

International Law and Legal Instruments

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ACRONYMS:

ACHR	American Convention on Human Rights
AD	American Declaration on the Rights and Duties of Man
AfCHPR	African Charter on Human and Peoples' Rights
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	International Convention on the Elimination of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EU	European Union
ExComm	Executive Committee of the High Commissioner's Program
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICESCR	International Convention on Economic, Social, and Cultural Rights
ICCPR	International Convention on Civil and Political Rights
ICJ	International Court of Justice
IDP	Internally Displaced Peoples
IFA	Internal Flight Alternative
ILO	International Labour Organization
IRO	International Refugee Organization
OAS	Organization of American States
RC	1951 Convention Relating to the Status of Refugees and its 1967 Protocol
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNRRA	United Nations Relief and Rehabilitation Association

OVERVIEW

Refugees are human rights violations made visible. Consequently, their precarious situation and the protections afforded to them cannot be understood without recourse to the human rights standards developed within international refugee law (IRL), international humanitarian law (IHL), and international human rights law (IHRL). A common tendency is to equate refugee law and refugee protection with the *1951 Convention and the 1967 Protocol relating to the status of Refugees* (from here on in the RC). However, analysis illustrates that the problem of refugees and the solutions to those problems cannot be understood unless viewed through a human rights lens, taking into account the various UN human rights Covenants and treaties. In addition, attention must be drawn to the regional arrangements that provide protection to refugees, such as the African Union, the Inter-American Commission and Court, and the European Court for Human Rights.

INTRODUCTION

The definition of “refugee” enshrined in Article 1A of the RC remains the corner stone of IRL and represents the minimum standards according to which states are obliged to accord refugee status and the benefits and rights resulting from therein. That this definition is the cornerstone of IRL is not to say that it is universally accepted as adequate. Regional arrangements developed in Africa and Latin America, namely the Convention Governing Specific Problems of Refugees in Africa (from here on in the OAU Convention) and the Cartagena Declaration (CD), have been developed so as to address perceived gaps in protection. Likewise, instruments of international human rights law have protected the rights of refugees and asylum-seekers in those areas where the RC is weak.

It is necessary to begin with a discussion of the RC, not because it necessarily represents a complete, holistic understanding of what it means to be a refugee in this day and age, but rather because it is the only international legally binding treaty whose focus is solely upon refugees and asylum-seekers. The sheer number of states signatory to it is testament to its importance.

PRINCIPAL INTERNATIONAL AND REGIONAL INSTRUMENTS

International and Regional Refugee/IDP Instruments

1951 Convention and 1967 Protocol Relating to the Status of Refugees

UNHCR

<http://www.unhcr.ch/cgi->

[bin/taxis/vtx/home/+LwwBmeJAIS_3wwwxFqzqvqXsK69s6mFqA72ZR0gRfZNhFqA72ZR0gRfZNTfQrpGdBnqBzFqmRbZAFqA72ZR0gRfZNDzmxwww1FqhuNlg2/pendoc.pdf](http://www.unhcr.ch/cgi-bin/taxis/vtx/home/+LwwBmeJAIS_3wwwxFqzqvqXsK69s6mFqA72ZR0gRfZNhFqA72ZR0gRfZNTfQrpGdBnqBzFqmRbZAFqA72ZR0gRfZNDzmxwww1FqhuNlg2/pendoc.pdf)

Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) 1969

Africa Union

<http://www.africa->

[union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf)

Cartagena Declaration, 1984

<http://www.asylumlaw.org/docs/international/CentralAmerica.PDF>

United Nations Office for the Coordination of Humanitarian Affairs. *Guiding Principles on Internal Displacement.*

http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html

International and Regional Human Rights Law

Universal Declaration of Human Rights

[Human and Constitutional Rights Resource Page](#)

http://www.hrcr.org/docs/universal_decl.html

International Covenant on Civil and Political Rights

Human and Constitutional Rights Resource Page

<http://www.hrcr.org/docs/Civil&Political/intlcivpol.html>

International Covenant on Economic, Social and Cultural Rights

Human and Constitutional Rights Resource Page

<http://www.hrcr.org/docs/Economic&Social/intlconv.html>

International Convention on the Elimination of All Forms of Racial Discrimination

Human and Constitutional Rights Resource Page

<http://www.hrcr.org/docs/CERD/cerd.html>

UN Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment

Human Rights Web

<http://www.hrweb.org/legal/cat.html>

UN Convention on the Elimination of All Forms of Discrimination Against Women

Human and Constitutional Rights Resource Page

<http://www.hrcr.org/docs/CEDAW/cedaw.html>

UN Convention on the Rights of the Child

UNHCHR

<http://www.unhchr.ch/html/menu3/b/k2crc.htm>

African [Banjul] Charter on Human and Peoples' Rights

Human and Constitutional Rights Resource Page

<http://www.hrcr.org/docs/Banjul/afrhr.html>

African Commission on Human and Peoples' Rights, Rules of Procedure

Human and Constitutional Rights Resource Page

http://www.hrcr.org/docs/African_Commission/afrcommrules.html

American Convention on Human Rights

Human and Constitutional Rights Resource Page

http://www.hrcr.org/docs/American_Convention/oashr.html

European Convention on Human Rights

Human and Constitutional Rights Resource Page

http://www.hrcr.org/docs/Eur_Convention/euroconv.html

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

Human and Constitutional Rights Resource Page

http://www.hrcr.org/docs/Eur_Conv_Torture/eurotort.html

American Declaration of the Rights and Duties of Man

Human and Constitutional Rights Resource Page

http://www.hrcr.org/docs/OAS_Declaration/oasrights.html

International Humanitarian Law

1949 Geneva Conventions and 1977 Protocols

ICRC

<http://www.icrc.org/ihl.nsf/WebCONVFULL?OpenView>

1. PRINCIPLES AND CONCEPTS OF IRL

1.1 *Refugee Status*

The meaning of what it means to be a refugee has undergone a shift, and continues to do so. In the early years of devising the refugee regime that is now referred to as international refugee law (IRL) (1920-1935) refugees were defined principally in relation to their vulnerability as individuals who did not enjoy state protection. The refugee was an anomaly within the international state system and international protection was designed so as to correct this anomaly. During this time the *Minority Treaties* were established to offer protection to those displaced during the First World War. These Treaties entrusted the League of Nations with the minority peoples' protection.¹ This was an important development insofar as for the first time, it recognized the millions of people who lived outside of normal legal protection and required an additional guarantee of their elementary rights from an external body. The granting of protection was intended to correct the problem of denial of state protection. It did not imply that the individuals protected were bearers of rights. Rights were dependant upon the relation between citizen and the state. According to political theorist Hannah Arendt, the *Minority Treaties* made explicit what was hitherto implicit in the workings of the Nation-State, namely that:

Only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions, that persons of different nationalities needed some law of exception until or unless they were completely assimilated and divided from their origin.²

Between the years 1935-39, it became evident that refugees, understood as peoples without state protection, were not as exceptional as had originally been assumed. In addition to the Russian refugees who resulted out of the Russian civil war and the Armenian refugees who fled the Greco-Turkish war, there were now those persons and groups who were adversely affected by particular socio-political events, namely the National Socialist regime in Germany. Such refugees were defined in a situation-specific manner.

