Enforcing Idealism: The Implementation of Complementary International Protection in Canadian Refugee Law

by

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Abstract

This thesis evaluates Canada's compliance with human rights-based complementary international protection. Through an analysis of the roots of international refugee protection, it first links the evolution of the latter with the development of human rights law instruments. It then defines complementary protection as the corpus of legal bases for asylum claims outside of the *Convention Relating to the Status of Refugees*. It uses various human rights instruments to outline international protection obligations, which take three different forms of complementary protection. The first one consists in independent protection mechanisms outside of the Refugee Convention, the most important being the formulation of non-refoulement in the Convention Against Torture. The others are rights that expand the application of existing protection mechanisms, and protection mechanisms established by the UNHCR outside of existing international treaties. This thesis argues that Canada's application of these norms reflects partial compliance with its obligations, as it acknowledges important humanitarian concerns regarding international protection, while attempting to preserve its prerogative to exclude individuals based on national security.

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1.1.1. Introduction

This thesis is about how the evolution of international protection mechanisms, in light of the development of international human rights law, affects the Canadian asylum system. The main inquiry of this thesis is the extent to which the adoption of international human rights treaties has had an impact on obligations created by the 1951 *Convention relating to the Status of Refugees* (Refugee Convention)[1], and how these obligations have been implemented in Canadian law.

This thesis seeks to answer this question by exploring three different phenomena. Firstly, it considers how the evolution of international protection has resulted in the creation of so-called "complementary protection" mechanisms, which are new and separate sources of protection. This thesis also explores how international treaties that are not directly focused on international protection, but on international human rights, affect and expand the interpretation of existing protection mechanisms. Thirdly, this inquiry is completed by a brief exploration of less formal sources of protection that lie in the United Nations bodies' mandate and activities.

These three types of developments in international law result in obligations for states that are parties to the concerned conventions and member states of the United Nations, of which Canada is a part. The protection mechanisms offered by Canada are essentially reflected in the recently reformed *Immigration and Refugee Protection Act* (IRPA)[2], which now expands protection beyond the obligations created in the Refugee Convention. Hence, my research is directed at determining how and to what extent IRPA's expansion

[1] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137 (entered into force 22 April 1954, accession by Canada 4 June 1969) [Refugee Convention].
[2] *Immigration and Refugee Protection Act*, S.C. 2001, c. I-25 [IRPA].

of protection to asylum-seekers reflects compliance with international human rights law instruments and the renewed international protection system they create. I include within the scope of my analysis of human rights law, the prohibition of torture and the protection of civil and political rights, the protection of social, economic and cultural rights, as well as human rights specific to children and women.

Because this thesis juggles with a variety of new and old concepts, the first chapter is aimed at setting up the theoretical background and the framework for the analysis of complementary protection sources. Complementary international protection can be understood as having similar characteristics as refugee protection while being separate from it. The formal sources of the international refugee law regime are thus a benchmark for the evaluation of complementary protection sources. I introduce my analysis by delving briefly into the history of asylum and international protection and finding clues as to how it has shaped the formation of the international refugee law regime and more specifically the drafting of the Refugee Convention.

I will begin this historical overview by looking into the first manifestations of protection granted to foreign nationals and their significance in the definition of the nature of international protection duties. This will reveal that the idea of shelter from persecution stems from historic state practice, and that modern asylum mechanisms draw inspiration from the norm of granting diplomatic asylum. This analysis will flow into how the UN's predecessor, the League of Nations, was the first to create an international protection regime through binding international treaties. These treaties show awareness of the need for an international response to growing numbers of individuals fleeing persecution, though they were also punctual responses to specific conflicts or situations of exodus.

The first universal protection regime came along with the 1951 Refugee Convention, drafted under the auspices of the UN. Using the travaux préparatoires of the Convention and the debates between member states they contain, I argue that the Convention definition of refugee[3] represented a compromise between two positions. The first is that international protection requires a generous definition that opens up to new and unpredicted protection needs as part of a humanitarian objective, and the second position affirms that the definition should be precise, but allow for modifications as new protection needs arise. This demonstrates a recognition that international protection should intervene when states are unable to protect individuals from persecution. My analysis then follows the subsequent evolution of international protection through a failed attempt at drafting a UN Convention on Territorial Asylum, followed by recognition of the effect of the development of human rights instruments on refugees' and asylum seekers' rights.

Using the insight gained through the historical context of asylum, I will move on to propose a definition of protection in a legal sense, based on what protection means within the Refugee Convention. This will help to set states' duties of protection against the role of international protection. These different levels of protection will allow me to pinpoint the type of international protection that can be qualified as complementary. I suggest that complementary international protection includes all types of protection outside of that offered by the state of nationality and the formal well-established international protection regime created by the Refugee Convention. I will also justify the qualification of alternative protection for forms of domestic implementation of complementary

[3] Article 1(A)2 Refugee Convention.

international protection. Since this idea of protection refers to the respect and fulfilment of human rights, I will continue Chapter 2 with a discussion of the connection between international human rights law and international refugee protection in order to further support the use of human rights law for expanding international protection. This discussion will be completed by a reflection on the nature of the state's duty to protect human rights, which will be based on Fredman's theory of human rights as generating positive duties[4].

The last section of chapter 2 is dedicated to a brief review of the legal basis for the existence of the United Nations High Commissioner for Refugees (UNHCR) and its mandate, which has grown to be more inclusive and far-reaching than the Refugee Convention. I demonstrate that even if it is a weaker source of obligations for member states, it has become a standard-setting organization, and its Executive Committee has been instrumental in the interpretation of states' international protection obligations, including complementary international protection. The UNHCR has a mandate flexible enough to adopt various assistance initiatives for displaced persons, which are often subsequently validated by the UN General Assembly. Although it does not originate in a treaty, I argue that the UNHCR benefits from support by much of the international community and, as such, may be considered a source of complementary protection. I further note that Canada has generally collaborated with the UNHCR by providing resettlement to protected persons abroad.

[4] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (New York: Oxford University Press, 2008).

In Chapter 3, I will analyze non-refoulement, the principle that garners the most scholarly and state support[5] as a complementary protection mechanism. Non-refoulement refers to the right not to be returned to a country where one faces a risk to life or a risk of torture or cruel, unusual or inhuman treatment or punishment. This principle was already stated in the Refugee Convention, but it emerged as a complementary protection mechanism with the *Convention Against Torture* (CAT)[6], and is a corollary of the prohibition of torture itself. I will therefore open the chapter with a general overview of the roots of the prohibition of torture and I will explain its qualification as a *jus cogens* norm. I will also explain the state duties that come along with the right not to be subjected to torture in light of Fredman's theory of human rights.

I will then expand on the principle of non-refoulement itself by providing a definition and a discussion of its scope. This will allow me to explain its qualification as a mechanism of complementary international protection, and to argue that as outlined in the CAT, it becomes a mechanism for international protection by obligating states to create alternative protection mechanisms on the domestic level. The scope of non-refoulement inevitably leads to a debate on its peremptory nature. I will also go into a discussion of exceptions to the principle created in the Refugee Convention and in state practice, in an attempt to reconcile them with the absolute prohibition of refoulement created by the CAT.

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[5] Jane McAdam, *Complementary Protection in International Refugee Law* (New York: Oxford University Press, 2007); Ruma Mandal, "Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")" (June 2005) Legal and Protection Policy Research Series, PPLA/2005/02 (UNHCR, Department of International Protection).

[6] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987, accession by Canada 24 June 1987) [CAT].

My analysis of the principle of non-refoulement under international law will form the framework for an evaluation of Canada's implementation of this principle through the alternative protection mechanism for "persons in need of protection" in section 97 of IRPA. This provision has been swiftly qualified as an expression of non-refoulement and an implementation of art. 3 CAT[7], which prohibits the return to torture, but I propose to examine it in further detail and suggest that this affirmation is only partially true. I argue that this section both widens the scope of non-refoulement as expressed in the CAT, while including exceptions to the principle that are incompatible with international law. Following a dissection of the text of the IRPA itself, I will look into how the principle of non-refoulement was defined and applied within case law, in order to demonstrate Courts' tendency to reconcile the imperfections in the legislation with the rules of international law, instead of reassessing its validity in light of Canada's obligations.

Chapter 4 will be concerned with rights that are relevant to refugees contained in the *International Covenant on Civil and Political Rights* (ICCPR)[8] and with how they expand the scope of complementary international protection mechanisms. More specifically, I will discuss how the formulation of non-refoulement in the ICCPR widens the scope of the principle as well as the role of this expansion within complementary protection. My argument is that it specifies the nature and scope of the obligation to create an alternative protection mechanism to guarantee non-refoulement on the domestic level. I further argue that the ICCPR, through its articles relating to alien rights and non-discrimination, creates procedural safeguards and guarantees access to state territory for foreign nationals fleeing persecution. The overview of regional instruments that follows will show that they make

[7] McAdam, *supra* note 5 at 129-130; Mandal, *supra* note 5 ¶ 194-202.
[8] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

the principles embodied in the ICCPR more explicit and specifically applicable to persons outside of the Convention definition, and they reaffirm international protection as a humanitarian concern.

The second section of chapter 4 will be dedicated to an analysis of the application of the ICCPR within Canadian case law, particularly in relation to the protection of the rights contained in the *Canadian Charter of Rights and Freedoms* (Charter)[9] for asylum-seekers and refugees. It will also deal with the implementation of ICCPR rights within the IRPA. Through this analysis, I will show how the IRPA should be interpreted according to instruments such as the ICCPR and according to humanitarian considerations.

I will also aim to demonstrate that the ICCPR's treatment by courts reflects a propensity to interpret Canadian law as consistent with international treaties to which Canada is a party, regardless of whether they are directly applied in the legislation. Finally, chapter 4 will look into the effect of the procedural safeguards and territorial access that are guaranteed by the ICCPR, and it will demonstrate how the Canadian asylum system limits access to the country's territory without proper weighing of competing rights in accordance with international human rights principles.

In chapter 5, I apply a similar methodology to an analysis of social, economic and cultural rights within the Refugee Convention, and within the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[10]. My research regarding this instrument will show that socio-economic and cultural rights are more valued and respected by states when it comes to settlement, or once an individual is recognized as a

[9] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].
[10] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976, accession by Canada 19 May 1976) [ICESCR].

refugee. In terms of the possibility of claiming protection based on a violation or denial of a social, economic or cultural right, my analysis will reveal that states only have the obligation to grant protection when the violation amounts to persecution under the Refugee Convention, or when it constitutes cruel, inhuman or unusual treatment or punishment.

I will also extend my research on socio-economic rights to situations where the development of complementary modes of protection would seem appropriate, such as displacement caused by climate change and natural disasters, the inability to obtain adequate health care, and the longer-term persecutory effects of discrimination in education.

My argument is that victims of natural disasters are only protected by international treaty law in cases where they also suffer persecution due to one of the Convention grounds as a result of the instability created by the disaster. Other individuals have to rely on the UNHCR and other organizations who provide assistance initiatives. Individuals deprived of appropriate health care may only be protected if they are being denied health care as a means of persecution for one of the five enumerated reasons in the Refugee Convention. As for education, it is only vaguely mentioned in the UNHCR's interpretation of persecution under the Refugee Convention, from which it is difficult to conclude that a state obligation to protect exists. These arguments will allow me to demonstrate that Canada has extended the scope of the existing protection mechanisms it offers to persons being denied socio-economic rights beyond that required by the Refugee Convention, and awards refugee or protected person status to such individuals.

Chapter 6 will serve to demonstrate that an individual's personal status or belonging to a family may influence the application of the refugee protection regime. I will examine how the importance of family unity may affect individual claims or deportation orders and serve to extend protection to some individuals who would otherwise be denied protection. I will show that it has some impact, but it is stronger when tied to the respect of the best interests of the child. Claims that would have been rejected may be reversed only because the best interests of the child are given considerable weight in international law, and within the Canadian refugee protection regime.

I will end chapter 6 by briefly looking into the impact that gender and sex have on the interpretation of the Refugee Convention definition, and how it affects the assessment of risk and persecution based on the five enumerated grounds, where female claimants are concerned. I will focus at greater length on persecution against members of a particular social group, and argue that women in general, as well as subgroups of women, may be considered as particular social groups when they are subject to different treatment based on sex, but that considerations related to gender are still inconsistently applied. I will use the guidelines issued by the UNHCR as the main source for the interpretation of the Convention in regard to women's rights, and will present a few examples of how they have been integrated into Canadian case law.

Based on this research, this thesis will argue that Canada has only partially complied with its international obligations regarding complementary protection in light of international human rights law. Despite the integration of the prohibition of torture and non-refoulement within the IRPA, the Act contains possibilities for exclusion that are irreconcilable with Canada's international obligations. I would suggest that when it

comes to new protection mechanisms that are separate from the Refugee Convention, Canada is reluctant to fully commit to the relatively new protection obligations set out by the CAT. The Canadian protection system appears more open to a logical and reasonable expansion via the interpretation of the Refugee Convention by general human rights instruments. I will show that where the obligations are clearly set out by the UNHCR's interpretations of international human rights law, Canada is willing to comply, but where there is debate, uncertainty or contradiction, Canadian legislation tends to opt for the minimal obligation. Finally, my analysis of the UNHCR mandate will reveal that Canada, nonetheless, upholds the humanitarian tradition of international protection by cooperating with the UNHCR's initiatives.

Chapter 2. The Refugee Concept Revisited

This chapter sets up the theoretical framework of my thesis. In order to gain insight into the duties related to international protection, I begin with an overview of the roots of asylum. This allows for a better grasp of the evolution of various mechanisms of international protection into an international refugee law regime, and for a better understanding of how the concept of protection was perceived by states when creating protection mechanisms. It also reveals hints that the international protection regime was designed in tandem with the creation of an international human rights law regime. I draw upon this historical inquiry to establish a working definition of protection through the distinctions between state protection, international protection, and complementary protection.

Next, since the connection between refugee law and human rights law is a fundamental element of complementary protection, I dedicate a section of this chapter to human rights theory and to the state duties attached to the protection of human rights. I conclude this chapter with a brief analysis of the UNHCR's mandate, the significance of its evolution and expansion, and the impact it has on member states.

2.1. Historical Evolution of Protection

2.1.1. Early History of Asylum and Refugee Protection

A brief history of the roots of asylum and refugee protection will reveal how the association between asylum and persecution emerged. It might also help in building an understanding of the language that surrounds international refugee protection and complementary protection. Despite the lack of treaties or agreements specific to refugees or asylum seekers before the 20th century, it has been recognized, through the

development of international aliens law, that aliens[11] were a vulnerable group that found itself at the mercy of the sovereign state[12].

The first agreements between European states with regards to aliens were concerned with foreign traders. These were concluded during the sixteenth century to grant protection to such traders through the guarantee of safe border-crossing and basic civil rights[13]. It was relatively easy for traders and migrants to acquire such rights and benefit from a freedom of international movement[14]. It is suggested that at the time, no further generalized protection was necessary for migrants, as states harboured hardly any concern for the preservation and integrity of the nation state, and perceived immigration as beneficial for society[15].

Another source of modern refugee law lies in the protection offered to fugitives against unjust punishment for political offences, and how it morphed from a defence from extradition to a defence from deportation as states began to protect and close their borders[16]. From this, "[it] followed that, if asylum's historical purpose was to be served in a world of closed borders, asylum needed to be made available to all those who were persecuted and who would otherwise be excluded or deported, and not merely those who were actually sought for extradition"[17]. The purpose of the persecution requirement, in turn, was "to distinguish between refugees deserving of asylum on the one hand, and

[11] *New Oxford American Dictionary*, 2d ed., *s.v.* "alien": "belonging to a foreign country or nation".
[12] James C. Hathaway, *The Rights of Refugees under international law* (New York: Cambridge University Press, 2005) at 79 [Hathaway, *Rights of Refugees*].
[13] *Ibid*. at 76.
[14] James C. Hathaway, *The law of Refugee Status* (Toronto: Butterworths, 1991) at 1 [Hathaway, *Refugee Status*].
[15] *Ibid.*
[16]Matthew E. Price, *Rethinking Asylum: History, Purpose and Limits* (New York: Cambridge University Press, 2009) at 52.
[17] *Ibid.*

ordinary migrants excluded by the new immigration restriction on the other hand"[18]. From the outset, this served as a basis for the consideration of asylum as the state offering a safe haven, a protection from being sent back to one's country of origin. It was not a legal status, although it may have been attached to one, as it referred to the general idea of protection from deportation. It hence becomes relevant to refer to persons seeking protection in the wider sense as asylum-seekers, and to view asylum as protection offered by a state including but not limited to refugee protection.

Historical inquiries generally reveal that the idea of criteria for immigration or refugee status determination were modern twentieth century concerns that went hand in hand with the emergence of the international human rights law regime and the growing importance of state sovereignty[19]. This idea of the nation state was arguably tainted by a mentality of preservation of ethnic identity and discrimination, possibly fuelled by the development of means of transportation[20].

The roots of the international refugee law doctrine as we know it appear to stem from diplomatic asylum[21]. This type of asylum mainly refers to ambassadors and other people escaping the jurisdiction of a country while dwelling on its territory. Nevertheless, its history reveals a number of situations where embassies granted asylum to people who had committed political crimes. In a number of these cases, such as that of a Danish dignitary granting refuge to Spanish people sought for political reasons in 1843[22], diplomatic asylum was not used merely by states to provide an extraterritorial refuge for

[18] *Ibid.*
[19] *Ibid.*
[20] Guy S. Goodwin-Gill, *International Law and the Movement of Persons Between States* (Oxford: Clarendon Press, 1978) at 91.
[21] UN General Assembly, *Question of Diplomatic Asylum: Report of the Secretary-General*, UN GAOR, 30th Sess., UN Doc. A/10139 (Part II) (1975).
[22] *Ibid.* ¶ 10.

their own citizens. Although it may have started out this way during the sixteenth century[23], it was increasingly used as protection for political activists during periods of political instability.

The rules for diplomatic asylum reflected similar concerns to those of modern asylum mechanisms, through their rejection of perpetrators of crime and inclusion of individuals who were persecuted for political reasons[24]. This suggests that as nations ventured into the development of a doctrine of protection, they may have drawn some inspiration from the evolution of the doctrine of diplomatic asylum as a means for a state to grant protection to persons who seek it within its jurisdiction, a situation equivalent to the granting of refugee status or complementary protection today. It also demonstrates early signs of awareness that a person may find himself to be the victim of persecution by his own state or unable to benefit from state protection. In other words, there was recognition that a person could legitimately seek refuge in another nation's territory if her basic freedoms were threatened in her country of nationality or residence.

2.1.2. Refugee Protection under the League of Nations

As the first international organization with a universal and far reaching mandate, the League of Nations established the first international treaties granting refugee protection. In the early agreements of the League of Nations during the 1920s, this protection was translated into punctual measures and arrangements regarding specific groups of people who no longer benefited from any state protection[25]. These agreements targeted particular

[23] *Ibid.* ¶ 2.
[24] *Ibid.* ¶ 13; Guy S. Goodwin-Gill, *The Refugee in International Law*, 2d ed. (New York: Oxford University Press, 1996) at 117-118 [Goodwin-Gill, *The Refugee*].
[25] *Arrangement With Regard to the Issue of Certificates to Russian Refugees*, 5 July 1922, 13 L.N.T.S. No. 355; *Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees*, 12 May

groups of people who were victims of political occurrences of the time and whose status became unclear as a result of political turmoil and war[26]. They defined refugees according to specific ethnic or national origin and lack of protection from the state[27]. The personal status of these refugees remained to be determined by the state that agreed to afford them protection[28].

Refugee status determination within the framework of the League of Nations was, therefore, not a measure generally applicable to individual migrants fleeing their country, but only to specific situations of mass exodus. At the time, refugee status was a quite uncommon response to new and anomalous situations[29]. In the case of the Germans in the 1930s, a new agreement was created for their inclusion in the international refugee protection regime[30], but this time, recognizing their need for protection as political dissidents[31]. This further suggests that the League of Nations regime was merely a series of responses to punctual protection needs. One could say that a similar logic directs the creation of complementary modes of protection today, as they are responses to new situations unaccounted for by current protection regimes.

1926, 89 L.N.T.S. No. 2004; *Arrangement Relating to the Legal Status of Russian and Armenian Refugees*, 30 June 1928, 89 L.N.T.S. No. 2005.

[26] Goodwin-Gill, *The Refugee*, *supra* note 24 at 4; Hathaway, *Refugee Status*, *supra* note 14 at 4; Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (New York: Oxford University Press, 2009) at 10-11; Gunnel Stenberg, *Non-Expulsion and Non-Refoulement: the prohibition against removal of refugees with special reference to Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees* (Uppsala, Sweden: Iustus Forlag, 1989) at 22-23.

[27] *Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees*, *supra* note 25, art. 2.

[28] *Convention Relating to the International Status of Refugees*, 28 October 1933, 159 L.N.T.S. n. 3663, art. 4 [1933 Convention].

[29] Hathaway, *Rights of Refugees*, *supra* note 12 at 83-84.

[30] *Convention Concerning the Status of Refugees coming from Germany Geneva*, 10 February 1938, 192 L.N.T.S. No. 446, 59 [1938 Convention].

[31] Stenberg, *supra* note 26 at 23.

Nonetheless, a few stateless people straying into a sovereign country would have been of little interest to the burgeoning international community. The treaties were deemed necessary because of the massive displacement of persons, which put the member states at risk of social disorder and possible loss of control over immigration[32]. Also, the political views of displaced persons were not relevant in the determination of their status until the 1930s, nor was any individual characteristic other than ethnic origin[33]. As the original belief was that the need for refugee protection would subside, no general instrument was implemented.

Before the 1930s, the protection system devised by the League of Nations remained essentially based on groups from specific ethnic origins chosen in an arbitrary way that was coloured by the politics of the countries of refuge[34]. This resulted in the existence of large groups of people who had lost their nationality, but who did not fall under any of the agreements granting refugee status[35]. These smaller groups finding themselves in a similar situation to that of Armenian and Russian refugees include Turks in Greece, Jews in Romania, and Hungarians dispersed through Austria, France and Romania[36].

The evolution of the world economy during the 1930s, combined with the realization that refugees would not, or, at least, not immediately, return to their country of origin, led to the adoption of the 1938 *Convention relating to the International Status of Refugees* which granted refugees socio-economic rights in terms of labour, welfare and education in the country of refuge[37]. This treaty is seen to be one of the earliest manifestations of a

[32] Hathaway, *Rights of Refugees*, *supra* note 12 at 85.
[33] Stenberg, *supra* note 26 at 23.
[34] McAdam, *supra* note 5 at 24-25.
[35] *Ibid.*; Stenberg, *supra* note 26 at 24.
[36] McAdam, *supra* note 5 at 25.
[37] 1938 Convention, *supra* note 30.

legally binding human rights protection regime[38], and it foreshadows the continuing interconnectivity between international human rights law and the law of refugee status.

Further, it allowed states to extend protection to groups other than those expressly mentioned in the previous agreements, thus creating an extended protection mechanism. Some may argue that it was an early form of complementary protection[39], but it appears more clearly to be the first sign of the elimination of categorization based on ethnic origin, which would eventually lead to a wider international refugee definition.

On the other hand, just as states were free to extend protection to displaced persons beyond their obligations, there were examples where they would instead practice the forced return (refoulement) of refugees for various reasons. For instance, Poland had issued a number of decrees to remove Russian refugees within its territory who had not fled for political reasons[40]. The agreements developed in the later part of the inter-war period stated a prohibition on refoulement of refugees who had legally entered the country, to which the only exception was security or public order[41].

Although historically important and most likely a source of inspiration to the later development of refugee law, these instruments were not acceded to by a majority of European states, and expulsion and forcible return for arbitrary reasons remained engrained in common practice[42]. At the time, non-refoulement, the right not to be returned to a country where one faces a risk to life, was a principle developed to protect from subsequent deportation persons already accepted as refugees. My discussion of this

[38] Hathaway, *Rights of Refugees*, *supra* note 12 at 87-88.
[39] McAdam, *supra* note 5 at 26.
[40] Stenberg, *supra* note 26 at 39.
[41] See Article 3 1933 Convention; Article 5(3)(a) 1938 Convention.
[42] Stenberg, *supra* note 26 at 45.

principle in Chapter 3 will explore how it parted from refugee protection to create an alternate mode of protection.

2.1.3. The Drafting of the 1951 Refugee Convention

In this subsection, I provide insight into what protection meant in the original drafting of the Refugee Convention, as well as its intended interaction with human rights protection instruments. My analysis deals with the inclusion of non-refoulement in the text of the Refugee Convention, as this is particularly important to my discussion of the concept in Chapter 3. This section will allow a better understanding of the benchmark protection from which additional or complementary protection is derived.

The drafting of the Refugee Convention can be deemed to have been initiated in the fall of 1949, with a draft resolution calling for the constitution of a High Commissioner's Office for Refugees, and for the drafting of a convention for the protection of refugees[43]. The resolution also calls for the provisional adoption of the definition contained in the constitution of the International Refugee Organization (IRO)[44], which had been established in 1949 as a temporary specialized agency of the UN[45].

Prior to this draft resolution, the UN Secretary General had issued a noteworthy report dealing with the definition of refugee, and with the extent of international refugee protection functions, which included the text of the IRO definition[46]. This report also dealt with the role and nature of international protection, an element of great interest with regards to the subject matter of the present thesis. Indeed, the Secretary General writes

[43] *Refugees and Displaced Persons: France: Draft Resolution*, UN GAOR, 4th Sess., UN. Doc. A/C.3/529 (1949).
[44] *Ibid.*
[45] Hathaway, *Refugee Status*, *supra* note 14.
[46] *Refugees and Stateless Persons: Report of the Secretary-General*, UN GAOR, 4th Sess., UN Doc. A/C.3/527 (1949).

that the first agent of protection to refugees and displaced persons is the state itself, and international protection is complementary to the state's protection[47]. In that sense, complementary protection could actually refer to all forms of protection provided by international law.

The definition in the IRO constitution identifies two types of persons in need of protection. These are "refugees" and "displaced persons", both of which acquire the relevant status as a result of the Second World War. The absence of state protection is only mentioned in the case of refugees, whereas displaced persons have a temporary status brought about by deportation by an occupying state, and from which they benefit until they are repatriated[48]. The definition of refugee also includes anyone who was considered a refugee prior to the adoption of the IRO constitution[49]. This tends to accentuate the idea that international protection is fundamentally a complement to state protection, and to suggest that member states intended to build on the existing definitions when drafting the Refugee Convention.

In 1946, a United Nations General Assembly Resolution reaffirmed that no refugees or displaced persons could be compelled to return to their country of origin[50]. This form of non-refoulement, as an element of the protection afforded to persons who benefit from a legally defined refugee status, was the only one officially recognized by the United Nations, just as it was under the auspices of the League of Nations[51].

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[47] *Ibid.* ¶ 18.
[48] *Ibid.* at Appendix I.
[49] *Ibid.*
[50] *Question on Refugees*, UN GAOR, UN Doc. A/RES/8 (1946).
[51] Stenberg, *supra* note 26 at 56.

Early on in the discussion regarding international protection of asylum seekers, it was recognized that the issue was primarily a humanitarian concern[52], and not a temporary one, as it was deemed unreasonable and inhuman to repatriate certain groups of refugees defined merely by ethnicity, such as Jews and Armenians[53]. It was also proposed by France that refugee protection should include the granting of a status, as well as material assistance, and so would include "legal, social, religious and political protection"[54]. In subsequent meetings, France pursued this idea further, proposing that although it may have been appropriate for the IRO to define only specific situations where protection was afforded, the United Nations had to avoid such discrimination and provide a wide framework of protection[55]. This is consistent with the report of the Secretary General, which defined international refugee protection as complementary to state protection, suggesting that it should apply to all situations where state protection is unavailable.

On the other hand, the United States argued that the existing categories of refugees should be maintained and new ones created by the General Assembly as the need would arise[56]. Their perception of international protection followed a protection framework according to which complementary protection regimes are additions to a continuously

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[52] UN General Assembly, *Provisional Summary Record of the Two Hundred and Fifty-eighth Meeting Held at Lake Success, New York, on Wednesday, 9 November 1949, at 3 p.m.*, 10 November 1949, UN. Doc. A/C.3/SR.258, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/3ae68bef4.html>, ¶. 20.

[53] *Ibid.* ¶ 29.

[54] UN General Assembly, *Provisional Summary Record of the Two Hundred and Sixty-first Meeting Held at Lake Success, New York, on Saturday, 12 November 1949, at 10.45 a. m.*, 14 November 1949, A/C.3/SR 261, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/3ae68bec8.html>.

[55] UN General Assembly, *Provisional Summary Record of the Two Hundred and Sixty-Second Meeting Held at Lake Success, New York on Monday, 14 November 1949, at 3 p. m.*, 15 November 1949, A/C.3/SR.262, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/3ae68bef8.html> ¶ 3.

[56] UN General Assembly, *Provisional Summary Record of the Two Hundred and Sixty-Fourth Meeting Held at Lake Success, New York, on Tuesday, 15 November 1949, at 3 p. m.*, 16 November 1949, A/C.3/SR.264, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/3ae68bec20.htm> ¶ 28.

growing list of persons protected by the international community. Their proposition was to continue a collection of specific protection regimes whenever state protection needed to be corrected or complemented.

The distinction with the French position lay in the fact that the United States did not want to take responsibility in advance for asylum needs that did not yet exist[57]. Their approach would thus lead to a need for successive additions of complementary regimes, whereas the French position would lead to a unified international protection framework that would encompass all needs through a wide definition. Indeed:

> France, true to its tradition, would like the definition of the term "refugees" to be as generous as possible; since, before the proposed convention entered into force, new and undreamed-of categories of refugees might be created, the definition should be couched in general terms, if necessary with specific exceptions, but should not enumerate the categories to be protected. In view of the turbulent state of the world, no such list could ever be complete.[58]

In a way, the French position also recognized that not only groups of people might need protection, but that individuals may also find themselves in need of asylum.

