climate of repression in Iran is worsening for Muslims who have renounced Islam," which was for the BIA to review on remand for sufficiency).

380. *Id.* (observing that the immigration judge "*credited* Toufighi's testimony that he was a church member" and that he would, if returned to Iran, "only practice his religion in hiding").

381. *Id.* at 999.

382. *Id.* at 1000 (echoing the holdings from *Najafi* and *Bastanipour*).

383. *Id.*

384. VG Stuttgart, Feb. 8, 2016, A 11 K 3425/15, http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&Datum=2016&nr=20465&Blank=1 [https://perma.cc/RB8S-4ZFA].

385. *Id.* ¶¶ 1–2.

386. *Id.*

387. *Id.*

388. *Id.* ¶ 3.

389. *Id.* ¶ 4.

Iranian government had no interest in persecuting them on account of their past political activity.[390] Second, their adoption of Christianity was pretextual since the couple had not internalized the Christian faith to the point of being unable to live without it.[391]

To support their claim for refugee status, the Iranian couple provided four letters. Two were written by pastors, attesting to the sincerity of their belief and church membership.[392]

During trial, the administrative court interviewed both wife and husband to investigate their political activities in Iran.[393] It also inquired into the reasons for their conversion and their knowledge about the Christian religion.[394] The court asked a number of open-ended questions about their reasons for the conversion, the meaning of the Christian faith for their lives, and how the plaintiffs practiced their faith, and how they would practice their faith in Iran.[395] The court also raised a number of knowledge questions about Christian holidays, the structure of the bible, and Christian prayers.[396]

The court affirmed the BAMF decision, thereby rejecting the Iranian couple's complaint for two reasons. First, based on the results of the trial, it was unable to gain a full conviction regarding the couple's claims of past persecution on account of political opinion due to the contradictory nature of their accounts.[397] Second, the court also held that the couple was not threatened by persecution on account of religion.[398]

The court noted that an investigation of the plaintiff's sincerity was necessary because the Iranian authorities, as a rule, deem it unimaginable that a Muslim could break the taboo of leaving Islam for Christianity, assuming by default that the person converting abroad did so insincerely, simply to gain the right of asylum.[399] Based on its

390. *Id.*

391. *Id.*

392. *Id.* ¶¶ 6–9. Such testimony by religious ministers is not given dispositive weight in German administrative court proceedings. *See supra* note 192.

393. VG Stuttgart, A 11 K 3425/15, ¶¶ 18, 20.

394. *Id.* ¶¶ 19, 21.

395. *Id.*

396. *Id.*

397. *Id.* ¶ 36.

398. *Id.* ¶¶ 44, 56.

399. *Id.* ¶¶ 49–50. This notion is apparently also held by the BAMF. Christoph Sydow, *Volker Beck wittert Volksverhetzung bei Flüchtlingsbehörde*, SPIEGEL ONLINE (Apr. 27, 2017), http://www.spiegel.de/politik/deutschland/volker-beck-wittert-volksverhetzung-bei-fluechtlingsbehoerde-a-1145086.html [https://perma.cc/Y9JW-2BZS]. As seen above in Part. II.B., apostasy is not a

investigation during trial, the court was not convinced that the plaintiffs had made "a serious conversion to the Christian religion that shaped the religious identity of the plaintiffs in an obligatory manner."[400] As one of the main reasons for its finding of lacking sincerity, the court noted that the couple was unable to explain why they had chosen Christianity instead of all the other world religions that can all be lived openly in Germany, because their reasons for choosing Christianity were equally valid for the other religions: "There is no recognizable intellectual, or even just spiritual, examination that, for the plaintiffs, could have exclusively led them to the Christian faith as their new religion."[401] Furthermore, the court, while recognizing that the plaintiffs had some basic knowledge about Christianity, also found their knowledge deficient.[402] Finally, the court noted that the plaintiffs could not explain how they might live their faith in Iran: "A convincing examination of how to lead the life of a Christian in Iran has evidently not taken place."[403]

b. Iranian Individual Male Case

In the 2016 *Iranian Individual Male Case*,[404] the administrative court in Berlin affirmed the BAMF's rejection of an Iranian individual's application for refugee status on account of past political and feared religious persecution.[405] The court was not convinced that the plaintiff left Iran based on past persecution.[406] Furthermore, the court noted that plaintiff's conversion to the Christian faith cannot result in a right to asylum simply because it is a fact created by the applicant himself after he left Iran that was not the result of a way of life that had shaped his personality and identity in Iran.[407]

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strict-liability offense in Iran, but it is not clear where German authorities get the sweeping notion that *all* conversions abroad will be seen as pretextual by Iranian authorities.