Following the Second World War, the international community developed a more individualist approach to the defining of a refugee. With the dissolution of United Nations Relief and Rehabilitation Association in 1947 and its emphasis upon repatriation, a pronounced focus developed on the notion of personal freedom. Refugee status came to be determined not

according to political and social categories, but rather based upon the individual merits of each case, with political reasons for flight as primary. In 1951 the international community negotiated the drafting and the adoption of the 1951 Convention on the Status of Refugees. At the moment of the drafting of a refugee definition, the concept of the “refugee” became a fixed rather than a contingent concept (Goodwin-Gill 1996; Hathaway 1991).

Websites

Vienna Convention on the Law of Treaties, 1969.
<http://www.un.org/law/ilc/texts/treaties.htm>

1.2. Asylum

The concept of a refugee ought not be conflated with that of an asylum-seeker. Traditionally, asylum meant a right to refuge and an asylum-seeker was one who sought out such refuge in a state other than one of his origin or habitual residency. With time, however, the term has undergone a shift and is now increasingly interpreted as the right of the state to give protection to exiles and refugees. This was clearly emphasized in the *Asylum case* before the International Court of Justice (ICJ).³

It is unclear in international law the extent to which individuals have the right to enter and *reside in* other countries. While the Universal Declaration of Human Rights, Article 14 speaks of the “right to seek and to enjoy in other countries asylum from persecution,” there is no explicit mention of a right *to be granted* asylum. The RC does not even address asylum, but rather considers it to be a matter best left to state discretion. This gap within the RC is a result of the common assumption within international relations, that states are the only subjects of international law and that individuals and more specifically, refugees and asylum-seekers, have no standing in international law.

The right to “receive” or “be granted” asylum, which establishes a positive obligation upon states can only be found in various regional arrangements, such as: Article 22(7) of the American Convention on Human Rights, Article 27 of the American Declaration on the Rights and Duties of Man, and Article 12(3) of the African Charter on Human and Peoples’ Rights. While Member States of the European Union affirmed the fundamental importance of asylum at the European Council Meeting in Tampere in 1999, the right to asylum remains conspicuously absent from any of the legally binding regional instruments for human rights protection at the European level. The European Charter of Human Rights does not enshrine the right even to *seek* asylum. (Plender & Mole 1999)

Websites

United Nations Declaration of Human Rights, 1948.
http://www.hrcr.org/docs/universal_decl.html

UNHCR Agenda for Protection UN doc. A/AC.96/965/Add.1, 26 June 2002.
http://www.unhcr.bg/pubs/agenda_protection/en/agenda_for_protection_en.pdf

Declaration on Territorial Asylum, UNGA res. 2313 (XXII), 14 Dec. 1967.
<http://www.refugeelawreader.org/files/pdf/53.pdf>

1.3. Refugee Status Determination Procedures

The determination of refugee status refers to the legal act by which the particular conditions giving rise to an individual’s flight are examined with the aim to determine whether or not the

individual is deserving of international protection. The RC does not expressly provide for how such procedures ought to be organized and function. Unfortunately, in Latin America, the Middle East, and Africa, few states have adopted any such procedures. For those states that have not developed such procedures, the responsibility often falls to the UNHCR to determine status and subsequently to make recommendations to the respective governments. The UNHCR is usually only authorized to grant an applicant “mandate status” which is not the same as refugee status granted by the putative asylum state. The latter is entitled to a much broader range of rights and freedoms than is a mandate refugee.

Websites

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992.

<http://www.hrea.org/learn/tutorials/refugees/Handbook/hbtoc.htm>

1.3.1. Safe Third Country Policies

The notion of a “safe third country” reflects a shift that has occurred within refugee status determination procedures. Instead of undertaking an in-depth examination of individual applicant’s situation, states are increasingly resorting to a formal consideration of the applicant’s flight itinerary. The idea is that if an applicant transits through a third country that is considered by the asylum state to be “safe”, then the applicant is obliged to apply for refugee status in that third country. This idea is based principally on the expectation of “burden sharing.” Within the European Union, for example, a refugee must apply for status in the first EU country that they enter. If they do not, and proceed to travel to another EU country, they will automatically be returned to the first EU member country that granted them entrance into the EU area. In some countries, automatic return is not limited to other EU states. Individuals may be sent without prior consideration of their claim and with no regard to their safety to another country, previously established by that state as “safe third country.” A case in point is Germany who may automatically send an applicant to Norway, Poland, Switzerland, or the Czech Republic. Lists of automatic safe third countries also exist in Finish, Dutch, and British legislation.

Burden of Proof

With the advent of safe third country policies there is often a presumption of safety if the state concerned has ratified the relevant instruments of international law. In the case of EU countries and according to the *Council of Europe’s Recommendation to Member States Containing Guidelines on the Application of the Safe Third Country Concept*,⁴ a safe third country state must have ratified the RC, the ECHR, and the ICCPR. Ultimately, the burden of proof is shifted to the applicant who must then demonstrate that the proposed safe third country is *not* safe. If the state has ratified the relevant instruments, the applicant must demonstrate that they do not comply with their obligations under those treaties. In General Comment No.1, the Committee Against Torture confirms that: “the burden is upon the author to present an arguable case. This means that there must be a factual basis for the author's position sufficient to require a response from the State party,” and that “the author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present.”⁵

Protection Elsewhere

Nevertheless, UNHCR in their *1993 Note on International Protection* emphasize the risks inherent in the presumption of “protection elsewhere.” They note that in many instances

applicants are simply sent to a “safe third country” without guarantees that the state in question will accept responsibility. The ultimate result is that the applicant is returned to their country of origin. Chain deportations of applicants under the basis of “protection elsewhere” may ultimately result in *refoulement*.⁶ The Committee Against Torture confirms that “another state” within the meaning of Article 3 of CAT, refers to “the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited.”⁷ Therefore, if a state engages in chain deportation they may ultimately violate Article 3 of CAT should the individual ultimately end up in a state in which they are faced with a serious risk of torture, cruel, inhuman or degrading treatment. **See Section 1.4.1**

1.4. Non-Refoulement

Non-refoulement is the cornerstone of IRL. Whereas states have not accepted the obligation to necessarily admit people to their respective territories, they have created a right of refugees and asylum-seekers to not be returned to a country in which one is likely to be tortured or subject to cruel, inhuman, or degrading treatment. This right is enshrined in Article 33 of the RC.

Despite its importance, Article 33(2) of the RC permits derogation from the principle of *non-refoulement*, in the name of "security of the country" when a refugee "has been convicted by a final judgment of a particularly serious crime" and thereby "constitutes a danger to the community of that country." What the exception in the RC highlights is the fact that while asylum states have accepted the notion that it is unacceptable to return a refugee to a situation in which they are likely to be tortured, they have *not* accepted the idea that a refugee has the non-derogable right to settle in the asylum state.

Nevertheless, the principle of *non-refoulement* and its status as a preemptory norm has been established in human rights law. As a preemptory norm, human rights treaty bodies, regional human rights courts, and domestic courts have ruled that the right to be free from torture, cruel, inhuman or degrading treatment is absolute and under no circumstances may it be violated. Asylum-seekers and refugees have used the application of the rule of prohibition against torture, cruel, inhuman or degrading treatment in an attempt to prevent extradition. This strategy has been particularly successful in terms of the *International Convention Against Torture* and the *International Covenant on Civil and Political Rights* at the universal level and the *European Convention on Human Rights* at the regional level.

Websites

UNHCR EXCOM, 'Non-refoulement', Conclusion No. 6 (XXVIII), 1977.