The final result appears to be a compromise between the two positions, as the scope of protection is relatively wide, but geographically and temporally limited to persons who are displaced as a result of events that occurred in Europe before 1951[59]. It also includes

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[57] UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Third Meeting Held at Lake Success, New York, on Tuesday, 17 January 1950, at 3 p.m.*, 26 January 1950, E/AC.32/SR.3, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/40aa193f4.html> ¶ 39.

[58] *Ibid.*

[59] Article 1(A)(2) Refugee Convention: "For the purposes of the present Convention, the term "refugee" shall apply to any person who: […] As a result of events occurring before 1 January 1951 and 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to

the refugees as they were previously defined in the League of Nations agreements and conventions[60]. After the adoption of the Refugee Convention, the occurrence of a series of refugee movements in Europe and northern Africa that did not satisfy the original time limit[61] resulted in a gap between the scope of the Refugee Convention and refugee protection needs in UN member states. The 1967 Protocol[62] closed this protection gap created by the temporal and geographical limitations in the Refugee Convention, thus achieving a formal universalization of the Convention, while maintaining its original substantive limitations[63].

Another point of interest in a discussion of complementary protection is article 33(1) of the Refugee Convention, the first widely accepted formulation of the concept of non-refoulement[64]. Based on the travaux préparatoires, the protection it offers is deemed to apply beyond individuals recognized as refugees to non-admittance at the frontier, as well as extradition. This is indicated by the words "in any manner whatsoever"[65], and the simple fact that the same reasons for persecution were repeated in a different article. Otherwise, the two would have been unnecessarily repetitive where a reference to the article 1 definition would have sufficed. On the other hand, Goodwin-Gill's analysis of the drafting of the Convention has revealed that the members present had a clear intention

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such fear, is unwilling to return to it."

[60] Article 1(A)(1) Refugee Convention: "For the purposes of the present Convention, the term "refugee" shall apply to any person who: Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization."

[61] Stenberg, *supra* note 26 at 61.

[62] *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267 (entered into force 4 October 1967, accession by Canada 4 June 1969).

[63] Hathaway, *Refugee Status*, *supra* note 14 at 10; Hathaway, *Rights of Refugees*, *supra* note 12 at 111.

[64] Article 33(1) Refugee Convention: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

[65] Paul Weis, *The Refugee Convention, 1951: the travaux préparatoires analysed, with a commentary* (New York: Grotius Publications, 2005) at 341-342.

of not letting refugees be returned to any country where they face a risk, but it does not seem to allow for individuals outside of the refugee definition to be targeted by article 33[66].

McAdam further stresses that the drafters were most likely aware that this article could expand protection to persons who did not fall under the definition of refugee given in article 1, because article 33 embodies article 14 of the Universal Declaration on Human Rights (UDHR), which states the right to enjoy asylum[67], thus indicating a desire to see the Refugee Convention evolve along with human rights principles[68]. The same principles may eventually impact on the interpretation of the concept of persecution, as well as create independent mechanisms that prevent removal[69]. This view also suggests that there was openness to the evolution of international protection, one that would be guided by international human rights law. Chapter 3 will discuss in greater detail the significance of non-refoulement in the expansion of international protection.

2.1.4. Evolution in the Application of the Convention Definition

Protection gaps are easy to find, as it is always possible to be more generous. The only international legislative measure of expansion adopted after the Refugee Convention was the removal of temporal and geographical limitations by the 1967 Protocol, but it remains important to look into the expansion of the refugee concept, be it through a more generous interpretation of the Refugee Convention, or by domestic legislation.

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[66] Goodwin-Gill, *The Refugee*, *supra* note 24 at 120.
[67] *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71; Article 14 reads as follows: (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.
[68] McAdam, *supra* note 5 at 30-31.
[69] *Ibid.* at 32.

After the adoption of the 1967 Protocol, it appears that states realized the need to go further in providing for international protection needs that did not exist within the Refugee Convention definition. To demonstrate that point, Hathaway argues that the records of the aborted 1977 Draft Convention on Territorial Asylum meant to embody the right to seek and enjoy asylum in the UDHR and the Declaration on Territorial Asylum[70].

Consistent with the fact that article 14 of the UDHR provides individuals with asylum from persecution without restrictions, and that the Draft Declaration on Territorial Asylum further proclaims that right and includes persons struggling against colonialism, this proposed convention would have broadened the concepts of persecution and political opinion[71]. In this new agreement, political opinion was to include opposition to colonialism and apartheid, persecution would be expanded to prosecution with persecutory intent, as well as persecution based on kinship, foreign occupation, alien domination, and all forms of racism[72].

Although this draft convention was not adopted, it remains a sign that the international community was becoming conscious that asylum needs could manifest themselves differently in the post-World War II world. It was recognition, over 25 years on, of the existence of situations of persecution outside of the five defined nexus of the Refugee Convention, where international protection was required by broader human rights principles. The drafting of this new convention resulted in a deadlock[73], which might

[70] *Declaration on Territorial Asylum*, GA Res. 2312 (XXII), UN GAOR, 22d Sess., Supp. No. 16, UN Doc. A/6716 (1967); Hathaway, *Refugee Status*, *supra* note 14 at 13-16.
[71] Hathaway, *Refugee Status*, *supra* note 14 at 14-15.
[72] Paul Weis "The Draft United Nations Convention on Territorial Asylum" (1979) 50 Brit. Y.B. Int'l L. 151, cited in Hathaway, *Refugee Status*, *supra* note 14 at 14-15.
[73] Hathaway, *Refugee Status*, *supra* note 14 at 15; According to Hurwitz, *supra* note 26 at 22, some of the diverging points of view included an ideological divide between states that wished to recognize a rights to asylum and states that firmly sided with the state's sovereign right to grant asylum. Another point of

explain in part the current existence of several regional agreements and domestic legislative measures that extend protection in their own way. Also, this difficulty in achieving a more generous international consensus may justify the use of broader human rights instruments to expand international protection instead of adopting a new treaty.

Even though the original Refugee Convention was drafted with the aim of going beyond a minimal common denominator to please the restrictions of all participating states, it was done with an appreciation of the sacrifices that should be made to reach a consensus[74], and that protection gaps would hence be created. Consequently, it would make sense to argue that even the Convention itself can protect refugees beyond the scope of article 1(A)(2), and that nothing in it prevents the application of the status it creates to other situations where protection is needed[75].

In addition to the attempt at drafting a new convention, the development of regional instruments, as well as informal categories of protection in state practice, have been observed[76]. Hathaway pointed out, however, that expanded protection for persons who face forced migration had not evolved into international customary law as of 1991[77]. He only identifies a customary right to be considered for temporary admission upon crossing the border, on the basis of a need for protection[78]. In other words, asylum seekers have a right to be heard when they come from a troubled country, which is merely a procedural

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contention was the application of the draft convention to individual asylum claims as well as situations of mass influx.

[74] UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Twenty-Sixth Meeting Held at Lake Success, New York, on Friday, 10 February 1950, at 2.15 p.m.*, 23 February 1950, E/AC.32/SR.26, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/3ae68c1b0.html> ¶ 68.

[75] McAdam, *supra* note 5 at 33.

[76] *Ibid,* at 34.

[77] Hathaway, *Refugee Status*, *supra* note 14 at 24-27;

[78] *Ibid.* at 26.

right. His analysis might be different twenty years on, in customary law as well as in light of new international legal instruments. This is especially probable given that the Convention Against Torture, which includes another version of non-refoulement, had not entered into force at the time. I will pursue this analysis further in chapter 3.

It has nonetheless been argued that complementary protection on the international level, that is protection complementary to that already offered by the Refugee Convention regime, only became part of international debates during the 1980s[79]. This could indicate that, facing the impossibility of reaching a consensus on the adoption of a new international refugee law instrument, the international community has turned to existing instruments to derive protection obligations. This tendency has been mainly developed by the UNHCR early on in the 1990s, and has been instrumental in the expansion of this institution's mandate to persons of concern that do not necessarily fit into the original Refugee Convention definition[80]. This mandate will be discussed at greater length in the last section of this chapter.

One point we may take away from the aborted Convention on Territorial Asylum is that, just as this Convention was meant to expand the protective measures in the Refugee Convention, asylum was considered by states that supported the Convention on Territorial Asylum as a wider net of protection than refugee protection[81]. Thus, it would be appropriate to refer to persons seeking refugee status or alternative protection generally as asylum seekers or protection seekers. The term "refugee" is a defined legal concept on both domestic and international levels, as well as a legal status. An asylum

[79] McAdam, *supra* note 5 at 44.
[80] *Ibid.* at 45-46.
[81] Hurwitz, *supra* note 26 at 15-17.

seeker or a protection seeker includes refugees, as well as other persons who enter a new country in search of protection and a legal status.

2.2.Defining Protection in a Legal Sense

2.2.1. Protection as a Legal Concept

As already explained, the aim of this thesis is to analyze international human rights instruments and evaluate whether they create protection obligations for Canada as a country of asylum. In order to make sense of these obligations, it is important to explore the meaning of protection in the legal context, and the place of complementary protection in the international legal framework. In this section, I start by outlining a general definition of protection as a legal concept, followed by explanations of the more specific concepts of state protection and international protection. I then use all these concepts to specify a definition of complementary protection.

In its simplest form, the concept of "protection" is complementary to that of "refugee", in the sense that the concept of "refugee" is defined in terms of "protection", and cannot be understood without it. Nevertheless, although the concept of refugee is the subject of a legal definition, that of protection remains undefined within international legal instruments[82]. Its dictionary definition includes "a legal or other formal measure intended to preserve civil liberties and rights"[83]. This definition may be relevant in light of article 31(1) of the *Vienna Convention on the Law of Treaties*[84], which states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The

[82] McAdam, *supra* note 5 at 19.
[83] *New Oxford American Dictionary*, 2d ed. *s.v.* "protection".
[84] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980, accession by Canada 14 October 1970).

dictionary definition of protection already suggests, through the terms "legal or other formal measure", that protection takes the form of governmental or state action.

In addition, this ordinary definition is confirmed by the object and purpose of the Refugee Convention which, as stated in its preamble, "[assures] refugees the widest possible exercise of […] fundamental rights and freedoms"[85]. From this, it is fair to conclude that the use of the concept of protection in this particular convention carries the same meaning.

A more thorough definition of protection was proposed early on by Grahl-Madsen:

> The word 'protection' denotes measures of some kind or other taken by a subject of international law in order to safeguard or promote the *integrity*, *rights* or *interests* of an individual. Protection may take many shapes. We may distinguish between internal protection ('the protection of the law') and external protection (diplomatic or consular protection…). Moreover, protection may be active or passive. Thus, if a government intercedes with another government for one of its citizens, we may speak of active or explicit protection. On the other hand, if the authorities of one State merely enable a person to refer to them and thereby get certain benefits from the authorities of another State, we may call it passive or implicit protection. Typical of the latter kind of protection is the issuing of national passports and certificates of nationality.[86]

This definition is exhaustive and clearly distinguishes between state protection and international protection, and also suggests that the Refugee Convention uses means to instate active protection mechanisms.

[85] Refugee Convention, Preamble ¶ 2: "[…] considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms, […]".
[86] Atle Grahl-Madsen, *The Status of Refugees in International Law* (Leyden : A. W. Sijthoff, 1966) at 381.

As for the context, the historical analysis in the previous section has demonstrated that protection has come to refer to the guaranteeing of a number of rights by states. The exact nature of the rights included in this concept and the extent to which they are protected is one of the central questions addressed in this thesis.

In his work, Fortin explores the meaning of protection within the refugee definition. This is useful to my argument, to the extent that the use of the concept in the Refugee Convention, being the main basis for protection under international law, has rendered it the most reliable indication of the meaning of this concept in international law in general. The work leading up to the conclusion of the Refugee Convention may also be a testimonial to the perception of protection held by states at the time, as well as their expectations in terms of its evolution.

As exposed in my analysis of the League of Nations refugee protection instruments, protection was afforded based on specific need, and the main criterion was the lack of state protection. This view is supported by Fortin[87], but he introduces the idea that the implied meaning of the concept of protection in the Refugee Convention definition was originally that of diplomatic protection[88]. This suggests that protection in the legal context may be understood as state protection, which leads me to a more specific discussion on this type of protection.

2.2.2. State Protection

Within the realm of state protection, Fortin argues that it can be either external or internal, and he describes the latter type of state protection as follows:

[87] Antonio Fortin, "The Meaning of 'Protection' in the Refugee Definition" (2000) 12 Int'l J. Refugee L. 548. The same view is also expressed, more briefly, by McAdam, *supra* note 5 at 19-20.
[88] *Ibid*. at 551.

> [It may be] promotional, preventive or remedial in nature, and implies the existence and effective functioning of administrative and judicial structures, as well as the existence and effective functioning of mechanisms and procedures for the investigation, prosecution and punishment of violations of the person's rights.[89]

Such a definition is highly reminiscent of a larger international scheme of protection of civil and political rights, and Fortin observes that various human rights instruments guarantee such equal protection by the law[90].

I have already mentioned McAdam's view that the Refugee Convention may well have been considered an international legislative vehicle for the non-binding UDHR, as well as the then embryonic covenants on human rights[91]. It is thus possible that, in keeping with this awareness of human rights, the concept of protection used in the Refugee Convention definition encompasses the state's protection of the universal human rights of its citizens.

However, Fortin argues that it refers merely to diplomatic protection, defined as consisting "primarily in the defence by the State of the interests and rights of its nationals abroad, when such interests and rights are not respected"[92]. His position is supported by two main arguments, the first of which is the definition of refugee by the Institute of International Law, which, as he suggests, inspired the Refugee Convention definition[93]. The original definition stated:

> In the present resolutions, the term "refugee" refers to any individual who, due to political events on the territory of their State of nationality, has voluntarily or involuntarily left the territory of said State, or is unable to return to it, and has acquired no other nationality and does not benefit from the diplomatic protection of a

[89] *Ibid.* at 552.
[90] *Ibid.*
[91] McAdam, *supra* note 5 at 29-30.
[92] Fortin, *supra* note 87.
[93] *Ibid.* at 557.

State [translated by author]. [94]

Fortin argues that despite the omission of the qualification of protection as diplomatic, the definition of the Refugee Convention is essentially meant to be the same as the foregoing. However, there must be a reason why the term "diplomatic" was dropped from the Refugee Convention definition, and it would seem safe to say that the intention might have been to allow for the evolution of the concept of "protection" from a term of art meaning diplomatic protection[95], to a larger concept including persons who do not possess a nationality. Hathaway and Foster also refute the historical evidence brought forth by Fortin, arguing that it is taken out of context, and is too scarce to lead to the conclusion that the drafters of the Convention had diplomatic protection in mind when they used the word "protection"[96].

Secondly, Fortin attempts to make the point that the requirement for the claimant to be outside her country of habitual residence means that the definition can only refer to diplomatic protection[97], but in many cases a claimant has fled her country due to lack of internal protection from persecution. It may be "evident that the only protection that can be made available to persons who are outside their country of nationality, or to which such persons can resort, is diplomatic protection"[98], but such an interpretation does not take into account the reasons which have driven this person outside of their country.

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[94] *Annuaire de l'Institut de droit International*, 1936, cited in Fortin, *supra* note 87 at 557.
[95] *Summary Record of the Hundred and Sixtieth Meeting of the Social Committee*, UN ESCOR, 11th Sess., UN doc. E/AC.7/SR.160, (1950) at 6-7.
[96] James C. Hathaway & Michelle Foster, "Internal protection/relocation/flight alternative as an aspect of refugee status determination", in Erika Feller, Volker Türk & Frances Nicholson, eds., *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003) 357 at 374-375.
[97] Fortin, *supra* note 87 at 564-565.
[98] *Ibid.*

To further demonstrate his point that "protection" is actually equivalent to diplomatic protection, Fortin argues that refugee status results from a failure by the state to interfere when rights are violated, and adversely, cannot be considered as a positive duty to protect[99]. He calls attention to situations where the state itself persecutes a person, maintaining that it would be absurd to say that such persecution results from the refusal of the state to protect its people against itself[100]. As euphemistic or pleonastic as it might seem to qualify these cases as results of the inability of the state to protect, they are still situations where the state fails to protect, and the fact that the supposed protector becomes the persecutor only makes the fear of persecution more well-founded and gives better reason to leave one's country. This incongruity does not mean, *a contrario*, that there is no positive duty of internal protection from the state when the agent of persecution is non-governmental. I will attempt to further outline the nature of a state's duty to protect in the following section.

Fortin's position, though it fosters an important reflection on the meaning of protection, is not shared by most scholars. The reflection and criticism to which his opinion has led me reflects the majority position taken by legal scholars. McAdam's work is based on the premise that the need for international protection arises when a state fails to protect the basic human rights of its citizens, and it is a view that was expressed by Goodwin-Gill in his introduction to the *International Journal of Refugee Law*[101]. Another opposing view to Fortin's position stems from Hathaway's work on defining the requirement that there be no internal flight alternative (IFA) available for protection to be granted[102]. The idea

[99] *Ibid.* at 573-574.
[100] *Ibid.*
[101] Guy S. Goodwin-Gill, "The Language of Protection" (1989) 1 Int'l J. Refugee L. 6 at 7-10.
[102] Hathaway, *Refugee Status*, *supra* note 14 at 133.

that a person cannot be considered a refugee if they can safely benefit from the protection of their state of nationality in another region of their country, implies that lack of internal protection in the entire country is a legitimate reason to leave one's country and make a refugee claim[103].

In a further discussion on the concept of IFA, Hathaway and Foster point out the main flaws of Fortin's analysis of the Refugee Definition in these terms:

> Taking account of both the ordinary meaning of the notion of 'protection" and the ways in which the term 'protection' is used elsewhere in the 1951 Convention, the Fortin position is anomalous. In particular, the Preamble refers to the intention of the parties to 'revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of protection offered by such instruments', and to the importance of coordinated measures to facilitate UNHCR's task of 'supervising international conventions providing for the protection of refugees'. Clearly, 'protection' as referred to in the preamble cannot mean only 'diplomatic protection', since the Convention is concerned nearly exclusively with the provision of 'protection' understood in the sense of human rights protection.[104]

They also demonstrate that Fortin's position is inconsistent with both the jurisprudence that recognizes refugee law as substitute protection and the UNHCR's interpretations of "protection" in accordance with the ordinary meaning of the word[105].

Fortin may be right to point out that the contemporary view of protection has stemmed from diplomatic protection, just as my historical inquiry has shown that diplomatic asylum was the first source of international agreements regarding persons fleeing their

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[103] *Ibid.*: "Where there is no *de facto* freedom from infringement of core human rights in a particular region (for example, due to the actions of an errant regional government or forces which make the exercise of national protection unviable), but the national government provides a secure alternative home to those at risk, the state's duty is met and refugee status is not warranted."
[104] Hathaway & Foster, *supra* note 96 at 373-374.
[105] *Ibid.* at 378-380.

country. However, the definition in the Refugee Convention is clearly not limited to diplomatic protection, and includes situations where internal protection is lacking. I would rather side with Goodwin-Gill's assessment of the refugee definition as a "critical point of departure in determining who is entitled to the protection and assistance of the United Nations, for it is the lack of protection by their own government which distinguishes refugees from ordinary aliens"[106]. This absence of protection may occur "as a matter of law, for example, in the case of stateless persons; or as a matter of fact, where individuals or groups are unable or unwilling to avail themselves of the protection of the government of their country"[107].

In either case, lack of protection by the state both on the internal and external levels is the trigger for international protection. Fortin even admits this in his discussion of stateless persons, as he acknowledges that stateless persons cannot benefit from diplomatic protection because having a nationality is a requirement for such protection[108]. No state has failed to protect them, since no state has ever had the responsibility to do so. Fortin is right in his affirmation that stateless persons clearly deserve international protection as compensation for their predicament[109], but it would be wrong to suggest that it is because they lack diplomatic protection, for they lack internal state protection as well. Refugees, in turn, find themselves in the same situation, even if they have a nationality[110].

[106] Goodwin-Gill, *The Refugee*, *supra* note 24 at 8.
[107] *Ibid.* at 15.
[108] Fortin, *supra* note 87 at 555.
[109] *Ibid.* at 556.
[110] *Ibid.* at 556-557.

2.2.3. International Protection

This discussion on stateless persons flows naturally into the nature and the role of the international protection of refugees, stateless persons, and other displaced persons who need it, in relation to state protection. This idea that the state is the provider of protection, and that, conversely, *de jure* or *de facto* statelessness calls for the intervention of international protection, suggests that international protection is indeed complementary to state protection. Refugee status is defined by a positive criterion, that is the existence of an apprehension of persecution, but that fear must be accompanied by a lack of protection. This makes international protection appear to be a second recourse, or an alternative to state protection.

Fortin argues that "[stateless] persons are no longer deprived of all protection in the international sphere, as they are entitled to the protection accorded to every human being under international law" [111]. Thus, his position is that international law takes responsibility for individuals who are unprotected by states[112]. Refugees, meanwhile, are individuals who have a nationality, but do not benefit from the protection of their country of nationality[113]. This lack of protection makes them *de jure* stateless. Aside from the fact that it has to be related to other criteria, statelessness or lack of protection remains the basis for the legitimacy of international protection[114].

This reasoning is consistent with the previously cited report of the UN Secretary-General, which unequivocally defines international refugee protection as complementary to state

[111] *Ibid.* at 555-556.
[112] Let it be known, however, that lack of nationality does not automatically entail lack of state protection, as a state of habitual residence may also offer protection.
[113] Fortin, *supra* note 87 at 556-557.
[114] See McAdam, *supra* note 5 at 20: "[International] protection provides a substitute for national protection, either in the country of origin or by assuming a new nationality".

protection[115]. This perception has been further confirmed by a former UN High Commissioner for refugees, who interpreted the function of international protection as being supplemental to the protection offered by the refugee's country of residence[116].

2.2.4. The Complementary Nature of Protection

The previous explanations on different levels of protection will allow for a better understanding of the concept of complementary protection. This section first defines what the term "complementary" means, how it is distinguishable from alternative protection, and how it applies to protection in a legal context.

According to the dictionary, "complementary" refers to "completing" or "forming a complement"[117]. Such a definition suggests that when something is complementary, it forms a complete and absolute entity or a coherent whole when added to what it is complementary to, much like two complementary angles form a right angle. In that sense, complementary protection would have to create a complete body of protection, one that leaves no protection gaps. In light of my historical overview of the emergence of international refugee protection, the latter was likely meant to be complementary to state protection in such a way.

Given that complementary protection may refer to international law as being complementary to domestic law in terms of protecting individual's civil rights and liberties, the Refugee Convention itself could be an instrument of complementary protection. On the other hand, it could be said that the complementary nature of

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[115] *Refugees and Stateless Persons: Report of the Secretary-General*, *supra* note 46; Fortin, *supra* note 87 at 569.
[116] Sadruddin Aga Khan, "Legal Problems relating to Refugees and Displaced Persons", (1976) 149 Rec. des Cours 329, cited by Fortin, *supra* note 87 at 570.
[117] *New Oxford American Dictionary*, 2d ed., *s.v.* "complementary".

protection lies within the source of protection, as opposed to the form of protection or the status to which it leads[118]. Protection, it seems, would thus be complementary in relation to a "formal" source of protection[119]. Currently, the Refugee Convention is the only formal source of international protection, but other sources may achieve this formal status with time.

Given the evolution in refugee status and protection seeking situations, and the new protection mechanisms that have emerged from that, the Refugee Convention has evolved into a solidified, formal protection regime, and that complementary protection comes from alternative sources separate from it. I also choose to use the term "complementary" for international protection, instead of "alternative" protection. An alternative is something "that is available as another possibility"[120]. It would be consistent with the original function of the international refugee protection regime as a complement to state protection to speak of complementary international protection, rather than alternative protection. Although complementary international protection comes from a range of sources, it tends toward the ideal of a complete protection regime, hence the pertinence of the term "complementary".

Domestic legislation, on the other hand, relies on a government's individual policy and does not necessarily hold such ambitions of complete protection. On the contrary, when an asylum-seeker enters Canada, he or she can choose to present a claim under section 96 IRPA[121] for refugee status, or under section 97 IRPA[122], to be recognized as a person in

[118] McAdam, *supra* note 5 at 23.
[119] *Ibid.*
[120] *Ibid.*
[121] Section 96 IRPA: "A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

need of protection. More often than not, he or she would file a claim under both sections, and if refused under section 96 IRPA, will hope to be accepted under section 97 IRPA. Section 97 IRPA thus fits better under the definition of alternative protection. Generally, the domestic implementation of international legislation is embodied in different legislative measures that offer alternative bases for protection claims. Hence, it seems more appropriate to speak of alternative protection when discussing the implementation of complementary international protection on a domestic level.

2.3.Human Rights Theory

3.1.1. The Relationship between Human Rights Protection and Refugee Protection

When discussing the meaning of protection within international refugee law, I have made several allusions to the idea that the objects of protection are the interests and physical integrity of the person, embodied through their civil and political rights. My overview of the drafting of the Refugee Convention also revealed its ties to international human rights treaties. This begs the question as to the nature of the relationship between the protection of human rights and refugee protection in international law.

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country."

[122] Section 97 IRPA: "(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection."

Fortin claims that the fundamental difference between the two regimes is that they employ two different standards of proof, such that "[where] human rights require certitude, refugee instruments only require likelihood"[123]. He points out that international human rights sanctioning mechanisms require a violation, whereas refugee protection is a more preventive regime[124]. This difference in thresholds could constitute an argument against describing protection in international human rights instruments as complementary protection.

However, his characterization overlooks the fact that some human rights require only likelihood as well. This is true of provisions such as article 3 of CAT[125], which recognizes the right not to be returned to a country where one faces a risk of torture. It involves likelihood or, more specifically, "substantial grounds" for belief that the right could be breached. This example introduces the possibility that provisions resembling what Fortin perceives to be refugee protection, that is protection based on likelihood, are introduced into what can be generally deemed to be a human rights protection treaty.

Throughout my analysis of the complementary protection obligations set out by international human rights law instruments, this distinction between likelihood and actual violations will be useful to identify complementary protection mechanisms. Indeed, where the criterion for intervention is the likelihood of a violation, it can be argued that we are faced with a complementary protection provision. This might be true of individual

[123] Fortin, *supra* note 87 at 571.
[124] *Ibid.* at 570-571.
[125] Article 3 of CAT reads: "1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

articles, such as in the CAT, but I will also attempt to find out if such a criterion of likelihood may also be deduced from the object and purpose of the human rights treaties I will examine.

In Hathaway's view, there is no distinction in terms of the standard of proof, but he recognizes the existence of "refugee-specific" rights within human rights instruments, which is consistent with the idea that the Refugee Convention was expanded by the incorporation of such rights within international human rights instruments[126]. He argues that "while there has been only modest evolution of the refugee rights regime since 1951, the broader field of international human rights law has undergone exponential change"[127]. He also considers the Refugee Convention as "only the second major human rights convention adopted by the United Nations"[128].

Despite the limited evolution of the refugee protection regime, he considers that "the maturation of human rights law over the past half-century has to a certain extent filled the vacuum of protection that required the development of a refugee-specific rights regime in 1951"[129]. According to this reasoning, refugee law is a component of international human rights law. As such, it was formed by the Refugee Convention and expanded by the growing number of human rights conventions. Following this view, complementary international protection forms an integral part of international human rights law, and any human rights treaty may contain so-called "refugee-specific" rights. I agree with this view, but since the term "refugee-specific" is not clearly defined, I choose to use the

[126] Hathaway, *Rights of Refugees*, *supra* note 12 at 119-123.
[127] *Ibid.* at 119.
[128] *Ibid.*
[129] *Ibid.* at 120.

element of likelihood as identified by Fortin, in order to identify such specific rights within human rights instruments.

Although scholars working in the field of international refugee law consider the connection with international human rights law, such interest does not seem to be reciprocated by scholars in the field of international human rights. Works that serve as a reference in the latter field make no mention of refugee-specific rights or even the Refugee Convention as an instrument of human rights protection[130]. This might be due merely to a lack of popularity of the topic among scholars in the field, but it does call for a careful justification to any claim that a human rights instrument contains provisions that provide complementary protection for asylum seekers.

2.3.2. The State's Duty to Protect

Working with the previously stated assumption that refugee protection and complementary protection are part of human rights law or, at the very least, connected to it, it becomes relevant to look into the role of the state in the application of a person's right to seek such protection. The issue at hand becomes the nature of the obligation of a state that has ratified a human rights treaty.

The first problem faced within a human rights context is the generality of rights. They make sense and are easily accepted when stated in a far-reaching manner, but their application to specific problems is difficult[131]. This is even more problematic in the context of protection-seekers, as their status is derived from the lack of protection of these general rights. The challenge thus becomes the identification of the rights that

[130] See generally Henry J. Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context* (New York: Oxford University Press, 2008).
[131] *Ibid.* at 484-485.

should be protected, as well as the extent to which they should be protected, which in turn allows the definition of the lack or failure of protection.

The discussion of the extent to which rights should be guaranteed so that a state can be deemed to protect a person in a satisfactory manner poses the question of the nature of the duties correlative to rights. In the context of refugee law, this becomes a discussion of the duties of the state rather than the individual, as it is based on the failure of one state to fulfil its duties and the search for another state that can.

Fredman derives a traditional view of rights as divided between the justiciable civil and political rights, which entail a duty of restraint, and the more aspirational socio-economic and cultural rights to which positive duties are attached[132]. In Fredman's own view, however, these two types of rights cannot be conceived as two entirely separate groups, as they inevitably overlap, and "they cannot be coherently distinguished by the kind of duty to which they give rise"[133]. The duties are rather shaped and limited by the ideology we use as a guide for our analysis of rights. For instance, civil and political rights examined with an understanding of freedom as non-intervention entail only negative duties, whereas a wider conception of freedom as the ability to exercise one's rights will entail positive duties[134].

