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Causation in international protection from armed conflict

Hélène Lambert

Westminster Law School

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Causation in International Protection from Armed Conflict

Hélène Lambert¹

In 2011, Afghanistan became again the main country of origin of asylum seekers in industrialized countries, followed not far behind by Iraq and Serbia (and Kosovo).² Industrialized countries also received record high numbers of asylum seekers originating from the Ivory Coast, Libya, Syria and Tunisia.³ Other significant countries of origin of asylum seekers in industrialized countries were Somalia, Eritrea, Nigeria and Mexico.⁴ It is no coincidence that all of these countries have experienced, and in some cases continue to experience, armed conflict. How we understand violence in a situation of armed conflict, and its effect on civilians, is therefore fundamental to decision makers and the courts in receiving countries.

This chapter builds on the seminal work of James Hathaway and Michelle Foster on causation in the context of refugee protection under the 1951 Convention relating to the Status of Refugees (hereinafter the Refugee Convention).⁵ Whereas the focus of Hathaway and Foster's work has been on refugee protection under the Refugee Convention, particularly the nexus between 'being persecuted' and the five grounds listed in Article 1(A)2, this chapter expands the scope of enquiry to other forms of international protection of pertinence to victims of armed conflict (such as subsidiary protection), with an empirical focus on the practice of the UK courts.⁶

The EU Qualification Directive (QD) defines 'persons eligible to subsidiary protection' as non-EU nationals 'in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin ... would face a real risk of suffering serious harm'.⁷ It further defines serious harm as 'serious and individual threat to a civilian's life or person by reason of

¹ The author is grateful to Theo Farrell, War Studies, KCL, for his feedback on this chapter.

² UNHCR, 'Asylum Levels and Trends in Industrialized Countries, 2011' (2012) <<http://www.unhcr.org/4e9beaa19.html>> accessed 3 September 2013, 15-16. China also was a major source of asylum seekers.

³ Ibid, 18.

⁴ Ibid, 18.

⁵ J. Hathaway and M. Foster, 'The Causal Connection ("Nexus") to a Convention Ground', Discussion Paper No.3 (Advanced Refugee Law Workshop IARLJ, Auckland, New Zealand, October 2002), reprinted in (2003) 15 IJRL 461; and M. Foster, 'Causation in Context: Interpreting the Nexus Clause in the Refugee Convention' (2002) 23 Mich J Int'l L 265.

⁶ Note that between 2007 and 2011, the UK was consistently ranked between 4th and 7th amongst the top 15 receiving industrialized countries, with asylum seekers primarily coming from Afghanistan, Pakistan and Iran, as well as Sri Lanka, Nigeria, Eritrea, Somalia and Sudan. UNHCR, 'Asylum Levels' (n 2) 12, 43 and 45.

⁷ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJEU 20.12.2011 L337/9-23, Article 2(f).

indiscriminate violence in situations of international or internal armed conflict'.⁸ At the heart of Article 15c therefore is a causal claim, namely, the existence of a serious and individual threat to life or person created by the presence of an armed conflict. The obvious approach to determining an individual claim under Article 15c would be to establish (a) that an armed conflict is present, (b) that an individual threat to life or person exists, and (c) that the former was a cause of the latter. This formulation follows standard practice in social science, which conceptualizes causation in terms of a traceable relationship between observable variables – the causal (or independent) and outcome (or dependent) variables.

The problem with this dominant approach is that it encourages a false sense of certainty when it comes to explaining the social world. It also privileges the search for objective knowledge, to 'prove' the existence of relationships between observable variables, over the accumulation of subjective knowledge that reveals the meaning of situations. The 'richness vs. rigour' debate over the virtues of qualitative versus quantitative analysis is an old one. For our purposes, it is sufficient to ask: what 'intellectual shortcuts' are the courts taking in applying conventional causal analysis in asylum determination cases? The dominant approach in social science requires that observable variables – armed conflict and existence of genuine threat – be 'fixed' conceptually, so that emphasis may be put on exploring the existence or not of a causal relationship between the two. As a consequence of this, less effort may be put into understanding violence as *experienced* by people on the ground and, in understanding the existence of 'a serious and individual threat' as *perceived* by people on the ground. For example, two key 'objective' criteria under International Humanitarian Law (IHL) in determining the existence of an armed conflict are the general level of violence and the degree of organization on the part of armed actors.⁹ But these are not necessarily the most important factors in determining the severity of a situation of armed conflict for civilians that experience it.

Recent scholarship on Non-International Armed Conflicts (NIAC) suggests that much of the armed violence is private and not political in character; the political economy of such conflicts is primarily concerned with the personal acquisition of wealth and power, and is largely fuelled by micro-dynamics of inter-personal grievance and score-settling.¹⁰ Thus, a NIAC may exhibit quite a low level of lethal violence and limited degree of organization by armed actors, and yet civilians on the ground may perceive serious threats as a consequence of daily and routine experiences.

This chapter advocates a broader approach to causation in asylum cases. In place of the social science approach that focuses on tracing 'efficient causation' between observable variables, it advocates an approach that gives equal priority to 'constitutive causation', that is, to understanding how threats are 'constituted' within a social environment. This broader approach discourages the early definitional fixing

⁸ Article 15(c), Qualification Directive. Serious harm is further defined as (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin.

⁹ ICRC, 'International Humanitarian Law and the challenges of contemporary armed conflict', report (31st International Conference of the Red Cross and Red Crescent, Geneva, 28 Nov- 1 Dec 2011) 7.

¹⁰ S. Kalyvas, *The Logic of Violence in Civil War* (Cambridge University Press 2006) and E. Simpson, *War From the Ground Up* (Hurst 2012). I am grateful to Theo Farrell for pointing me towards the work by Simpson and Kalyvas.

of ‘conflict and threat’ - or ‘cause and effect’. Instead it opens up enquiry into the complex character of contemporary NIACs (or material conditions), and the experience and perceptions of asylum applicants fleeing armed conflict (or the social context). I conclude with some comments on the role of IHL in understanding causation.