<http://www.refugeelawreader.org/files/pdf/67.pdf>

UNHCR, 'Note on International Protection', UN doc. A/AC.96/830, 7 Sept. 1994

<http://www.refugeelawreader.org/files/pdf/68.pdf>

1.4.1. Convention Against Torture (CAT)

Article 3 of CAT states that: “No 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.” Unlike the RC, CAT allows for no derogation. In the case of *Mutombo v. Switzerland*, the Committee on CAT considered favourably the complaint of an

asylum-seeker whose application had been rejected by the Swiss Federal Refugee Office. The Committee concluded:

That the expulsion or return of the author to Zaire in the prevailing circumstances would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In the light of the above, the Committee is of the view that, in the prevailing circumstances, the State party has an obligation to refrain from expelling Balabou Mutombo to Zaire, or to any other country where he runs a real risk of being expelled or returned to Zaire or of being subjected to torture.⁸

While the Committee Against Torture represents a viable and effective forum for the vindication of rights of asylum-seekers and refugees, it is limited by its own jurisdiction, specifically by the requirement that an applicant exhaust all domestic remedies.⁹ The Committee itself rejects many communications. That an asylum-seeker exhaust all domestic remedies is not required under the RC, which recognizes that an individual may be “unwilling or unable” to avail herself of state protection.

Key cases

Mutombo v. Switzerland (CAT 13/1993) (27 April 1994). (No violation where an applicant has established existence of gross violations of human rights in country of return, absent sufficient evidence of the applicant's 'personal risk').

Tala v. Sweden (CAT 43/1996) (15 November 1996). (Contradictions and inconsistencies in the testimony of an asylum seeker were attributed to post-traumatic stress disorder resulting from torture).

Aemei v. Switzerland (CAT 34/1995) (9 May 1997). (Activities carried out by receiving state may also give rise to risk of being subjected to torture).

Paez v. Sweden (CAT 39/1996) (28 April 1997). (Membership of applicant in the Peruvian Shining Path organisation is not material to enjoyment of absolute Art. 3 CAT right, contrasting with Art. 1F of 1951 Convention).

Websites

Convention Against Torture

<http://www.hrweb.org/legal/cat.html>

Committee General Comment No.1, 21 November 1997.

<http://www.unhchr.ch/tbs/doc.nsf/0/13719f169a8a4ff78025672b0050eba1?Opendocument>

1.4.2. *International Covenant on Civil and Political Rights (ICCPR)*

Article 7 of the ICCPR enshrines an absolute prohibition on the use of torture, cruel, inhuman or degrading treatment. The Human Rights Committee (the supervisory body for the ICCPR) has developed jurisprudence in regards to Article 7 that is significant for asylum-seekers and refugees, specifically in relation to extradition. In General Comment No. 20 the HRC concludes that:

The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no

derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.

In *Kindler v. Canada*, the HRC concluded that there could be no discrimination between nationals and non-nationals when it comes to the prohibition on torture.

The availability of the HRC as a forum for the vindication of a refugee's rights is limited by the jurisdictional provision in the ICCPR. In order to receive individual petitions attempting to prevent extradition/deportation with reference to Article 7 ICCPR, the particular state of asylum must have ratified the Optional Protocol to the ICCPR granting the Committee competence to investigate the claim. If the particular state in question has not done so, the asylum-seeker/refugee would be unable to communicate with the Committee.

Websites

International Covenant on Civil and Political Rights (ICCPR)
http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

1.4.3. European Convention of Human Rights (ECHR)

Article 3 of the ECHR enshrines the absolute prohibition against torture or inhuman or degrading treatment or punishment. In response to the Government's claim that Article 33(2) of the RC permitted states to derogate from its obligations not to *refouler*, the Court in the case of *Chahal v. UK* replied that:

The Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.¹⁰

This conclusion illustrates well the difference between the absolute prohibition of torture, cruel, inhuman, or degrading treatment that is established in IHRL, and the prohibition in the RC, which is derogable and also restricts its protection to those with a well-founded fear based upon one of the five Convention grounds.

In addition, Article 8 of the ECHR is highly relevant to cases of expulsion. An expulsion will only be in accordance with this Article if it is lawful domestically, pursues one of the aims of Article 8(2) and the expulsion is proportionate. Relevant factors for assessing proportionality include the reason for the expulsion, the applicant's ties with the deporting state, the extent of the disruption of his/her family life, whether there are real obstacles to establishing life elsewhere and, in criminal cases, the gravity of the offence in respect of which deportation was ordered.

1.5. Non-Discrimination

Concern for discrimination in regards to the protection of refugees and asylum-seekers is part of a larger, more general preoccupation within IHRL. General prohibitions against discrimination can be found in Article 2(1) ICCPR, Article 2(2) ICESCR, Article 1(1) CERD, Article 1 CEDAW, Article 2(1) CRC, and ILO Convention No.111. This principle is also emphasized within regional human rights law: Article 14 ECHR, Article 1(1) ACHR, and Article 2 ACHPR. Conspicuously lacking is a non-discrimination clause in the European Social Charter.

While discrimination is clearly defined in CERD, CEDAW, and CRC, these definitions specify their relation to race, women, and children respectively. Consequently, the general definition generally accepted in IL is that provided for in the *ILO Convention No.111 Concerning Discrimination in Respect of Employment and Occupation*. Article 1 of said Convention defines discrimination as: “any distinction, exclusion, or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”

A careful reading of the *ILO Convention* definition of discrimination reveals that it is not only direct discrimination that is prohibited, but in addition, indirect discrimination. The key concern is whether the purpose of a given piece of legislation was discriminatory and/or if its end effect plays out on a discriminatory basis. If an apparently “neutral” piece of legislation favours one group over another then that particular piece of legislation is discriminatory. This is also the view taken in IRL. If an otherwise legitimate piece of legislation is enforced on a discriminatory basis and/or used to oppress a government’s opponents, a victim demonstrating that they have been discriminated against on one of the enumerated grounds might constitute as a refugee within the meaning established by the RC.

1.5.1 Discrimination and IRL

The principle of non-discrimination is particularly relevant to IRL given that a Convention refugee is someone who is fleeing persecution based upon discriminatory grounds. Under the RC, an applicant must demonstrate that they face a risk above and beyond the risk faced by the general population. They must demonstrate a nexus between the objective conditions in their country of origin and the subjective fear they experience. Under the RC, persecution is discriminatory if it is based upon one of the five grounds enumerated therein: race, religion, political opinion, nationality, or membership in a social group. The principle of discrimination and its role within refugee status determination procedures is a particularly contentious issue when one is considering admitting claimants fleeing civil war or internal tensions/disturbances. See **section 4.0**

In addition, the principle of non-discrimination is relevant to IRL in terms of protections afforded to those refugees who return to their country of origin; thereby ceasing to be refugees and whom are “returnees.” The UNHCR, the only international organization mandated to provide protection to refugees, weighs all protection activities against the principle of non-discrimination, which it determines to be “the basic international legal standard guiding the protection of returnees.”¹¹

Websites

1951 Convention and 1967 Protocol Relating to the Status of Refugees

[http://www.unhcr.ch/cgi-](http://www.unhcr.ch/cgi-bin/texis/vtx/home/+LwwBmeJAIS_3wwwxFqzvqXsK69s6mFqA72ZR0gRfZNhFqA72ZR0gRfZNtFqrpGdBnqBzFqmRbZAFqA72ZR0gRfZNDzmxwww1FqhuNlg2/pendoc.pdf)