As a simple example within the refugee protection context, the right to life and security cannot be infringed upon by the state for reasons of a person's race or national background. That state nevertheless has a duty to provide people who are being persecuted for such reasons with effective police or security forces and complaint

[132] Fredman, *supra* note 4 at 66.
[133] *Ibid.* at 67.
[134] *Ibid.*; Bastarache J. also recognizes this point in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016 ¶ 19-28.

mechanisms in case of corruption or misconduct. If one or both of these duties are unfulfilled, the target of persecution may legitimately seek asylum in a state that will fulfil them. This deconstruction of duties is embedded in the Refugee convention, but my analysis of complementary protection aims at attempting to see if such duties can be derived from other rights, which are not explicitly accounted for in the formal refugee definition. The presence of a duty to protect will be an indicator of the existence of a basis for complementary protection when this duty to protect is unfulfilled.

Fredman develops a general analysis of the duty to protect based on the idea that the right-holder has to be protected from the perpetrator of the breach, without infringing on the possible competing rights of said perpetrator. Fredman uses the examples of the right to assembly, the right to life and the right not to be subjected to torture. In these different cases, the agent who opposes the right-holder has different levels of competing rights, such as the right to counter-demonstrate which opposes the right to assembly. She then demonstrates that the level of protection required from the state varies accordingly[135]. This consideration will be useful when determining at which point specific rights become a basis for a complementary protection regime. Indeed, the criteria that lead to the conclusion that there is a failure to protect will vary according to the rights under assessment.

[135] *Ibid.* at 73-76.

2.4. UNHCR's Obligations in Relation to States' Responsibility for Protection Seekers

As a body mandated by the UN General Assembly to assist governments in the repatriation or resettlement of refugees[136], the UNHCR may be considered as a source of protection for asylum seekers outside of international treaties. This section briefly explores how the UNHCR expands and implements the protection offered by international refugee law and human rights instruments. This thesis centres on international treaties, but it remains relevant to observe other ways in which states manage to reach consensus on international protection of asylum seekers and their human rights. These mechanisms may reveal themselves to be a quicker way for states to respond to new emergencies and situations where international protection of groups or individuals is required.

The first two subsections deal with the UNHCR's mandate and activities, in order to analyze how they have evolved beyond international treaties. Within this analysis, I weave in reflections on the UNHCR's position or importance in relation to international law and what it means for the interpretation of the latter. In the third section, I look into the interactions of the Canadian protection system with the UNHCR's activities.

2.4.1. Complementary Protection Through the Evolution of the UNHCR Mandate

The legal foundation of the UNHCR's statute is a UN General Assembly resolution, and the statute itself enables the General Assembly, as well as the Economic and Social Council, to adopt more resolutions that expand or amend said mandate[137]. These

[136] *Statute of the Office of the United Nations High Commissioner for refugees*, GA Res. 428 (V), UN GAOR, 5th Sess., UN. Doc. A/RES/428(V) (1950) [UNHCR Statute].
[137] Article 3 UNHCR Statute: "The High Commissioner shall follow policy directives given him by the

resolutions generally fit into one of two types. These are general resolutions relating to the developments in refugee law and the UNHCR's mandate in general, and specific resolutions relating to situations arising in a given region or country[138]. The UNHCR's original mandate includes promoting the ratification of international conventions for the protection of refugees, promoting the admission and settlement of refugees, promoting and working with governments towards measures to improve the situation of refugees and reducing the numbers of persons requiring protection, as well as exchanging legal and other information on refugees with governments[139]. The term "refugee" is defined within the statute itself, and essentially reiterates the text of the Refugee Convention definition[140].

General Assembly or the Economic and Social Council."

[138] Volker Türk, "The role of UNHCR in the development of international refugee law", in Frances Nicholson & Patrick Twomey, eds., *Refugee Rights and Realities* (Cambridge: Cambridge University Press 1999) 153 at 154.

[139] Article 8 UNHCR Statute: "The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by:
(a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
(b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
(c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
(d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;
(e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
(f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
(g) Keeping in close touch with the Governments and inter-governmental organizations concerned;
(h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions;
(i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees."

[140] Article 6(A) UNHCR Statute: "The competence of the High Commissioner shall extend to:
A. (i) Any person who has been considered a refugee under the Arrangements of 12 May 1926 and of 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization.
(ii) Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is

Hence, the UNHCR's mandate was originally limited to the application of the 1951 Refugee Convention[141], but as it was constituted by the General Assembly, later resolutions of the Assembly or the ECOSOC expanding its responsibilities or endorsing its initiatives have had the effect of continuously expanding the UNHCR's mandate, creating a distinction between the original 1950 Statute and the UNHCR's effective mandate[142]. The latter provides protection and assistance to different categories of persons within and outside of the Convention definition. Türk explains this widened mandate as follows:

> Demonstrating the underlying broad consensus of the international community to provide UNHCR with specific responsibilities in respect of certain groups of persons, successive General Assembly and ECOSOC resolutions, supported by UNHCR's Executive Committee, have had the effect of extending the High Commissioner's competence to five main categories: (i) refugees and asylum seekers; (ii) stateless persons; (iii) returnees; (iv) the internally displaced; and (v) persons threatened with displacement or otherwise at risk.[143]

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unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it. […]

[141] The UNHCR's role is acknowledged directly within article 35 of the Refugee Convention: "1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.
2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:
(a) The condition of refugees,
(b) The implementation of this Convention, and;
(c) Laws, regulations and decrees which are, or may hereafter be, in force
relating to refugees."; it is also indirectly acknowledged within articles 22 and 45 of the Convention on the Rights of the Child, pertaining to the humanitarian assistance of child refugees.

[142] Türk, *supra* note 138 at 154-155.

[143] *Ibid.* at 155.

One recent example of such a resolution is for assistance to refugees, returnees and displaced persons in Africa[144].

It appears that the evolved mandate of the UNHCR explicitly includes persons outside of the refugee definition, encompassing many other categories of persons who do not benefit from the protection of their state, or even those who are at risk of losing such protection. As such, the UNHCR's extended mandate could be considered as a complementary protection mechanism created by the international community.

Some specific initiatives have been created to deal with situations where persons do not fit into the Convention definition of refugees, such as the cluster approach, which will be included in my discussion of natural disasters in chapter 5. This strategy is based on the spontaneous partnerships of international organisations and NGOs to provide a concerted effort of humanitarian assistance in situations such as natural disasters or armed conflict. Recent data have revealed that about half of the world's internally displaced persons[145] have been assisted through an arrangement in which UNHCR was the lead agency or a key partner[146]. The existence of such strategies for intervening in cases where individuals would otherwise remain unprotected, demonstrates that the UNHCR has the flexibility to adopt new initiatives that are later condoned by the General Assembly.

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[144] *Assistance to refugees, returnees and displaced persons in Africa: resolution / adopted by the General Assembly*, GA Res. 61/139, UN GAOR, 61st Sess., Supp. No. 49, UN Doc. A/RES/61/139 (2007).

[145] UN High Commissioner for Refugees, *UNHCR's Operational Experience With Internally Displaced Persons*, September 1994, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/3ae6b3400.html> at 76 : "[an internally displaced person is] someone who, had she or he managed to cross an international boundary, would have fallen within the refugee definition"; it may also refer to persons who have been forced to flee their homes unexpectedly due to a natural or man-made disaster.

[146] UN High Commissioner for Refugees, *Statement by Volker Türk, Director, Division of International Protection (48th Meeting of the Standing Committee, Agenda Item 3)*, 22 June 2010, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/4c20b9342.html>.

However, the idea that UNHCR would close gaps in international protection remains a source of discomfort and a recurring issue for the UNHCR[147], as its statute and the resolutions that expand it are not international treaties. Therefore, the UNHCR's opinions are not a direct source of international law. Türk defines the UNHCR's position in the realm of international law in the following terms:

> UNHCR has the competence to develop progressively international law and standards relating to populations of concern. It is broadly recognized that the international legal framework is generally adequate to cover various forms of forced displacement, but there is a continuing need to supplement and substantiate some of its aspects, to identify normative gaps and to fill those through the progressive development of law standards.[148]

Despite the perhaps overly optimistic assessment of the adequacy of the international legal framework, this statement rightfully defines the UNHCR as a standard-setting organization. Its initiatives and interpretations become customary through approval by the General Assembly, which suggests approval by the international community. Because they tend to harmonize national interpretations of international law through their influence on state refugee protection systems[149], the UNHCR agents appear to strive towards building customary interpretations of international law. They may also influence the drafting of international conventions and their application within individual states.

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[147] Türk, *supra* note 138 at 165.

[148] UN High Commissioner for Refugees, *UNHCR's Role in Supervising International Protection Standards in the Context of its Mandate - Keynote Address by Volker Türk*, 20 May 2010, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/4bfb8c962.html>.

[149] UN High Commissioner for Refugees, *"The Work of the Refugee Protection Division in the International Context", Statement by Erika Feller, Assistant High Commissioner - Protection, UNHCR, at the Immigration and Refugee Board, Refugee Protection Division National Training Seminar (Toronto, Canada, January 28-30, 2008)*, 28 January 2008, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/47d017942.html> at 7: "In an effort to promote a harmonized interpretation of the criteria in the refugee definition, UNHCR makes available guidance on the eligibility of certain groups of refugees and advice on the interpretation of the definition itself.

2.4.2. The UNHCR's Executive Committee Resolutions and their Normative Value

The UNHCR's main vehicle as an international standard setting organization is its Executive Committee. The Executive Committee was established by resolution of the General Assembly in 1957 and originally required to have twenty to twenty-five members[150]. Following successive enlargements over the years, its membership has recently increased to seventy-eight[151]. The Executive Committee's role is to advise the UNHCR as to its statutory functions and deciding whether to provide protection and assistance when specific refugee problems arise[152]. It essentially manages the way the UNHCR fulfils its mandate, and as such, it must interpret the scope of the mandate and the extent of international protection that is attributed to displaced persons under international law.

Within the realm of complementary international protection, the Executive Committee has recognized that individuals who do not fit within the Convention definition may need international protection and deserve a legal status in the country of asylum. It generally accepts that all individuals who are facing displacement, coupled with lack of protection, fall under the mandate of the UNHCR[153]. In their discussion on complementary protection, the Committee mainly vies for inclusive protection regimes and status determination based mainly on protection needs, by stating:

> Beneficiaries of complementary protection should be identified according to their

[150] *International assistance to refugees within the mandate of the United Nations High Commissioner for Refugees*, GA Res. 1166 (XII), UN GAOR, 12th Sess., UN Doc. A/RES/116626 (1957).
[151] *Enlargement of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees : resolution / adopted by the General Assembly*, GA Res. 63/146, UN GAOR, 63d Sess., Supp. No. 49, UN Doc. A/RES/63/146 (2009).
[152] Goodwin-Gill, *The Refugee*, *supra* note 24 at 9.
[153] UN High Commissioner for Refugees, *General Conclusion on International Protection*, UNHCR ExCom, 43d Sess., UN Doc. No. 68 (XLIII) – 1992.

> international protection needs, and treated in conformity with those needs and their human rights. The criteria for refugee status in the 1951 Convention should be interpreted in such a manner that individuals who fulfil the criteria are so recognized and protected under that instrument, rather than being treated under complementary protection schemes.[154]

The Executive Committee thus recognizes the importance of creating complementary forms of protection, but warns against the use of complementary protection mechanisms, which do not benefit from a universal definition, to deny rights to refugees. It also encourages the UNHCR to engage in discussions with states to develop adequate protection regimes for protection needs outside of the Refugee Convention[155].

The Executive Committee's activities further strengthen the connection between international refugee law and international human rights law, through the constant affirmation of the humanitarian nature of international protection[156]. Its decisions also frequently refer to the importance of considering the specific needs of women and children faced with refugee situations[157]. Through its contribution to a wide definition of "refugee", the Committee has assisted vulnerable persons who otherwise would not have been protected for reasons such as inability to leave their country. In sum, the Executive Committee's conclusions may be considered as acceptance by the international

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[154] UN High Commissioner for Refugees, *Providing International Protection Including Through Complementary Forms of Protection*, UNHCR, 33d Sess., UN Doc. EC/55/SC/CRP.16 (2005).

[155] UN High Commissioner for Refugees, *General Conclusion on International Protection*, UNHCR ExCom, 50th Sess., UN Doc. No. 87 (L) - 1999: "[The Executive Committee reaffirms] that the 1951 Convention relating to the Status of Refugees and the 1967 Protocol remain the foundation of the international refugee regime; *recognizes*, however, that there may be a need to develop complementary forms of protection, and in this context, *encourages* UNHCR to engage in consultations with States and relevant actors to examine all aspects of this issue."

[156] See, for instance, UN High Commissioner for Refugees, *International Solidarity and Refugee Protection*, UNHCR ExCom, 39th Sess., UN Doc. No. 52 (XXXIX) - 1988; It is consistent with Article 2 UNHCR Statute: "The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees."

[157] *Ibid.*

community of the humanitarian activities of the UNHCR and openness to new forms of protection. However, they remain non-binding for states, and it is possible that the same states that are on the Committee would be less generous when drafting a binding legal instrument.

2.4.3. Effects of the UNHCR Mandate on the Canadian Refugee Protection Regime

Since the legal basis for the UNHCR and the state obligations attached to it are UN General Assembly resolutions, they are not binding for member states. The statute of the UNHCR, nonetheless, appeals to states' cooperation in the fulfilment of the mandate it sets out. The General Assembly essentially calls upon states to cooperate with UNHCR activities and ratify all conventions that provide international protection[158]. The mandate of the UNHCR thus encompasses all the obligations that states have through treaty law, but expands beyond it. Canada does not have such an extensive mandate as the UNHCR does, but is bound to cooperate with it as a member of the international community.

The UNHCR has, nonetheless, had a direct and continuous influence on Canadian refugee law. The UNHCR's intervention is not only justified under its mandate, it is also

[158] GA Res. 428 (V), *supra* note 479: "[The General Assembly calls] upon Governments to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his Office, especially by:
(a) Becoming parties to international conventions providing for the protection of refugees, and taking the necessary steps of implementation under such conventions;
(b) Entering into special agreements with the High Commissioner for the execution of measures calculated to improve the situation of refugees and to reduce the number requiring protection;
(c) Admitting refugees to their territories, not excluding those in the most destitute categories;
(d) Assisting the High Commissioner in his efforts to promote the voluntary repatriation of refugees;
(e) Promoting the assimilation of refugees, especially by facilitating their naturalization;
(f) Providing refugees with travel and other documents such as would normally be provided to other aliens by their national authorities, especially documents which would facilitate their resettlement;
(g) Permitting refugees to transfer their assets and especially those necessary for their resettlement;
(h) Providing the High Commissioner with information concerning the number and condition of refugees, and laws and regulations concerning them."

welcomed in most stages of status determination. Indeed, the IRPA explicitly allows agents of the UNHCR to attend a refugee status determination hearing[159].

From this study of the evolution of international protection and the conceptual framework of international protection and international human rights law, this thesis now turns to an application of various human rights instruments to the international protection context. The first of these will be the right not to be subjected to torture as provided for by the Convention Against Torture.

[159] Section 166(e) IRPA: "[A] representative or agent of the United Nations High Commissioner for Refugees is entitled to observe proceedings concerning a protected person or a person who has made a claim to refugee protection."

Chapter 3. The Expansion of Protection by the Convention Against Torture and the Principle of Non-Refoulement

The principle of non-refoulement emerged along with the international definition of refugee status, and is the cornerstone of this chapter. Formerly applicable exclusively to persons already recognized as refugees and included in article 33 of the Refugee Convention itself, it is now more widely used to protect any person from return to a country where it is likely that they will face torture or cruel or unusual treatment. The inclusion of the right to non-refoulement within article 3 of the Convention Against Torture formally links it with the prohibition of torture and consecrates its expansion to all persons regardless of refugee status, thus transforming it into a mechanism of complementary international protection. This chapter seeks to untangle the different uses of the principle of non-refoulement, along with an overview of the state duties it creates. This will form a basis for determining whether Canada complies with the obligations created by this complementary international protection mechanism.

I begin my analysis by examining the prohibition of torture from the historical and theoretical point of view, in order to make sense of the right not to be subjected to torture as an element of non-refoulement. An analysis of the state duties related to the prohibition of torture will be helpful to gain a deeper understanding of the obligations with regards to non-refoulement. In the following section, I delimit the scope of non-refoulement and justify its qualification as a mechanism of international complementary protection. I apply my theoretical analysis of state duties with regards to torture to the exclusions to non-refoulement. Finally, I use these reflections to evaluate the integration of these duties in Canadian law through different sections of the IRPA and case law.

3.1.The Prohibition of Torture

3.1.1. The Origins and Legal Basis for the Prohibition of Torture

The core element of a complementary international protection mechanism based on non-refoulement in the Convention Against Torture (CAT) is the prohibition of torture itself. The CAT is a new legal suppression of a millennial practice that was widespread among European civilizations. A striking characteristic of the study of early practices of torture is the moral dilemma that accompanies it. For example, according to the principles guiding the administration of torture in Roman times, information obtained under torture could not be used as main evidence in a trial, but could complete evidence already acquired through other means[160]. In addition to the unwritten rule that it should be used in moderation, some principles were used by the Romans to limit the practice in terms of the age or health condition of the subject[161]. This suggests that though the practice was legal, it was often not considered defensible from a moral point of view.

Another pattern that emerges is that torture was more commonly used on individuals who were not considered as right-holders, as was the case of heretics during the Middle Ages, or even individuals who were not considered as citizens or human beings, as it appears through records of it being inflicted more commonly on slaves in the Roman Empire[162]. Such categorizations of individuals excluded some people from civil rights, and this denotes a moral impetus prohibiting the practice of torture on individuals who could, indeed, benefit from civil rights. Nonetheless, it was not recognized as a moral requirement to spare individuals accused of a crime from the practice, as it remained a

[160] Matthew Lippman, "The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (1994) 17 B.C. Int'l & Comp. L. Rev. 275 at 275-278.
[161] *Ibid.* at 277.
[162] *Ibid.* at 277-278.

common method for establishing ancillary evidence until the late 18th century. It was discarded by European governments based on rational and logical demonstrations by criminologists such as Beccaria[163], which showed that it was not an effective method of proof and too often resulted in the punishment of innocent people[164].

The resurgence of torture under 20th century totalitarian regimes, along with other horrific human rights violations, prompted the international community to prohibit it in article 5 of the UDHR in 1948[165]. The practice was, nonetheless, commonly used by European states for political control during the cold war era, as reported in cases presented before the European Court of Human Rights[166]. At the same time, Amnesty International spearheaded an international campaign for the eradication of torture[167]. These efforts to specifically tackle the persistence of torture were mirrored by the United Nations, with the inclusion of the prohibition of torture in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) in 1966[168], and the adoption of the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or

[163] *Ibid.* at 281: "The use of torture became increasingly hard to reconcile with the historical tide of humanity and rationality. In 1764, Italian criminologist Cesare Beccaria drafted the most influential and comprehensive critique of torture. Although Beccaria's arguments were not novel, he provided an intellectual justification which quickened the currents of reform".
[164] *Ibid.* at 281-283.
[165] *Ibid*. at 289-290; Article 5 UDHR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
[166] Lippman, *supra* note 160 at 290-296.
[167] *Ibid.*
[168] Entered into force 23 March 1976; Article 7 ICCPR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Degrading Treatment or Punishment[169] in 1975. It was then renewed and strengthened with the first legally binding Convention Against Torture (CAT) in 1984[170].

The CAT contains a detailed definition of torture in article 1, which includes the infliction of severe pain or suffering by a public official, with the exception of suffering arising from a lawful sanction[171]. The CAT requires that states undertake measures to eliminate torture within their own territory, as well as measures such as non-refoulement[172], which are meant to avoid supporting or encouraging the practice in other states. Article 3 of CAT codifies the principle of non-refoulement, stating that no one shall be returned to a state where they face a risk of torture. In paragraph 3(1), it states the prohibition to return anyone to "another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". Paragraph 3(2) clarifies the nature of the "substantial grounds", stating that they cover "all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights". This suggests that general non-compliance with international human rights of a state of origin can become a basis for granting asylum.

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[169] *Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res. 3452 (XXX), UN GAOR, 30th Sess., UN Doc. A/RES/3452 (1975).

[170] Lippman, *supra* note 160 at 300-307, 312.

[171] Article 1 CAT reads: "1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

[172] Article 3 CAT.

According to the travaux préparatoires surrounding article 3 of CAT and non-refoulement, much of the discussion centred around paragraph 3(2) and whether it should contain examples of what constitutes a "consistent pattern of gross, flagrant or mass violations of human rights"[173]. Interestingly, the Canadian delegation expressed disappointment with the fact that paragraph 3(1) only mentions torture, leaving out cruel and unusual treatment or punishment[174].

The prohibition of torture is known as a *jus cogens* norm in international law, which is one that allows for no derogation whatsoever[175]. It appears easy to assert that a strong normative base in both international treaties and international customary law prohibits the use of torture, but this view has been challenged[176]. Watson writes that "[if] one is disposed to adopt a positivistic approach to legal rules, equating legal validity with the identification and reiteration of "official" written norms, rather than with norms which are efficacious, then such a treaty regime establishes a satisfactory body of prohibitive rules"[177]. He goes on to make the point that "[if], on the other hand, one is less concerned with the world of conceptualism than with the realm of reality, then the fact that there is widespread state practice in violation of the treaty regime is still very relevant"[178].

This sheds light on the fact that a norm that could be considered strong and as a source of pride for the international legal system may upon closer examination reveal itself to be

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[173] Commission on Human Rights, *Report of the Working Group on a draft convention against torture and other cruel, inhuman or degrading treatment or punishment*, UN ESCOR, 40th Sess., UN Doc. E/CN.4/1984/72 at 3-5.
[174] *Ibid.* at 3.
[175] Krishma C. Parsad, "Illegal Renditions and Improper Treatment: An Obligation to Provide Refugee Remedies Pursuant to the Convention Against Torture" (2009) 34 Denv. J. Int'l L. & Pol'y 681 at 684.
[176] James Shand Watson, *Theory & Reality in the International Protection of Human Rights* (Ardsley: Transnational Publishers, 1999).
[177] *Ibid.* at 140.
[178] *Ibid.* at 141.

ineffective. It is also consistent with the history of torture, which shows that it was considered immoral, but was still widely perpetrated through centuries. It is a valid point, and the text of the CAT itself suggests an awareness of the possible non-compliance of states with this prohibition.

The clearest indication of that awareness is the provision for asylum within the Convention. It includes not only the obligation to provide international protection from torture, but also a commitment not to encourage or endorse states that are known to practice torture. This could be a sign that the inclusion of asylum grounds in an international human rights instrument is not merely meant to compensate for the absence of an asylum convention, but also a way to make the protection of international human rights more efficient in providing shelter from non-complying states.

3.1.2. State Duties and Interests in Relation to Torture and Non-Refoulement

As mentioned before, Fredman's theory of state duties regarding the protection of human rights is useful for untangling the connections between the state, the right-holder, and the perpetrator of the breach of human rights. In the model she uses, she demonstrates that the competing rights and interests of the state and the perpetrator of the breach limit an individual's rights, and that different individual rights create varying levels of competing rights. In other words, each right creates a different interaction between these three actors[179].

Accordingly, as a *jus cogens* norm, or an absolute right, the right not to be subjected to torture does not allow much weight to be allotted to the rights of the perpetrator of the

[179] Fredman, *supra* note 4 at 73-76.

breach, as would be the case, for instance, if we were dealing with the right of assembly[180]. Fredman describes the state's duty to protect as a very strong one in unequivocal terms:

> This can be seen in *Z v UK*[181], which concerned a claim that the State had failed in its duty to protect children against inhuman and degrading treatment inflicted by their parents. In this case, the Court stressed that 'Article 3 enshrines one of the most fundamental values of democratic society'. This leads to a strong duty to protect, deriving from the obligation under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the [European Convention on Human Rights].[182]

Hence, when it comes to torture and non-refoulement, the state's duty involves more than merely taking reasonable steps to protect the right. It has a duty to guarantee individuals to be free from torture or cruel and degrading treatment or punishment[183].

In relation to Watson's criticism that a norm cannot be considered as effective unless it is always respected, Fredman proposes a more nuanced view. She has shown that most rights pose a problem of indeterminacy and competing principles, but the right not to be subject to torture is an absolute one, and as such, involves a more rigid obligation from the state. Although it is not absolutely respected in practice, it is at least widely recognized and applied as such by courts, whereas other human rights involve a weighing of competing rights[184]. Despite criticism regarding its application, the prohibition of torture may thus be appropriately qualified as a *jus cogens* norm.

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[180] *Ibid.* at 75.
[181] *Z and others v. United Kingdom*, no. 29392/95, [2001] 34 E.H.R.R. 3 (ECHR), cited in Fredman, *supra* note 4 at 75.
[182] Fredman, *supra* note 4 at 75.
[183] *Ibid.* at 76.
[184] *Ibid.*

3.2.Theory of Non-Refoulement

The complementary protection mechanism contained in article 3 CAT is an example and a renewed use of the principle of non-refoulement. Generally, this principle holds that "no refugee should be returned to any country where he or she is likely to face persecution or torture"[185]. This definition brings out the question of whether the principle applies only to refugees. I have already outlined through the history and evolution of refugee law and asylum practices that non-refoulement was conceived as a right pertaining to persons who had already been recognized as refugees[186]. However, the inclusion of the principle in article 3 of CAT makes no mention of refugees, as it refers to persons in general. Hence, this section proposes to clarify the definition and scope of the principle of non-refoulement, before moving on to a justification of its qualification as complementary protection, and a discussion of exclusions to the principle.

3.2.1. Definition and Scope

The association between non-refoulement and refugee or asylum provisions originates in early to mid-nineteenth century, when the principle of non-extradition or non-rejection became associated with the possibility of persecution[187]. Previously, refoulement was merely a term referring to summary return to the frontier of aliens who did not possess appropriate identification[188]. Goodwin-Gill's inquiry into the history of non-refoulement as a sidekick to the development of refugee protection leads him to the conclusion that

[185] Goodwin-Gill, *The Refugee*, *supra* note 24 at 117.
[186] Non-refoulement was applied as such in the first international agreements on refugees under the League of Nations; see See Article 3 of 1933 Convention, Article 5(3)(a) of 1938 Convention.
[187] Goodwin-Gill, *The Refugee*, *supra* note 24 at 117-118.
[188] *Ibid.* at 117.

the right to non-refoulement, as expressed in article 33 of the Refugee Convention, is a rule "clearly designed to benefit the refugee"[189].

Goodwin-Gill remains aware of the reality beyond the Convention's design; he expresses concern that the application of such a principle would be predicated on a person already being recognized as a refugee by the state[190]. This indeed creates a loophole that significantly limits the scope of the principle, because it means that individuals may be returned to torture while their status determination is pending. Goodwin-Gill evaluated state practice in the application of article 33 of the Refugee Convention. His research revealed that, despite a few instances where state practice confirms a restrictive view of non-refoulement as applicable only to recognized refugees, the principle has generally evolved to be applicable as soon as asylum seekers arrive at the frontier, hence rejecting the idea of dependence upon status recognition[191]. His view is that state practice closes the protection gap created between entry and status recognition, and the application of article 33 to asylum seekers "at least during an initial period and in appropriate circumstances"[192] has become a customary norm.

Stenberg reaches the same conclusion. He bases his argument in part on the original legal signification of the verb 'refouler' in French, which expresses a right of non-return upon entry. Its use in the English version of article 33 of the Refugee Convention without translation thus conveys the same meaning[193]. Although both Stenberg and Goodwin-Gill recognize that article 33 may apply to persons who have entered the country seeking

[189] *Ibid.* at 121.
[190] *Ibid.*
[191] *Ibid.* at 123-124.
[192] *Ibid.* at 137.
[193] Stenberg, *supra* note 26 at 200.

refuge before they benefit from refugee status, it is still applicable only to persons who are refugees, and not to persons who may seek protection based on grounds outside of the Refugee Convention. As a result, it would not apply to other asylum seekers upon entry. Hence, there is room for an expansion of the principle by the CAT.

Regardless of the original intention behind article 33 of the Refugee Convention, the principle of non-refoulement has evolved through state practice in the 40 years following its adoption, as well as by a number of UN resolutions[194]. This point is demonstrated through examples of state practice such as the "B status" in Sweden, which is a domestic mechanism of alternative protection[195]. It is also evidenced through regional treaties such as the 1969 Organization for African Unity *Convention on Refugee Problems in Africa*[196] and the *Cartagena Declaration* of 1984[197], which contain provisions for the application of non-refoulement to persons beyond the refugee definition who are threatened by violence or by massive human rights violations[198]. The subsequent use of non-refoulement in a general treaty aimed at prohibiting torture seems to be merely the next logical step in the expansion of the scope of the principle of non-refoulement.

Non-refoulement within the framework of CAT applies "to everyone, irrespective of their nationality or legal status, whether they are inside or outside their country of origin and

[194] Guy S. Goodwin-Gill, "Non-Refoulement and the New Asylum Seekers" (1986) 26 Va. J. Int'l L. 897 at 900-902 [Goodwin-Gill, "New Asylum Seekers"].
[195] *Ibid.* at 901. This status is granted to asylum seekers who demonstrate valid humanitarian reasons for being allowed to remain in the country, but who do not qualify under the Refugee Convention.
[196] *Convention Governing the Specific Aspects of Refugee Problems in Africa*, Organization for African Unity, 10 September 1969, 1001 U.N.T.S. 45 (entered into force 20 June 1974) [OAU Convention].
[197] *Cartagena Declaration on Refugees,* Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/3ae6b36ec.html> [Cartagena Declaration]; Goodwin-Gill, "New Asylum Seekers", *supra* note 194 at 901-902.
[198] See Article 3(3) Cartagena Declaration.

whether or not they fear being harmed for reasons of discrimination"[199]. This does not mean that the protection offered by article 3 of CAT is without its limits. More precisely, based on the objective of this provision and the concept of national protection, "it is fair to suggest that in cases of dual or multiple nationality the prohibition on refoulement does not apply in situations in which the person concerned can obtain protection from another country of which he is a national"[200], since "a person applying for protection from refoulement must first seek protection from his own State rather than a foreign one"[201].