By way of illustration, let us briefly consider two cases by two very different judicial bodies: *Sufi and Elmi v United Kingdom* decided by the European Court of Human Rights (ECtHR) on 28 June 2011, and *AMM and others (Somalia) v Secretary of State for the Home Department* decided by the UK Upper Tribunal (UKUT) on 28 November 2011. Both cases involved Somali nationals about to be sent back from the UK to parts of Somalia, and considerations of degrading or inhuman treatment in the context of the humanitarian situation existing in southern and central Somalia, outside Mogadishu. Thus, even though these cases involved the interpretation of Article 3 ECHR/Article 15(b) QD, they do provide us with a picture of the courts’ approach to causation between an armed conflict and the real risk of ill-treatment/harm to civilians which would also apply to Article 15(c) cases.

In *Sufi and Elmi v United Kingdom*, the ECtHR, having first established that Mogadishu was generally unsafe, considered whether the applicants could be returned safely to another part of Somalia, and it found the living conditions in the main refugee camps in Somalia and neighbouring Kenya to be so dire that for the UK to return a person to these camps would breach Article 3 ECHR.¹¹ In order to reach its decision, the Strasbourg Court drew a distinction between:

- Dire humanitarian situations, which are attributable to poverty or to a lack of resources to deal with naturally phenomena such as drought; and
- A humanitarian crisis that is mainly due to ‘the direct and indirect actions of the parties to the conflict’.¹² For the Court, ‘it is clear that while drought has contributed to the humanitarian crisis, that crisis is *predominantly* due to the *direct and indirect* actions of the parties to the conflict’ (italics added).¹³

The Court explained this finding based on the fact that ‘The reports indicate that all parties to the conflict have employed indiscriminate methods of warfare in densely populated urban areas and with no regard to the safety of civilian population’; this ‘has resulted in widespread displacement and the breakdown of social, political and economic infrastructures’.¹⁴

¹¹ This is in stark contrast with its decision in *Salah Sheekh v the Netherlands* [2007] 45 EHRR 50 where the Court considered that ‘socio-economic and humanitarian considerations ... do not necessarily have a bearing, and certainly not a decisive one, on the question ... [of] real risk’, in the context of ‘internal flight alternative’ (para 141).

¹² *Sufi and Elmi v UK* [2011] ECHR 1045, para 282. Note that the Strasbourg Court also recognized ‘real risk’ of ill-treatment on account of the human rights situation, as distinguished from the situation of general violence, in the context of internal relocation to parts of southern and central Somalia (ibid, para 272).

¹³ Ibid, para 282.

¹⁴ Ibid, para 282. This situation was further ‘greatly exacerbated by al-Shabaab’s refusal to permit international aid agencies to operate in the areas under its control’.

The UKUT expressed a real concern with this finding on the ground that ‘even on the evidence available to the Court in that case, it is, with respect, difficult to see how the actions of the “parties to the conflict” (which must mean the TFG/AMISOM and Al-Shabaab) can be said, by their indiscriminate methods of warfare *over a comparatively short period of time*, to have caused a breakdown of “social, political and economic infrastructures”’ (italics added).¹⁵

These two cases illustrate two different approaches to armed conflict and causation. As will be discussed below, the UKUT in *AMM* applied the ‘efficient causation’ approach in assessing the existence of a direct line of causation between armed violence and civilian flight. In addition, the UKUT in *AMM* seemed to be requiring some kind of pattern or regularity that would enable it to reach a probable solution. In *Sufi and Elmi*, we may say that the ECtHR applied a ‘constitutive causation’ approach in recognizing that the armed conflict created conditions that produced threats of serious harm to civilians from the collapse of basic services and infrastructure, albeit with a confusing reference to the ‘predominant cause’ approach.

1. The ‘causation problem’ in refugee law and subsidiary protection law

There is an emerging body of writing that is related to causation in refugee protection, however, as yet no study has explored or understood causation in the context of subsidiary protection. The sections below aim to fill this gap.

1.1 What do we understand by causation in refugee law (Article 1A(2))?

James Hathaway and Michelle Foster have long highlighted the importance of a clear understanding of nexus in refugee law, namely of establishing ‘a causal connection between a Convention ground and the reason for the applicant’s well-founded fear of being persecuted’.¹⁶ Taking the example of two cases based on very similar facts and raising almost identical issues, they show how two different approaches to nexus could lead to two totally different outcomes. According to one approach, entirely based on the existence of a direct cause, in this case persecution based on religion, the Court would ask the question: why does the persecutor wish to harm the applicant, or the state refrain from protecting him?¹⁷ With such an approach, the intent to discriminate on religious grounds is determinative because it is believed that ‘conscious discrimination’ is essential to the concept of persecution under the Refugee Convention.¹⁸ According to the other approach, based on how religion might instead indirectly have caused the applicant to fear persecution, the Court would ask the question: ‘why is the applicant in the predicament in which he is?’¹⁹ With such an approach, the Court is essentially trying to identify the ‘true reason’ for the feared persecution on the ground that ‘history supports the view that religious persecution often takes “indirect” forms’.²⁰

¹⁵ In *AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia v. Secretary of State for the Home Department*, CG [2011] UKUT 00445 (IAC) para 131. Note that the judgment in *Sufi and Elmi v UK* was handed down while the *AMM* cases were pending, but that the ECtHR was not final at the time and the Secretary of State still hoped to influence the final judgment.

¹⁶ Hathaway and Foster, ‘The Causal Connection’ (n 5) 465.

¹⁷ *Ibid*, 466.

¹⁸ *Omoruyi v SSHD* [2000] EWCA Civ 258.

¹⁹ Hathaway and Foster, ‘The Causal Connection’ (n 5) 466.

²⁰ *Okere v MIMA* [1998] 157 ALR 678.