[bin/texis/vtx/home/+LwwBmeJAIS_3wwwxFqzvqXsK69s6mFqA72ZR0gRfZNhFqA72ZR0gRfZNtFqrpGdBnqBzFqmRbZAFqA72ZR0gRfZNDzmxwww1FqhuNlg2/pendoc.pdf](http://www.unhcr.ch/cgi-bin/texis/vtx/home/+LwwBmeJAIS_3wwwxFqzvqXsK69s6mFqA72ZR0gRfZNhFqA72ZR0gRfZNtFqrpGdBnqBzFqmRbZAFqA72ZR0gRfZNDzmxwww1FqhuNlg2/pendoc.pdf)

International Convention on the Elimination of All Forms of Racial Discrimination

http://www.unhchr.ch/html/menu3/b/d_icerd.htm

ILO Convention No.111: Discrimination (Employment and Occupation) Convention

http://www.unhchr.ch/html/menu3/b/d_ilo111.htm

1.6. International Protection as Subsidiary

The primary responsibility for the respect, protection, and fulfillment of human rights and freedoms rests with states. The majority of human rights enshrined in the various international human rights treaties are intended for all human beings, regardless of their status. The ICCPR, Article 2(1) states that State parties are obliged to protect and ensure the rights of “all individuals within its territory and subject to its jurisdiction.” Other international human rights treaties include variations on this phrase. Very few rights are limited only to nationals.¹²

However, over the course of history it has become painfully clear that states are not only incapable in certain circumstances of providing for the rights of those within its jurisdiction, but that in addition states have actively attacked and jeopardized the rights and lives of those within its jurisdiction. With the advent of IHRL, beginning with the UDHR in 1948, there was a gradual acceptance amongst members of the international community that states who systematically and continuously violate the human rights of those individuals within their jurisdictions, ought not to be shielded from the prying eyes of the international community by the doctrine of state sovereignty.

Nevertheless, primary responsibility for protection remains with the state and this is reflected in the status of international protection as subsidiary to national protection. The international protection provided through instruments of IHL and IRL is intended to provide protection to those individuals who are unable or unwilling for legitimate reasons to vindicate their problems within the state of which they are citizens or in which they currently reside. The supervisory mechanisms of the various human rights treaty bodies, such as the HRC, Committee on CEDAW, the Committee on CERD, and so forth all require that applicants first exhaust domestic remedies prior to submitting a communication to the relevant committee. Under IRL, it is clear that the intent is not to protect individuals from “common crimes,” which is the responsibility of the relevant state, but rather serves only to protect against ‘persecution’ when a state is unwilling or unable to provide such protection.

When a state fails in its obligation to protect an individual, another state must provide protection. Therefore, the primary responsibility for the protection of refugees lies with asylum states pursuant to their obligations under the RC and/or any regional arrangements/Conventions (eg. 1969 OAU Convention or the CD) to which they are a party. However, while the competence of the state in the country of asylum to provide protection is clear, the content of that protection is more difficult to discern. The RC places protection and all that this entails, entirely in the hands of states. The only legal obligation states have under IRL is that of *non-refoulement*.

Websites

UNHCR EXCOM, 'Protection of Asylum Seekers in Situations of Large-scale Influx', Conclusion No. 22 (XXXII), 1981

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1.7. Family

The right to a family is a fundamental human right. Article 16 of the UDHR establishes this right for all peoples, regardless of status. Protection of the family as the “natural and fundamental group unit of society” is confirmed in the ICCPR¹³, ICESCR¹⁴, CAT¹⁵, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, African Charter on the Rights and Welfare of the Child¹⁶, American Declaration on the Rights and Duties of Man¹⁷, American Convention on Human Rights¹⁸, the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁹, Article 4.3 Protocol II of the Geneva Convention, and Article 23 of the European Council Directive on the minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Despite the universal confirmation that it is worthy of protection, there is no one universally accepted definition of what constitutes a “family.” There is a great range of opinions and contentious debate regarding its definition. The differences between what constitutes a family may be based upon one or a number of cultural, religious, political or other factors.

1.7.1. Family Unity and Reunification

The right to marry and to found a family implies the right to live together as a family. International Law, therefore, has established the right to “family unity.” This is especially relevant in regards to refugees, to the extent that families are often separated during flight. As a result of visa requirements, many refugees are forced to leave family members behind in their country of origin and to then seek reunification once granted refugee status in the asylum state. In the context of IRL, the right to family unity is qualified primarily because it intersects with the right of sovereign states to control the entry of non-nationals into their territory.

The right to marriage and family as established within IHRL entails contrasting obligations upon states. On the one hand, states are obliged to refrain from taking action that disrupts families. On the other hand, states must take positive steps to reunite families if they have been separated.

Given that the right to family unity is established in IHRL and IL, and therefore applies to all human beings regardless of citizenship or status, provisions, or lack thereof within IRL cannot limit its scope. Indeed, the RC does not incorporate the principle of family unity. Nevertheless, UNHCR notes that most states respect the principle and that a failure to allow for family reunification and thereby for family unity, is interpreted as a violation of the right as opposed to evidence that the right does not exist.²⁰

Websites

International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171, Arts. 17, 23

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UNHCR, 'UNHCR Guidelines on Reunification of Refugee Families', July 1983

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2. STANDARDS OF PROTECTION

2.1 *1951 Convention Relating to the Status of Refugees and the 1967 Protocol*

The 1951 Convention Relating to the Status of Refugees and the accompanying 1967 Protocol represent a politically partisan view of human rights to the extent that they prioritize civil and political rights over socio-economic and cultural rights. Such prejudice is evident in the textual definition of a refugee as one who flees a violation of civil and political rights *only*.

Similarly, the 1951 Convention relating to the status of Refugees displays a European bias. The Convention enshrines both temporal and geographic limitations. Article 1B(1)(2) restricts its scope to those “events occurring in Europe before 1st January 1951”; or “events occurring in Europe or elsewhere before January 1951.” These limitations were designed so as to allow for the distribution of the refugee burden throughout Europe while at the same time avoid creating a reciprocal binding obligation towards refugees from non-European countries. The 1967 Protocol Relating to the Status of Refugees in Article 1(2) removes both the temporal and geographic limitations of the 1951 Convention. Nevertheless, under Article 1(3) of the Protocol State parties to the 1951 Convention are permitted to make reservations to Article 1(2) and thereby retain a geographic limitation. The Protocol is an independent instrument and states may accede to it without being party to the 1951 Convention. However, the jurisdictional clause in Article IV of the Protocol, which establishes that the settlement of disputes relating to the interpretation or application of the Protocol be settled by the International Court of Justice, is only applicable to those states which are party to both the 1951 Convention and the 1967 Protocol. (Jastram & Newland 2003)

Websites

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 <http://www1.umn.edu/humanrts/instreet/refugeehandbook.pdf>

Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1
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<http://www.hrea.org/learn/tutorials/refugees/Handbook/hbtoc.htm>

2.1.1. *Definition of a refugee and the determination of status under the RC.*

The discourse of the refugee inevitably conflates with that of refugee status. The question is no longer, "what is a refugee?" but is instead, "who is a refugee?" The legal definition enshrined within the RC is therefore normative in character, and in line with legal thinking, seeks justification on the basis of individual motivation. The category “refugee” is clearly a construction, useful for political purposes. Indeed, as noted by refugee legal expert Guy Goodwin-Gill, "the purpose of any definition or description of the class of refugees is to facilitate and to justify, aid, and protection; moreover, in practice, satisfying the relevant criteria will indicate entitlement to the pertinent rights or benefits."²¹

The definition of refugee is enshrined within Article 1A(2) of the RC. Omitting the geographic and temporal limitations removed by the 1967 Protocol, the term “refugee” shall apply to any person who:

Owing to a 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 such fear, is unwilling to return to it.