Furthermore, the association of non-refoulement with torture brings its own set of caveats, due to the scope of the definition of torture in article 1 CAT. The definition contains requirements in terms of the intent of the perpetrator, which must be either linked to the interest or policies of the state, or perpetrated by a representative of the state. It also includes requirements regarding the purpose for which torture is practiced[202]. In contrast, the European Court of Human rights, in its judgments on cases involving torture, holds no requirements as to the perpetrators and the motives, but all the cases it was presented with so far involved only torture emanating from state policy[203].

Also, the definition of torture in CAT explicitly excludes pain or suffering inherent to lawful sanctions. This raises issues, as it could not have been intended in the CAT to allow states to disguise torture as a lawful sanction[204]. Indications as to what could not be excluded from the definition, even if labelled a "lawful sanction", lies in the body of decisions from the Committee Against Torture as well as reports of the UN Commission

[199] Cornelis W. Wouters, *International Legal Standards for the Protection from Refoulement* (Oxford: Intersentia, 2009) at 531.
[200] *Ibid.*
[201] *Ibid.*
[202] *Ibid.* 534-535.
[203] *Ibid.* 535.
[204] *Ibid.*

on Human Rights. They have named a number of specific actions that constitute torture regardless of circumstances[205]. Examples include conduct such as extraction of nails, burns, electric shock and deprivation of senses[206].

This thesis is primarily concerned with situations where persecution is perpetrated by the state. However, it also considers situations where the persecutor is unrelated to the state, and the latter is unable to protect its national or resident. Instances of torture in the context of organized crime or domestic violence could potentially fit within this scenario. From the foregoing, it appears that such situations are excluded from the scope of article 3 of CAT. Freshwater uncovered that during the drafting of the CAT, the state parties concluded that "if torture is committed by a private actor, in normal circumstances, the government of the home country should take responsibility for protecting its citizens and punishing the perpetrators"[207]. Apparently, "[the] Convention was intended to deal with the problem that arises when the authorities of a country are involved, a situation in which the normal "machinery of [...] prosecution and punishment" by the home government might not operate to perform its responsibilities with respect to its citizens"[208]. Hence, domestic criminal law is expected to provide for the prosecution of private offenders[209].

This original intention of the drafters of CAT begs the question as to whether it is possible to claim protection under article 3 CAT when the persecutor is unrelated to the

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[205] *Ibid.*
[206] Commission on Human Rights, *Report: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN ESCOR, 42d Sess., UN Doc. E/CN.4/1986/15 (1986), cited in Parsad, *supra* note 175 at 685.
[207] Patricia J. Freshwater, "The Obligation of Non-Refoulement under the Convention Against Torture: When has a Foreign Government acquiesced in the Torture of its Citizens?" (2005) 19 Geo. Immigr. L.J. 585 at 587.
[208] *Ibid.* at 587-588.
[209] McAdam, *supra* note 5 at 115.

state. If the public element is an absolute requirement, article 3 CAT only partially relates to the concept of protection as herein defined, and does not provide complete protection.

The definition of torture in article 1 requires only "consent or acquiescence"[210] of a public official to the practice of torture for the convention to be triggered. The dictionary definition of "acquiescence" is " to accept something reluctantly but without protest"[211]. This suggests that where the perpetrator of torture is not linked with the state, the practice still amounts to torture when the state is aware of it, but fails to intervene. The UN Committee Against Torture and other UN bodies have issued few comments on the intended use of this word. One key comment from the UN Commission on Human rights stated: "A head of State, also in his or her capacity as commander-in-chief, should […] not authorize his or her subordinates to use torture, or guarantee immunity to the authors and co-authors of and accomplices to torture"[212]. This statement supports the interpretation of acquiescence as allowing torture to occur without necessarily instigating it.

Accordingly, a United States Senate resolution stated that "the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity"[213]. A study of the drafting of the definition also reveals that these words were added for the purpose of encompassing acts that are tolerated by the state[214]. Such an interpretation widens the personal scope of the CAT and makes it a legal basis for a

[210] Article 1 CAT.
[211] *New Oxford American Dictionary*, 2d ed., *s.v.* "acquiescence".
[212] Commission on Human Rights, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN GAOR, 59th Sess., UN Doc. A/59/324 (2004).
[213] U.S. *Cong. Rec.* daily ed., vol. 136, 288, at E1445, (1990), cited in Freshwater, *supra* note 207 at 588.
[214] McAdam, *supra* note 5 at 115.

personal claim for asylum motivated by another state's failure to protect, but it still appears to exclude situations where a government acts but does not succeed in preventing the risk of torture.

With all these considerations in mind, the following section is dedicated to a further examination of the rationale behind the qualification of the CAT as a complementary international protection instrument.

3.2.2. Qualification as Complementary Protection

If the CAT can be considered as a source for a complementary protection mechanism, it is only as a result of a modern interpretation of this treaty, since it was initially designed to expand on the general prohibition in article 5 UDHR and article 7 ICCPR and allow for a more effective eradication of torture[215]. Its use as a complementary international protection mechanism appears to stem more from the way it has been implemented in some states and the political pressure it creates, rather than from the objective and text of the treaty itself.

According to McAdam, the requirement of state complicity with torture in article 1 CAT is one that limits the range of article 3 CAT as a source for international protection claims[216]. The lack of clarity as to the lawful sanctions exception adds yet another dent into that protection mechanism[217]. Hence, although the presence of this provision for non-refoulement in the CAT can be considered as a statement in favour of the universality of the principle, and an escape for victims of torture[218], it does not accomplish this in and of itself. Article 3 of CAT depends on actions undertaken by the state in order to be used as

[215] *Ibid.* at 111.
[216] *Ibid.* at 114-116.
[217] *Ibid.* at 116-118.
[218] *Ibid.* at 188

an independent mechanism of protection from the Refugee Convention. McAdam further points out that this article's efficiency is dependent upon recognition of the competence of the Committee Against Torture by state parties:

> Unless a state has made a declaration under article 22 CAT[219] recognizing the competence of the Torture Committee to hear individual claims against the State, it will be very difficult for a person to successfully invoke protection from *refoulement* under article 3. Even if a State's obligations under other international treaties, regional treaties, and customary international law prevent *refoulement*, the relief to which an applicant will be entitled depends on the obligations which the State has implemented domestically, and the mechanisms available for complaints to be

[219] Article 22 CAT reads: "1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party to the Convention which has not made such a declaration.
2.The Committee shall consider inadmissible any communication under this article which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.
1. Subject to the provisions of paragraph 2, the Committee shall bring any communication submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
2. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.
3. The Committee shall not consider any communication from an individual under this article unless it has ascertained that:
   a. The same matter has not been, and is not being examined under another procedure of international investigation or settlement;
   b. The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.
4. The Committee shall hold closed meetings when examining communications under this article.
5. The Committee shall forward its views to the State Party concerned and to the individual.
8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit parties thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration."

brought[220].

At this point, although 108 states have ratified the Convention, only 39 have made a declaration pertaining to the competence of the Committee[221].

Thus, it appears that article 3 of CAT becomes a mechanism for complementary international protection by becoming a source for alternative protection mechanisms on the domestic level and individual claims to the Committee Against torture. The latter is a weaker source of protection, as the Committee's decisions are not binding on a State and cannot be materially enforced.

The power of article 3 of CAT lies in the fact that it universalizes non-refoulement and creates pressure for it to be upheld in domestic legislation. Similarly, the Committee's decisions may still serve as public denunciations of non-compliance with the Convention, and as such, exert a level of political pressure on the states involved. Gorlick remarks that "[not] only has the Committee been able to prevent the *refoulement* of individual asylum seekers who are likely to be subject to torture, but through its State party reporting procedure some States have been prompted to re-examine their laws and practices related to refugee protection"[222]. His scrutiny of the structure of the Committee's decisions on article 3 CAT brought him to the conclusion that the reasoning behind them is similar to refugee status determination decisions at the domestic level[223]. He also raises concerns as to the cases that were turned away by the Committee due to a strict application of the rules contained in article 22 CAT[224]. It may be due to a legitimate concern that the

[220] McAdam, *supra* note 5 at 119.
[221] Brian Gorlick, "The Convention and the Committee againt Torture: A Complementary Protection Regime for Refugees" (1999) 11 Int'l J. Refugee L. 479 at 483.
[222] *Ibid.* at 481.
[223] *Ibid.* at 485-486.
[224] *Ibid.* at 491.

Committee is not meant to be an international appeal board for refugees[225], but it also means that the success of article 3 of CAT as a complementary protection mechanism truly depends on domestic implementation among the state parties.

3.2.3. Exclusions

Beyond the limitations inherent in the definition of torture under the CAT, and those related to the refugee definition underlying article 33 of the Refugee Convention, there is an ongoing doctrinal discussion on exclusions to the principle. Article 3 of CAT is absolute, and non-refoulement contains no exclusions. However, the Refugee Convention defines situations where people are excluded from relying on the right to non-refoulement. I have previously mentioned the *jus cogens* nature of the prohibition of torture. Making sense of the debate on whether non-refoulement may also be considered a *jus cogens* international rule will be primordial for evaluating the extent of Canada's obligations with regards to this principle.

Jean Allain considers that the only way to make sure that states never return any person to another state where they face a risk of torture is to demonstrate that non-refoulement, like torture itself, is a *jus cogens* norm in international law, one which carries no exclusions[226]. He does so by examining state practice, more specifically " [the] practice of States in not forcibly repatriating refugees must […] be shown to be based on the belief (*opinio juris*) that they themselves are bound by a legal obligation not to do so, and that such an obligation is binding on them as a matter of *jus cogens*"[227]. Using many examples of the affirmation of non-refoulement as a *jus cogens* norm in customary

[225] *Ibid.*
[226] Jean Allain, "The *jus cogens* Nature of *non-refoulement*" (2001) 13 Int'l J. Refugee L. 533 at 533-534.
[227] *Ibid.* at 538.

international law, while downplaying the importance of violations of the rule, Allain insists that non-refoulement is indeed a rule without exceptions[228].

Although Allain's view is based on highly detailed research and analysis, it considers only the refugee protection regime, and the right of non-refoulement of refugee claimants. It demonstrates that the identification of "safe third countries"[229] may easily lead to refoulement of refugees by limiting their ability to make claims[230], but it fails to consider the expressly stated exclusions in article 33(2) of the Refugee Convention and how they, in fact, may lead to refoulement[231]. Neither does his argument include a discussion on the existence of exceptions to non-refoulement as applied in article 3 of CAT. In spite of the importance of customary international law in determining a state's obligations, it is important to consider that written exclusions might be integrated into international legal instruments, and to evaluate to what extent states may avail themselves of such exclusions.

There are two exclusions in article 33(2) of the Refugee Convention, which are evaluated with respect to the country of asylum. The first is that there are reasonable grounds for believing the person to be a danger to the country in which they seek asylum, and the second is that the claimant has been convicted by a final judgment of a particularly

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[228] *Ibid.* at 540-541.

[229] "Safe third countries", generally, are countries which are considered to meet international standards for the protection of refugees. As such, claimants coming to a country of refuge from these states are returned to the country through which they transited, as they are expected to make a protection claim in the first safe country they reach. For instance, Canada has entered a Safe Third Country Agreement with the United States, in accordance with ss. 101 and 102 IRPA: *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries*, 2002.

[230] Allain, *supra* note 226 at 554.

[231] Article 33(2) reads: 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

serious crime. The two are separate and alternative[232]. The threshold necessary to consider the refugee as a threat to the security of the country is considered by scholars to be very high. For example, Bruin and Wouters state:

> Although Article 33 (2) Refugee Convention does not specify the facts and circumstances that constitute a danger to the national security and leaves a margin of appreciation for States, the Article does demand a level of risk substantiated by proof. The threshold is high. It applies to persons who try to overthrow the government by force or other illegal means, who are endangering the constitution, the territorial integrity, the independence or the peace of the country of refuge.[233]

Examples of serious crimes for which conviction leads to exclusion mentioned by drafters of the Refugee Convention include rape, homicide, armed robbery and arson[234], and the criminal conviction must result from a final judgment. A claimant may also be denied refugee status through the exceptions in article 1(F) of the Refugee Convention[235]. The latter requires a lower standard of proof, but the claimant must be believed to have committed a serious non-political crime, a war crime or acts contrary to the purposes and principles of the United Nations[236]. Duffy qualifies these exclusions in the following manner.

> [The] stipulated exclusions are extremely limited and were meant to target only those who had committed an 'indisputably wrong act', extraditable criminals, or in 1(F)(a) those who are believed to have committed, 'a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such

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[232] James C. Hathaway & Colin J. Harvey, "Framing Refugee Protection in the New World Disorder" (2001) 34 Cornell Int'l L.J. 290, cited in Aoiffe Duffy, "Expulsion to face Torture? Non-Refoulement in International Law" 20 Int'l J. Refugee L. 375.
[233] Rene Bruin & Kees Wouters, "Terrorism and the Non-Derogability of Non-Refoulement" 15 Int'l J. Refugee L. 5, at 18.
[234] Duffy, *supra* note 232 at 375
[235] *Ibid.*
[236] *Ibid.*

crimes'.[237]

As such, these exceptions should only apply to a relatively small subset of asylum seekers.

The above grounds for refoulement are in apparent contradiction to the formulation of non-refoulement in article 3 of CAT, which contains no explicit exclusions. Scholars affirm that its main feature is that it is absolute and non-derogable[238]. Indeed, the Committee Against Torture has stated that the principle of non-refoulement, when it comes to torture, applies even to those associated with terrorism[239]. This view also benefits from some scholarly support. Duffy states:

> It could be argued that *non-refoulement* is a fundamental component of the customary prohibition on torture and cruel, inhuman and degrading treatment or punishment. With 90 per cent of the world's sovereign states party to a treaty which prohibits *refoulement* in some shape or form, does this sufficiently establish the normative status of *non-refoulement* in international law? The incorporation of this principle into key international instruments is also testament to consistent practice and a strong *opinio juris* which contributes to the creation of a customary norm[240].

The qualification of non-refoulement as a strong component of the prohibition on torture implies that this prohibition cannot be respected as *jus cogens* if refoulement to states that practice torture persists. The link between non-refoulement and the prohibition on torture makes a strong point for the *jus cogens* nature of non-refoulement.

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[237] *Ibid*. at 376.
[238] McAdam, *supra* note 5 at 118; Duffy, *supra* note 232 at 379-380.
[239] Duffy, *supra* note 232 at 385; Committee Against Torture, *Report of the Committee Against Torture*, UN GAOR, 41st Sess., Supp. No. 44, UN Doc. A/64/44 (2009) at 27 and 118, The Committee reaffirms this opinion in several comments on state reports, including those from China and the Philippines.
[240] Duffy, *supra* note 232 at 384.

In order to reconcile the existence of exclusions in one of the instruments with the absolute and non-derogable character of the other, it is possible to conclude that exclusions are possible even when a person would fit the definition of refugee and face persecution, as long as this persecution does not amount to torture. This opinion has garnered support among scholars, some of whom also include other cruel, inhuman or degrading treatment or punishment in the types of persecution that preclude refoulement[241]. In cases where torture or cruel, inhuman and degrading treatment or punishment are not involved, a balancing test between the risk of persecution faced by the claimant and the risk the claimant potentially presents to the country of refuge may be done by courts to determine if removal is allowed[242].

Furthermore, states have been known to rely on diplomatic assurances that the asylum seeker will not be subject to torture when returned to another state. This practice has been submitted to the scrutiny of the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment[243]. The Rapporteur's report asserts that diplomatic assurances should not be used to get around the absolute rule of non-refoulement. The main problem is the absence of certainty that both parties are making the agreement in good faith and that it will not be breached. There are no mechanisms to sanction such agreements and they are not legally binding[244].

In addition, within a context of complementary international protection, a diplomatic assurance may be given by a state that is willing to protect the individual, but still unable

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[241] Sir Elihu Lauterpacht & Daniel Bethlehem, "The Scope and Content of the Principle of *Non-refoulement"* (2001) *Opinion for UNHCR's Global Consultations* 147; Hathaway & Harvey, *supra* note 232, cited in Bruin & Wouters, *supra* note 233 at 20-21.
[242] *Ibid.*
[243] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN GAOR, 60th Sess., UN Doc. A/60/316 (2005).
[244] *Ibid.*

to do so. A person may be in need and deserving of protection by the state of asylum despite a diplomatic assurance. This, and all other foregoing considerations with regards to non-refoulement will be assessed against Canadian domestic law to see if it is in tune with its international obligations as a state of asylum.

3.3.Integration into Canadian Law

3.3.1. Inclusion of Non-Refoulement within Canadian Legislation

One object of this thesis is to apply the international obligations sketched out in the previous section to Canadian domestic law, with a view to evaluating our state's compliance with the treaty obligations it set out to uphold. Having ratified both the Refugee Convention[245] and the Convention Against Torture[246], Canada has undeniable obligations to respect the principle of non-refoulement, both towards refugees and other persons seeking protection. I have discussed the principle of non-refoulement as articulated in both international instruments in order to better assess the concept itself, but this section is concerned with the inclusion of the non-refoulement obligations under the CAT into alternative protection mechanisms in Canada.

Although not explicitly written as such, section 97 IRPA is arguably an embodiment of non-refoulement in Canadian law[247]. The existing scholarly analysis of this section is very limited, but it does suggest it is the main legislative expression of complementary international protection in this country. At this point, it might be helpful to reiterate the text of section 97 IRPA.

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[245] Status of ratification, online: UNTS <http://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V%7e2&chapter=5&Temp=mtdsg2&lang=en>, accessed May 10, 2010; ratified June 4, 1969.
[246] Status of ratification, online: UNTS <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en>, accessed May 10, 2010; ratified June 24 1987.
[247] Nicole LaViolette, "La *Loi sur l'immigration et la protection des réfugiés* et la définition internationale de la torture" (2004) 34 R.G.D. 587 at 595; see also McAdam, *supra* note 5 at 129-130.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

At first glance, subsection 97(1)(a) contains all the elements of the principle of non-refoulement, as it precludes the return of an individual to a country where they face torture within the meaning of article 1 of CAT. This rule thus carries the same limitations on state-related perpetrators and lawful sanctions, as the CAT itself.

I have observed earlier that the Canadian delegation had expressed disappointment as to the fact that cruel, inhuman or degrading treatment or punishment had been excluded from article 3 of CAT, which establishes the absolute principle of non-refoulement. It is consistent with this sentiment that non-refoulement in subsection 97(1)(b) expands to a risk to life or of cruel and unusual treatment or punishment. Subsection 97(1)(b)(iii) also mirrors the definition of torture in CAT by including the limitation related to lawful

sanctions. However, new limitations are added through subsections 97(1)(b)(ii) and 97(1)(b)(iv), which require that the risk be personalized and that it not be caused by the inability of the country to provide adequate healthcare.

Interestingly, subsection 97(1)(b)(i) rejects the limitation as to state actors, opting instead to call for proof that the other state be unable or unwilling to protect the claimant. In doing so, it clearly and explicitly makes the concept of "person in need of protection" analogous to the definition of refugee, by integrating the concept of protection as it is seen in international refugee law. On the other hand, nowhere in subsection 97(1) is there mention of non-refoulement or article 3 of CAT, which contains this rule and proclaims its peremptory nature. Non-refoulement is only explicitly guaranteed by Canadian legislation once a claim has been processed and protection granted[248]. It is possible that these references have been overlooked in order to avoid the absolute nature of non-refoulement and to allow for exceptions regarding individuals whose status has yet to be determined.

Hence, it appears that the idea behind section 97 IRPA was to integrate non-refoulement as it is articulated in the Refugee Convention, while widening its personal scope and using the CAT to clarify the notion of torture. This interpretation is strengthened by the text of section 98 IRPA which states that "[a] person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of

[248] Immigration and Refugee Board of Canada, *Consolidated Grounds in the Immigration and Refugee Protection Act - Persons in Need of Protection: Danger of Torture*, 15 May 2002, online: < http://www.irb.gc.ca/Eng/brdcom/references/legjur/rpdspr/cgreg/lifevie/Pages/index.aspx> at 3 [IRB, *Consolidated Grounds*]: "A person determined by the Board to be a Convention refugee or a person in need of protection is conferred refugee protection pursuant to s. 95(1)(b). […] Refugee protection affords the same rights pursuant to the *IRPA* as those granted to Convention refugees pursuant to the *Immigration Act.*2 Those rights include the right of *non-refoulement* and the right to apply for permanent residence."

protection"[249]. It is possible that these sections have been chosen because they allow rejection of claimants without assessment of their refugee or protection claims. This contrasts with paragraph 33(2), which allows for the exclusion of claimants after assessment of their claims if their prolonged stay in the country of refuge presents a threat[250].

Hathaway and Harvey have extensively analyzed the article 1(E) and 1(F) exclusions that are mentioned in section 98 IRPA. They warn against the use of the article 1(F) exclusion on serious criminality, arguing that "in relying on the peremptory Article 1(F) procedure to deny refugee status for safety and security reasons that are relevant only to an application to authorize *refoulement* under Article 33(2), governments contravene international refugee law"[251]. They suggest that governments may be tempted to apply only the article 1(E) or article 1(F) exclusions, and to apply it to a wider range of criminal offences than it is allowed by international refugee law. They explain the importance of meeting the procedural standards for the application of exclusions in these terms:

> Governments are entitled to invoke an expansive range of concerns to justify a denial of protection on the grounds of safety or security, but only if they are prepared to meet the more demanding procedural requirements of Article 33(2). States that act under Article 1(F) to vindicate safety and security interests effectively demand the best of both worlds, denying the critical balance at the heart of the Refugee

[249] Sections E and F of the Refugee Convention: "E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.
F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."
[250] Hathaway & Harvey, *supra* note 232 at 259-260.
[251] *Ibid.* at 260.

Convention between refugee rights and asylum-state interests[252].

I return to this exclusion in the next subsection to determine if Canada has only applied section 98 IRPA to serious criminals, as it should.

The only other provision similar to paragraph 33(2) of the Refugee Convention is section 115 IRPA[253], which targets individuals already recognized as refugees and carries similar exclusions on grounds of serious criminality. It is also labelled as the "principle of non-refoulement" within the Act. It is thus arguable that the Act meant to include non-refoulement in its oldest sense, that is, non-removal of persons who already benefit from refugee status, without applying it to other persons whose status determination is pending. This section entitles the Minister to issue a "danger opinion" on refugees who possess a criminal record, which balances the level of risk the refugee represents for Canadian society against the risk he faces if returned to his country of origin or nationality[254]. If the former outweighs the latter, the refugee may be deported.

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[252] *Ibid.*

[253] Section 115 IRPA: "(1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.
(2) Subsection (1) does not apply in the case of a person
(*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or
(*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.
(3) A person, after a determination under paragraph 101(1)(*e*) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection."

[254] See *Ragupathy v. Canada (Minister of Citizenship & Immigration)*, 2006 FCA 151, [2007] 1 F.C.R. 490.

3.3.2. Use of the Principle of Non-Refoulement in Canadian Case Law

Perhaps one of the most important ways of evaluating the extent of Canada's obligations as well as compliance with these obligations, is to look into the legal opinions expressed by domestic courts. In relation to the prohibition of refoulement to a state where there is a risk of torture, the *Suresh*[255] and *Pushpanathan*[256] cases are fundamental, as they reflect the Supreme Court's opinion on both Canada's international obligations, and the way they should be implemented domestically.

In the *Suresh* case, the appellant had already gained refugee status and was facing deportation due to his allegiance to an allegedly terrorist organization. His contention was that he would face torture if he were returned to Sri Lanka. Despite his having already obtained refugee status in Canada, the reasoning of the Court with regards to non-refoulement may be equally applicable to persons seeking protection in Canada. Interestingly, the Court addresses the apparent contradiction between the exclusions in the Refugee Convention and the peremptory nature of non-refoulement in the CAT, and seems to conclude that the latter prevails. The Court thus presented its analysis of the scope of the CAT:

> It is not apparent to us that the clear prohibitions on torture in the CAT were intended to be derogable. First, the absence of an express prohibition against derogation in Art. 3 of the CAT together with the "without prejudice" language of Art. 16[257] do not

[255] *Suresh v. Canada (Minister of Citizenship & Immigration),* 2002 SCC 1, [2002] 1 S.C.R. 3, 18 Imm. L.R. (3d) 1 [*Suresh*].
[256] *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] S.C.R. 982, 43 Imm. L.R. (2d) 117 [*Pushpanathan*].
[257] Article 16 CAT: "1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

> seem to permit derogation. Nor does it follow from the assertion in Art. 2(2) of CAT[258] that "[n]o . . . exceptional circumstances . . . may be invoked as a justification of torture," that the absence of such a clause in the Art. 3 refoulement provision permits acts leading to torture in exceptional circumstances. Moreover, the history of Art. 16 of the CAT suggests that it was intended to leave the door open to other legal instruments providing greater protection, not to serve as the means for reducing protection. During the deliberations of the Working Group that drafted the CAT, Art. 16 was characterized as a "saving clause affirming the continued validity of other instruments prohibiting punishments or cruel, inhuman, or degrading treatment": *Convention against Torture, travaux préparatoires*, at p. 66. This undermines the suggestion that Art. 16 can be used as a means of narrowing the scope of protection that the CAT was intended to provide.[259]

Further on, the Court affirms, based on these arguments as well as recommendations from the UN Committee Against Torture, that the CAT should be considered as the prevailing international instrument over the Refugee Convention. It would indeed make little sense to deny refugees rights that the CAT provides to all individuals without discrimination[260]. From this, the Court reaches the conclusion that international law prohibits deportation to torture regardless of national security interests[261].

Following the Court's insightful analysis on the contradictions of international law on non-refoulement, their analysis under the *Canadian Charter of Rights and Freedoms* opens the door to exclusions to that principle.

> We conclude that generally to deport a refugee, where there are grounds to believe

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2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion."

[258] Article 2(2) CAT: "No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture."

[259] *Suresh*, *supra* note 255 ¶ 71.

[260] *Ibid.* ¶ 72-73

[261] *Ibid.* ¶ 75.

> that this would subject the refugee to a substantial risk of torture, would unconstitutionally violate the *Charter*'s s. 7 guarantee of life, liberty and security of the person. This said, we leave open the possibility that in an exceptional case such deportation might be justified either in the balancing approach under ss. 7 or 1 of the *Charter*.[262]

This particular passage has been the subject of vehement criticism[263]. One of the voices that rose up against it is the UN Committee Against Torture, which expressed concern at the Court's failure to recognize the absolute nature of the principle of non-refoulement in this case[264]. In the Committee's opinion, no deportation to torture can be justified under section 1[265] or 7[266] of the Charter, which makes the Court's analysis an open door to violations of international law.

The Court's reasoning may be linked with the UNHCR's involvement as an intervener in the *Suresh* case[267]. Its participation was justified by its mandate in overseeing the application of treaties relating to refugees. In the factum submitted to the Supreme Court of Canada, the UNHCR emphasizes the need to apply the Refugee Convention along with the Convention Against Torture and ICCPR, thus underlining the interplay between refugee law and human rights. The UNHCR contends that an interpretation of international law is the key to interpreting domestic law within this case[268]. The High

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[262] *Suresh*, *supra* note 255 ¶ 129.
[263] McAdam, *supra* note 5 at 130.
[264] UN Committee Against Torture, *Conclusions and recommendations of the Committee against Torture: Canada*, UN CAT, 34th Sess., UN Doc. 07/07/2005. CAT/C/CR/34/CAN (2005).
[265] Article 1 of the Charter: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
[266] Section 7 Charter: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
[267] *Suresh*, *supra* note 255.
[268] UN High Commissioner for Refugees, *Manickavasagam Suresh (Appellant) and the Minister of Citizenship and Immigration, the Attorney General of Canada (Respondents). Factum of the Intervenor,*

Commissioner's factum recognizes that the prohibition on refoulement in article 3(1) of CAT is absolute, while that of article 33 of the Refugee Convention contains exclusion. However, it puts forth the idea that the CAT prevails on the Refugee Convention, based on three arguments. The first reason is the fact that it was ratified later[269]. Also, the factum states that treaties are to be interpreted in accordance with the evolving international human rights context[270], and finally, that article 5 of the Refugee Convention opens to more benefits being allotted to individuals through other treaties[271]. However, through an application of the proportionality test[272] developed in the *Oakes*[273] case, the UNHCR concludes: "*refoulement* can only be justified under article 33(2) of the *Refugee Convention* if there is a very serious threat to the security of the country of refuge that is proportional to the risk faced by the refugee upon *refoulement*"[274]. The UNHCR's position could thus have been the basis for the Supreme Court's decision to

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United Nations High Commissioner for Refugees ("UNHCR"), 8 March 2001, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/3e71bbe24.html> [UNHCR *Factum*].

[269] *Ibid.* at 6: "[Articles] 30(3) and (4) of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*") provide that where states have each ratified successive treaties that relate to the same subject matter, the later treaty prevails in relations between those states".

[270] *Ibid.*, at 7: "[Article] 31(3)(c) of the *Vienna Convention* provides that in the interpretation of a treaty, "there shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties" […]These rules of interpretation make clear that treaty provisions such as article 33(2) of the *Refugee Convention* are intended to be interpreted within the evolving context of international human rights law, which includes the article 3(1) prohibition against *refoulement* to torture."