400. VG Stuttgart, A 11 K 3425/15, ¶ 51.

401. *Id.* ¶ 53.

402. *Id.* ¶ 54.

403. *Id.* ¶ 55.

404. VG Berlin, May 27, 2016, 3 K 13.15 A, http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/wid/bs/10/page/sammlung.psml?action=controls.sammlung.PrintOrSaveDocumentContent&case=print [https://perma.cc/NL8L-5WKC].

405. *Id.* ¶ 12.

406. *Id.* ¶ 17 (noting that plaintiff's contradictory remarks during trial "increased doubts as to whether his claimed fate of persecution is close to reality (*realitätsnah*)").

407. *Id.* ¶ 18.

The court explained its, incorrect,[408] categorical denial with more precision by stating that asylum seekers basing their fear of persecution on a *sur place* conversion to a religion persecuted in their country of origin, they must make credible their inner motives of such conversion.[409] In other words, they must establish that their conversion was based on a firm conviction and a serious change of religious attitudes instead of opportunistic considerations, so that now the conversion shapes the religious identity of the asylum seeker.[410]

A merely formal conversion to Christianity by baptism is normally not sufficient.[411] Instead, adult converts must show that they are familiar with the basic tenets of their new religion.[412] Moreover, they must show that their way of life in Germany is defined by their new religion.[413]

The plaintiff did not convince the court that his fear of persecution because of religion was well-founded.[414] Specifically, the court noted that the Iranian individual first decided to undergo instruction in the Christian religion after his application with the BAMF had been rejected and that attempts to show the seriousness of his conversion were based on fabrication.[415] This led the court to doubt whether the plaintiff, after his removal to Iran, would engage in the kind of religious activities that would expose him to a real risk of persecution; the court also doubted that he could not be expected to forego the exercise of such activities without unreasonable limitations of his religious identity.[416]

Specifically, the court found that the plaintiff, while still in Iran, had not been a person deeply engaged with the Muslim religion, which made it unlikely that he first in Germany extensively examined his previous understanding of god. The court found it "no less likely" that he got in contact with the Christian congregation where he was baptized

408. The court had initially confused the proper standard for political asylum determinations under GG, art. 16, with the proper standard for refugee determinations under AsylG § 3. HEUSCH ET AL., *supra* note 15, at 21.

409. VG Berlin, 3 K 13.15 A, ¶ 27.

410. *Id.*

411. *Id.* ¶ 28.

412. *Id.* (noting that the applicants' personality and intellectual disposition determine the depth and nature of this investigation).

413. *Id.*

414. *Id.* ¶ 29.

415. *Id.* ¶ 30.

416. *Id.* ¶ 31.

because it offered support and care in all kinds of practical, non-religious matters.[417]

The court was not moved to change its mind by the fact that the Iranian male was familiar with the basic tenets of the Christian religion and that his pastor described him as a committed Christian.[418] This was so because the court held that the prognosis of how the plaintiff's relationship to his new faith will likely appear after his return to Iran was decisive.[419] Since the court did not gain the impression that the plaintiff's religious identity will be limited in Iran—he conceded a willingness to adapt his ways of sharing his new beliefs to the legal conditions in Iran and was not a leader in the German congregation—the court did not consider it particularly likely that he will have issues in Iran due to his activities in Germany.[420]

c. Iranian Couple II Case

In the 2013 *Iranian Couple II Case*,[421] the administrative court in Schwerin overturned the BAMF's rejection of an Iranian couple's application for religiously motivated asylum.[422] Unlike the administrative courts in the previous two decisions, the Schwerin administrative court documented its extensive investigation into the political and human-rights conditions in Iran.[423]

Based on these findings of fact, the court held that, since the wife was baptized in 2011, thereby converting to the Christian faith, her life and freedom would be in danger if she were removed to Iran.[424] The court explained that there is a risk that the plaintiffs' human rights will be severely limited because they must expect that they cannot practice their faith without interference and that they could be criminally persecuted for apostasy which may result in the death penalty.[425] Adopting the 2009 findings of the administrative appellate court in North-Rhine Westphalia, the court noted that currently also low-profile converts from Islam to Christianity are at risk who do no more than attend pub-

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. VG Schwerin, Feb. 13, 2013, 3 A 1877/10 As, https://openjur.de/u/620085.print [https://perma.cc/L4RZ-F2TQ].