There are several important elements within this definition and each shall be discussed in turn.

Well-Founded Fear

The RC requires that an individual asylum-seeker demonstrate a "well-founded fear of persecution" based upon one of the five Convention grounds. Since "fear" is necessarily subjective, a determination of status will require an evaluation of the applicant's statements. Of less importance in status determination procedures is an analysis of the objective conditions in the applicant's country of origin. Nevertheless, the *well-foundedness* requirement obliges the individual applicant to prove that her subjective fear is based upon external or objective facts, which demonstrate that there is likelihood that she will be persecuted upon her return. The subjective fear of a particular individual is not sufficient grounds for the granting of refugee status.

This interpretation was confirmed by the UNHCR in their *Handbook on Procedures and Criteria for the Determining Refugee Status under the 1951 Convention and the 1967 Protocol related to the status of Refugees*. Paragraph 42 of the said *Handbook* reads:

As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgment on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin-- while not a primary objective--is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.

The onus is on the individual asylum seeker to convincingly demonstrate the nexus between subjective fear and objective reasons for such fear. However, practical considerations and the trauma experienced by a person in flight also indicate a corresponding duty upon whoever must ascertain and evaluate the relevant facts and credibility of the applicant.²² The balance between the state and the individual asylum-seeker in regards to the burden of proof varies greatly between states, ranging from a "degree of probability" to "beyond reasonable doubt."

A crucial element in determining *well-foundedness* is the degree or lack thereof state protection. As it is left to states' discretion to determine the manner in which refugee status is granted, different states emphasize this criterion differently. According to the Supreme Court of Canada (SCC), whether or not state protection exists is not an independent factor in the Convention definition but on the contrary is an essential part of establishing a basis for refugee status.²³ Countries such as Canada, draw such an interpretation from Article 1(A)(2) of the RC, which states that an individual fleeing persecution according to one of the five grounds and who 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..." This presumption is analogous to the requirement in

IHRL, that domestic remedies be exhausted prior to submitting a request for vindication at the international level. The intent behind such a requirement is to give the state in question the opportunity to remedy the situation on their own and to fulfill their obligations under international law. While the RC does not require that domestic remedies be exhausted, as do the various supervisory bodies of international human rights treaties, the state is nonetheless presumed to be capable of protecting their citizens unless the applicant provides clear and convincing evidence to the contrary.

The question of the degree or lack thereof state protection is particularly relevant in regards to persecution by non-state actors. The question is whether or not it is sufficient for a claimant to demonstrate a fear of persecution emanating from the behaviour of a non-state actor or must the claimant also demonstrate a failure or absence of state protection. A case in point is *Horvath v. Secretary of State for the Home Department*, in which the Court ruled that “while he [Horvath] had a well-founded fear of violence by skinheads, this did not amount to persecution because he had not shown that he was unable or, through fear of persecution, unwilling to avail himself of the protection of the state.”²⁴

Persecution

The RC does not define persecution. Nonetheless, it clearly contains two elements: first of all, whether the harm suffered or feared amounts to persecution; and second of all, whether or not the state can be held accountable. There are some scholars and legal experts who maintain that in order for a particular act to constitute persecution under the RC, it must involve the violation of a “core” human right. There is not, as of yet, any agreement as to which rights might constitute such a “core”, nor is there one universally agreed upon list of “basic human rights.”

Conservative views rely upon a narrow interpretation of Article 33 of the RC in order to justify such a restriction. Article 33 specifies that a person may not be returned to a country in which “his life or freedom would be threatened.” The argument that then follows is that in order to be accepted as a refugee under the RC, the persecution one faces must amount to a violation of one’s right to life and/or freedom.

Nevertheless, the preamble of the RC makes reference to the UDHR. While the UDHR is not a binding instrument of IL, it has been recognized as an instrument of customary international law and consequently is binding upon all states. The UDHR is considered to be the minimum standard of duties owed by states not only to their nationals but also to all persons and groups within their jurisdiction.²⁵ Consequently, the more common view is that a particular action may constitute persecution under the RC if it violates human dignity. The appropriate standard according to such a view is not therefore the right to life and freedom but is more expansive and includes the systemic or sustained violation of human rights in general.

Nevertheless, it is clear in the wording of Article 1A of the RC, that in order to qualify as a refugee, persecution must involve discrimination on one of the five grounds enumerated therein. The RC is inherently forward looking and consequently the persecution feared may be actual or potential. There is no requirement that an individual must have suffered past persecution. In addition, the UNHCR specifies in their *Handbook on Procedures and Criteria for the Determining Refugee Status under the 1951 Convention and the 1967 Protocol related to the status of Refugees* that an individual subjected to various measures in and of themselves not persecutory (i.e. discrimination in other forms), may qualify as a refugee under the RC on “cumulative grounds.”²⁶

Evidently, there is no clear answer to the question of what constitutes “persecution” under the RC. Each case must be evaluated independently and both the psychological and personal characteristics of the applicant, as well as the objective conditions in their country of origin, must be taken into account by decision-makers.

Persecution vs. Hardship

With the RC definition in hand respective states set about determining who is a "legitimate" refugee and who is not. The former is forced to flee, while the latter is generally assumed to have left of their own free will. Under the RC, refugee status is not accorded to those who flee intolerable economic conditions. It is not accorded to those who flee famines and/or environmental catastrophes. It is not accorded to those who live in desperate poverty. These individuals are sometimes labeled as “economic migrants.” This distinction between “political refugees” on the one hand and “economic migrants” on the other draws the line between those who can claim a right to special urgency and those who are left to their own devices.

Indubitably, such a distinction evolves out of the drafters’ apparent bias towards civil and political rights. The RC definition does not address many possible reasons for flight. Nevertheless, there is some inherent flexibility within the RC that may allow for so-called “economic migrants” to qualify as refugees, through the principle of discrimination and its links to the concept of persecution as stipulated within the RC. If an applicant can demonstrate that the economic hardship she experiences is a result of discriminatory oppression, a violation of human rights in the nature of persecution may be established. However, according to a literal interpretation of Article 33 of the RC, a claimant would be obliged to demonstrate that the alleged violation of an economic or social right was severe enough to constitute a threat to their life and/or liberty.

Moreover, the RC in Articles 17-24 clearly enshrines several so-called “economic and social” rights. Nevertheless, such rights are accorded only to those refugees “lawfully staying” in the territory of the state of asylum. Lawfully staying could perhaps be equated with having lawfully entered a country, and refers to the fact that the individual must have entered with proper documentation, identification, and so forth and that the state is aware of the person’s presence. However, it must be distinguished from “lawful presence.” An individual with lawful presence would require a residency permit or be in the country within a time-frame authorized by the Government of the state concerned. That an individual must be lawfully staying infers that these rights ought to be accorded not only to refugees (who would be lawfully present) but also to asylum-seekers, who are lawfully present. Note that refugees are not to be punished for illegal entry. The denial of economic, social rights on account of unauthorized entry would constitute a violation of Article 31 of the RC. **See section 2.1.5.**

While the economic and social rights enshrined in the RC are subject to limitations, such that states are only obliged to treat refugees and asylum-seekers in a manner no different than that in which they treat their nationals²⁷, under IHRL, a state is obliged to take positive action towards the full realization of economic and social rights of all peoples within its jurisdiction. Article 2(1) of the ICESCR obliges states to:

Undertake 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.