It is fair to say that agreement generally exists that the Refugee Convention does not require a Convention ground to be the sole reason for being persecuted. However, in practice, courts

frequently apply an *effective* sole cause test by rejecting Convention-related explanations for persecution (despite evidence to the contrary) and hypothesizing about alternative non-Convention grounds that can exclusively account for the fear of persecution.²¹

Foster explains:

[C]ourts frequently proceed on the apparent assumption that there is one sole explanation or reason for a well-founded fear of being persecuted, and therefore the existence of a non-Convention ground as a potential explanation for the fear of being persecuted negates a Convention-related explanation. Such an approach involves an artificial analysis whereby a false dichotomy is drawn between non-Convention grounds and Convention-related explanations or factors.²²

Beyond the ‘effective sole cause’ test, uncertainty remains as to whether a Convention ground should be an essential cause, the predominant (or central) cause, or simply a contributing cause.

The ‘essential and significant cause’ test or ‘but for’ test²³ has been criticized for involving too many different interpretations and therefore for being imprecise. Indeed, if the ‘but for’ test does succeed in remedying some of the limitations of the ‘sole cause’ test by contemplating multiple causes,²⁴ ‘it has been heavily denounced ... due to its inability adequately to accommodate situations involving multiple causes, including both multiple independent causes and multiple cumulative causes’²⁵ because to do so, as Lord Justice Sedley notes, ‘opens up the possibility of an infinity of causes’.²⁶

Foster further argues that ‘[e]ven in cases where courts are able to determine the multiple causes, gaps in the available evidence are often so significant as to seriously impede the nexus determination’.²⁷ The gathering of evidence in refugee law, particularly in civil war situations, can be obstructed by a number of considerations, such as ‘[d]ifficulties in cross-cultural communication, lack of access to corroborating evidence in foreign countries, inability to procure witnesses’ etc.²⁸ Thus, multiple causes and evidentiary gaps - so characteristic of refugee law - pose serious challenges to successful nexus determination.

²¹ Foster, ‘Causation in Context’ (n 5) 270.

²² Ibid.

²³ This test asks the question: ‘*but for* the protected ground, would the persecution have occurred?’

²⁴ Foster, ‘Causation in Context’ (n 5) 274.

²⁵ Hathaway and Foster, ‘The Causal Connection’ (n 5) 471.

²⁶ Sedley, L.J. of the Court of Appeal, in *Velasco v. Secretary of State for the Home Department*, quoted in Foster, ‘Causation in Context’ (n 5) 276.

²⁷ Foster, ‘Causation in Context’ (n 5) 297.

²⁸ Ibid.

As will be discussed below, recent works by social scientist have studied the challenges associated with causal analysis. For example, consideration of multiple causes ultimately requires counter-factual analysis. This is where causation gets immensely complex. Lebow explains that ‘to assess the probability of an alternative world we must direct our attention, not to any particular alternative world, but to all the possible worlds in which a specified outcome did or did not occur’.²⁹ Viewed this way, analysis of multiple potential causes actually requires analysis of multiple counter-factual worlds, each with its own complex social dynamics. This is Lord Justice Sedley’s ‘infinity of causes.’

The reality is that tests based on essential, predominant and even contributing causes have failed to recognize the underlying complexity of causal analysis. Instead, courts have chosen to isolate and weigh different causes, without sufficiently recognizing the interconnectedness, contingency and social context of these various causes. For instance, the ‘predominant cause’ test has been criticized for reducing the evidentiary test in the Refugee Convention to mathematical calculations or weighting, disconnected from ethical considerations.³⁰ Hence, courts have often preferred to rely on the ‘contributing cause’ test according to which the fear of being persecuted only requires to be caused ‘at least in part’ by a Convention ground, as long as it is not ‘remote to the point of irrelevance’.³¹

In sum, the key literature on causation in refugee law argues for a rejection of the ‘sole cause’ test for being too restrictive and of the ‘but for’ test for being unworkable. Furthermore, the requirement that a Convention ground be ‘central or predominant’ should not be read in the Refugee Convention because trying to ascertain the degree of significance of a particular factor is simply too artificial. According to Foster:

In none of the refugee cases reviewed for the purposes of [her] article, involving multiple causes, was a court able to ascertain the degree of significance of a certain factor, other than to recognize that it played “a part” in the fear of future persecution. Rather, it is acknowledged that in many cases Convention factors are “inextricably linked” to non-Convention grounds.³²

The key literature, therefore, suggests that the most reliable approach to causation is ‘one that asks whether the Convention ground is a contributing cause of the applicant’s well-founded fear of being persecuted’.³³ I argue, that even with this test, which has the virtue of considering the wider social context of civilian flight, there still is a risk that courts may place too much faith in the possibility of isolating and weighing causes as observable variables.

1.2 What do we understand by causation in subsidiary protection law?

²⁹ R.N. Lebow, *Forbidden Fruit – Counterfactual and International Relations* (Princeton University Press 2010) 194.

³⁰ Hathaway and Foster, ‘The Causal Connection’ (n 5) 474.

³¹ *Ibid*, 476.

³² Foster, ‘Causation in Context’ (n 5) 336.

³³ *Ibid*, 340. See also J.C. Hathaway, ‘Michigan Guidelines on Nexus to a Convention Ground’ (2002) 23 *Mich J Int’l L* 207, para 13, recommending that the test be one of ‘contributing cause’ rather than, for example, ‘motivating cause’.

Article 15c of the EU Qualification Directive defines serious harm as ‘serious and individual threat to a civilian’s life or person *by reason of* [‘en raison de’] indiscriminate violence *in situations of* [‘résultant de’] international or internal armed conflict’ (italics added).