[271] Article 5 Refugee Convention: "Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention."

[272] UNHCR *Factum*, *supra* note 268 at 13: "Like the *Oakes* test, a decision-maker applying article 33(2) should be required to assess: (a) first, whether the danger to the security constitutes a sufficiently serious danger to the country of refuge; and (b) second, whether the *refoulement* of the refugee is a proportional response to this danger. With respect to the sufficiency of the danger, UNHCR's position is that the danger must be: (a) a danger to the country of refuge; and (b) a very serious danger. With respect to proportionality, UNHCR's position is that: (a) there must be a rational connection between the removal of the refugee and the elimination of the danger; (b) *refoulement* must be the last possible resort to eliminate the danger; and (c) the danger to the country of refuge must outweigh the risk to the refugee upon refoulement."

[273] *R. v. Oakes*, [1986] 1 S.C.R. 103.

[274] UNHCR *Factum*, *supra* note 268 at 2.

allow for the application of this rule and allow for exceptions to non-refoulement[275]. In addition, section 1 of the Charter is only used to save any section 7 violation in exceptional circumstances. Also, the UNHCR's brief does not account for the court's opinion that exceptions to the principle of non-refoulement can be created through the fundamental justice balance in section 7 as well as under section 1 of the Charter.

The other Supreme Court case worth mentioning in an analysis of complementary protection based on non-refoulement is *Pushpanathan*. Of particular interest in this case is the Court's majority opinion on the difference between article 33 of the Refugee Convention and article 1F of the same Convention.

> Article 1F(b) contains a balancing mechanism in so far as the specific adjectives "serious" and "non-political" must be satisfied, while Article 33(2) as implemented in the Act by ss. 53 and 19[276] provides for weighing of the seriousness of the danger posed to Canadian society against the danger of persecution upon *refoulement*. This approach reflects the intention of the signatory states to create a humanitarian balance between the individual in fear of persecution on the one hand, and the legitimate concern of states to sanction criminal activity on the other. The presence of Article 1F(b) suggests that even a serious non-political crime such as drug trafficking should not be included in Article 1F(c). This is consistent with the expression of opinion of the delegates in the *Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees*, vol. III, 86, at p. 89.[277]

Hence, it would appear that article 1(F) distinguishes itself from article 33 by adding criteria to the process of determining whether a person is a refugee or a person in need of protection. Since the status granted to both categories of claimants under IRPA is the

[275] *Suresh*, *supra* note 255 ¶ 129.
[276] Immigration Act, R.S.C. 1985, c. I-2, s. 19 and 53, now section 115 IRPA.
[277] *Pushpanathan*, *supra* note 256 ¶ 73.

same[278], it would appear logical to create an alternative protection mechanism without compromising on the requirement that the protected person cannot be a persecutor. Adversely, article 33 would be concerned with the refoulement of refugees (or protected persons, since they benefit from the same legal status) once protection has been granted.

Unfortunately, the Supreme Court has not yet had the opportunity to analyze section 97 IRPA's compliance with Canada's international obligation of non-refoulement. The Federal Court has nevertheless made a brief statement on the relationship between section 97 IRPA and article 3 CAT.

> Paragraph 97(1)(a) of the Act refers specifically to the notion of torture contained in Article 1 of the Convention and therefore integrates the principles contained in Article 3 of the Convention. Consequently, the answer to this question is contained in the law itself and does not require certification.[279]

This statement has then been incorporated into subsequent judgments by the federal court[280]. It reflects a position that had been adopted before the enactment of section 97 IRPA, according to which article 3 of CAT is only concerned with individuals who have

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[278] Section 95 IRPA: "(1) Refugee protection is conferred on a person when:
(*a*) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;
(*b*) the Board determines the person to be a Convention refugee or a person in need of protection; or
(*c*) except in the case of a person described in subsection 112(3), the Minister allows an application for protection."

[279] *Sidhu v. Canada (Minister of Citizenship & Immigration)*, 2004 FC 39, 128 A.C.W.S. (3d) 559 ¶ 26.

[280] See *Choudhary v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 412, 166 A.C.W.S. (3d) 1124 ¶ 25 : "It cannot therefore be said, as argued by the applicants, that the PRRA decision in this case violates either the Convention Against Torture or the *Charter*. This argument does not stand the analysis of subsection 97(1) of the *Act* which refers specifically to torture and is therefore the basis of an effective assessment pursuant to Canada's international obligations (*Sidhu*)"; *Colindres c. Canada (Minister of Citizenshup and Immigration)*, 2007 FC 717, 160 A.C.W.S. (3d) 1046 ¶ 25: "As to the applicant's argument that the PRRA officer infringed article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention), section 97 of the IRPA, which was the basis for the analysis by the PRRA officer under paragraph 113(*d*), incorporates the principles set out in article 3 of that Convention. In particular, section 97 prohibits the removal of an individual to a country where he or she is at risk of mistreatment, torture or death, which is precisely the kind of protection that article 3 of the Convention requires (see *Li v. Canada (Minister of Citizenship & Immigration)*, 2005 CAF 1 (F.C.A.))."; *Martinez c. Canada (Minister of Citizenship and Immigration)*, 2010 FC 31, [2010] F.C.J. No. 41.

gone through the determination process and have been denied refugee status[281]. In practice, this means that claimants who are denied a hearing to decide whether they are refugees or persons in need of protection, based on the exclusions of section 98, cannot claim that their right to non-refoulement has been violated.

Hence, the right to non-refoulement is almost absolute, as determined in the *Suresh* case, for persons who are allowed to present their refugee claims. However, courts have found that it can be subject to exceptions in the context of pre-removal risk assessment (PRRA)[282]. PRRA is a process by which a person may apply for protection when they are about to be returned[283], and the determination of risk is made based on the criteria in

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[281] *Sandhu v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 902, 258 N.R. 100, 99 A.C.W.S. (3d) 304 ¶ 2: "In our opinion, Dubé J. was right to conclude that art. 3 of the Convention Against Torture and Other Cruel or Degrading Treatment or Punishment […] is concerned with the return stage, and accordingly a stage of the process which is subsequent to the stage at which refugee status is determined by the Refugee Division (see *Barrera v. Canada (Minister of Employment & Immigration)* (1992), [1993] 2 F.C. 3 (Fed. C.A.))."; *Shephard c. Canada (Ministre de la Citoyenneté & de l'Immigration)* : "The first question was determined by the Federal Court of Appeal in *Xie*, *supra*, note 282 ¶ 39, when it found that denying an individual referred to in paragraph 1F of the Convention the right to have a refugee claim heard on the merits before the RPD does not violate section 7 of the Charter; *a fortiori*, therefore, it does not violate article 3 of the *Convention against Torture*, which applies only, as discussed earlier, at the removal stage."

[282] *Xie v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, [2005] 1 F.C.R. 304 ¶ 33 [*Xie*]: "That is the structure of the Act as it relates to the determination of claims for protection. It has two streams, claims for refugee protection and claims for protection in the context of pre-removal risk assessments. Those who are subject to the exclusion in section 98 are excluded from the refugee protection stream but are eligible to apply for protection at the PRRA stage. The basis on which the claim for protection may be advanced is the same, but the Minister can have regard to whether the granting of protection would affect the safety of the public or the security of Canada. If protection is granted, the result is a stay of the deportation order in effect against the claimant. The claimant does not have the same access to permanent resident status as does a successful claimant for refugee protection."

[283] Section 112(1) and (2) IRPA: "112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).
(2) Despite subsection (1), a person may not apply for protection if
(*a*) they are the subject of an authority to proceed issued under section 15 of the *Extradition Act*;
(*b*) they have made a claim to refugee protection that has been determined under paragraph 101(1)(*e*) to be ineligible;
(*c*) in the case of a person who has not left Canada since the application for protection was rejected, the prescribed period has not expired; or
(*d*) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

sections 96 to 98 IRPA[284]. There are also circumstances under which the application for protection may only result in stay of removal, such as serious criminality or a violation of human rights[285]. The Federal Court's opinion in *Xie* is that individuals excluded under section 98 IRPA, which provides for rejection based on article 1(F) of the Refugee Convention, can make a claim for protection under section 112 and obtain stay of removal, but they are meant to be rejected from refugee protection[286]. This opinion was followed and referred to with approbation in several other cases[287]. This means that a person who is excluded under section 98 IRPA can demonstrate that they should not be returned, but they are not allowed protection as herein defined.

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[284] Consideration of an application for protection shall be as follows: (*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;
(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;
(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;
(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and
(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or
(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

[285] Section 112(3) IRPA: "(3) Refugee protection may not result from an application for protection if the person:
(*a*) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;
(*b*) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;
(*c*) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or
(*d*) is named in a certificate referred to in subsection 77(1)."

[286] *Xie*, *supra* note 282 ¶ 36.

[287] See *Li v. Canada (Minister of Citizenship and Immigration)*, 2010 FCA 75, 317 D.L.R. (4th) 447; *Liu v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 877, 83 Imm. L.R. (3d) 228; *Altenor c. Canada (Minister of Citizenship and Immigration)*, 2009 FC 563, [2009] F.C.J. No. 732; *X, Re* (20 May 2005), IRB Decision VA6-03502, online: CanLII (IRB) <http://www.canlii.org/en/ca/irb/doc/2008/2008canlii4959/2008canlii49549.html>; *Ivanov v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1210, 261 F.T.R. 211.

From these observations, it appears that the Federal Court is trying to minimize Canada's international obligations in order to reconcile them with the structure of the IRPA, rather than reassess the validity of the IRPA as part of an international legal framework. The Supreme Court judgments in *Suresh* and *Pushpanathan* are also flawed as they open to the possibility of individuals being returned to torture. They were based on legislation which was repealed with the adoption of the new IRPA in 2001, but these findings have not been readjusted by the Federal Court in light of the legislative reform and the adoption of sections 97 and 98 IRPA, which have added new protection provisions. This adds difficulty to the interpretation and application of these new provisions.

From this analysis of the implementation of the prohibition on torture and refoulement in the IRPA, this thesis now turns to the examination of how civil and political rights generally impact on traditional and alternative protection mechanisms.

Chapter 4. General Protection Based on Civil and Political Rights

Classic refugee protection is a palliative regime, which appears to draw inspiration from civil and political rights as it expands from the non-discrimination provision in article 2 of the UDHR[288], to a measure preventing persecution based on discriminatory grounds[289]. Just as article 2 was meant to guarantee all other rights contained in the UDHR irrespective of civil and political status, the Refugee Convention aims to guarantee the possibility to reside in a state which guarantees core rights to persons of all races, religions, nationalities, political opinions or social groups. In spite of this apparent connection between refugee protection and civil and political rights, there may be persisting protection gaps between the 1951 Refugee Convention and the International Covenant on Civil and Political Rights which entered into force in 1976. This chapter identifies such protection gaps, and finds out if and to what extent the ICCPR can be used as a complementary protection mechanism.

Although I have dealt extensively with the principle of non-refoulement in Chapter 3, the CAT is not the only instrument that guarantees it. Therefore, in the first section, I examine which rights in the ICCPR are applicable to refugees, starting with non-refoulement and how its scope differs from that in CAT. I then examine other refugee-specific rights contained in the ICCPR. I conclude the first section by examining a few regional human rights and refugee protection instruments and making sense of them in light of civil and political rights. This sets up the framework for the second and last

[288] Article 2 UDHR: "Everyone 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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."
[289] James C. Hathaway, "Reconceiving Refugee Law as Human Rights Protection", (1991) 4 Journal of Refugee Studies 112 at 120-121.

section, in which I look at how the ICCPR is interpreted in light of the *Canadian Charter of Rights and Freedoms* and the IRPA, as well as in specific case law regarding refugee protection and removal orders.

4.1. Refugee-Specific Rights in the ICCPR

4.1.1. Non-Refoulement through the ICCPR

Most discussions of the principle of non-refoulement include article 7 ICCPR[290]. It provides for a general prohibition of torture, but makes no explicit mention of asylum or the principle of non-refoulement. The link to non-refoulement has been created by case law and opinions from the Human Rights Committee, which is the implementing body of the Covenant. Interestingly, the Committee has recognized that return to a country where an individual faces a risk of torture, or cruel, inhuman or degrading treatment or punishment would be contrary to provisions of the ICCPR in two important cases out of Canada.

In *Ng v. Canada*[291], the applicant faced extradition to the United States, where he was likely to be subject to the death penalty by asphyxiation. In this situation, the Committee decided that the treatment he was likely to be subjected to was in violation of article 7 ICCPR, and therefore challenged the legality of the extradition from which this treatment would result. In *Judge v. Canada*[292], however, no violation of article 7 was recognized, but the Committee concluded that the extradition of the claimant to face the death penalty

[290] Article 7 ICCPR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."
[291] Human Rights Committee, *Charles Chitat Ng v. Canada*, HRC, 49th Sess., UN Doc. CCPR/C/49/D/469/1991 (1994) [*Ng*].
[292] Human Rights Committee, *Roger Judge v. Canada*, HRC, 78th Sess., UN doc. CCPR/C/78/D/829/1998 (2003).

in the United States would violate the right to life embodied in article 6 ICCPR[293]. It is not clear from such interpretations that they translate into asylum mechanisms, but it has been argued that the adoption of the CAT cemented the ICCPR as a basis for protection claims[294].

Wouters argues that article 2(1) ICCPR[295] enables the principle of non-refoulement contained in articles 6 and 7 ICCPR by outlining a far reaching personal scope for the rights contained in the Covenant. The absence of limitations as to the legal, political or social status opens to the possibility of protection from refoulement to individuals who do not benefit from refugee status[296]. From this reasoning, it becomes plausible that these articles of the ICCPR may be used to protect persons without distinctions.

The territorial scope of article 2(1) remains limited by the addition of the words "within its territory and subject to its jurisdiction", which were interpreted in light of the object of the Covenant and with a view to avoid absurd results in the application of the Covenant

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[293] Article 6 ICCPR: "1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide.1 This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."
[294] Tom Clark, "Rights Based Refuge , the Potential of the 1951 Convention and the Need for Authoritative Interpretation" (2004) Int'l J. Refugee L. 584 at 591.
[295] Article 2(1) ICCPR: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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."
[296] Wouters, *supra* note 199 at 369.

rights as referring to individuals within the state party's territory *or* subject to its jurisdiction[297]. For asylum seekers, this means that their rights should be protected by the country where they seek refuge. The Human Rights Committee also remains a strong source for the interpretation of the territorial scope of the Covenant[298]. In relation to non-refoulement, Wouters summarizes the Committee's opinion and its implications.

> According to the Committee, while States are responsible for guaranteeing the rights of the Covenant to all individuals under their control when it comes to the prohibition on refoulement the State has an obligation only not to remove those individuals from within its territory. This would imply that no obligations exist towards people who are not within the State party's territory. This would, for example, exclude individuals who were at the de facto border of the States [and] individuals seeking asylum at the embassy of the State party […].[299]

According to Wouters, these examples may be considered as situations where the state party has effective control over the individuals, and as such, may qualify as instances where the state has jurisdiction. However, this argument is not explicitly accounted for by the official sources of interpretation for the Covenant[300]. Nonetheless, one may conclude that Canada has an undeniable obligation to uphold the rights defined in articles 6 and 7 ICCPR as well as an obligation not to put these rights at risk by returning individuals to a country where they are threatened.

In terms of the material scope of the protection from refoulement derived from the ICCPR, the most eye-catching feature is that article 7 ICCPR prevents both torture and cruel, inhuman or degrading treatment or punishment. As such, it is said to widen the

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[297] *Ibid.* at 370-371.
[298] Human Rights Committee, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, HRC, 80th Sess., UN Doc. CCPR/C/21/Rev.1/Add.1 (2004) ¶ 2, cited in Wouters, *supra* note 199 at 575.
[299] Wouters, *supra* note 199 at 576.
[300] *Ibid.*

material scope of article 3 CAT[301]. According to the HRC, "[it] is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity"[302]. Because of article 7, the ICCPR can even be said to be complementary within the realm of complementary international protection. It strengthens and adds substance to complementary protection mechanisms by forging far-reaching fundamental rights and principles.

McAdam, however, takes a somewhat contrary position and argues that the ICCPR is "the least suitable instrument for complementary protection"[303]. She considers that "[although] some ICCPR rights are [relatively] expansive, and the HRC's proceedings are comparatively shorter and its views simpler, these do not outweigh its restrictive evidence, inconsistent reasoning, and the fact that it has considered comparatively few removal cases"[304]. She comes to this conclusion by setting it against the European Convention on Human Rights (ECHR), a status-granting regional instrument.

This rejection of the ICCPR as a complementary international protection mechanism because of the flawed procedure of its implementing body and its inability to grant status appears to be inconsistent with her assessment of the CAT, which she qualifies as a complementary protection mechanism. Although the Committee attached to the CAT seems to be more effective and the subject of less criticism, the fact that it has high

[301] McAdam, *supra* note 5 at 136.
[302] Human Rights Committee (UN), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, HRC, 44th Sess. (1992), online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/453883fb0.html>.
[303] Hélène Lambert, "Protection against *Refoulement* from Europe: Human Rights Law Comes to the Rescue" (1999) 48 I.C.L.Q. 515 at 524, cited in McAdam, *supra* note 5 at 139.
[304] McAdam, *supra* note 5 at 139-140.

requirements to hear a case strongly suggests that it is not meant to be the main recourse for individuals seeking relief under the CAT. The HRC presumably serves a similar purpose as a last resort when state jurisdictions do not recognize violations of ICCPR-based rights.

The HRC has also issued a series of general comments on the interpretation and application of the ICCPR, one of which makes a statement on the principle of non-refoulement.

> [The] article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.[305]

The Committee then goes on to specify that the domestic legislation of the state parties should be made to comply with this principle and to give effect to other ICCPR rights[306]. Additionally, in case of discrepancy between the national and international laws, domestic legislation should be adjusted to fit into the ICCPR framework[307].

As such, both treaties prevent refoulement, but do not create a status resulting from non-refoulement. The CAT only goes further than the ICCPR in stating the prohibition of refoulement in explicit terms. They both depend on state parties to create such status and

[305] *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, *supra* note 298 ¶ 12.
[306] *Ibid.* ¶ 13.
[307] *Ibid.*

implement stronger domestic provisions to strengthen these international human rights. In my view, both instruments can be qualified as complementary international protection instruments that depend upon the creation of alternative protection mechanisms on the domestic level in order to be fully effective.

4.1.2. Other Refugee-Specific Rights in the ICCPR

Non-refoulement may be a strong source of complementary international protection, but it is not the only one. If other rights are taken into consideration in conjunction with that of non-refoulement, the ICCPR becomes not only an additional basis for protection, but also sets minimum standards for the rights granted to protection seekers. This section is dedicated to a discussion of refugee-specific rights other than non-refoulement in the ICCPR.

Of particular interest to protection-seekers are articles 12[308] and 13[309] ICCPR, which pertain to the rights of aliens. They allow aliens who are lawfully in the territory of a state to benefit from liberty of movement, and the right not to be expelled unless there are public security concerns. In its general comment on the position of aliens under the Covenant, the Committee has reaffirmed that aliens benefit from all the rights contained

[308] Article 12 ICCPR: "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order *(ordre public),* public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country."

[309] Article 13 ICCPR: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his explusion and to have his case reviewed by, and be represented for the purpose before, the competent au thority or a person or persons especially designated by the competent authority."

in the Covenant, barring a few exceptions, based on article 2 ICCPR[310], which provides for the application of rights without discrimination to individuals within the state's jurisdiction. I have previously outlined article 2 ICCPR as the key to the principle of non-refoulement, but it opens the door to the application of a plethora of other rights for aliens, which include protection seekers.

The right to enter a territory that is recognized in article 12 ICCPR is limited by states' local legislation, as indicated by the word "lawfully". The HRC adds a few exceptions to this seemingly clear rule of state prerogative.

> The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide whom it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.[311]

This statement confirms once again the principle of non-refoulement, but adds two new considerations of great importance for aliens. The idea of respect for family life will be explored in greater detail in chapter 6. Considerations of non-discrimination are the most pivotal for this section. They imply that aliens who find themselves within the territory and jurisdiction of the state, and thus under the impetus of article 2, benefit from a number of fundamental rights regardless of how they entered the territory. Because these rights are guaranteed by the host state, it can be said to create a certain form of protection for persons seeking asylum in this state.

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[310] Human Rights Committee (UN), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, HRC, 27th Sess. (1986), online: UNHCR Refworld < http://www.unhcr.org/refworld/docid/45139acfc.html> ¶ 2-3.
[311] *Ibid.* ¶ 5

Aliens' right to non-discrimination in the Covenant applies to all rights but those specifically relating to citizens. Some rights also explicitly mention the prohibition of discrimination, such as article 26 ICCPR, which guarantees equality before the law[312]. Aliens also benefit from basic rights such as the right to life, liberty and security of the person as well as the freedom of thought, conscience and religion[313]. However, the Committee's opinion is not entirely clear as to the extent to which all these rights apply to aliens who are not lawfully within the territory of the state.

The right to procedural fairness for aliens is particularly strengthened by article 13 ICCPR, which provides that expulsion or removal cannot be executed without a fair decision in accordance with domestic law. However, this right is only afforded to aliens who enter the territory lawfully, thus excluding large numbers of asylum seekers. In that sense, the rights contained in the Covenant are not quite refugee-specific as they do not take into direct consideration the possibility that a person entering illegally may present a claim for protection, unlike the Refugee Convention in its article 31[314]. Nonetheless, the interpretation of the principle of non-refoulement as having a wide scope may complete the gap in article 13 and allow for the elimination of distinctions between aliens based on the legality of their presence.

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[312] Article 26 ICCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[313] *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, *supra* note 310 ¶ 7.

[314] Article 31 Refugee Convention: "1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

All in all, none of the rights guaranteed to aliens in the Covenant appear as strong and far-reaching as that of non-refoulement, but they do provide aliens with fundamental guarantees against discrimination and a certain level of procedural fairness. From this, we may conclude that the ICCPR aims to set basic standards for domestic protection regimes without becoming a mechanism for protection in itself or granting a specific status. Further, non-refoulement is the only truly preventive right in the Covenant, other rights only being enforceable if a violation occurs. Hence, the rights of aliens under the Covenant are not refugee-specific rights as defined in chapter 2, but they encompass some or all of protection seekers through their general formulation.

4.1.3. Implementation of Refugee-Specific Rights in Regional International Instruments

The preceding interpretation of ICCPR rights in relation to asylum seekers reveals that the Covenant sets standards for domestic asylum regimes while reaffirming and expanding the principle of refoulement. Since it cannot be used as an independent complementary protection mechanism, it would be pertinent to examine how it relates to regional international instruments, as such agreements reflect the consensus of a group of states and thus form a part of international law while portraying a more specific interpretation of ICCPR obligations.

The ICCPR's prohibition on refoulement is very similar to that in article 3[315] of the European Convention on Human Rights (ECHR)[316]. This article merely prohibits torture and inhuman treatment or punishment, but the European Convention enforcing body, the

[315] Article 3 ECHR: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
[316] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5.

European Court of Human rights, has established in its case law that returning a person to a country where they face such harm would be a breach of article 3 of ECHR[317]. The jurisprudence of the Court has recognized and reaffirmed the absolute nature of non-refoulement, thus rendering the ECHR equivalent to the CAT in its prohibition of refoulement.

As homologous as this prohibition might seem to the interpretation of the ICCPR by the HRC, it is considered as a significantly stronger source of complementary protection due to the higher efficiency and consistency of its implementing body[318]. More than a simple criticism of the ICCPR, the functional superiority of such a regional instrument reinforces the idea that the principles in an aspiring universal international instrument cannot be realized without domestic or regional implementation.

The *Convention governing the Specific Aspects of Refugee Problems in Africa* (OAU Convention) was adopted in the same decade as the ICCPR. It reiterates the Refugee Convention definition[319], but also extends the meaning of the term "refugee". It defines the term thusly:

> The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[320]

[317] *Soering v. United Kingdom,* no. 14038/88, [1989] 11 E.H.R.R. 439, *Chahal v. United Kingdom* no. 22414/93 [1996] 23 E.H.R.R. 413, cited in McAdam, *supra* note 5 at 137.
[318] McAdam, *supra* note 5 at 139.
[319] Article 1(A)(2) Refugee Convention.
[320] Article 1(2) OAU Convention.

This expansion of the definition of refugee allows for individuals to seek asylum when public security is severely compromised by civil strife or armed conflicts. It recognizes that in certain situations, people may fall victim to persecution on a random basis, and that the right to life[321] is not fulfilled if such persons are not allowed to seek the protection of neighbouring states. It also recognizes the risk that torture or cruel treatment may be inflicted on an arbitrary basis on account of such disturbances of public order, thus respecting article 7 ICCPR.

The definition weaves in elements of the principle of non-refoulement, as persons who are at a substantial risk to their life benefit from the protection of the African Convention as refugees. This convention further solidifies the principle of non-refoulement by prohibiting rejection at the frontier[322] and compelling states of the Organization of the African Unity (OAU) to ensure, to the best of their ability, the settlement of individuals who fit into this expanded definition of refugee[323].

Interestingly, article 3 of the OAU Convention prohibits refugees from engaging in various forms of "subversive" activity in addition to the obligation to conform to the asylum country's laws and regulations. These activities include causing or aggravating tension through the media, which is an acknowledgment that protection in times of political instability comes at the cost of political freedom and freedom of speech[324]. This concern with the minimization of refugee-related political tension is also reflected in

[321] Article 6 ICCPR.
[322] Article 2(3) OAU Convention: "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory."
[323] Article 2(1) OAU Convnetion: "Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality."
[324] Hathaway, *Rights of Refugees*, *supra* note 12 at 119.

article 2(2), which prohibits states from considering the admission of refugees as a hostile act[325].

These provisions demonstrate awareness of the political echo that comes with the granting of asylum. It is hardly surprising, since the history of asylum abounds with examples of states using diplomatic protection for individuals sought after because of their political activity as a statement in favour of said activity. I have mentioned examples of this in chapter 2. The African Convention marks an evolution of refugee protection as a humanitarian issue. Nevertheless, the political repercussions are likely the main reasons all states have not expanded the refugee definition to include victims of generalized political instability. Also, many states may be reluctant to limit freedom of expression to guarantee the purely humanitarian nature of refugee protection.

The latest relevant regional instrument is the 1984 *Cartagena Declaration on Refugees*. It was adopted at a colloquium entitled "Coloquio Sobre la Proteccíon Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios", and represents an example of cooperation between Central American states. This non-binding instrument calls for the adoption and implementation of the 1951 Refugee Convention and cooperation with the UNHCR[326], while promoting a focus on the roots of refugee problems[327] and reaffirming the humanitarian nature of refugee protection with a view to limit political tensions while respecting refugees' human

[325] Article 2(2) OAU Convention: "The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State."
[326] See generally Article II Cartagena Declaration.
[327] Article II(m) Cartagena Declaration: "To ensure that the Governments of the area make the necessary efforts to eradicate the causes of the refugee problem."

rights[328]. The Colloquium's conclusions take example from the OAU Convention concerning the expansion of the refugee definition[329], the reaffirmation of the absolute nature of non-refoulement[330], and maintaining the purely humanitarian nature of refugee protection[331]. On the down side, this document produces no strict legal obligation upon the participating states.

This presentation of regional refugee protection instruments in conjunction with the ICCPR shows that in practice it has been less likely for a universal binding treaty such as the latter to serve as an independent asylum mechanism. It is a source of many principles and the rights it contains could clearly be better protected by an expansion of the 1951 refugee definition. The aforementioned regional instruments are better geared towards the specific needs of individuals seeking protection, be it with stronger enforcement mechanisms like the ECHR, or by being centred specifically around refugee and asylum issues, as is the case of the OAU Convention and the Cartagena Declaration. Hence the ICCPR may serve as a source of inspiration for principles of complementary protection,

[328] Article II(p) Cartagena Declaration: "To institute appropriate measures in the receiving countries to prevent the participation of refugees in activities directed against the country of origin, while at all times respecting the human rights of the refugees."

[329] Article III(3) Cartagena Declaration: "To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."

[330] Article III(4) Cartagena Declaration: "To confirm the peaceful, non-political and exclusively humanitarian nature of grant of asylum or recognition of the status of refugee and to underline the importance of the internationally accepted principle that nothing in either shall be interpreted as an unfriendly act towards the country of origin of refugees."

[331] Article III(5) Cartagena Declaration: "To reiterate the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens."

but it relies mostly on regional and domestic measures to ensure that all the human rights it guarantees are, indeed, respected in the context of displacement.

4.2.Implementation in Canadian Law and Policy

4.2.1. Human Rights Law in Canadian Immigration and Constitutional Law

Officially, international instruments to which Canada is a party are not binding until they are implemented into domestic law[332]. An obvious example of such implementation in our field of interest is article 96 IRPA, which recites the exact text of the article 1(A)(2) Refugee Convention definition, or article 97 IRPA, which makes direct reference to article 1 of the CAT. Although the ICCPR has not been subject to such implementation, it is undeniable that its principles have coloured the Canadian Charter[333]. This sub-section examines the application of the ICCPR in cases dealing with the Charter and more specifically, those dealing with Charter rights in relation to asylum. First, I further examine the right to non-refoulement in the *Suresh*[334] and *Burns*[335] cases, as well as in section 97 IRPA, and then discuss the problematic application of the principles of fundamental justice in relation to the right to present a claim for protection.