Consequently, violations of the rights enshrined in the ICESCR may amount to persecution if the claimant can demonstrate that the state took retrogressive measures. This obligation is not limited to nationals but rather a state owes this obligation to all of those individuals and groups within its jurisdiction. The ICESCR does not allow for discrimination on the basis of citizenship. Consequently, whether or not a state is party to the RC it must comply with this obligation as enshrined within the ICESCR.

Persecution vs. Prosecution

A refugee is someone who flees actual or potential injustice in the form of persecution. She is not one who is a fugitive from justice. Consequently, flight to avoid punishment for having committed an ordinary common law offence is not generally recognized as a basis for refugee status under the RC. Even if the law under which the claimant is being prosecuted is not a law that is recognized in the country of asylum or if the punishment is harsh compared to that given in the country of asylum, prosecution does not necessarily amount to persecution given that the law applies to all persons within the jurisdiction of the sending state.

In deciding whether a particular law or punishment amounts to persecution, decision-makers in the country of asylum must evaluate the national laws of the sending state with the view of discerning whether or not they are in accordance with IHRL and the states obligations there under. The purpose of the evaluation is not to make a value judgment in regards to the aims pursued by a particular law²⁸, but rather is to distinguish whether or not its application is discriminatory. If an otherwise “neutral” piece of legislation is applied in a discriminatory manner, persecution may be established.

Such an evaluation is dependent upon the jurisprudence developed by the human rights treaty bodies. Note that restrictions upon an individual’s rights are permissible under IHRL, given certain criteria. Restrictions must be legally prescribed, must be deemed “necessary,” and must be applicable to all individuals in an equal manner.²⁹

“Unable or unwilling”

Generally speaking, the agents of persecution are members of the state apparatus, either government officials or military personnel. In such a situation, the “unwillingness” of the state to provide protection to the claimant is self-evident. The claimant cannot seek the protection of their government because they are being, or are likely to be, victimized by that same government or its agents.

What then of the situations in which the agents of persecution are non-state actors, such as rebels, insurgents and so forth? The question is whether or not it is sufficient for a claimant to demonstrate a fear of persecution emanating from the behaviour of a non-state actor or must the claimant also demonstrate a failure or absence of state protection?

Of particular relevance in regards to the nature of state obligations is General Comment ICESCR No.3, which clarifies that states party to instruments of IHRL have obligations both of conduct and of result. Their duties are three-fold: 1) to respect; 2) to protect; 3) to fulfill. The obligations to protect and to fulfill require that states not only refrain from activities that would violate the human rights of individuals/groups within their jurisdiction, but in addition that they take preventive measures so as to protect those same rights from the violating behaviour of private agents.

In *Ward v. SCC*, a distinction was made between “unable” and “unwilling.” The Court defines “unable” as “...physically or literally unable,” and interprets “unwilling” to refer to those

situations in which “...protection from the state is not wanted for some reason, though not impossible.”³⁰ Some people have interpreted this distinction to imply that “unable” refers to stateless peoples, whereas “unwilling” refers to refugees and asylum-seekers. Nevertheless, the UNHCR in their Handbook, maintain that the terms “unable” and “unwilling” apply both to stateless peoples and refugees alike.

The term “unwilling” refers to those who refuse to avail themselves of national protection, and must therefore be read in conjunction with “owing to such fear.” If an asylum-seeker is able to avail herself of national protection it is unlikely that she will be able to establish that she is outside of her country of origin owing to a well-founded fear. In availing herself of national protection, she cannot be considered a refugee under the RC. A claimant may be “unwilling” to avail herself of national protection because of state complicity in the face of persecution by non-state actors. In such a situation, persecution by non-state actors may be established within the meaning of Article 1 RC, provided that the claimant demonstrate a failure to protect on behalf of the state. To clarify, the state cannot be expected to protect all individuals within their jurisdiction from any and all harm. The obligation is one of conduct rather than result. If there is a “real” risk of persecution, the state is obliged to take steps to protect.

For Reasons of Race, Religion, Nationality, Membership in a Particular Social Group or Political Opinion.

In order to qualify as a refugee within the meaning of the term established in the RC, a claimant must demonstrate a “well-founded fear of persecution” based upon one of the five grounds listed above. “For reasons of” implies that the applicant must demonstrate that the harm feared or suffered was invoked *on account of* one of the five grounds. This necessitates some evaluation of the motives of the perpetrator. This is confirmed in domestic refugee law jurisprudence, in cases such as *R.A. vs. BIA*, 11 June 1999 and *INS v. Elias-Zacarias*.

Race

The term “race” is not defined in the RC. However, considering the fact that the drafters of the RC intended to include Jewish people fleeing persecution at the hands of the Nazis, race must be interpreted broadly so as to include ethnic, cultural, and linguistic groups. This assumption is confirmed in the *UNHCR Handbook*.³¹ Such an interpretation of “race” is also in conformity with that provided in CERD, Article 1(1).

Religion

Both the UDHR and the ICCPR enshrine the right to freedom of thought, conscience, and religion, which includes the “freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching.”³² The right to religion implies its negative corollary: the right to *not* practice a religion.

The right to religion and to manifest one’s religion is subject to certain limitations, as prescribed by Article 19(3)(a)(b) ICCPR. According to this Article, restrictions must be provided by law and be necessary³³:

- a) For respect of the rights or reputations of others
- b) For the protection of national security or of public order (order public), or public health or morals.

This demonstrates a recognition of the fact that in a democratic society, comprised of peoples with diverse faiths and beliefs, some restrictions are necessary so as to reconcile the diverging interests of different groups and to ensure that everyone’s rights are respected.

In addition, the UNHCR clarifies that: “mere membership in a religious group” is not sufficient to establish a basis for refugee status.³⁴ On the contrary, an applicant must demonstrate the linkage between the actual or perceived threat and their own self-defined or externally ascribed religious beliefs.

Nationality

Like many of the other terms used in the RC, “nationality” is not defined. According to UNHCR, “nationality” in the context of the RC is not synonymous with “citizenship” and must be interpreted in a broad manner so as to include membership in an ethnic or linguistic group. The term overlaps considerably with that of “race.”³⁵ Such an interpretation is also enshrined in Article 10(1)(c) of the European Council Directive.

The term serves to protect those individuals who are of a minority ethnic, cultural or linguistic group. Under IHRL, minority groups are entitled to additional protections when and where necessary. Article 27 ICCPR is of particular importance, and taken in tandem with the non-discrimination clause of Article 26, if violated may constitute a basis for refugee status. See *Hopu and Bessert v. France*.

Furthermore, the term “nationality” offers protection for those who are residents in a country of which they are not citizens, such as refugees or stateless persons. In such instances, their “country of origin” may be their state of habitual residence. The term also offers protection to those who are denied full citizenship rights, such as Palestinians living in Israel.

Persecution based upon political opinions may converge with that of persecution based upon nationality in those situations when conflicts between national groups are combined with political movements. Such is often the case in states who are composed of previously sovereign territories where people continue to define themselves according to the predecessor state and are, as a result, persecuted.