In clear contrast with the ‘causation problem’ in refugee law, which is concerned with flight from individual persecution (i.e., discriminate violence for specific reasons), the ‘causation problem’ in EU subsidiary protection law is essentially about flight from the indiscriminate effects of generalized violence in an armed conflict. Thus, the nature of the threat (i.e., its indiscriminate effects) emanating from generalized violence, as opposed to the individualization of the fear emanating from persecution, is at the heart of Article 15c. This core element calls for a close examination of causation between an objective situation of generalized violence and a need for international protection from a harm that is not discriminate (persecution) but indiscriminate (generalized violence).³⁴

Considerations of IHL have been ruled out by recent case law from the ECJ/CJEU³⁵ and the UKCA.³⁶ Because of this, the intentions or culpability of the actors to a conflict are not important to an understanding of causation in Article 15c.³⁷ Rather, the intensity or level of violence is the crucial element to any such enquiry into the causes of the threat and flight.³⁸ Accordingly, up to now, case law has focused on assessing the *level* of violence in an armed conflict and resulting indiscriminate effects on the civilian population. However, logically one must also consider the *character* of violence as a quality distinct from the level of violence in order to gain a more reliable appreciation of ‘why people flee armed conflicts’.³⁹ In principle, it is entirely possible for an armed conflict to display relatively low level of generalized violence but of such a character as to expose civilians to real risk of serious harm.

2. Causation and complexity of armed conflict

³⁴ According to Jane McAdam, a reading of Article 2(f) 2011 QD (old Article 2(e) 2004 QD) shows that ‘Conditions in the country of origin are a precondition to triggering article 15(c)’ and the cause of the threat is ‘indiscriminate violence arising in situation of armed conflict’. J. McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) 77. The original version of Article 15 also provided that the threat could result from ‘systematic or generalized violations of [an applicant’s] human rights’, but this additional ground was soon deleted.

³⁵ See Case C-465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921, and Case C-285/12, *Aboubacar Diakite v Commissaire général aux réfugiés et aux apatrides*, 30 January 2014.

³⁶ *QD and AH (Iraq) v Secretary of State for the Home Department* [2009] EWCA Civ 620.

³⁷ *HM and Others v SSHD (HM1) (Article 15c) Iraq CG* [2010] UKUT 331 (IAC) para 77.

³⁸ C-465/07 *Elgafaji* (n 35); C-285/12 *Diakite* (n 35); *QD and AH (Iraq)* (n 36); Home Office, UK Border Agency, Casework Instruction, ‘Humanitarian protection: Article 15 (c) of the Qualification Directive’, 13 September 2010.

³⁹ H. Lambert and T. Farrell, ‘The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence’ (2010) 22 *IJRL* 237; T. Farrell and O. Schmitt, ‘The Causes, Character and Conduct of Armed Conflict, and the Effects on Civilian Populations, 1990-2010’, UNHCR Legal and Protection Policy Research Series, April 2012; H. Lambert, ‘The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Violence’ (2013) 25 *IJRL* 207. See also, H. Storey, ‘Armed Conflict in Asylum Law: The “War-Flaw”’ (2012) 31 *RSQ* 1, and J.F. Durieux, ‘Of War, Flows, Laws and Flaws: A Reply to Hugo Storey’ (2012) 31 *RSQ* 161.

According to Gil Loescher: ‘The real refugee problem is that political, economic, and security conditions in the home country are so bad that citizens feel compelled to leave’.⁴⁰ How does one disentangle these conditions for the purpose of granting protection? And should these be disentangled at all?

Since Descartes, empiricist-positivist theorists have referred to causes as ‘pushing and pulling’ forces, ‘those things that through their action or movement precipitate change’, namely, the ‘efficient cause’.⁴¹ Understood in this way, causes have been ‘associated with regularities and mechanistic “when A, then B” type relations’.⁴² This approach, which in modern times is most closely associated with David Hume, assumes a linear relationship between efficient causes and outcomes. It requires that causes and outcomes be conceptually fixed and observable, and attention is then focused on examining the relationship between the former and the latter. For example, under such an approach, one would isolate level of armed violence, food insecurity, and collapse of basic services, as separate potential ‘causes’ of civilian flight, and seek to weigh each as actual causes in individual cases. The problem with this approach is that the focus is on identifying and weighing observable variables rather than understanding the real world around us. Indeed, in our everyday life, the notion of cause is used in a much wider sense when we talk about ‘consequences’; we talk ‘of things, ideas or people as ‘influencing’, ‘producing’, ‘constraining’, ‘enabling’ or ‘shaping’ courses of event’.⁴³ This more ‘common-sensical’ everyday terminology’ is not captured in the Humean conceptualization of efficient causes.⁴⁴

An alternative approach is to focus on ‘constitutive cause’; this is cause in the sense of making it possible for something to happen. According to this view, causes are not the relationship between A and B, but rather the materiality and social structures that make it possible for A and B to exist and meaningfully relate to one another.⁴⁵ Such an approach would direct more attention to the underlying material conditions that produce serious threats to civilians that necessitate flight. Thus, armed violence may not directly produce immediate threats of sufficient magnitude, but may nonetheless create the material conditions for the collapse of those things that are necessary to sustain civilian lives and communities. An example might be the collapse of agriculture in an area affected by armed conflict. In such a situation, it may appear that the efficient cause of population displacement is food insecurity, but the constitutive cause is the armed conflict.

The ‘constitutive causation’ approach also focuses attention on understanding the social context of armed violence. How is violence used to create social control? What social meanings are attached to violent acts? One example is the use of ‘night-letters’ by the Taliban to control civilian communities in contested areas of Afghanistan. Robbed of its social context, there is nothing violent about delivering a letter. However, for civilians on the ground, the violence of such letters is very real, and

⁴⁰ G. Loescher, *Beyond Charity – International Cooperation and the Global Refugee Crisis* (Oxford University Press 1993) 181.

⁴¹ M. Kurki, *Causation in International Relations – Reclaiming Causal Analysis* (Cambridge University Press 2008) 219.

⁴² *Ibid.*, 138, referring to Humean philosophies.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, 218-230.

sufficiently terrifying to ensure compliance or to cause flight. Social context is equally important in the case of acts of indiscriminate violence. For example, suicide attacks are made possible by social structures that give value to such activity, and accordingly produce people prepared to kill themselves and murder innocents.