422. *Id.* ¶¶ 1, 35.

423. *See id.* ¶¶ 36–70, 101–65 (analyzing a variety of government and non-government sources).

424. *Id.* ¶ 71.

425. *Id.* ¶ 90.

lic religious rites.[426] The court, therefore, did not think a reasonable person in the situation of Iranian Muslim converts to Christianity can be expected to return to Iran, if that convert wishes to practice his or her religion outside of house churches.[427] The court did not find any evidence that the plaintiffs' conversion was done to be recognized as refugees.[428] Therefore, the court ordered the BAMF to award refugee status to this Iranian couple.

Conclusion: Toward a More Just Adjudication of Refugee and Asylum Claims

A. The Findings

The international refugee definition that has been at the center of this Note has been described as "compris[ing] one holistic test of interrelated elements" where the relationship and relative weight of these elements "necessarily falls to be determined on the facts of each individual case."[429] While this characterization threatens to negate the very existence of a meaningful, predictable test, this Note has demonstrated that the U.S. and Germany agree on a number of elements when it comes to adjudicating asylum or refugee claims.

Even absent an internationally binding definition of persecution, adjudicators in both countries recognize that persecution requires severe mistreatment—a requirement that may be met cumulatively—and that persecution may be inflicted by state and non-state actors. In order to gauge the severity of the threatened or actual mistreatment, both judicial systems inquire into the importance of the sanctioned religious practice for the applicants. Both countries also embrace an objective concept of persecution, that is, they disregard the subjective motivation of agents of persecution.

Adjudicators in both countries look for subjective and objective elements to establish a well-founded fear of persecution, and both countries agree on the basic contours of the objective prong. Both also rule out as asylum seekers or refugees those who cannot have a well-founded fear of persecution because they have reasonably within their reach an alternative to seeking surrogate protection abroad inside their countries of origin.

Finally, decision-makers in the U.S. and Germany look for a nexus between the claimed protected characteristic and the persecutory conduct.

426. *Id.* ¶¶ 92–96.

427. *Id.* ¶ 97.

428. *Id.* ¶¶ 166, 187–88.

429. U.N. High Comm'r for Refugees, *supra* note 134, ¶ 3.

But at the same time, this Note has also demonstrated that not only "the facts of each individual case" undermine the benefits of having a uniform international refugee definition in terms of assuring similar outcomes for similarly situated persons. Instead, the inherent vagueness of the definition creates a number of additional moveable parts that legislators and adjudicators in the U.S. and in Germany move about according to national legal precedent and broader procedural requirements.

Facially, the main difference between the U.S. and the German asylum systems consists of the fact that asylum is a discretionary grant in the U.S., while it is an individual right in Germany. But the individual laws and regulations, as well as the review of administrative decisions by the courts in the U.S., show that this difference is not overly significant in practice because once U.S. agencies find that applicants are eligible for asylum, their application is apparently rarely denied on a discretionary basis. Thus, in both countries the main hurdle for asylum seekers or refugees is to establish that they are actually refugees within the meaning of the 1951 Convention.

Regarding the practical application of the common international definition of "refugee," a major fundamental procedural or evidentiary difference lies in the heightened standard of proof the German civil-law judiciary requires to establish anything, including the sincerity of an applicant's conversion, while U.S. courts require the typical preponderance of evidence standard for civil trials such as usual asylum cases.

As for substantive law, there are a number of significant differences: Germany, unlike the U.S., recognizes non-state actors of protection—e.g., international organizations—if they meet certain statutory requirements at the time a refugee-status claim is adjudicated.

More importantly, Germany alters the subjective prong of the well-founded fear analysis from an inquiry into the subjective genuineness of the applicants' fear into an investigation into whether the religious conduct that is sanctioned in their country of origin is central to the individuals' "religious identity." As the German court cases demonstrate, this inquiry is a very searching one that calls for a highly self-reflective and established religiosity of the applicants. But as discussed above, this is an inquiry U.S. adjudicators expressly do not undertake, being satisfied instead with a bona-fide showing of sincerity of belief. They do, however, investigate the subjective importance of a sanctioned practice for the applicants when evaluating whether conduct rises to the level of persecution.

As for nexus determinations, German law applies a standard that is more generous for applicants in that it only requires them to show that their religious identity, which is difficult to establish, is one reason for being persecuted among others. Current U.S. law, on the other hand, while it makes it relatively easy to establish "religion," makes it harder

to prove nexus by requiring that "religion" be "one central reason" for persecution.