Membership in a Particular Social Group

The RC does not define what this term means or which groups it intends to include. As a result, some scholars, such as Arthur C. Helton, have suggested that it is a “catch-all” category, intended to protect all future victims of persecution. Given that the RC is forward-looking, and is concerned with future injustices rather than past harm, Helton suggests that “social group” was intended to grant the RC some flexibility in including “new” forms of persecution.

Nevertheless, as elucidated by the SCC in *Ward*, IRL is intended to be subsidiary to national protection and therefore the RC cannot be interpreted as an instrument intended to provide protection to all suffering individuals³⁶. The RC was drafted by self-interested states and was developed out of a desire to control refugee and immigration flows. As such, built-in restrictions exist. It might also be argued that a non-qualified, “catch-all category” interpretation of the term “social group” perhaps exaggerates the intentions of the RC.

Moreover, a social group under the RC cannot be defined simply by the nature of the persecution suffered. Domestic jurisprudence suggests that a nexus between the fear of persecution and the unwillingness and/ or inability of the state to offer protection must be demonstrated. A case in point is domestic abuse. It is not sufficient for an applicant to claim refugee status based upon her membership in the social group of “battered women.” However, could she demonstrate that the state had done nothing to offer protection to women and that law enforcement officials refuse to apprehend and punish perpetrators, then the applicant would have a stronger basis to claim

persecution. In addition, an applicant must demonstrate that the perpetrator was motivated, at least in part, by the asserted group membership.³⁷ This view was affirmed in Canadian jurisprudence in the case of *Ward*.³⁸

Similarly emerging from domestic jurisprudence, the concept of *ejusdem generis* has gained prominence in the definition of what constitutes a “social group.” This principle literally translates as “of the same kind” and was enunciated most clearly in *Matter of Acosta and the US Board of Immigration Appeals*.³⁹ In *Acosta*, the Court found that in order to qualify as persecution based upon membership in a social group, the social group in question had to display shared, innate, and immutable characteristics, such as sex, colour, or kinship. However, the term is broad enough to include such shared characteristics that while not immutable, are so fundamental to an individual’s identity and/or conscience that they cannot be asked to change it. The particular kind of characteristic remains to be determined on a case-by-case basis. This jurisprudence is affirmed by UNHCR, who defines a social group as⁴⁰:

“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.

What is excluded from such a definition are those “groups defined by a characteristic which is changeable or from which disassociation is possible, so long as neither option requires renunciation of basic human rights”⁴¹

Gender

Of increasing salience within discussions related to the viability of the RC to contemporary concerns is the inclusion of gender as a basis for persecution. UNHCR admits that the RC has been interpreted “through a framework of male experiences.”⁴² With the exception of a few cases involving rape, national jurisprudence rarely refers to female-specific cases of persecution, such as infanticide, dowry-related violence, female genital mutilation, domestic violence, forced abortion, compulsory sterilization, and trafficking. It is important to note that gender persecution must not necessarily involve direct physical attacks on a woman’s physical integrity. The UNHCR outlined in their Handbook and also in their *Guidelines on International Protection: 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*, that discrimination may amount to persecution if it leads to “consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on the right to earn one’s livelihood, the right to practice one’s religion, or access to available educational facilities.”⁴³

Despite the fact that UNHCR “encourages asylum countries to recognize gender-based persecution as a ground for claiming asylum, and to ensure that asylum procedures are sufficiently gender-sensitive,”⁴⁴ the Office does not argue for the inclusion of “gender” as an independent ground under the RC.⁴⁵ They maintain that the RC is inherently flexible and that the five listed Convention grounds can be interpreted through a “gender lens.” The idea is that persecution on account of gender must be tied to reasons of race, religion, nationality, political opinion, or membership in a particular social group.

Gender as Social Group

When neither law nor religion dictates the measures imposed on women, and yet state protection is not forthcoming, classifying “women” as a social group may be the best strategy. The Executive Committee UNHCR in their Conclusion No. 39, encourages States to:

...adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention.⁴⁶

According to such an interpretation of "social group," "sexual orientation" may also constitute a basis for refugee status if the claimant is subjected to harm on account of their failure to conform to societal sexual norms and expectations.

The classification as a particular social group is particularly relevant to women to the extent that a great deal of the harms suffered by women are suffered within the private sphere. For this reason, it is important to note that certain actions may amount to persecution despite the fact that it is non-state actors who inflict them. If the State condones or is systematically neglectful in their duty to protect people under their jurisdiction, complicity within the meaning of persecution can be established. A case in point is *Ward v SCC*, in which the Court found that: "Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or *if the authorities refuse, or prove unable, to offer effective protection.*"⁴⁷

The Specifics of Categorization

Within the social group "women", courts have hitherto been inclined to create "sub-groups. For example in *Cheung v. MEI*, the Court had to decide whether "women in China who have more than one child and are faced with forced sterilization" constituted a social group. Likewise, in *Mayers v. MEI*, the social group in question was: "Trinidadian women who are subject to wife abuse." Such sub-groupings are problematic. First of all, they are tautological. Second of all, and more importantly, they imply the existence of past persecution/abuse. The RC does not require past persecution as a prerequisite to establishing a well-founded fear of future persecution.⁴⁸ Moreover, it is questionable the extent to which such sub-groups are recognized by society as being "different" or as having a "distinct identity. That a group must establish their "distinct identity" and that the rest of society recognizes the distinctiveness of this identity is an explicit condition of qualifying as a "social group" within the EC Directive.⁴⁹

Furthermore, the creation of such sub-groups tends to conflate "gender persecution" with "persecution on the grounds of gender." As noted by scholar Audrey Macklin, "persecution *as a woman*" is not synonymous with "persecution *because one is a woman.*"⁵⁰ The former involves acts that involve sex-specific harm, i.e. rape. The latter involves, for example, flogging for refusing to wear a veil.

Obstacles

Conservative views are against the inclusion of gender as a basis for refugee status, claiming that any and all women will flood the borders of receiving countries. They claim that "women" as a social group is too large to fit and on account of its size cannot be accommodated within the term as used in the RC. Such concerns raise the question of whether the ubiquity and frequency of gender-based violence detracts from its status as persecution? In considering whether or not to grant refugee status to those individuals and groups who flee situations of civil war, national courts have decided that if the violence is widespread and indiscriminate, than an individual does not qualify. **See section 4.0** The applicant must demonstrate that he or she suffered or will suffer in a discriminatory manner. Likewise, it must be shown that the harms experienced or feared are above and beyond what has been experienced by the population at large.

In a similar fashion, the UNCHR clarifies that: “the characterization of “woman” as a social group does not mean that all women are automatically entitled to refugee status.⁵¹ A woman claimant must still demonstrate the causal link between her well-founded fear of persecution and the grounds for such a fear. However, the mere size of the social group is not a sufficient reason to discount the notion of “women” as a “particular social group.”⁵²

Nevertheless, the inclusion of “gender” within the category of “social group” as a ground for refugee status could create a rather controversial situation. Macklin cites the *1993 UN Human Development Report*, which found that there is no country that treats its women as well as it treats its men.⁵³ If discrimination forms the basis for deciding whether a particular action or law is persecutory, then the decisive issue is to distinguish between those situations that amount to mere discrimination, and those that amount to discrimination so severe as to amount to persecution. Given that all countries discriminate towards women, national courts would be obliged to compare the discrimination suffered in the country of origin with that suffered in the country of asylum. Cultural differences would become paramount and would be the deciding factor in deciding whether or not a particular action/ law was persecutory. IRL would therefore become a hodge-podge of diverse, culturally relative findings and jurisprudence. Such irregularities within IRL are not beneficial for asylum-seekers and the process of refugee status determination would become even more subjective than it already is. Moreover, as pointed out by Macklin, “pursuing gender as a basis for refugee status results in a situation where virtually all countries are refugee-producing.”⁵⁴ (Macklin 1995)

Websites

UNHCR Guidelines on International Protection: 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.