Issues of social structures, meanings and context are especially important for violence which produces low civilian fatalities, and thus may make an armed conflict appear less severe to outside observers, but which may be widespread and/or truly terrifying to civilians on the ground. Note that, in contrast, IHL directs our attention to concrete observables that are divorced of social context, such as, ‘the number, duration and intensity of individual confrontations, the type of weapons and other military equipment used, the number and calibre of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, and the number of civilians fleeing combat zones’.⁴⁶

Recent research has highlighted the importance of understanding how armed conflict creates the material conditions that cause civilians to flee. In a comparative study of four conflicts that produced mass displacement of civilians – DRC and Chad in 2000, and Somalia and Sudan in 2007 – Lambert and Farrell note that the number of civilian fatalities in conflict was remarkably low in all but DRC (even using the highest estimates). Equally striking is that under-5 mortality and child malnourishment rates were very high in all four countries affected by conflict: 11-20% for under-5 mortality, and 28-36% for child malnourishment.⁴⁷ In a follow-on study for UNHCR, Farrell and Schmitt show the linkages between, on the one hand, armed conflict, poverty and food insecurity and, on the other hand, the greatly raised incidence of disease. They note the devastating impact of armed conflict on the economies of affected countries, observing that ‘the typical NIAC lasts seven years ... leaving a country 15 per cent poorer at the end’.⁴⁸ As Farrell and Schmitt explain, this has follow-on effects on food insecurity. ‘Analysis of cross-national quantitative data reveals that the median armed conflict between 1990 and 2004 will have increased the number of undernourished in the general population by 3.3 per cent, or 300,000 persons’.⁴⁹ Finally, Farrell and Schmitt discuss how displacement, poverty, and food insecurity greatly increase the vulnerability of individuals and communities to disease. Crowded displaced persons camps, with cramped conditions, poor sanitation, inadequate access to food and healthcare, and undernourished people, are perfect breeding grounds for deadly diseases, such as, tuberculosis, cholera, typhoid and dysentery. Farrell and Schmitt cite one study in the leading medical journal, the *Lancet*, which found that ‘over 80 per cent of the 300,000 excess deaths from the 2004-08 Darfur conflict occurred not as a result of armed violence but from diseases like diarrhea’.⁵⁰

Recent research also highlights the importance of understanding the social context of armed violence, that is, the social meanings attached to acts of violence and the social structures that produce and sustain such violent activity. It is clear that NIACs have a

⁴⁶ ICRC, ‘International Humanitarian Law and the challenges of contemporary armed conflicts’ (n 9).

⁴⁷ Lambert and Farrell, ‘The Changing Character of Armed Conflict’ (n 39) 264-5.

⁴⁸ Farrell and Schmitt, ‘The Causes, Character and Conduct of Armed Conflict’ (n 39) 11.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, referring to O. Degomme and D. Guha-Sapir, ‘Patterns of Mortality Rates in the Darfur Conflict’ (2010) 373 *Lancet* 297.

reverse political economy from traditional international armed conflicts (IACs). In NIACs, armed groups tend to make far more extensive and everyday use of violence to control civilian populations with the aim of extracting resources and/or labour to sustain military activity, which is itself often directed towards the illegal accumulation of private wealth. This character of NIAC is well understood in the academic literature and in IHL.⁵¹ Less appreciated perhaps is the extent to which armed violence is driven by local pressures and opportunities, and depends on the presence of social as well as material resources.

In his widely acclaimed study of civil war, Stathis Kalyvas argues that NIACs are not fuelled by ideologies or ethnic cleavages at the macro-level. Rather they are fuelled by micro-level dynamics, differences between and within communities at a very local level, such as feuds and disputes over land and other resources. Armed conflict provides opportunities for local actors to access social resources, such as, a legitimating ideology and/or higher authority, to make it possible for them to engage in armed violent action.⁵² For instance, the dominant view of the NIAC in Afghanistan is that it is an armed conflict between the Afghan State, supported by international forces, and a Taliban insurgency. However, one recent study uncovers the extent to which armed violence on the ground is driven by self-interest, rivalry between village or valley based sub-tribal groups, and a local level competition for resources.⁵³ In this local level struggle, the Afghan State and the Taliban are both exploited by local actors as sources of social legitimacy and material support. Sub-tribal groups that are dominant in local government commonly abuse their position to direct security forces against rival sub-tribal groups. Absent social context, the conflict becomes one of State versus insurgent. With social context, it becomes clear that a more complicated set of local dynamics is at play. To illustrate this point, Afghan families commonly send relatives to join both the State security forces and the insurgency in order to be able to extend influence into both camps.⁵⁴

3. How the UK Courts have attempted to deal with causation in Article 15c

Causation has long been an issue of considerable interest for the UK courts and tribunals, particularly in tort law. A search on Westlaw UK (03 January 2013) - Keyword 'causation' – found 4,000 hits, all under Cases, none under Legislation, Journals, current awareness or EU. Of these 4,000 cases, most dealt with criminal law matters, very few deal with issues of refugees and armed conflict.

3.1 Reasons and causes

Let us first consider the question: are 'reasons' the same as 'causes'? Some authors argue that reasons for social action or human motives or intentions (referring to the 'self') are not causal explanations; causes should only apply to something of an external kind.⁵⁵ In the context of the Refugee Convention, Article 1A(2), when

⁵¹ Ibid, 3-6, referring to the work by Mary Kaldor (*New and Old Wars: Organized Violence in a Global Era* (2nd edn, Polity 2006)) and Paul Collier (*The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It* (Oxford University Press 2008)) amongst others.

⁵² Kalyvas, *The Logic of Violence* (n 10).

⁵³ Simpson, *War* (n 10).

⁵⁴ Ibid.