Bassan has conducted a study of cases relating to the Charter, which reveals that international human rights treaties are routinely used by the Courts when they are asked to review the constitutionality of domestic laws. She recognizes the theoretical differences between implemented and unimplemented treaties, but argues, in light of the

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[332] *Labour Conventions Case*, [1937] A.C. 326: "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action"

[333] Daniela Bassan, "The Canadian Charter and Public International Law: Redefining the State's Power to Deport Aliens", (1996) 34 Osgoode Hall L. J. 583, 585 : " Most of the rights and freedoms protected in the *Charter* are also contained in international human rights instruments: the [ICCPR], the [ICESCR], the [UDHR], and the [ECHR] were particularly influential in the drafting of the *Charter*."

[334] *Suresh*, *supra* note 255.

[335] *United States of America v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283 [Burns].

body of court cases considering the Charter, that the judicial use of international human rights law has tended to overlook those differences[336]. Her analysis of Charter-related case law reveals that the recourse to international human rights instruments by courts does not obey any specific rules and is therefore unpredictable[337]. "Thus, the willingness to consider international conventional law is not impeded by the constitutional rule that unimplemented treaties are not part of the domestic law of Canada"[338]. Rather, there seems to be a presumption in the interpretation of Canadian law that the legislator does not intend to violate international law instruments, which results in the frequent use of the ICCPR and ECHR by the Supreme Court[339].

In the *Suresh* case[340], the Supreme Court came to the conclusion that the deportation of an individual to a country where they face a risk of torture is, in most cases, incompatible with principles of fundamental justice.

> Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Art. 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the *Charter* generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive.[341]

This passage reveals that the Court considers deportation to face torture illegal in light of the constitution and rejects Canada's obligations under international law as a source for this prohibition. The Court does not recognize that the Charter constitutes the domestic

[336] Bassan, *supra* note 333 at 591.
[337] *Ibid.* at 593.
[338] *Ibid.*
[339] *Ibid.*
[340] *Suresh*, *supra* note 255.
[341] *Ibid.* ¶ 78.

implementation of human rights such as the right to life and security of the person. The wording of the Court's opinion and, more specifically, the use of the word "directly", suggest that international law still indirectly constrains the actions of the Canadian government.

Furthermore, the previously mentioned extradition cases before the human rights committee are similar to the *Burns* case[342] before the Supreme Court. It involved the constitutional analysis of the extradition of the respondents, two murder suspects, to the state of Washington, without prior assurance that they would not be subjected to the death penalty. In this case, the Court considers the prohibition of cruel and unusual treatment or punishment under section 12 of the Charter, but it makes no mention of the influence of the same prohibition in the ICCPR. The *Ng* decision[343] considered the method employed to carry out the death penalty, asphyxiation, as part of the reasons why it constitutes cruel punishment, but the Supreme Court has not considered this factor in this case. It decides that the decision should not be made under section 12, but under the balancing process of the principles of fundamental justice in section 7[344] and under the section 1 proportionality test. The Court found that extradition without assurances that capital punishment would not be imposed violated the respondents' rights under section 7 of the Charter[345] and could not be justified under section 1[346]. Despite ruling in favour of the respondents, the Court fails to consider ICCPR rights and HRC decisions in its discussion of the case. It, nonetheless, recognizes that Canadian principles of

[342] *Burns*, *supra* note 335.
[343] *Ng*, *supra* note 291.
[344] *Burns*, *supra* note 335 ¶ 57.
[345] *Ibid.* ¶ 132.
[346] *Ibid.* ¶ 143.

fundamental justice have evolved since the domestic adjudication of the *Ng* case, and that they now go against the constitutionality of extradition to face the death penalty.

Notably, it can be said that paragraph 97(2) IRPA implements the non-refoulement obligations contained in the ICCPR, as it extends the principle to individuals who face a risk of cruel, unusual or inhuman treatment or punishment[347]. I have already pointed out that, in doing so, it goes further than the obligations set out for parties to the CAT. Further, procedural rights and equality before the law of aliens who are not refugees, as defined in articles 13 and 26 of ICCPR, are also guaranteed by section 97 of IRPA. Like claims made under section 96 of IRPA, persons in need of protection go through a hearing process before an IRB member.

Overall, the Canadian legislation appears to be influenced by the principles contained in the ICCPR in matters relating to international protection, but there is no explicit reference to it in the IRPA or the Charter. Paragraphs 2(b), (c) and (e) IRPA acknowledge in general terms Canada's "humanitarian ideals", "international obligations", as well as its commitment to "human rights and fundamental freedoms of all human beings" without explicit mention of any human rights protection instrument[348]. The ICCPR is more likely to be continuously used as an interpretive tool in asylum case law, as a result of the

[347] McAdam, *supra* note 5 at 129.

[348] Paragraphs 2(b), (c) and (e) IRPA: "(*b*) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;
(*c*) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;
(*e*) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings".

presumption that Canadian legislation is consistent with international treaties to which Canada is a party[349].

In addition, part of the UNHCR's and states' obligations outlined by the UN General Assembly is to partake in agreements and cooperate in order to reduce the number of people needing protection. Canada's acknowledgement of these further obligations is seen primarily through the adoption of various policies, and not through law. For example, Canada has implemented a resettlement program that "places emphasis on the protection of refugees and people in refugee-like situations by providing a durable solution to persons in need of resettlement"[350]. These refugee-like situations include violations of human rights as a result of war, or other generalized massive violations of human rights, in conformity with the definitions of Humanitarian-Protected Abroad Classes[351].

This program allows for assistance for a predetermined number of individuals, in addition to applications for private sponsorships[352]. It provides resettlement for individuals referred by the UNHCR or by private sponsors, and comprises an "Urgent Protection Program" which responds to requests by the UNHCR for the protection of individuals who face an immediate threat to their life[353]. Other measures are targeted at refugees with special needs such as women or children[354].

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[349] Bassan, *supra* note 333 at 595; this presumption was later strongly established in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1 Imm. L.R. (3d) 1 [*Baker*].
[350] UN High Commissioner for Refugees, "Country Chapter: Canada", March 2007, in UNHCR, *Resettlement Handbook*, 2d ed., November 2004, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/3ae6b35e0.html> at CAN/1 [UNHCR *Resettlement Handbook*].
[351] *Immigration and Refugee Protection Regulations*, S.O.R./2002-227, ss. 146-148 [IRPA Regulations].
[352] UNHCR *Resettlement Handbook* , *supra* note 350 at CAN/1.
[353] *Ibid.* at CAN/4.
[354] *Ibid.* at CAN/6.

This policy is a notable example of the influence of human rights on Canada's asylum regime is the country's general cooperation with the UNHCR. This collaboration is tied to some provisions in the IRPA regulations, but is not part of the IRPA itself. It allows protection for persons who may not be able to make the journey to Canada to present a claim for themselves, and opens to new refugee-like situations, such as violations of human rights in situations of armed conflict. As such, it presents an alternative protection option, which conforms with Canada's humanitarian commitments. However, it remains limited when it comes to the wider protection of social, economic and cultural rights, and does not present a program of assistance for victims of natural disasters, an issue that I will discuss further in chapter 5.

4.2.2. The Right to a Full Hearing and Access to State Territory

The Charter makes clear distinctions between individuals who benefit from a status and those who do not, as section 6, regarding freedom of movement, refers to citizens and permanent residents, while sections 2 and 7 to 14 extend protection of fundamental rights to everyone[355]. At the time of Bassan's study, which was before the last legislative reform of the IRPA, the Supreme Court had already issued its decision in the *Singh*[356] case. This case was the first example of refugee claimants who had failed in their claim, but argued that their removal would be a violation of section 7 of the Charter, which generally mirrors articles 6 and 9 of the ICCPR. The judges concluded that the term "everyone" encompassed a broader class of persons than citizens and permanent residents, and so included refugee claimants. They further noted that returning them to a country where

[355] Bassan, *supra* note 333 at 597.
[356] *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, 58 N.R. 1 [*Singh*].

they face a threat to their life would be a violation of section 7 of the Charter[357]. The Court went on to observe that the procedure for refugee status determination did not allow the claimants to effectively challenge a rejection of their claim, and as such it was contrary to principles of fundamental justice[358] and could not be justified under section 1 of the Charter[359]. They thus reached the conclusion that this breach could be avoided by allowing the claimants a chance to demonstrate their refugee status through an oral hearing.

Bassan argues that the *Singh* case allows the definition of "security of the person" as freedom from state-imposed psychological stress[360].

> The significance of this decision is that "security of the person" can be engaged by state-imposed psychological stress felt by aliens who, in this case, feared punishment abroad. The limitation of the case is that it was based on the procedural content of the principles of fundamental justice; it is clear that the aliens had no substantive right *per se* to seek asylum in Canada.[361]

The claimants only challenged the procedural rules contained in the *Immigration Act*, and did not ask for the recognition of a right of non-refoulement. The case does not actually deal with the notion of state-imposed psychological stress, but it arguably could have gone further than the procedural content to examine what happens to claimants who face a risk to their life and do not fit the Convention refugee definition. Hence, in this decision, the Supreme Court judges attempted to ensure the fulfilment of the right to life

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[357] *Singh*, *supra* note 356 ¶ 93: "I note particularly that a Convention refugee has the right under s. 55 of the Act not to "... be removed from Canada to a country where his life or freedom would be threatened ...". In my view, the denial of such a right must amount to a deprivation of security of the person within the meaning of s. 7".
[358] *Ibid.* ¶ 109-110.
[359] *Ibid.* ¶ 119-120.
[360] Bassan, *supra* note 333 at 602.
[361] *Ibid.* at 598-599.

by demanding a fair hearing process, without turning the Charter into an alternative protection mechanism.

Hathaway and Neve point out that the right to a hearing of every claim on its merits remains conditional upon territorial access. The success of the screening process at the border results in legal presence on the territory of the state of refuge[362]. A foreign national, at a port of entry, may only be deemed admissible by immigration officers if they find no "reasonable grounds to believe" that the individual falls under sections 34 to 42 of IRPA. These provisions identify grounds for inadmissibility that include national security, violating international human rights, serious criminality, organized criminality, health grounds, financial reasons, misinterpretation, non-compliance with the act or an inadmissible family member. Only when a claimant is admissible can he or she remain in the country in order to present a protection claim.

According to sections 44 and 45 IPRA, if an officer finds an individual inadmissible, they prepare a report, after which an admissibility hearing takes place. This hearing can result in the admittance of the individual for further examination under subsection 45(c) of IRPA, which can apply to asylum seekers.

However, there is no guarantee that an admissibility hearing based on 34 to 37 of IRPA, which provide for inadmissibility based on grounds of different forms of criminality, will include consideration of the possible risk faced by the foreign national who seeks entry. The absolute nature of non-refoulement requires a careful weighing of the evidence that the claimant faces a substantial risk of torture, a process which can only be achieved

[362] James C. Hathaway & R. Alexander Neve, "Fundamental Justice and the Deflection of Refugees from Canada" (1996) 34 Osgoode Hall L.J. 213 at 228.

fairly through a hearing of the claim on its merits. The determination of inadmissibility may only be reversed by an appeal to the Minister, whose decision is discretionary.

Despite this possibility, the fact remains that sections 34 to 37 IRPA only require taking into consideration the criminal background of the individual, without consideration for the risk faced by said individual. The wording of these sections allows the literal application of the distinction, within articles 12 and 13 of the ICCPR, between aliens who are lawfully in the state territory and those who are not. The HRC's interpretation of this article requires that exceptions be made when the alien faces a risk to her life.

Hathaway and Neve also argue that these inadmissibility provisions can preclude refugee claimants from access to a full determination hearing on its merits. They demonstrate, using the *Berrahma*[363] and *Nguyen*[364] cases, that Courts have not found this to be contrary to the principles of the *Charter*. This position has been confirmed in several subsequent cases[365]. In a more recent analysis based on these accessibility provisions and policy statements by the government, Bossin has concluded that the IRPA was drafted with a view to limit access to refugee status determination[366]. The IRPA thus fails to consider the *jus cogens* nature of non-refoulement, and effectively violates article 31 of the Refugee Convention, which aims to prevent penalties for claimants who enter the country

[363] *Berrahma v. Canada (Minister of Employment and Immigration)*, 132 N.R. 202, 25 A.C.W.S. (3d) 925, cited in *ibid.* at 228.
[364] Nguyen v. Canada (Minister of Employment and Immigration), [1993] 1 F.C. 696 at 704, cited in *Hathaway & Neve, supra* note 362 at 228: "To deny dangerous criminals the right, generally conceded to immigrants who flee persecution, to seek refuge in Canada certainly cannot be seen as a form of illegitimate discrimination. Only section 15 of the Charter is engaged since... a declaration of ineligibility does not imply or lead, in itself, to any positive act which may affect life, liberty or security of the person."
[365] *Soe v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 671, 64 Imm. L.R. (3d) 83; *Gwala v. Canada (Minister of Citizenship & Immigration)*, [1999] 3 F.C. 404; *Raza v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 F.C. 185, 47 Imm. L.R. (2d) 257.
[366] Michael Bossin, "Bill C-31: Limited Access to Refugee Determination and Protection" (2001) 19 Refuge 55.

of refuge without authorization. The Court's interpretation of IRPA seems to base the right to make a claim on the legal entry into the territory of the state of refuge.

Such a result is also in apparent contradiction with section 2 IRPA, which states that one of the first objectives of the Act is to save lives and offer of protection to the displaced and persecuted[367]. The same section, in subsection (e), establishes the importance of fair and efficient procedures that respect human rights and fundamental freedoms. Security concerns are only mentioned at the bottom of the list[368]. The manner in which sections 34 to 37 IRPA may be applied, in light of the jurisprudence, does not take into consideration the human rights that the law itself states as being the most important within the refugee protection regime.

The Courts may generally be deemed to be aware of the importance of using human rights, including far-reaching instruments such as the ICCPR, to guide the interpretation of the protection mechanisms offered by the Canadian legislation. Nevertheless, the courts' interpretations in many cases allow for loopholes that the ICCPR does not permit and that are inconsistent with the legislation itself.

Civil and political rights, even those as fundamental as the right to life and the right to not to be subjected to torture, are not entirely respected in Canada's domestic approach to international protection. This thesis will now delve into the even more difficult application of social, economic and cultural rights within the realm of international protection.

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[367] Paragraph 2(a) IRPA: "[The objectives of this act with respect to refugees are] to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted."

[368] Paragraph 2(h) IRPA; "[The objectives of this act with respect to refugees are] to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals."

Chapter 5. Protection Obligations Based on Social, Economic and Cultural Rights

Now that I have dissected the prohibition of torture and other civil and political rights as sources for complementary forms of asylum, it is worth expanding the scope of this thesis to an analysis of social, economic and cultural rights as bases for asylum. I continue with the same method, beginning with a discussion of a socio-economic basis for asylum founded in international law, and then exploring how it applies in Canadian domestic law.

First, I discuss international obligations related to socio-economic rights in a general theoretical sense, and then apply them to more specific situations. Those will be natural disasters, as they are situations where socio-economic rights may be difficult to fulfil, and the inability to provide adequate health care, as it is of particular concern in Canadian asylum law. I conclude the first section by examining whether longer-term concerns, such as the preservation of minority cultures and the ability to earn a living through better education, may serve as bases for complementary protection.

The second section of this chapter analyzes the Canadian asylum law regime in light of the same socio-economic and cultural rights. I focus my analysis mainly on section 97 IRPA, as well as instances of Canada accommodating refugees fleeing from natural disasters and other socio-economic problems. I also weave case law into my evaluation of Canada's compliance with its socio-economic and cultural international obligations.

5.1. Failure to Protect Socioeconomic Rights as a Basis for Asylum Claims

5.1.1. General Considerations Regarding Socio-Economic Rights in Relation to Asylum

The UDHR contains some reference to socio-economic and cultural rights[369], but they are more detailed in the binding 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), which entered into force in 1976, almost simultaneously with the ICCPR. In Hathaway's opinion, the nature of the socio-economic rights recognized in the ICESCR prove the strength and absolute nature of the rights protected in the Refugee Convention as well as refugee-specific rights[370]. This is mainly due, he argues, to the fact that despite the non-discriminate nature of the ICESCR rights, they are only required to be granted in proportion to the member state's resources[371]. With some refugees being indeed present in countries with fewer economic resources, they could be denied many fundamental rights were it not for the existence of the Refugee Convention, which guarantees those rights regardless of a country's economic resources[372].

This may be a hint that the ICESCR, much like the ICCPR, may not serve as an independent complementary protection mechanism, but it also suggests that a violation or lack of fulfilment of social, economic and cultural rights may be a basis for protection. Such a lack of fulfilment may result from a political choice, in which case it is worth

[369] Articles 22 to 29 UDHR.
[370] Hathaway, *Rights of Refugees*, *supra* note 12 at 122.
[371] Article 2 ICESCR: "1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."
[372] Hathaway, *Rights of Refugees*, *supra* note 12 at 122

asking if it amounts to persecution by the government. In other, more frequent cases, it may result from a state's inability to provide for these rights. Such a situation can arguably amount to persecution, just as the inability to protect from violations of basic civil rights is a fundamental element of refugee status determination. A third issue to consider with regards to socio-economic and cultural rights, is the extent to which they are fulfilled by the state of refuge. Where civil and political rights are more strongly tied to a right of non-return, socio-economic rights are often tied to settlement and the status granted to protection seekers[373]. Indeed, there seems to be higher recognition for the right to work, access to education and health care, and other rights for protected persons when they settle in a country of refuge, than awareness of a need to protect individuals from violations of those rights in their country of origin.

Before exploring how social and economic rights may expand the protection afforded by the 1951 Refugee Convention, it is worth looking into the rights already contained in the latter as a basis for comparison. The Convention provides refugees with access to wage-earning employment[374], self-employment[375] and liberal professions[376] equal as that afforded to other aliens, as well as the same treatment as is accorded to nationals in terms of protection of intellectual property[377], access to national rationing systems[378], housing[379], public education[380], public relief and assistance[381] and social security[382].

[373] Clark, *supra* note 294 at 593.
[374] Article 17 Refugee Convention.
[375] Article 18 Refugee Convention.
[376] Article 19 Refugee Convention.
[377] Article 14 Refugee Convention.
[378] Article 20 Refugee Convention.
[379] Article 21 Refugee Convention.
[380] Article 22 Refugee Convention.
[381] Article 23 Refugee Convention.
[382] Article 24 Refugee Convention.

Clark suggests that the reiteration of the human rights that are contained in the Refugee Convention within the binding covenants, such as the ICESCR, guarantees them to protection seekers who are outside of the refugee definition, but find themselves in a similar situation as refugees[383]. This contention may arguably be derived from article 5 of the Refugee Convention, which states that nothing in said Convention can impair rights and benefits accorded to refugees apart from the Convention[384]. Another author makes the point that denying refugees and asylum seekers those social and economic rights upon arrival could result in "constructive refoulement"[385]. Edwards writes:

> Not only might the lack of social and economic rights in a particular destination country threaten to deter individuals from seeking asylum from persecution there, but it may act as a push factor in which refugees and/or asylum-seekers, out of pure economic necessity, are forced to return to a country in which their life or freedom could be threatened.[386]

This serves as a strong argument for the presence of an obligation to provide for the social and economic rights contained in the Refugee Convention, to the same extent that the Convention requires, to claimants whose status has not yet been recognized. Without those rights, they might not be able to stay until their claim is heard and decided upon.

Despite the clarity of an obligation on the part of the state of refuge to guarantee rights to individuals fleeing a risk to their life or persecution, it is unclear whether the unfulfilment of a socio-economic or cultural right may prompt a legitimate asylum claim under international law. At first glance, it appears that a situation would amount to persecution

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[383] Clark, *supra* note 294 at 595.
[384] Article 5 Refugee Convention: "Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention."
[385] Alice Edwards, "Human Rights, Refugees and the Right to 'Enjoy' Asylum" (2005) 17 Int'l J. Refugee L. 293 at 322.
[386] *Ibid.*

if the individual were being deprived of socio-economic rights due to one of the nexus defined in the Refugee Convention, or faces a risk to life when the deprivation of one of those rights constitutes cruel treatment or punishment.

An example of this is the right to adequate food and water that is explicitly recognized in the ICESCR[387]. It is arguable that events such as the great famine of 1932-1933 in Ukraine would have created conditions amounting to persecution, or at least conditions that would render refoulement to Ukraine illegal. Some groups of Ukrainians, as well as scholars, argue that the famine was a direct result of Stalin's economic policy and intentionally designed to eliminate ethnic Ukrainians[388]. There is some debate and uncertainty as to whether it fits the definition of genocide, but it is fairly clear that this deprivation of a basic socio-economic right was intentional and brought on by state policy[389]. A similar situation today, where intention is discerned behind a famine, would make a convincing case for a refugee claim based on the denial of an economic right. However, its strength would lie in the fact that it is connected to discrimination on the basis of ethnicity, or, at the least, to cruel and unusual treatment or punishment, which would make it persecution in the sense of the Refugee Convention definition or a basis for non-refoulement as provided for by the CAT and the ICCPR.

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[387] Article 11 ICESR.

[388] A.J. Hobbins & Daniel Boyer, "Seeking Historical Truth: the International Commission of Inquiry into the 1932-33 Famine in Ukraine" (2001) 24 Dal. L.J. 139.

[389] International Commission of Inquiry Into the 1932-33 Famine in Ukraine, *Final Report*, 1990, online: Ukrainian World Congress <http://www.ukrainianworldcongress.org/Holodomor/Holodomor-Commission.pdf > at 4: "The Commission majority finds beyond doubt that the immediate cause of the 1932-1933 famine lay in the grain procurement imposed upon Ukraine from 1930 onwards. It finds it also indisputable that the dreadful effects of the excessive grain procurements were considerably aggravated by the Soviet authorities trying to carry out the forced collectivization of agriculture, to eliminate the kulaks and to snuff out those centrifugal Ukrainian tendencies which threatened the unity of the Soviet Union."

It appears, then, that one of the main contributions of the ICESCR to international asylum law is to widen the rights of persons who seek refuge in another state, but do not have a recognized status. It does so mainly through its non-discrimination provision[390], which extends protection to social, economic and cultural rights to everyone regardless of status, without jurisdiction limitations such as those contained in the ICCPR[391]. The Human Rights Committee's comments on this provision clearly confirm this:

> The ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.[392]

Further, ICESCR rights serve as interpretative tools for the concept of persecution, in the sense that if their denial by the state of origin is associated with one of the enumerated grounds in Article 1(A)(2) of the Refugee Convention and poses a danger to an individual's life, it can amount to persecution within the realm of said definition. If deprivation of one of the ICESCR rights is severe enough to amount to torture or cruel treatment or punishment, it allows for the principle of non-refoulement to apply. According to UNHCR guidelines, the concept of persecution is fluid and much dependent on the individual context of the claim[393]. On persecution through discrimination, the UNHCR holds the view that individuals who benefit from less favourable treatment may

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[390] Article 2(2) ICESCR.
[391] Article 2(1) ICCPR.
[392] Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 42d Sess., UN Doc. E/C.12/GC/20, (2009).
[393] UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UNHCR, UN Doc. HCR/1P/4/Eng/Rev.2 (1992) ¶ 51-53 [UNHCR Handbook].

be considered to suffer from persecution. However, it remains mindful of the distinction between discrimination and persecution:

> It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.[394]

This interpretation of discrimination as persecution opens the way to consider the deprivation of some socio-economic rights as part of a claim under the Refugee Convention. However, the ICESCR does not appear to offer an independent protection mechanism. It is, nonetheless, worth examining some specific situations where a socio-economic protection need may arise and found a recognized protection claim.

5.1.2. Lack of Protection from Natural Disasters as Persecution

Once a rather marginal category of displaced persons, individuals fleeing from natural disasters are now of growing concern to the international community. In addition to accentuating the potential lack of protection from political persecution, natural disasters cause a breakdown in many states' ability to provide for most basic socio-economic rights. We know that a state's material inability to protect its nationals' and residents' civil and political rights may be sufficient to result in a right to be protected elsewhere. The question thus arises as to whether the concept of protection may be extended to situations of natural disasters, when states become unable to provide for their nationals' and residents' social and economic rights.

[394] *Ibid.* ¶ 54-55.

The primary responsibility to adequately prepare in advance for natural disasters, as well as to provide protection and assistance in the event of their occurrence, lies with the state that is exposed to such a disaster[395]. Residents and nationals have the right to request such protection and assistance, but if they intend to credibly claim protection from the international community, they have the duty to claim their country's protection first. Only if that request fails can displaced persons assert their state's inability to protect. This is confirmed by the UN Human Rights Council:

> Where the capacity and/or willingness of the authorities to fulfil their responsibilities is/are sufficient, the international community needs to support and supplement the efforts of the government and local authorities. The scope and complexity of many natural disasters call for the active involvement of organizations and groups, both within and outside the United Nations system, which possess special expertise and resources, including from among the displaced and host communities, as well as from civil society.[396]

This obligation is echoed by a decision of the European Court of Human Rights, in which it defined the duty to protect as the obligation to take positive measures to protect from imminent disasters, as well as providing redress in cases where loss results from the negligence of local authorities[397]. Given the realization that states may be unable to provide for their citizens following a natural disaster, UN guidelines generally favour

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[395] Human Rights Council, *UN Human Rights Council: Addendum to the Report of the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Operational Guidelines on Human Rights and Natural Disasters*, HRC, 4th Sess., UN Doc. A/HRC/4/38/Add.1 (2006) ¶ 12.
[396] *Ibid.* ¶ 15.
[397] Human Rights Council, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin: addendum: protection of internally displaced persons in situations of natural disasters*, HRC, 10th Sess., UN Doc. A/HRC/10/13/Add.1 (2009) at 7.

humanitarian assistance on site, with no specific acknowledgement of natural disasters as a basis for an international protection claim[398].

The UNHCR has also considered how the depletion of natural resources due to climate change may result in armed conflicts and violence[399]. According to the UNHCR, such cases may warrant the application of the Refugee Convention as well as complementary international protection[400]. Another scenario induced by climate change is that of sinking islands due to rising sea levels, which will render many persons stateless[401]. Theoretically, the refugee regime was designed to protect persons who are stateless, as well as those who are de facto stateless due to lack of protection form their state. Hence, people from such sinking states clearly would require some form of protection under international law. This protection has been called for by the UNHCR, but no clear international protection scheme has been designed as of yet.

The most obvious scenario and the main concern in this subsection is that of a sudden and highly destructive natural disaster, like the Haiti earthquake in January 2010, or the 2004 Indian Ocean tsunami. The UNHCR recognizes that individuals fleeing from such natural disasters lack one of the criteria defined in the Refugee Convention, which is persecution related to one of the five enumerated grounds in Article 1(A)(2)[402]. In order to fill this legal vacuum, the UNHCR has mandated itself with a Cluster Approach. This involves the joint participation of NGOs in a relief effort on a case-by-case basis, and, as mentioned in chapter 2, has been helpful in assisting large numbers of displaced

[398] *Ibid.*
[399] UN High Commissioner for Refugees, *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*, 14 August 2009, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/4a8e4f8b2.html> at 5.
[400] *Ibid.*
[401] Such a danger is currently faced by the Maldives, Vanuatu and Tuvalu; see *ibid.*
[402] *Ibid.*

persons[403]. However, natural disasters would probably be easier to face if states acknowledged an obligation to grant refuge or designed a framework that allows for a more predictable and rapid response.

Currently, the only international legal instrument that provides protection to individuals crossing borders because of a breakdown of socio-economic rights following a natural disaster is the OAU Convention[404]. In article I(2), this convention defines a refugee as a person "compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality because of events seriously disturbing public order in either part or the whole of his country of origin or nationality". This definition would include armed conflicts caused by the effects of climate change on the availability of resources[405]. Also, the meaning of "events seriously disturbing public order" may be reasonably interpreted as including natural disasters, as there is no further requirement that the "events" should be directly caused by human activity[406].

The UNHCR thus shows strong recognition of the need to extend protection to victims of natural disasters and to develop a better means of protection of ICESCR rights in the refugee context, but Canada has no obligation to provide such protection at the moment. Although an ideal solution for victims of natural disasters would be to add only a

[403] *Ibid.* at 6: "[As] natural disaster scenarios continue to multiply in the coming years, severely testing the efficacy of the Cluster Approach it is likely that new paradigms and models of cooperation will be needed."
[404] *Ibid*.
[405] *Ibid.*
[406] UN High Commissioner for Refugees, *Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group)*, UNHCR, UN Doc. EC/1992/SCP/CRP.6 (1992): "The OAU Convention does not refer to people who are forced to leave their respective countries of origin due to economic deprivation or chronic poverty but this cause is assuming increasing significance in Africa. So also is the category of people who are forced to leave by a combination of factors. This includes victims of man-made disasters who are at the same time victims of natural disasters. This cause or category of people is not explicit in the OAU Convention, but reference in the Convention to "events seriously disturbing public order in either part or the whole of his country of origin or nationality", can be construed to cover this category."

provision that covers natural disasters within the 1951 Refugee Convention, the UNHCR acknowledges that it is unrealistic, as it would open up a debate about the entire international refugee protection system and, in light of the current political context, might result in a restriction of the refugee definition[407]. At best, the OAU Convention serves as an example that states outside of Africa may follow through their own legislation.

5.1.3. Lack of Adequate Health Care as Persecution

The right to the highest attainable standard of health[408] is a complex right, which is essential to the enjoyment of several other human rights, both civil and political, as well as social and economic. It indeed affects fundamental civil rights such as the right to life[409], the right not to be subjected to cruel and unusual treatment or punishment[410], the freedom of movement[411], and stems from important socio-economic rights such as the right to food, water, clothing and adequate housing[412], the right to social insurance and social security[413], and even the right to education[414]. Consistent with this intertwinement,

[407] *Ibid.*: "Some states and NGOs have suggested that the 1951 Refugee Convention should simply be amended and expressly extended to include people who have been displaced across borders as a result of long-term climate change or sudden natural disasters. UNHCR considers that any initiative to modify this definition would risk a renegotiation of the 1951 Refugee Convention, which, in the current environment, may result in a lowering of protection standards for refugees and even undermine the international refugee protection regime altogether."