In addition to these important legal differences that have the strong potential of resulting in dissimilar outcomes, the U.S. and Germany enjoy relations with Iran that are quite different. One cannot help but notice that German courts seem to operate with a quite optimistic understanding of the situation Christians—including those who converted abroad—face in Iran. This may be due to the fact that Germany, unlike the U.S., has diplomatic ties with Iran. While this does not make the Iranian government less secretive, it does allow for "official" German observers on the ground. This, in turn, leads German courts to rely less—or not at all—on reports produced by human-rights organizations in their evaluation of the local situation.

Comparing the pictures drawn by the U.S. Commission on International Religious Freedom, the U.S. State Department, and German courts, it seems safe to say reports by human-rights organizations have a tendency to paint a bleaker picture of the situation in Iran than the diplomatic personnel of a government interested in maintaining reasonable relations with Iran. Perhaps unsurprisingly, the *Iranian Couple II Case*, discussed above as the only favorable German court decision, relied heavily on international sources to establish the situation in Iran.

B. Toward a More Just Adjudication of Claims

The primary purpose of recognizing asylum or refugee status is to provide meaningful surrogate protection against persecution in the applicants' country of origin, not to provide some abstract right or entitlement in the applicants' host country. Thus, the assessment of the situation in that country is of the essence. It is equally evident that differences in this assessment will result in different outcomes in asylum and refugee claims.

The U.S. and Germany agree, at least in principle, that the potential persecutor's view of the applicant at the time of adjudication should be determinative when adjudicating refugee and asylum claims. This approach is exemplified in the *Bastanipour* and *Najafi* decisions of the U.S. Court of Appeals for the Seventh Circuit, discussed above.

But this perspective does not always seem to win the day. In fact, beyond the shared understanding that persecutors may impute religious beliefs and practices to applicants, German courts either do not seem willing to take this perspective at all or appear to operate with an overly optimistic assessment of the situation faced by Christians in Iran. But focusing single-mindedly on the applicants' "religious identity" might not capture their religious self-understanding and thus infringe on their religious liberty. More importantly, such focus also potentially adds nothing to establishing whether applicants will suffer persecution in Iran, since it is not immediately clear that potential persecutors in Iran

share this focus on a self-reflective and somewhat stable "religious identity" that satisfies some textbook definition of religion.

In other words, to justify the "German" approach, it would have to be established that potential agents of persecution will engage in persecution only if a sanctioned conduct is "central" to the victim's religious self-understanding and identity. While this Note has demonstrated that apostasy is not a strict-liability offense but, at least in Islamic legal doctrine, is actually quite difficult to establish and has only rarely been invoked as a justification for punishment in Iran, it does not appear that Iranian judges, police officers, or other potential persecutors have adopted the German approach to evaluating a defendant's "religious identity" before handing her over for punishment for apostasy or other severe mistreatment on account of religion.

Without a doubt, there are many practical obstacles when evaluating how an Iranian judge or another potential agent of persecution might view an idiosyncratic Christian convert returning from a Western nation or practicing her religion in a covert manner in Iran. But simply substituting familiar credibility evaluations for investigating how a potential persecutor might view the applicant is inadequate.

The outcomes of such an inquiry are not necessarily more beneficial for those seeking asylum or refuge in the U.S. or Germany: Such an inquiry may show that persecution is less likely in a particular case than otherwise assumed. Or it may show that it is more likely. Still, it is the right inquiry to undertake if the goal is the protection of those who otherwise might suffer severe harm.

Generally speaking, German and U.S. adjudicators seem to look at two different countries when evaluating Iranian refugees' applications for asylum and refugee status. This is not desirable because this difference in perspective is not what ultimately decides the fate of potential victims of persecution in Iran. It is also not desirable because it may encourage international forum shopping by those who can afford it.

Therefore, adjudicators in both countries should base their decisions on the best available evidence on Iran which may cut either way. But adjudicators owe no less to those seeking refuge from persecution. This could be accomplished by relying on a broad spectrum of information sources to cancel out potential source bias, although, in the end, the trier of fact will consider all the evidence, including evidence regarding the situation in Iran, and make her own credibility determinations. But those overseeing triers of fact could lessen the burden of frontline adjudicators and ensure a more even adjudication by providing generalized country guidance that does not leave the individual trier of fact to make complex assessments, as this is already required, e.g., by the IRFA.

In view of the difficulty of obtaining similar outcomes for similarly situated applicants across two different legal systems, focusing on the treatment awaiting such applicants in their country of origin would be an important contribution toward such similar treatment. No less is demanded by justice.

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