⁵⁵ Kurki, *Causation in International Relations* (n 41) 74.

assessing why an applicant left her country (namely, the well-founded fear of being persecuted), introduced a distinction between subjective and objective account. The language in this provision is overwhelmingly about ‘compelling reasons’, ‘motives’. The objective situation in the country of origin is helpful in order to assess the applicant’s credibility. In recent years, the use of Country of Origin Information has gained considerable value in this assessment process. Whether we use the word ‘cause’ or ‘reason’, the point is that we do use causal language; we explore causation. What made this person leave? What was the cause of her doing that? It was a combination of x, y, z, including the human instinct for survival. In sum, whether we are talking about reasons, motives or intentions, these are all causes and the exploration of these causes requires clearer understanding.

3.2 *Refugee law cases*

The position of the UK courts regarding the causation test in refugee law cases is well established and rests on a rejection of the ‘but for’ test, favouring instead the ‘effective reason’ test. This position was summarized by the House of Lords in *Secretary of State for the Home Department v K and Fornah* as follows:

The ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that the ground relied on is an effective reason. The persecutory treatment need not be motivated by enmity, malignity or animus on the part of the persecutor, whose professed or apparent motives may or may not be the real reason for the persecution. What matters is the real reason. In deciding whether the causal link is established, a simple "but for" test of causation is inappropriate: the Convention calls for a more sophisticated approach, appropriate to the context and taking account of all the facts and circumstances relevant to the particular case.⁵⁶

Lord Bingham further stated: ‘Whatever the difficulty of applying it in a particular case, I do not think that the test of causation is problematical in principle’.⁵⁷

3.3 *Cases on subsidiary protection*

There is now a growing case law on subsidiary protection (Article 15c in particular) and the most important of these cases are discussed below.

The UKCA did not discuss specifically the issue of nexus or causation in *QD and AH v SSHD (Iraq)*.⁵⁸ However, it made a number of interesting observations when considering the risk of a threat in Article 15c. For example, the UKCA explained: ‘it

⁵⁶ *Secretary of State for the Home Department v K and Fornah* [2006] UKHL 46, para 17 (Lord Bingham of Cornhill) referring to precedents such as *R v Immigration Appeal Tribunal, ex parte Shah, and Islam v SSHD* [1999] 2 A.C. 653-655; *R (Sivakumar) v Secretary of State for the Home Department* [2003] UKHL 14, [2003] 1 WLR 840, paras 41-42; *Sepet v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856, paras 21-23; and *Suarez v Secretary of State for the Home Department* [2002] EWCA Civ 722, [2002] 1 WLR 2663, para 29, as well as the *Michigan Guidelines on Nexus to a Convention Ground*, published following a colloquium in March 2001.

⁵⁷ *Secretary of State for the Home Department v K and Fornah* (n 56) para 18.

⁵⁸ [2009] EWCA Civ 620.

is not thinkable that the Directive seeks to cover such remote and not truly dangerous situations [such as the possibility that a quiescent militia will re-emerge, or a rumour that the local wells have been poisoned] rather than the real risks and real threats presented by the kinds of endemic act of indiscriminate violence'.⁵⁹ Thus fear alone is not sufficient; there must also be a possibility that that fear may become a reality.⁶⁰ The CA appears to give priority to the quantifiable, the measurable, the predictable, the probable. The CA further explained: 'In this regard it is possible that the Directive is less strong than IHL, which ... prohibits "threats of violence the primary purpose of which it to spread terror among the civilian population"'.⁶¹ The CA nevertheless rejected the requirement of a 'consistent pattern' in the context of Article 15c – requirement that had been adopted by the then Asylum and Immigration Tribunal in *AA (Zimbabwe)* - because '[t]he risk of random injury or death which indiscriminate violence carries is the converse of consistency'.⁶²

In contrast with the UKCA, the UKUT has explicitly considered (in much detail) causation in Article 15c. In *GS (Article 15(c): indiscriminate violence) Afghanistan*,⁶³ the UT confirmed that 'by reasons of' in Article 15c should be given the same meaning as 'for reasons of' in Article 1(A)2 of the Refugee Convention, which simply required 'a connection'.⁶⁴ When considering criminal activities, the UT saw 'no reason in principle why criminal acts should not be included in the scope of indiscriminate violence and, indeed, it is often difficult to separate armed conflict from a criminal act'.⁶⁵ The UT further explained:

The correct approach is not simply to ask whether the indiscriminate violence is criminal, or in pursuance of the armed conflict. It is a question of causation. The words used in Article 15(c) are "by reason of indiscriminate violence in situations of international or internal armed conflict". There therefore needs to be a causal link between the threat to life or person and the indiscriminate violence, but that indiscriminate violence does not need to be caused by one or more armed factions or the state.⁶⁶

The UT then went on to apply the 'effective cause' test (previously applied in *AM and AM*) according to which 'the indiscriminate violence ... does not need to be the only cause [of the threat] but [it] has to be more closely connected than only remotely'.⁶⁷

⁵⁹ Ibid, para 27.

⁶⁰ Ibid, para 28. Article 2(f) 2011 QD. The old Article 2(e) requires that 'substantial grounds ... for believing ... a real risk of ... serious harm'.

⁶¹ Ibid, para 28.

⁶² Ibid, para 32.

⁶³ CG [2009] UKAIT 00044.

⁶⁴ Ibid, para 35. See also, *AM and AM (Somalia) v Secretary of State for the Home Department*, CG [2008] UKAIT 00091; Mark Symes argued that this interpretation was called for on the ground that considerations of IHL have been ruled out (by the ECJ in *Elgafaji*).

⁶⁵ CG [2009] UKAIT 00044, para 65. The Tribunal confirmed its interpretation in *HH and others (Somalia)* that indiscriminate violence does not have to be violence that emanates directly from combatants themselves but instead from 'looters and other criminal elements, taking advantage of a breakdown in law and order to go on the rampage' (*GS (Afghanistan)*) CG [2009] UKAIT 00044, para 63).

⁶⁶ CG [2009] UKAIT 00044, para 65.

⁶⁷ Ibid, para 66.