[408] Article 12 ICESCR: "1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
(b) The improvement of all aspects of environmental and industrial hygiene;
(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

[409] Article 6 ICCPR.

[410] Article 7 ICCPR.

[411] Article 12 ICCPR.

[412] Article 11 ICESCR.

[413] Article 9 ICESCR.

[414] Article 13 ICESCR.

the definition of health in article 12 ICESCR goes beyond health care by imposing preventive and general public health measures, such as environmental and industrial hygiene. Given its range, it is no surprise that the right to health comes into play in different aspects of international refugee law.

No state can realistically be expected to guarantee a right to be healthy, but the right to health comprises specific freedoms and entitlements[415]. According to the Committee on Economic, Social and Cultural Rights' interpretation, Article 12 ICESCR provides the entitlement to a health care system, which everyone may equally access, while guaranteeing the individual freedom to control one's body, which includes sexual and reproductive freedom[416]. In conjunction with the absolute non-discrimination provision in article 2(2), this means that everyone, including refugees and other protection seekers, should benefit from those rights. This interpretation has been partially confirmed in a UNHCR study of complementary protection[417].

> [Individuals] who have been granted protection from removal are entitled to basic human rights […]. Children of such persons are guaranteed access to free primary education. In addition, all beneficiaries of protection from removal have the right to the highest attainable standard of physical and mental health, as well as an adequate standard of living (i.e. shelter, food and clothing).[418]

This interpretation is limited to individuals who are granted protection from removal, which links the rights to a status. These rights should actually be guaranteed to persons whose removal or status determination is pending as well, in order to avoid "constructive

[415] Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, UN CESCR, 22d Sess., UN Doc. E/C.12/2000/4 (2000) ¶ 8.
[416] *Ibid.*
[417] Mandal, *supra* note 5 ¶ 74.
[418] *Ibid.*

refoulement", that is, the idea that protection seekers might be forced to return to a country where they risk persecution because of inadequate conditions upon arrival to the country of refuge. Nonetheless, for the purposes of this thesis, it means that Canada has the obligation to guarantee an appropriate standard of health to all individuals to whom it grants refuge, regardless of the status attached to protection.

Meanwhile the concept of "highest attainable standard of health" may be translated as "the highest attainable standard of health possible given the state's resources and biological predispositions and personal choices of the individual"[419]. The fulfilment of the right to health may thus be perceived as a balancing act. The general unavailability of appropriate health care facilities would thus not be recognized in international law as a ground for protection of individuals from states where such availability is disproportionately lower than the states' resources. Nor is there such protection when the quality, restrictions based on ethical or moral considerations or physical accessibility of health care is inadequate in light of the available resources.

It appears, at this point in time, that international protection for individuals who do not benefit from adequate health care only applies when their situation fits into the Refugee Convention definition. The only aspect of the right to health that is consistent with those requirements is that health services be offered in a non-discriminatory way. For instance, individuals who are infected with HIV and are denied treatment, because of the prejudice associated with the condition and, despite the state having sufficient resources to provide

[419] *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant*), *supra* note 415 ¶ 9.

it, may qualify as refugees who are persecuted by reason of belonging to a social group[420]. This is true if we apply the UNHCR's definition of social group.

> A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[421]

My analysis of Canadian case law in subsection 5.2.3 will determine how Canadian authorities perceive persecution based on denial of health care.

5.1.4. Incidence of Cultural Rights in Asylum Claims

A final example of a pivotal right guaranteed by the ICESCR is the right of communities to realize their cultural development, mainly through education. The right to education is defined in article 13 ICESCR[422], which is linked to the right to freely pursue economic, social and cultural development in article 1(1) ICESCR[423]. These rights essentially open up awareness to and respect of most civil and political rights, as well as the right to benefit from social, economic and cultural development. As such, withholding people's right to education may be perceived as persecution, and becomes yet another interesting question regarding asylum law.

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[420] UN Joint Programme on HIV/AIDS, *Strategies to Support the HIV-Related Needs of Refugees and Host Populations*, October 2005, UNAIDS/05.21E, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/438b21d64.htm>.

[421] UN High Commissioner for Refugees, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, UNHCR, UN Doc. HCR/GIP/02/02 (2002) ¶ 11.

[422] Article 13 ICESR: "1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace."

[423] Article 1(1) ICESCR: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The obligation to provide education to everyone, including persons benefiting from asylum, becomes clear given my previous analysis of other socio-economic rights. However, it is not entirely clear whether the withdrawal of this right for a targeted group amounts to persecution. Following the interpretation of persecution through discrimination offered by the UNHCR[424], depriving a group of people of the right to education might amount to persecution.

The Roma of Eastern and Central Europe could be cited as an example of such persecution, as their access to education is limited in comparison with the majority ethnic groups in countries such as Romania, Hungary and Bulgaria[425]. Despite the interpretation that this amounts to persecution under the Refugee Convention, most European countries reportedly have routinely refused refugee claims from Roma people based on both discrimination and poor education, as well as violent attacks and vandalism[426]. Scholars who study this issue seem to imply that many countries in which Roma make asylum claims misunderstand their situation and discriminate against them through the rejection of their claims[427], which seems plausible to me. It is also worth noting that the Roma can present an example of persecution based on other socio-economic rights, as they "have much lower life expectancies, lower literacy rates, and a lower standard of living than the general populace and often are relegated to appalling living conditions"[428]. Much of these conditions are arguably caused by rampant discrimination and inadequacy of state

[424] UNHCR Handbook, *supra* note 393 ¶ 51-53.
[425] See generally Istvan Pogany, "Minority Rights and the Roma of Central and Eastern Europe" (2006) 6 Human Rights Law Review 1.
[426] Fred Bertram, "The Particular Problems of the Roma" (1996) 2 U.C. Davis J. Int'l L. & Pol'y 173 at 181.
[427] *Ibid.*
[428] *Ibid.* at 181-182.

policies towards the Roma, and they have the effect of thwarting Romani communities' growth and threatening the preservation of their culture.

The foregoing observations on different socio-economic rights serve as an indication that protection obligations, as outlined in the Refugee Convention, provide clear rights for recognized refugees and protected persons upon settlement. Violations or deprivations of socio-economic rights may also be considered under the refugee definition. However, there is currently no customary or treaty law providing clear protection to individuals who seek protection from denial of education and cultural development, but ethnic minority struggles serve as an indication that such obligations should be clarified, and means of protection extended.

5.2. Implementation of Socio-Economic Rights in Canadian Asylum Law

5.2.1. The Obligation to Provide for Claimants' Socio-Economic Rights

Canadian immigration and refugee protection legislation and regulations provide several references to social and economic rights. They generally conform to Canada's clearer Refugee Convention obligations, but present an interpretative challenge where international obligations are not quite set in stone. From the previous section, I have identified the obligation of countries of refuge to provide adequate health care, the right to work, and the right to benefit from social security and education for children that are equal to the rights afforded to their nationals. This is clear in the Refugee Convention, and strengthened by the wide scope of the ICESCR.

As a response to this right, refugee claimants and other protection claimants are granted a permanent resident visa[429], which allows them to apply for employment authorization, to receive social security, or to apply for student authorization. This in turn allows such persons to have access to housing, clothing, food and water. Canada generally fulfils these obligations regarding individuals recognized as refugees, and towards claimants who are awaiting status determination.

As for considerations related to health care, foreign nationals are deemed inadmissible if they are afflicted with a health condition that is likely to be a danger to public health, to public safety, or might cause excessive demand[430] on health or social services, based on section 38 IRPA[431]. Currently, the regulations provide an exception to the excessive demand exclusion for refugees and protection seekers, which means they all have access to health care while their claim is pending and they will not be excluded on these grounds[432]. However, the exception does not cover protection seekers who might cause a risk to public safety or public health, for instance those who present with a highly contagious disease that may cause a risk of epidemic[433]. It seems that just as the obligation to provide protection cannot be avoided by restricting territorial access, the

[429] Section 39 IRPA Regulations, based on section 32 IRPA.
[430] Section 1(1) IRPA Regulations. : " […] "excessive demand" means (*a*) a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the most recent medical examination required by these Regulations, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or (*b*) a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents."
[431] Section 38 IRPA: "(1) A foreign national is inadmissible on health grounds if their health condition
(*a*) is likely to be a danger to public health;
(*b*) is likely to be a danger to public safety; or
(*c*) might reasonably be expected to cause excessive demand on health or social services."
[432] Section 139(4) IRPA Regulations: "A foreign national who is a member of a class prescribed by this Division, and meets the applicable requirements of this Division, is exempted from the application of paragraph 38(1)(*c*) of the Act."
[433] Section 38(1)(a) and (b) IRPA.

obligation to provide health care to protection seekers should be extended to prevent such restrictions on territorial access. States of refuge such as Canada have the appropriate health care facilities to provide services to individuals who fear for their life while avoiding a national epidemic. Recognizing this would avoid turning protection claimants away due to a medical condition.

5.2.2. Protection from Natural Disasters

The IRPA and its affiliated regulations make no direct mention of situations of natural disasters, but they present two apparent windows of opportunity for persons seeking refuge from such situations. The first one is to seek a decision of the Minister based on humanitarian or compassionate grounds, in order to waive the usual requirements of the IRPA[434]. The second is the possibility to interpret the provisions regarding humanitarian-protected persons abroad[435] in a wide-ranging manner. These provisions were designed to expand the meaning of "person in similar circumstances" in subsection 12(3) IRPA[436]. This subsection is part of the section relating to classes of foreign nationals who may be selected as permanent residents. It thus includes refugees who make inland claims, and also allows for assistance to persons outside of Canada who find themselves in a situation

[434] Section 25(1) IRPA: "The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations."; Sub-section 95(1)(c): "Refugee protection is conferred on a person when […], except in the case of a person described in subsection 112(3), the Minister allows an application for protection."

[435] Section 146 IRPA Regulations.

[436] Subsection 12(3) IRPA: "A foreign national, inside or outside Canada, may be selected as a person who under this Act is a Convention refugee or as a person in similar circumstances, taking into account Canada's humanitarian tradition with respect to the displaced and the persecuted."

that does not satisfy all the requirements of the Refugee Convention definition, but are nevertheless considered as deserving protection.

The regulations express what is meant by "similar circumstances" in Canadian legislation. Humanitarian-protected persons may be members of the country of asylum class[437], or members of the source country class[438]. None of these provisions include humanitarian tragedies caused by natural disasters, as they are meant to extend protection to individuals affected by civil war, or persons from countries where civil and political rights are systematically violated[439]. Given the wording of this provision, it is more likely to apply when civil and political unrest come about as a result of devastation by a natural disaster.

The Canadian Minister of Citizenship and Immigration has, nonetheless, issued certain guidelines regarding situations where natural disasters occur. There is no special program designed to grant refuge to such persons, but applicants for all immigration or refugee classes may have their claims processed in an expedited manner when they are rendered more vulnerable by such an event[440].

In a review of the case law regarding international protection, the Immigration and Refugee Board confirms that no interpretation of international refugee law allows for the

[437] Section 147 IRPA Regulations: "A foreign national is a member of the country of asylum class if they have been determined by an officer to be in need of resettlement because
(*a*) they are outside all of their countries of nationality and habitual residence; and
(*b*) they have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries."
[438] Section 148 IRPA Regulations.
[439] Such states are designated as "source countries" and determined by the Minister.
[440] Citizenship and Immigration Canada, Operational Bulletin OB-083, "Guidelines for Priority Processing in the Event of Disaster Situations" (October 30, 2008).

inclusion of victims of natural disasters or climate change[441]. They reach this conclusion by stating that inability to protect alone would not be sufficient to allow for a claim to be accepted, as persecution is also required. They base this on the *Ward* case[442]:

> The need for "persecution" in order to warrant international protection, for example, results in the exclusion of such pleas as those of economic migrants, i.e., individuals in search of better living conditions, and those of victims of natural disasters, even when the home state is unable to provide assistance, although both of these cases might seem deserving of international sanctuary.[443]

This analysis rightfully underlines the importance of the requirement that persecution occurs. However, there is a difference between persons seeking a higher standard of living, and those who face a serious and immediate risk to their life due to a natural disaster. The Court could have been more flexible in their application of this requirement in the latter case, given that migration is not entirely done by choice.

It appears then, that despite a compliance with clearly defined international obligations derived from multilateral treaties, Canada is not willing to go beyond these obligations by following norms and general recommendations of the UNHCR or other UN bodies.

5.2.3. Protection from Unwillingness or Inability to Provide Health Care

In addition to exceptions relating to health care in the determination of admissibility at the frontier, section 97 IRPA, which recognizes persons in need of protection, contains an explicit exclusion of claims relating to the inability to provide health care.

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[441] Immigration and Refugee Board of Canada, *Interpretation of the Convention Refugee Definition in the Case Law*, 31 December 2005, online: <http://www.irb.gc.ca/Eng/brdcom/references/legjur/rpdspr/def/Pages/index.aspx> at 1-5 [IRB, *Refugee Definition in the Case Law*].
[442] *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85 at 731-732 [*Ward*].
[443] *Ibid.*

> A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally […] to a risk to their life or to a risk of cruel and unusual treatment or punishment if […] the risk is not caused by the inability of that country to provide adequate health or medical care.[444]

I have previously demonstrated that such an exception would not be inconsistent with Canada's international obligations. However, the language of this subsection, in a way, supports my argument that an obligation to protect persons who need health services that are disproportionately inaccessible could be legitimate under international law. In this section of IRPA, the Canadian government recognizes an obligation to protect individuals from a risk to life that can be avoided by granting refuge. In the same breath, this section excludes a risk to life related to inadequate health care. Had it not specified that exclusion, the case law could have included it by interpreting the general objective of this provision.

This exception only identifies *inability* to provide adequate health care, which suggests that a state's *unwillingness* to provide health care would be a basis for protection in Canadian law. I have mentioned the hypothetical example of individuals who are HIV positive in the previous section as situations where a state may be unwilling to provide health care due to membership in a particular social group. Such cases have been recently examined by the Federal Court in the *A.B.* case[445].

Under the refugee claim analysis, the IRB had deemed the claimants, HIV positive persons from Zimbabwe, part of a social group. However, the IRB found that their

[444] Subsection 97(1)(b)(iv) IRPA.
[445] *A.B. and others v Canada (Minister of Citizenship and Immigration)*, 2006 FC 444, [2007] 1 F.C.R. 505.

allegations of stigmatization and thus persecution were too speculative[446]. The IRB's conclusions on the country conditions acknowledge the instability of Zimbabwe as a factor in limiting the country's resources, but they observe that health care is available to all, and that it should not be evaluated according to Canadian standards or judged on its shortcomings[447]. The IRB also analyzed the case in light of whether the claimants were persons in need of protection pursuant to section 97 IRPA. They concluded that the claimants did not face a risk of torture or cruel and unusual treatment, and that health care in Zimbabwe is equally accessible to all[448]. The Board only considered section 25 IRPA, and whether to grant status on compassionate and humanitarian grounds, as an alternative protection mechanism[449].

The Federal Court reviewed the Board's analysis of section 97 IRPA. In their opinion, "the correct approach to the application of section 97 of the IRPA in a context like this one is to first decide if there is sufficient evidence to establish that an applicant's life would be at risk and then to determine if the health care exclusion applies"[450]. Relying on an analysis of the *Covarrubias*[451] and *Singh*[452] cases, and an analysis of the evidence presented by the claimants, the Court concluded that they did not qualify for protection under 97 IRPA, due to inadequate evidence. Nevertheless, their interpretation of section

[446] *Ibid.* ¶ 5.
[447] *Ibid.* ¶ 6.: "The Board's review of the evidence concerning the relevant country conditions led to the following findings: […]Zimbabwe has a health care system in place for its citizens but it was not for the Board to judge the health care delivery system in the context of Canada or to attach blame for its shortcomings when the forces at play were many and complex."
[448] *Ibid.* ¶ 8.
[449] *Ibid.* ¶ 9.
[450] *Ibid.* ¶ 18.
[451] *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1193, 48 Imm. L.R. (3d) 186.
[452] *Singh v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 288, [2004] 3 F.C.R. 323, 39 Imm. L.R. (3d) 261.

97 IRPA allows protection for individuals who are denied health care in a discriminatory fashion. This conclusion is based on the words within the legislation. The Court states:

> I am not satisfied that the section 97(1)(b)(iv) exclusion is so wide that it would preclude from consideration all situations involving a person's inability to access health care in his country of origin. […] Parliament has frequently used the phrase "unable or unwilling" in the IRPA (see sections 96, 97, and 39). [The] failure to use "unwilling" in section 97(1)(b)(iv) was quite deliberate and was intended to narrow the scope of that exclusion. [It] would take very little adjustment to the language of the exclusion to make it beyond doubt that it was intended to cover every situation of risk to life on health grounds.[453]

They further strengthen this interpretation by fitting it into an analysis of international human rights and the purpose of international protection.

> [The] Federal Court of Appeal decision in *De Guzman v. Canada (Minister of Citizenship and Immigration)* […][454] clearly endorses an approach to the interpretation of the language of the IRPA to achieve, where possible, harmony with Canada's obligations under international human rights instruments. As an example, […] the International Covenant on Economic, Social and Cultural Rights […] requires states' parties to use their maximum of available resources for the realization of the right to health. […] Canada should extend refugee protection to claimants who would otherwise be returned to places where their governments are in deliberate non-compliance with such international commitments and where their lives would be in jeopardy. [455]

It seems then, that if a claimant who requests protection through section 97 IRPA manages to establish, with corroborating evidence, that they are being denied health care as a means of discrimination, they may thus obtain refuge in Canada.

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[453] *Ibid.* ¶ 27-28.
[454] 2005 FCA 436, [2006] 3 F.C.R. 655, 51 Imm. L.R. (3d) 17 ¶ 75.
[455] *Ibid.* ¶ 30.

5.2.4. Protection from Unwillingness or Inability to Provide Education

Where discrimination in education is considered, Canadian law reflects the general evasiveness of international human rights law on the subject, and the lack of recognition in international protection for longer term concerns such as the preservation of a minority culture, and equal prospects of earning a livelihood.

Discrimination through education is still commonly mentioned in cases where other types of persecution and discrimination are considered, including in protection claims made by Roma of Eastern and Central Europe, who exemplify this concern. Many of the Roma cases involve claimants who have been unnecessarily and arbitrarily placed in schools for children with special needs, or fear that their children will not have access to the same level of education as the majority of children in the same countries because of rampant discrimination from educators[456]. Although the differential treatment is based on the claimants' ethnicity, education concerns alone are not sufficient to found a protection claim. The claims were only accepted when they also included other factors such as physical abuse[457].

One instance where the right to education was more seriously considered by the Federal Court was a case where a Romani couple had a Canadian-born child who would be seriously disadvantaged if the family were returned to Romania[458]. The Court recognized the following problems faced by Romani children, including several ways in which they are disadvantaged in education:

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[456] See *Kaleja v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 252; *Kakonyi v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1410; *Milushev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 180, 60 Imm. L.R. (3d) 48; *Toth v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 682, 149 A.C.W.S. (3d) 295 149 A.C.W.S. (3d) 295.
[457] *Ibid.*
[458] *Dragomir v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1241, 76 Imm. L.R. (3d) 302 [*Dragomir*].

> Roma children often experience discrimination and exclusion when accessing state education. Some reports detail overt discrimination, such as teachers only providing help to non-Roma children, through to reports of violence and abuse directed at Roma children. Several sources noted that lack of education was a serious problem among Roma in Romania. Roma children are 25 per cent less likely to attend elementary school and 30 per cent likely [sic] to attend secondary school. Children are among those who are directly affected by human rights abuses in Romania. […] The lack of economic and social opportunities in Romanian society has subjected Roma children to various vulnerabilities. In some circumstances, they are forced to work to earn a living. While the law prohibits forced or compulsory child labor, such practices remain widespread in Romani communities. Many children were reported to occasionally forego attending school while working on family farms, especially in rural areas and in Romani communities. 3.9 million of the 5.6 million children in the country were "economically active". Over 300 thousand (approximately 7 percent) were "child laborers"[…] Child labor, including begging, selling trinkets on the street, or washing windshields, remained widespread in Romani communities; children engaged in such activities could be as young as five years old.[459]

In that case, the Court deemed the best interests of the child in relation to education, as well as the social and economic setting that leads to lack of education, as the determining factors of the case, and that the previously cited conditions were not properly taken into consideration. The court thus considered the Visa Officer's decision to be manifestly unreasonable and referred it to redetermination by another Visa Officer. However, it remains a rare occurrence and most cases need more elements of persecution for protection to be granted.

From this, it appears that the social, economic and cultural rights contained in the ICESCR do not create a basis for protection in themselves, but they may guide the

[459] *Ibid.* ¶ 4.

interpretation of the Refugee Convention and alternative protection mechanisms that exist in states. As such, protection claims where it is alleged that these rights are unfulfilled may be granted, when the unfulfilment of ICESR rights corresponds with criteria in existing protection schemes. However, claims based on rights that are significant in the long term tend to be associated with the search for a higher standard of living and are, thus, usually rejected.

From these chapters dealing with how human rights can be invoked to expand protection, the following chapter looks into how considerations regarding the claimant's identity affect the application of protection mechanisms.

Chapter 6. Obligations Related to Groups not Explicitly Accounted for by the Refugee Definition

My discussion has so far centred around the types of protection that are generally applicable to everyone, regardless of other considerations such as age, gender or family ties. This chapter deals with how these three considerations affect the interpretation of international law and human rights, and how they may widen the scope of international protection for specific groups of people. It is also concerned with specific rules that have a positive discrimination effect and account for the needs of groups who may be more vulnerable, such as children and women. I also deal with the specific value of the preservation of family ties, which affects the interpretation and application of international protection laws.

This chapter is divided according to the different concerns or groups I have identified, starting with the importance of the preservation of family ties, the best interests of the child, and finally, touching upon the awareness of types of persecution that are more detrimental to women and the protection that is granted accordingly. Each section contains an overview of the protection offered by international law, followed by an analysis of Canadian law and policy regarding the same topic.

6.1. Concern with Family Ties and Family Unity

Respect for family life is an important factor in the interpretation of alien rights in the ICCPR. Along with the prohibition of torture and cruel, unusual or inhuman treatment or punishment and non-discrimination, it is one of the factors which trigger an exception to the state's ability to determine who enters its territory[460]. In light of the foregoing, it

[460] *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, *supra* note 310 ¶ 5: "The

becomes relevant to look into the way family ties may be used to extend protection to persons who would otherwise be excluded.

The ICCPR generally recognizes family as "the natural and fundamental group unit of society" that is "entitled to protection by the society and State"[461]. Article 23 of ICCPR further recognizes the right to wilfully marry and found a family[462]. The concept of family is to be broadly interpreted as it is understood in the country concerned[463]. In addition to the obligation to protect family integrity through legislation, states have the obligation not to interfere with it[464].

This recognition of the importance of the family unit suggests that persons who are granted protection by an asylum state should see the same protection afforded to their family in order to preserve its integrity. It also creates awareness that persecution may have repercussions on an entire family, and not just on the individual who faces it directly. This is reflected by the Human Rights Committee's comments on the protection of the family:

Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise."

[461] Article 23(1) ICCPR.

[462] Article 23(2), (3) and (4): "The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

[463] Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, HRC, 32d Sess. (1988), online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/453883f922.html>.

[464] Article 17 ICCPR: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference."

> [The] possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.[465]

Apart from the Refugee Convention provision that nothing in the latter can impair other rights granted to refugees[466], the Conference of Plenipotentiaries that adopted the Convention itself issued a recommendation affirming refugees' right to family unity[467].

However, the right to family unity is not as widely recognized as the right not to be subjected to torture, and States tend to shape its scope according to the best interests of the child, the state's right to make decisions on entry or stay of non-nationals and the nature of the family ties involved[468]. The factor that strengthens it most remains the imperative obligation to act in the best interest of the child[469], which will be discussed at greater length in the following section.

Based on the foregoing international affirmations of the importance of family unity, it is conceivable that persecution under the Refugee Convention can comprise of interference

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[465] Human Rights Committee (HRC), *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, HRC, 39th Sess. (1990) online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/45139bd74.html> ¶ 5.

[466] Article 5 Refugee Convention.

[467] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951, UN Doc. A/CONF.2/108/Rev.1, 26 Nov. 1952, Recommendation B: "The Conference,
Considering that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and
Noting with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems (E/1618, p. 40) the rights granted to a refugee are extended to members of his family,
Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:
(1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country:
(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."

[468] Kate Jastram & Kathleen Newland, "Family Unity and Refugee Protection" in Feller, Turk & Nicholson, *supra* note 96, 555 at 568.

[469] *Ibid.*

with family life by reason of one of the five enumerated grounds, and that if the state fails or refuses to fulfil this right, it ought to be a basis for a refugee claim under section 96 of IRPA. Conversely, where a risk of torture or cruel, inhuman or degrading treatment or punishment is concerned, it may be demonstrated as a risk to the entire family and should warrant the protection of section 97 of IRPA. It may also be demonstrated through threats targeting the family or the persons who provide for the rest of the family. My analysis of Canadian case law and policy will reveal that such an interpretation has not been applied.

Furthermore, families may require protection based on the risk faced by one of their members. However, family unity does not overcome the possibility of exclusions based on serious criminality under article 1(F) of the Refugee Convention, or section 98 of IRPA in the Canadian context. If one member faces exclusion, family members may demonstrate that they, nonetheless, deserve refugee or protected person status, and they may demonstrate that they face a greater risk due to the excludable act of their family member[470]. In reality, members of an excluded claimant's family need to make a difficult choice between facing a risk of persecution and breaking family unity. In light of this, Feller and others call for a very strict interpretation of the exclusion clauses in Canada, in order to avoid breaking families apart for crimes that do not warrant exclusion[471]. Furthermore, in cases of deportation such as *Chiarelli*[472], the constitutional analysis of the

[470] *Ibid.*at 573.
[471] *Ibid.* at 573-574: " The impact of exclusion on family unity underscores the need to ensure there is not an overly expansive interpretation of the exclusion grounds under the 1951 Convention and/or other immigration-related grounds of inadmissibility, as this can result in families being split, or kept apart, due to a minor infraction on the part of one member. This is particularly an issue in countries, such the United States (*sic*) and Canada, where legislation subsumes concepts from both Article 1F and article 33(2) of the Convention into a single stage in the process which allows claims to be denied without full consideration of the merits."
[472] *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711.

validity of deportation orders does not take into account principles such as family unity, something Bassan deplores in her analysis of the case. She writes:

> The *Chiarelli* position sanctions the fundamental importance of the State's power to expel while seemingly ignoring the alien's competing interests. In order to extend constitutional protections to permanent residents facing deportation from Canada, it is incumbent upon the courts to adequately consider the interests of the individual, whose ties with the State are through home, family and society.[473]

In deportation cases, the best interests of the child, if their separation from a parent would cause undue hardship, are likely to have a higher impact in the weighing of competing rights than mere family unity. I will examine such cases in the following section.

In Canada, the right to family unity has been mentioned in the case law as part of the concept of "indirect persecution"[474]. It was defined and applied in the *Bhatti* case in these terms:

> The theory is based on a recognition of the broader harm caused by persecutory acts. By recognizing that family members of persecuted persons may themselves be victims of persecution, the theory allows the granting of status to those who might otherwise be unable to individually prove a well-founded fear of persecution.[475]

This decision included the psychological stress and trauma related to a family member being persecuted, but also went as far as considering the adverse effects of persecution on family members' social and economic rights through impeding the head of the family's ability to earn a livelihood[476].

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[473] Bassan, *supra* note 333 at 607.
[474] IRB, *Refugee Definition in the Case Law*, *supra* note 441 at 9-29.
[475] *Bhatti v. Canada (Secretary of State)*, (1994) 25 Imm. L.R. (2d) 275, 84 F.T.R. 145 ¶ 10.
[476] *Ibid.* ¶ 8.

The Federal Court reined in this expansion in the interpretation of the Refugee Convention definition in subsequent decisions. Rothstein J. considered, in the *Pour-Shariati* case[477], that the concept of indirect persecution had been too broadly defined in the name of family unity.

> The concept of "indirect persecution" in *Bhatti* is defined in very broad terms. It can encompass situations ranging from a person witnessing the ill-treatment of loved ones to the experience of a person who is obliged to stay in his or her country of origin, without the economic and social support of a certain family member. It is suggested that the principle of family unity justifies the indirect persecution concept.[478]

Rothstein J. states that such a broad concept is irreconcilable with the Convention refugee definition and unjustifiably broadens it[479].

The idea of indirect persecution supported by the importance of family unity was later excluded altogether from the refugee definition in *Casetellantos*[480], which has been confirmed in the more recent *Sivamoorthy*[481] case. Similar to the Supreme Court's analysis of distress caused by natural disasters[482], the *Casetellanos* case made no distinctions between psychological and physical trauma caused by the persecution of a family member because of one of the five Convention grounds, and the way such persecution affects the family's ability to earn a livelihood or maintain a certain standard of living. Also, the IRB states that claims based solely on family unity, defined by the UNHCR[483] as cases where the immediate family members of a claimant who fits the refugee definition may be granted protection regardless of their own risk of persecution

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[477] *Pour-Shariati v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 767, 89 F.T.R. 262.
[478] *Ibid.* ¶ 10-11.
[479] *Ibid.*
[480] *Casetellanos v. Canada (Solicitor General)*, [1995] 2 F.C. 190 ¶ 33-34.
[481] *Sivamoorthy v. Canada (Minister of Citizenship & Immigration)*, 2005 FC 199, 137 A.C.W.S. (3d) 394.
[482] *Ward*, *supra* note 442.
[483] UNHCR Handbook, *supra* note 393 ¶ 184.

on the sole basis of the principle of family unity, are not recognised in Canadian law[484]. The IRB thus confirms the reversal in the case law, altogether rejecting indirect persecution founded on family ties as a basis for the application of the Refugee Convention definition.

Despite the protection provisions being interpreted in a limited way, a claimant who is recognized as a protected person may apply for permanent residence along with their family members, even if they are abroad. An individual who is recognized as a protected person has 180 days to apply for permanent residence[485], and they may include family members in this application[486]. Family members may only obtain permanent residence after the protected person has paid the processing fees[487], obtained their own permanent resident status and demonstrated that their family members are indeed related in the way they claim to be[488]. The claim is then processed through the Canadian visa office abroad.

Hence, despite the limited interpretation of the Refugee Convention and of persons in need of protection provisions being focused on the individual and not the family, an individual who is granted protection may be reunited with his or her family. However, this reunification process has been the subject of criticism due to processing delays, as it takes several months to gather the processing fees, and then several more months to process the applications[489]. Added to the time a claimant is separated from their family while their protection claim is being processed, this can add up to at least 2 years of separation and seriously challenge the integrity of family relationships.

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[484] IRB, *Refugee Definition in the Case Law*, *supra* note 441 at 9-30, 9-31.
[485] Section 175 IRPA Regulations.
[486] Section 176 IRPA Regulations.
[487] The fees amount to $550 per adult and $150 per child.
[488] Canadian Council for Refugees, *More than a Nightmare: Delays in Refugee Family Reunification* (Montreal: Canadian Council for Refugees, 2004) at 6.
[489] *Ibid*. at 7.

From the abovementioned observations, it appears that in Canadian law, family unity itself is insufficient to extend the parameters of protection contained in the Refugee Convention, an interpretation that is inconsistent with the UNHCR's inclusion of family unity as a basis for extended protection. However, it is possible that family unity is given weight when tied to another, more clearly and generally accepted factor, such as the best interest of the child or women's rights. The former will be the subject of the next section.

6.2.The Importance of the Best Interests of the Child

From a legal point of view, children have a clearly defined status as minors[490], which triggers a higher responsibility and duties on the part of the family and the state. It is, therefore, hardly surprising that provisions directly target them in both international and domestic law. In the ICCPR, article 23 on the protection of family unity is directly followed by an article guaranteeing the protection of the child without discrimination[491]. The HRC states that all civil and political rights should be guaranteed to children, as well as the rights they benefit from as minors[492]. The protection of children's rights benefits from a near-universal ratification, with only two signatory countries not having ratified the 1990 *Convention on the Rights of the Child*[493]. Signatory states are, nonetheless,

[490] Article 1 Convention on the Rights of the Child: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."
[491] Article 24 ICCPR: "1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality."
[492] Human Rights Committee, *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, HRC, 35th Sess. (1989), online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/45139b464.html>.
[493] Status of ratification, online: UNTS <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en>; Somalia and the United States of America are the only two states who have yet to ratify it.

bound to refrain from undermining its objectives, as stated by the Supreme Court in *Baker*[494].

In international law, and under the Canadian interpretation of it, protection related to some civil and political rights is more easily triggered where minors are concerned[495]. One of those rights is the inherent right to life and the prohibition of torture. Those rights have been recognized in the Convention on the Rights of the Child, which guarantees and extends them by prohibiting the imposition of the death penalty or imprisonment without possibility of liberation on children under 18[496]. The Canadian Immigration and Refugee Board has declared that it recognizes an inherent difference when a certain type of treatment is inflicted on a child or on an adult, based on the Convention on the Rights of the Child and the comments of the UN Committee on the Rights of the Child[497]. The IRB states: "Although the same definition of torture applies to both adults and to children, its application should take into account the particular situation of children, as recognized in the *Convention on the Rights of the Child*"[498]. The UN Committee on the Rights of the Child's recommendations describe the extent of the protection required for children

[494] McAdam, *supra* note 5 at 176; *Baker*, *supra* note 349.
[495] *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, (entered into force 2 September 1990, accession by Canada 13 December 1993); Preamble: "[…] Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth […]".
[496] Article 6 Convention on the Rights of the Child: "1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child."; Article 37 Convention on the Rights of the Child: " States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time […]".
[497] IRB*, Consolidated Grounds*, *supra* note 248 at 37-38.
[498] *Ibid.* at 37.

within the realm of discipline, detention and punishment which, if they surpass the threshold outlined or fail to fulfil the obligations outlined by the Committee, become a basis for protection against cruel, unusual or degrading treatment[499].

The rights of the child with regards to cruel treatment have been considered by the Federal Court in the *Hashmat* case[500], which centred around whether a family could relocate to another part of Afghanistan to avoid the risk of persecution. This possibility, termed Internal Flight Alternative (IFA), forms part of the assessment of the inability or unwillingness to protect on the part of the home country. If claimants may avoid persecution by moving to a different region of their country of origin, they are denied refugee status. In this case, however, the high risk of violence being inflicted on the children on the journey to the possible IFA excluded it as a viable option. The same goes for an IFA where there is no family or other settlement arrangements available for the child[501].

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[499] Committee on the Rights of the Child, *State Violence Against Children: Report and General Recommendations*, CRC, 25th Sess., UN Doc. CRC/C/97, (2000), online: <http://www.unhchr.ch/html/menu2/6/crcdod.htm>: " (6) The Committee urges States parties to repeal, as a matter of urgency, any legislation that allows the imposition of unacceptable sentences (death or life imprisonment) for offences committed before the age of eighteen, contrary to the provisions of the Article 37(a) of the Convention.
(7) The Committee recommends that States parties review all provisions of criminal legislation, including on criminal procedure, dealing with children under eighteen (including any special legislation applying to armed forces) so as to ensure that it reflects appropriately the provisions of the *Convention on the Right of the Child* (articles 37 and 40). It also recommends that States parties consider incorporating into all relevant domestic laws and regulations […] In particular, the Committee recommends that penal legislation applicable to juveniles be reviewed so as to ensure that courts are not restricted to custodial sentences disproportionate to the offence.
(8) The Committee recommends that States parties review all relevant legislation to ensure that all forms of violence against children, however light, are prohibited, including the use of torture, or cruel, inhuman or degrading treatment (such as flogging, corporal punishment or other violent measures) for punishment or disciplining within the child justice system, or in any other context. The Committee recommends that such legislation incorporate appropriate sanctions for violations and the provision of rehabilitation for victims."
[500] *Hashmat v. Canada (Minister of Citizenship and Immigration)*, (1997) 131 F.T.R. 28, 71 A.C.W.S. (3d) 540, cited in IRB, *Refugee Definition in the Case Law*, *supra* note 441.
[501] *Elmi v. Canada (Minister of Citizenship and Immigration)*, (1999) 163 F.T.R. 122 50 Imm. L.R. (2d) 89; *Hassan v. Canada (Minister of Citizenship and Immigration)*, (1999) 73 F.T.R. 313, 87 A.C.W.S. (3d) 996.

The IRB has also directly applied the standards against violence inflicted on children. For example, they did so in Decision VA0-02635[502], concerning a Chinese adolescent who had been beaten into submission by his father and forced to come to Canada to earn money for his family.

> [In] the panel's view, the cruel and degrading punishment which the claimant received cannot be justified under rubrics like "filial piety" and "patrilineal authority." The States parties to the UN *Convention on the Rights of the Child* took a stand against violence towards children, and by doing so clearly held that the international community should not tolerate certain patterns of behaviour, whether or not they are culturally-specific. Using children as soldiers, selling them into prostitution, and beating them into submission are all acts enjoined by the *Convention*, wrong wherever they are practiced, in China or in Canada. Thus, when "filial piety" and "patrilineal authority" result in the psychological disabling of a child's normal functioning, "cultural" values must take a back seat to the child's best interests. It is persecution to be beaten in this cruel and systematic way, whatever arguments we advance to justify it.[503]

The same view has been upheld in another case of parental abuse, allowing an individual claim by a child to be accepted[504]. In both cases, the children were being illegally trafficked, and would be inevitably "re-trafficked" if returned. The IRB also concluded that despite the existence of child protection laws in China, the cultural importance of the father as the head of the family usually prevails and the laws are rarely enforced. The lack of fulfilment of a child's basic economic and social rights, which are generally provided to other children in the same country of origin, has also been accepted by courts

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[502] *X. v. Canada (Immigration and Refugee Board)* (22 March 2001), IRB Decision VA0-02635, online: CanLII <http://www.canlii.org/en/ca/irb/doc/2001/2001canlii27001/2001canlii27001.html>.
[503] *Ibid.* at 8.
[504] *Decision V99-02929*, Immigration and Refugee Board of Canada, 21 February 2000, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/4b18e5592.html>.

as persecution. Indeed, "A child who would experience hardships including deprivation of medical care, education opportunities, employment opportunities and food would suffer concerted and severe discrimination, amounting to persecution"[505].

More pivotal in the interpretation of protection measures in Canadian law is the principle of the best interests of the child. Article 3 of the Convention on the Rights of the Child requires courts of law to treat it as a primary consideration, without distinction as to the area of law concerned[506]. As such, it is an important part of asylum and refugee protection, in terms of procedural matters and treatment of asylum seekers, as well as the status determination on its merits[507]. It is also tied to the principle of family unity, which is defined in the Convention on the Rights of the Child as part of a child's fundamental rights.

This principle's general acceptance is hampered by its wide net of protection and the issue of indeterminacy that accompanies it. Indeed, it might be very far reaching and connected to a great variety of rights, but it also may be considered as vague[508]. For example, genital mutilation may be considered in many states as being in the best interest of the child in some cultures because of its significance in the child's social development and their membership in a community, whereas in other states, the violence of the

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[505] *Cheung v. Canada (Minister of Employment and Immigration),* [1993] 2 F.C. 314 at 325, cited in IRB, *Refugee Definition in the Case Law*, *supra* note 441 at 3-13.

[506] Paragraphs 3(1) and 3(2) CRC: "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."

[507] McAdam, *supra* note 5 at 173.

[508] *Ibid.* at 179.

practice sets it against a child's best interests[509]. In Canadian cases, the practice has been considered as amounting to persecution and thus against the best interests of the child[510], which suggests that Canada interprets violence as a more important factor than social norms in the consideration of those interests.

The best interests of the child are given varying weight in status determination, or in the evaluation of deportation orders in different countries[511], but the courts in Canada attribute a substantial weight to the principle[512]. Although family unity on its own does not have a major impact on deportation cases, the Supreme Court's analysis in *Baker*[513] has led to a different conclusion when the best interests of children come into play.

This case was concerned with a woman who applied for an exemption from her deportation order based on humanitarian and compassionate grounds, under section 114(2) of the *Immigration Act*[514]. One of the reasons she submitted for her exemption was the negative effect her deportation might have on her children. L'Heureux-Dubé J. recognized that the Convention on the Rights of the Child was not implemented into Canadian law, and thus did not have a direct application in domestic law, but, she argued, its fundamental principles ought not to be undermined through the application and interpretation of domestic law[515]. In that case, the principle at hand was the best interests of the child, and this case consecrated its important weight in deportation decisions. The

[509] *Ibid.*
[510] See *Ndegwa v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 847, 55 Imm. L.R. (3d) 108; See also IRB, *Refugee Definition in the Case Law*, *supra* note 441 at 3-5: "Some forms of harm are unlikely to be inflicted repeatedly (e.g., female genital mutilation), or are simply incapable of being repeated (e.g., the killing of the claimant's family as a form of retribution against the claimant); nevertheless, they are so severe that their characterization as persecution seems beyond dispute."
[511] McAdam, *supra* note 5 at 180-182.
[512] *Wu v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1274, 17 Imm. L.R. (3d) 47 cited in *ibid.* at 180.
[513] *Baker*, *supra* note 349.
[514] Now section 25(1) IRPA.
[515] Baker, *supra* note 349 ¶ 69-70.

principle has since been integrated directly into section 25(1) of IRPA. This provision deals with ministerial discretion based on humanitarian and compassionate grounds, both in cases of admission and deportation, and requires the Minister to consider the best interest of the child when evaluating such requests[516].

The reasoning in this landmark case is consistent with the guidelines of the IRB, which require the analysis of the best interest of the child as a primary consideration in all claims involving child refugee claimants[517]. Nonetheless, the endorsement of the principle by the Supreme Court led to a consistent consideration of the best interests of the child in asylum or deportation cases. One such case is *Patel*[518], where the Federal Court justifies the application of the best interests of the child to a protection claim.

> The applicant submits that humanitarian and compassionate considerations have no place in the determination of whether or not a claimant is a Convention refugee or a person in need of protection. And that the Board is required to make a determination on the basis of the factors set out in sections 96 and 97 of the Act. Any humanitarian and compassionate factors raised by a particular claimant, such as the best interest of the child, can only be fully considered once a determination is made on the issue whether a claimant merits protection in Canada. However, the words "humanitarian and compassionate" are not found in the Board's reasons, although references are made on the other hand to "the best interests of the child". But as the applicant has acknowledged, the "best interests of the child" are relevant to the procedures

[516] Section 25(1): "The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations."
[517] Immigration and Refugee Board of Canada, *Guidelines Issued by the Chairperson Pursuant to Section 65(4) of the Immigration Act: Guideline 3 - Child Refugee Claimants: Procedural and Evidentiary Issues*, 30 September 1996, online: <http://www.irb.gc.ca/eng/brdcom/references/pol/guidir/pages/ChiEnf.aspx>.
[518] *Canada (Minister of Citizenship and Immigration) v. Patel*, 2008 FC 747, [2009] 2 F.C.R. 196.

followed in such a case.[519]

This statement confirms that the IRB has a duty to consider all humanitarian and compassionate grounds brought forth by a claimant, including the best interests of the child, upon making a decision on admission.

In another case regarding the deportation of a Romani couple that has a Canadian-born child, the Court recognizes the inclusion of access to proper education in the analysis of the best interests of the child[520]. One of the main concerns of the parents in this case was the discrimination faced by Romani children within the Romanian education system, which results in the Romani community being limited in its ability to earn a livelihood. The Court establishes in this case, as well as in *Patel*, that the general well-being and necessities of life for the child have to be considered when evaluating the best interest of the child, and those may include civil and political rights as well as socio-economic rights. Hence, children's rights do not create new and separate mechanisms of protection. They expand existing ones beyond their literal interpretation, in accordance with new developments in human rights law. The next section focuses on whether women's rights have the same effect on asylum practices.

6.3.Gender-Related Persecution and Concerns Specific to Women

It is generally recognized that women and girls are a more vulnerable group as refugees[521], and there is growing acceptance for the inclusion of women as a particular social group within the Convention Refugee definition[522], and for feminism as a political

[519] *Ibid.* ¶ *58*-59.
[520] *Dragomir*, *supra* note 458.
[521] Goodwin-Gill, *The Refugee*, *supra* note 24 at 255-257.
[522] Alice Edwards, "Age and Gender Dimensions in International Refugee Law" in Feller, Türk & Nicholson, *supra* note 96, 46 at 51-57.

opinion[523] for the purpose of the Refugee Convention definition. Edwards comments on the developments regarding refugee women in these terms:

> As a culmination of these developments, judicial reasoning took on new approaches, moving away from paradigms dominated by the experiences of male refugees, and towards a gender-sensitive and gender-inclusive interpretation and application of refugee law that gave equal significance to the sometimes different, although no less serious, forms of persecution feared by women. Case law has recognized a wide range of valid claims, including sexual violence, domestic violence, punishment and discrimination for transgression of social mores, sexual orientation, female genital mutilation, and trafficking […].[524]

These comments reflect the focus of this section. It will combine gender-specific concerns in international human rights law, the most recent guidelines issued by the UNHCR, and how they impact on Canadian asylum legislation and case law.

The ICCPR recognizes the right of women to enjoy all civil and political rights without discrimination[525] and prevents the imposition of the death penalty on pregnant women[526]. The ICESCR reiterates the prohibition of discrimination against women[527] and further protects them against discrimination in work conditions[528]. These provisions reflect an

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[523] Alice Edwards, "Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women", (August 2009) Legal and Protection Policy Research Series, PPLAS/2009/02 (UNHCR, Protection Policty and Legal Advice Section (PPLAS)) at 17 [Edwards, "Gender Equality"]

[524] *Ibid.*at 52.

[525] Article 3 ICCPR: "The States Parties to the present Covenant undertake to ensure the equal right of men and women tforth in the present Covenant."

[526] Article 6(5) ICCPR: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."

[527] Article 3 ICESCR: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

[528] Article 7 ICESCR: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
(a) Remuneration which provides all workers, as a minimum, with:
(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal

awareness of common patterns of discrimination against women and have been expanded by the adoption of the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW)[529] and its enforcing Committee's position that gender-based violence fits within the definition of discrimination against women[530].

However, if we apply this in the asylum context, not all discrimination against women amounts to persecution. It appears, rather, from Edwards' comments and examples of persecution, that it becomes persecution when tied with some form of violent or cruel behaviour that exploits the particular vulnerabilities of women. It may also become persecution when it results directly from a discriminatory state policy[531].

Also, Edwards contends, the CEDAW requires asylum states to implement gender-sensitive asylum procedures by considering the foregoing types of gender-related persecution, as well as the way gender may affect the possibility of reaching an IFA[532]. She further calls attention to the various forms of discrimination, which prevent women from reaching a state of asylum and essentially stem from the human rights situation of the country of origin.

> These can include restrictions on the freedom of movement of women in her country of origin, lack of access to necessary documentation, such as passports, because she is female, legal requirements for permission from husbands to travel or cultural factors that put women travelling alone or without male family members at risk of

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work; […] "

[529] *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981, accession by Canada 10 December 1981) [CEDAW].

[530] Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendations Nos. 19 and 20*, UN CEDAW, 11th Sess., UN Doc. A/47/38 (1992).

[531] Rodger Haines QC, "Gender-related Persecution" in Feller, Türk & Nicholson, *supra* note 96, 319 at 335.

[532] Edwards, "Gender Equality", *supra* note 523 at 18-19.

harassment and violence.[533]

As such, they appear to fall out of the scope of the protection system in countries of asylum such as Canada, which process mostly inland claims. However, part of my enquiry on the role of UNHCR and independent organizations in international protection has shown that Canada protects some individuals abroad through its humanitarian-protected persons abroad classes.

The UNHCR has issued and updated guidelines on the integration of gender in the interpretation of the Refugee Convention[534]. The guidelines explore how gender, as a social construct, may affect persecution based on one of the five grounds enumerated in the Convention. For instance, it may intersect with religion, if a woman is persecuted for not conforming with the behavioural codes assigned to women in her religion[535]. They also touch upon the interpretation of social group as including sex, which is, like other social groups, innate and unchangeable[536].

Those guidelines have been picked up by the IRB, which issued its own guidelines for board members processing gender-based persecution claims. The IRB identifies four broad categories of women refugee claimants where gender may be relevant for understanding persecution. These are:

> Women who fear persecution on the same Convention grounds, and in similar circumstances, as men, [women] who fear persecution solely for reasons pertaining to kinship, i.e. because of the status, activities or views of their spouses, parents, and siblings, or other family members, [women] who fear persecution resulting from

[533] *Ibid.* at 19.
[534] UN High Commissioner for Refugees, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, UNHCR, UN Doc. HCR/GIP/02/01 (2002).
[535] *Ibid.* at 7.
[536] *Ibid.* at 8.

> certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned persons, [and women] who fear persecution as the consequence of failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin.[537]

The IRB goes on to condone the inclusion of gender in the category of particular social groups, based on the *Ward*[538] case, as well as on the UNHCR's interpretations of international law[539]. In such cases, the persecution has to occur because of the person's gender, or because of a woman's belonging to a specific subgroup of women.

Dauvergne's research on the vulnerabilities of women in all aspects and stages of the refugee determination process has shown that the IRB's gender guidelines have not been consistently and effectively applied[540]. In many recent cases, both the Board fails to appreciate the particular vulnerabilities of women and the trauma associated with sexual violence.

For example, in the recent *Gaymes* case[541], a woman from the small island state of St-Vincent and Grenadines was claiming persecution based on the fact that her father had sexually abused her. Her claim was that the abuse led to the development of a mental

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[537] Immigration and Refugee Board of Canada, *Guidelines Issued by the Chairperson Pursuant to Section 65(4) of the Immigration Act: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution*, 13 November 1996, No. 4., online: < http://www.irb.gc.ca/eng/brdcom/references/pol/guidir/Pages/women.aspx > [IRB, *Guideline 4*]

[538] *Ward*, *supra* note 442, cited in *ibid*.: "The *Ward* decision indicated three possible categories of "particular social group":
1) groups defined by an innate or unchangeable characteristic;
2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
3) groups associated by a former voluntary status, unalterable due to its historical permanence.

[539] IRB, *Guideline 4*, *supra* note 537.

[540] Catherine Dauvergne, Leonora C. Angeles & Agnes Huang, *Gendering Canada's Refugee Process* (Ottawa: Status of Women Canada, 2006).

[541] *Gaymes v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 801.

illness, that she suffered continuous harassment by local people who knew of her situation, and that she had been the victim of a sexual assault by two men and a policeman who took advantage of weaknesses caused by her mental illness. Both the Board and the reviewing Court deemed that she had not provided sufficient proof of the assault, disregarding the fact that it may be unrealistic to ask for documented proof in a case of rape, especially since the claimant was still not comfortable even mentioning it upon entry in Canada. In this case, the stigma attached to rape, as well as the other elements of persecution brought forth by the claimant, were not carefully weighed by the Court.

In some cases, the IRB has recognized that women who face a personal risk of cruel treatment in the form sexual violence and who cannot obtain police protection should be granted protection[542]. There are, nonetheless, numerous instances where the Board does not properly assess psychological evidence related to sexual assault and the reluctance to report such incidents to the authorities in light of gender considerations [543]. In many of those cases, the reviewing Court quashes the decisions based on insufficient consideration of the gender guidelines. In practice, however, only a minority of decisions are reviewed, which raises concerns as to the Boards consistency with the application of the guidelines.

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[542] *P. (I.M.P.) v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 259; the case recognized that the claimant was at personal risk of sexual violence, as she had been assaulted by a man with considerable political power, and had received threats of further assaults. However, the board recognized a viable IFA, which was confirmed by the Federal Court. A similar decision was reached in *Canto Rodriquez v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 462.

[543] See, for example, *Duitama Gomez v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2010 FC 765; *Dezameau v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 559; *Miramontes-Hernandez v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 469; *Pereyra Aguilar v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 216; *Kayumba v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 138.

Another critique is that men may also be persecuted based on gender if they refuse to conform to the gender identity that is assigned to them. LaViolette argues that the Canadian guidelines reflect persecution based on sex, rather than including all the forms of persecution based on gender as a social construct[544]. Even where women are concerned, LaViolette highlights cases before the IRB where claims by lesbian women were only considered in light of sexual orientation, without further analysis of the persecution related to their challenge to established norms of feminity[545]. These considerations reflect the need to carefully explore the ramifications of each individual case, while promoting an expansion of the interpretation of the notion of persecution and the social group nexus in light of different aspects of gender roles. The Federal Court has stated that the guidelines do not create new grounds for finding a person to be a victim of persecution[546], but it is arguable that the concept of persecution itself is often being too narrowly interpreted. The Canadian interpretation based on gender thus seems to include women's rights in the application of sections 96 and 97 of IRPA, but not in a way that is as clear and consistent as the consideration of the best interests of the child within Canadian asylum practice.

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[544] Nicole LaViolette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines" (2007) 19 Int'l J. Refugee L. 169 at 184: "Women are more vulnerable to violence, persecution, and gender-based discrimination. Every State must tackle the problems related to protecting refugee women within the context of refugee determination. However, it cannot be ignored that relations based on gender affect not only the freedom of women, but also the freedom of those men who, with good reason, challenge the privileged position they hold because of gender-specific power relations."

[545] *Ibid.* at 190-193. See *P.T.F.(Re)*, [2000] CRDD No. 117 (QL); *D.A.K.(Re)*, [2000] CRDD No. 338 (QL); *C.U.V.(Re)*, [2001] CRDD No. 397 (QL).

[546] *N. (F.) v. Canada (Minister of Citizenship & Immigration)* (2000), 182 F.T.R. 294, 97 A.C.W.S. (3d) 736.

Chapter 7. Conclusion

This thesis has sought to provide a precise and nuanced view of Canada's compliance with complementary protection obligations imposed by international human rights law, while exploring different forms that complementary protection can take. It has argued that the granting of refugee status to a new category of persons who fear for their life within section 97 IRPA is a step forward, but does not represent Canada's full compliance with its international obligations. Through an analysis of state obligations based on several international human rights instruments developed after the 1951 Refugee Convention, this thesis has shown that Canadian law usually honours the humanitarian concerns in international refugee law, while making efforts and creating loopholes in order to maintain its prerogative of exclusion based on national security.

A historical overview of asylum practices and the creation of the international refugee protection regime has revealed a shift from state discretion to an aspiring universal and binding protection regime. The study of the work leading to the conclusion of the Refugee Convention has revealed that it is inextricably linked with human rights law, and that it can be qualified as "a specialist human rights treaty which acts as a *lex specialis* for persons in need of international protection"[547]. Its drafting history shows that it was meant to provide a framework of protection that would operate on a case-by-case basis, and would be flexible enough to encompass most situations that were not foreseeable at the time. In McAdam's words:

> Whereas pre-1951 concepts of protection, based on national category, were expanded incrementally through their application to new national groups, the Convention conceptualization has been extended through developments in human rights law,

[547] McAdam, *supra* note 5 at 253.

> which have informed both the meaning of 'persecution' and the scope of *non-refoulement*. Accordingly, while human rights law widens threshold eligibility for protection, the Convention remains the blueprint for rights and legal status.[548]

This thesis followed the foregoing reasoning by defining complementary international protection as a corpus of obligations which widen the scope of international refugee law with the objective of making it complete, that is encompassing all situations where individuals find themselves unprotected by their state of nationality or residence. In reality, this translates as non-specific human rights instruments being applied to the context of refugee protection. Presuming that states have a positive duty to prevent and sanction violations of human rights within their jurisdiction, an inability or unwillingness of the state to do so puts individuals in a situation where they may literally be called "persons in need of protection".

My method involved investigating what recourses exist when a state is unable or unwilling to protect different types of rights. This served to highlight situations where a basis for protection was created outside of the Refugee Convention, situations where rights were used for the interpretation of the Convention itself, as well as situations where international organizations create initiatives to guarantee the fulfilment of human rights.

The only source of protection which has sufficient independence from the Refugee Convention to be deemed a separate and complementary protection mechanism is the prohibition of non-refoulement in article 3 of CAT. Its embodiment in Canadian law, in section 97 of IRPA, does not mention either this article of the CAT or the principle of non-refoulement, thus avoiding the explicit integration of those peremptory norms. It expresses a clear integration of the prohibition of torture by including most elements of

[548] *Ibid.*

article 1 of CAT and expanding it to include cruel, inhuman or unusual treatment or punishment as well, in accordance with article 7 ICCPR.

Section 97 of IRPA links the category of persons in need of protection to the same exclusions that are contained in the refugee definition, in article 1(E) and (F) of the Refugee Convention, and leaves them subject to numerous grounds of inadmissibility at the frontier, all of which go against the absolute nature of the principle of non-refoulement. An analysis of case law has shown consensus that non-refoulement is implicit within section 97 of IRPA, that it is indeed absolute, and that the CAT prevails over the Refugee Convention. However, courts have sought to justify the exclusions and the effective preference for the Refugee Convention over the CAT, instead of reassessing IRPA's validity in light of international law.

With regards to civil and political rights that influence the interpretation of the refugee definition and the principle of non-refoulement, most can be integrated within the meaning of persecution in the Convention definition. However, Canadian law does not respect the provisions relating to territorial access in the ICCPR and the Refugee Convention, as its admissibility requirements allow for rejection of claimants at the frontier on the basis of health or criminality grounds, without proper weighing of the risk the claimant faces. If the risk is torture or cruel punishment, it goes against the principle of non-refoulement. This thesis has also shown that the unwillingness to provide health care may be accepted as grounds for protection, but the exclusion in cases of inability to provide health care, and the public health exclusion at the frontier also go against the absolute nature of non-refoulement.

In relation to other social and economic rights, Canadian law does not provide a clear framework of protection for situations where national disasters undermine individuals' ability to provide for their basic needs, unless a breakdown in infrastructure causes civil and political unrest. In such cases, Canada may consider individuals to be persons "in a similar situation" to refugees and accept them through its humanitarian assistance program, based on recommendations by the UNHCR. Also, the Supreme Court has explicitly rejected natural disasters as persecution in the *Ward* case by essentially placing their victims on the same level as people who merely seek a higher standard of living. This thesis has also posed the question of longer-term concerns for the development of minority cultures and the ability to earn a livelihood through non-discrimination in education, which have been shown to hold little weight in protection claims. Despite limits to the humanitarian character of the Canadian asylum system, it has generally welcomed guidelines which take the interests of families, children and women into account. Overall, these aspects of the Canadian implementation of international law could be criticized for not being generous enough, but this thesis has also shown that responses to these rights are not yet fully developed within international law itself.

This thesis generally aimed at exploring the general meaning of "persons in need of protection" within international law, and has demonstrated that it encompasses victims of the breakdown of states' ability to protect their residents' and nationals' basic human rights. In Canadian legislation, the expression has come to identify a more limited group of persons. Although other measures provide some additional protection, they generally appear as a pale reflection of the evolution of Refugee law in light of the development in human rights law, in large part because they are hindered by numerous exclusions and

their overall complexity. Complementary protection is still a concept under development, but its emergence shows how wide-ranging and idealistic rights can become meaningful and enforceable in a specific area of law. Its Canadian implementation, though limited, adds to the growing international support for the existence of complementary protection mechanisms and solidifies their recognition as international customary norms.

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