The UT further considered whether violence under Article 15c could only be direct, or whether it could also include indirect violence (e.g., starvation, denial of medical care), and saw this to be also a question of causation. In this case (*GS Afghanistan*), the Tribunal said:

One consequence of the years of conflict is that agriculture, and food distribution, have suffered and that has given rise to difficulties of food supply. In our judgment *it cannot be said that such a general situation has come about “by reason of indiscriminate violence in situations of international or internal armed conflict”*⁶⁸ (italics added).

The Tribunal explained:

The food supply difficulties arise from a situation that has gone on for many years, and have not been shown to be the result of indiscriminate violence, as opposed to the targeted violence of armed groups against one another.⁶⁹

The Tribunal essentially was not convinced that even without an armed conflict, the situation in Afghanistan would be a great deal better, and so it concluded:

The food supply problem cannot be shown to be connected otherwise than very remotely to indiscriminate violence, even if it is more closely connected to armed conflict.⁷⁰

In principle, therefore, the UT recognizes both direct violence, such as criminal activities (efficient cause), and indirect violence, such as food supply and lack of medical care (constitutive cause), to involve questions of causation. However, by choosing to apply the ‘effective cause’ test, in the sense of ‘more closely connected than only remotely’⁷¹, the Tribunal ended up denying any relevance *in fact* to constitutive causes.⁷²

Finally, in *HMI (Iraq)*, the UKUT adopted an ‘inclusive approach’⁷³ to indiscriminate violence in Article 15c, ‘subject only to there being a sufficient causal nexus’.⁷⁴ It

⁶⁸ Ibid, para 69.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Not in the sense of ‘the only and sole cause’ as described in Foster – see discussion in Section 1 above.

⁷² It may be noted here that in *T v Immigration Officer* [1996] UKHL 8 – a case concerned with the interpretation of ‘serious non-political crime’ in Article 1F(b) of the Refugee Convention – Lord Mustill noted the difficulties associated with applying ‘remoteness’ in practice ‘if the logic is not clear’ in the ‘continuous causal chain’: ‘I can see that even where the actor has no motive other than to further his cause, the chain of events between the act and the achievement of the political goal may be so long that the two are disconnected ... In short, to say that the political aim must cause the crime, or that the crime must not be too remote from the aim, does no more than assert that the crime must be really political in nature to fall within the exception’. He further warned against ‘criteria such as remoteness, causation, atrociousness and proportionality being too subjective to found the consistency of decision’, finding instead the objective application and definition of key terms in international instruments more useful.

⁷³ ‘[T]hat takes into account all the different types of violence in Iraq’. *HM and Others v SSHD (HMI) (Article 15c) Iraq CG* [2010] UKUT 331 (IAC), para 246.

⁷⁴ Ibid, para 239. Note that this approach was confirmed in *HM2 (Article 15c) Iraq* [2012] UKUT 00409 (IAC), para 45.

referred to the ‘operative cause’ test: ‘the serious and individual threat involved does not have to be a direct effect of the indiscriminate violence; it is sufficient if the latter is an operative cause ... that is not too remote’.⁷⁵ The UT explained:

In our judgment the nexus between the generalized armed conflict and the indiscriminate violence posing a real risk to life and person is met when the intensity of the conflict involves means of combat (whether permissible under the laws of war or not) that seriously endanger non-combatants as well as result in such a general breakdown of law and order as to permit anarchy and criminality occasioning the serious harm referred to in the Directive. Such violence is indiscriminate in effect even if not necessarily in aim.⁷⁶

When assessing the foreseeability of the risk of harm, a clear prediction is not required; rather the scale of the harm caused to civilians needs to be ‘substantial’ because of the intensity of the conflict existing at the relevant time.⁷⁷ The UT acknowledged

the difficulty in obtaining reliable data on civilian casualties whilst the conflict is in progress and the risks in excluding indirect casualties who are “killed or suffer serious illness as a consequence of the effects of war, for example, from imprisonment, abuse, starvation, or even the destruction of critical infrastructure and services”.⁷⁸

The UT therefore accepted factoring in considerations of State failure (as well as population displacement) into the overall assessment provided ‘a sufficient causal nexus’ (not necessarily an exclusive one) exists between the violence arising in the conflict and the harm.⁷⁹ In the application of this test, the UT recognized the need for caution in drawing too many conclusions from patterns of violence. However, and somewhat contradicting itself, it held:

We do think that it can properly be said that in August/early September 2010 the various insurgent groups, AQI included, are weaker organizationally and militarily and that the evidence does not suggest that this will change in the foreseeable future. To that extent we do think it is correct to regard the levels of indiscriminate violence as being not only lower presently *but likely not to revert to anything like the levels they reached in 2006/2007* (my italics).⁸⁰

In conclusion, the UT found the level of violence in Iraq not to be particularly high against civilians, except perhaps those with specific characteristics (e.g., government officials, security personnel, civil servants, journalists, medical doctors, etc).⁸¹

4. Conclusion - Understanding causes of armed violence and the role of IHL

⁷⁵ *HM and Others* (n 73), paras.78-79.

⁷⁶ *Ibid*, para 80.

⁷⁷ *Ibid*, para 82.

⁷⁸ *Ibid*, para 91, citing Lambert and Farrell, ‘The Changing Character of Armed Conflict’ (n 39).

⁷⁹ *Ibid*, para 92.

⁸⁰ *Ibid*, para 260.

⁸¹ *Ibid*, para 278.

Most if not all of the case law relating to people fleeing armed conflict today is about mixed motives or complex causes. With an increase in civil conflict,⁸² trying to understand causes has become immensely complicated. In its 2009 report on Iraq, UNHCR observed:

Due to the complex situation of a high number of actors involved in providing security and actors involved in violence, where the lines are blurred, an asylum-seeker's failure to identify the perpetrator of violence should not be considered as detrimental to his/her credibility.⁸³ [...] Likewise, the complexity of a situation should not prejudice the substance of a person's asylum claim.⁸⁴

Asylum courts are finding conventional causal analysis challenging in cases involving people fleeing the indiscriminate effect of generalized violence in a situation of armed conflict. This is because causation has so far mainly been understood in terms of 'efficient cause.' This approach encourages definitional fixing of concepts, such as, conflict and threat, and direct causal explanation involving observable variables and outcomes. As discussed in this chapter clear examples of this approach can be found in the application of the 'effective sole cause' test, the 'but for' test and the 'predominant cause' test applied by many courts around the world.

Less clear-cut however is the application of the 'contributing cause' test. This test discloses a certain receptiveness towards the wider social context of civilian flight – what this chapter has identified as 'constitutive causation.' However, it still leaves open the risk that courts may place too much faith in the possibility of isolating and weighing causes and thereby slip into efficient causal analysis. Illustrations of this can be found in the case law of the UKUT in cases such as *GS* and *HMI* (confirmed in *HM2*) discussed above.⁸⁵ In both cases, the UKUT recognized in principle the relevance of the wider material conditions causing civilian flight (including, lack of food supply and medical care) but in practice, by requiring that these constitutive causes be 'more closely connected than only remotely', it effectively engaged in the isolation and weighing of direct and indirect causes against each other. Based on the facts available to it in these cases, the Tribunal denied the relevance of these so-called 'remote causes'.

This chapter argues for an approach to causation that recognizes and gives equal consideration to 'constitutive causation', not just in principle but also in fact. This necessitates a better understanding of how threats are constituted, both in terms of the underlying material conditions and also within a particular social environment. This broader approach discourages the early definitional fixing of 'conflict and threat' - or 'cause and effect', by opening up instead enquiry into the complex *character* of violence in contemporary NIACs, and the experience and perceptions of asylum

⁸² Farrell and Schmidt, 'The Causes, Character and Conduct of Armed Conflict' (n 39).

⁸³ UNHCR's Submissions in the Court of Appeal C5/2008/1706 on appeal from the AIT *QD (Iraq) v SSHD*, para 45.7 quoting UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers, April 2009, 23-4, para 27.

⁸⁴ *Ibid*, para 45.7.

⁸⁵ Note that the UKUT uses a variety of formulations to describe the 'contributing cause' test: the 'connection cause' test, 'the 'effective cause' test and the 'operative cause' test, all it would appear to mean the same, and leading to unnecessary confusion.

applicants fleeing armed conflict. I end this chapter by questioning whether there is a role for IHL in such enquiry.

Given the current state of IHL, it is hard to see what its role might be. Several courts are currently reaching out to IHL as a resource to assist in defining concepts, such as, armed conflict, including the intensity of the violence involved, whether explicitly or implicitly.⁸⁶ For instance, the ECtHR in *Sufi and Elmi v UK* and the UKUT in *AMM*, both *implicitly* reached out to IHL in their understanding of causation by relying on the following indicative factors for assessing the intensity of violence which are provided in IHL: duration of confrontations, the extent of material destruction, and the number of civilians fleeing combat zones. However, the application of IHL in asylum law cases is controversial, not in the least because IHL and refugee law/subsidiary protection law have very different purposes.⁸⁷

More importantly, I am not convinced that IHL is currently equipped to play any significant role in our understanding of constitutive causation, unless it is able to develop and strengthen its normative framework to address the challenges of local conflict dynamics in NIACs. For instance, the appearance of a hierarchy in a party to an armed conflict may disguise a much more complex situation involving local conflict dynamics. Thus, the Taliban insurgency in Afghanistan appears to be both a hierarchically organized armed force and, at the same time, composed of many parochially focused local armed groups that often act against one another.⁸⁸

Finally, despite a relatively clear definition of armed conflict based around organisation and violence, IHL treaty-law is silent on who makes such a determination. At present, there is not one competent entity and it is left up to the belligerents (States or others) to make such crucial determination. On occasion, the belligerents' decision to qualify (or not) a certain situation as an armed conflict can come under judicial scrutiny.⁸⁹ If not the belligerents themselves, the ICRC often also determines the existence of an armed conflict and classifies it (as either an IAC or a

⁸⁶ Lambert, 'The Next Frontier' (n 39), case law in the UK, Germany, France, the Czech Republic and the Netherlands. However, the CJEU recently confirmed its ruling in *Elgafaji*. In the Case C-285/12 *Diakite*, the Court concluded that on a proper interpretation of Article 15c, an internal armed conflict exists 'if a State's armed forces confront one or more armed groups or if two or more armed groups confront each other. It is not necessary for that conflict to be categorised as 'armed conflict not of an international character' under international humanitarian law; nor is it necessary to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict' (para.35).

⁸⁷ Storey, 'The "War-Flaw"' (n 39), and Durieux, 'A Reply to Hugo Storey' (n 39).

⁸⁸ T. Farrell and A. Giustozzi, 'The Taliban at war: inside the Helmand insurgency, 2004-2012' (2013) 89 International Affairs 845.

⁸⁹ See, for example, ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A (2 October 1995); International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges (29 January 2007), No. ICC-01/04-01/06; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* Judgment of 19 December 2005 [2005] ICJ Rep. See also M. Roscini, 'The United Nations Security Council and the Enforcement of International Humanitarian Law' (2010) 43 Israel L Rev 330.

NIAC), but such determination is not binding and it is often not even made public, for risk of undermining ICRC's humanitarian access to the victims of the conflict.⁹⁰

In sum, I would continue to agree with the general view that when it comes to refugee or subsidiary protection, IHL may not be the best tool for assessing protection needs; international refugee law and international human rights law (including EU law on subsidiary protection) are best fit for the task.⁹¹ However, on the key issue of causation, there is still much work to be done.

⁹⁰ ICRC's interview with Kathleen Lawand, 'Internal conflicts or other situations of violence – what is the difference for victims?' (10 December 2012) <<http://www.icrc.org/eng/resources/documents/interview/2012>> accessed 8 January 2013.

⁹¹ *QD and AH (Iraq)* (n 36) paras 15-18. See also, UNHCR's Submissions in the Court of Appeal C5/2008/1706 (n 83) Annexe, paras 18-21.