<http://www.ncadc.org.uk/archives/filed%20newszines/news27/gender.html>

Victims of HIV/AIDS

By the end of 1999 there were an estimated 32 million adults around the world with the HIV virus or AIDS. Similarly, there were some 11 million children who had either lost both parents to AIDS or who had they themselves been infected with the HIV virus. HIV/AIDS does not recognize borders and UN Secretary-General Kofi Annan has described its impact as “no less destructive than that of war itself.”⁵⁵ While the issue of reproductive health and HIV/AIDS has received some attention on the global agenda, it has received much less attention in regards to refugee populations. Refugees with HIV/AIDS are often refused entry and the benefits of international protection on the basis of their health. A case in point is a 1990 US law, sponsored by Senator Jesse Helms, which stipulates that individuals with HIV/AIDS cannot immigrate to the United States. That many countries are now considering HIV/AIDS as a “new” exclusion clause for refugee status is truly deplorable.

Interestingly, in the case of *D. v. UK*, the European Court of Human Rights found that the deportation of D., who was infected with HIV/AIDS, to the island of St. Kitts where there were no medical facilities to assist him, amounted to cruel, inhuman treatment within the meaning of Article 3 of the ECHR. By analogy, the refusal to provide international protection to a *bona fide* refugee because they were infected with HIV/AIDS would constitute a violation of the principle of *non-refoulement*.

Furthermore, there have been some progressive Judges who are increasingly referring to HIV/AIDS victims as members of a “social group.” In opposition to the US law mentioned

above, an Immigration Judge (IJ) in New York issued a decision granting asylum on the basis that the applicant, a person living with HIV, is a member of a "particular social group" subject to persecution in his home country because of such membership. The applicant, a native and citizen of Ivory Coast and Togo who discovered his HIV-positive status after suffering a seizure while in the United States, was able to demonstrate to the IJ's satisfaction that treatment for HIV infection is scarce or non-existent in Ivory Coast and Togo, that hospitals and families shun HIV-positive persons, and that they are generally isolated and ostracized as a group. The IJ granted asylum and withholding of deportation, finding that the AIDS epidemic in Africa is a "serious problem" and that the respondent "would in fact be persecuted because of his membership in a social group."⁵⁶

Political Opinion

The mere adherence to a political opinion that contrasts with that of the authorities is not in and of itself, sufficient to qualify as a basis for refugee status under the RC. The applicant must demonstrate that their beliefs are not or will not be tolerated by the authorities. It is noteworthy that the term used is "political opinion" rather than "political activity." The implication is that according to the RC, a claimant is not obliged to have acted upon their political beliefs in order to qualify for refugee status. Nevertheless, there must be evidence that the potential persecutors could be aware of the claimants' opinions and that if expressed, such opinions would not be tolerated. Fear of persecution may not be discounted on the basis that if the claimant were to keep silent, they would avoid detection and consequently persecution. The right to freedom of expression is a fundamental human right.

This basis for refugee status applies, therefore, not just to those individuals with an obvious political affiliation, such as members of a political party, but also applies to those who are at risk of internal political forces and those whose opinions may be implicit in their conduct.

According to the UNHCR, a clear distinction must be made between those who flee persecution based upon political opinion, and those who flee punishment of politically motivated acts.⁵⁷ Insofar as the punishment is in conformity with the general law of the country concerned and is not applied in a discriminatory manner, then fear of prosecution will not constitute as a valid basis for refugee status.

"Is Outside the Country of His Nationality."

Refugee protection is intended to be a surrogate for national protection. There exists within IRL, a presumption in favour of the State. As stated in *Ward*: "it should be assumed that the state is capable of protecting a claimant."⁵⁸ UNHCR confirms that: "international protection cannot come into play as long as a person is within the territorial jurisdiction of his home country."⁵⁹ This view has been reformulated into the concept of "internal flight alternative," (IFA) otherwise known as "internal relocation alternative," or "internal protection alternative" (IPA).

Until the 1980s the risk of persecution faced by an applicant was evaluated in relation to their country of origin as a whole. Formerly, Western states were eager to accept refugees from countries of the Eastern bloc and in addition, refugees were seen as an excellent source of labour for countries of asylum. However, the European refugees of the 1950s-1970s have increasingly been replaced by refugees who are culturally, racially, and politically distinct from the peoples of the "Western world." Mounting xenophobia led to the "drying-up" of Western states' post WWII generosity towards refugees and led to increasing restrictions upon admission.

In addition, many of the conflicts that have flourished since the 1980s are regional. Civil wars and internal disturbances are now more common than are the monolithic aggressor states, such as

Stalin's Soviet Union. This change in the nature of the conflict and the identity of the agents of persecution has resulted in situations in which while one part of the country may be dangerous, another part of the country may be reasonably well-protected. An applicant for refugee status may, therefore, be at risk of persecution in one part, but not in *all*, of their country of origin.

Both of these factors have led to the emergence of IFA as a principle of IRL. While there is no direct reference to IFA within the RC, the fact that refugee law is intended to be subsidiary to national protection and pursuant to the phrase "outside the country of his nationality" in Article 1A(2) of the RC, the RC has been interpreted to imply that an applicant must exhaust all possibilities of availing herself of national protection prior to claiming refugee status in another country. This would necessarily involve seeking vindication of one's rights internally prior to externally. This strict, textual interpretation of the RC is problematic.

Internal Flight/Protection Alternative Test

The Vienna Convention on the Law and Interpretation of Treaties (VCLT) affirms that a treaty must be read in accordance with its "object and purpose." The object and purpose of the RC is clarified by the human rights tenets included within the Convention. Refugees have the right to leave their country of origin and to seek asylum and protection elsewhere. They are entitled to the right not to be returned to situations of danger (Art.33). While the right to asylum is not explicit within the RC (see section 1), it is implied by the non-penalization of illegal entry (Article 31), the prohibition of expulsion (Art.32), and the principle of *non-refoulement* (Art. 33). The notion that an applicant who faces a well-founded fear of persecution must first seek internal protection in *all* parts of their country of origin, contrasts with those rights specifically enshrined within the RC. As a result, UNHCR denies that IFA is a "principle of refugee law."⁶⁰ Rather, the UNHCR draws attention to paragraph 91 of their *Handbook* as an accurate rendering of RC legal principles regarding IFA. Paragraph 91 reads as follows:

The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.⁶¹

Such a rendering has not been universally accepted by all state and national legislatures.

Minimum Standards of Protection within an IFA

Since an applicant may be denied the protection in the putative asylum state, it must be demonstrated that the protection they will be afforded in the IPA is at least in conformity with the minimum standard of protection enshrined within the RC. The onus to prove that this is the case rests with the putative asylum state. The preamble of the RC refers to the UDHR, and as such, the minimum standard proposed by the RC could be interpreted to include the enjoyment of all "fundamental rights and freedoms without discrimination." However, the RC does not require states party to it to fulfill such an obligation. Rather Article 3 RC enshrines a more general duty for states to apply the provisions of the Convention "without discrimination." The rights and duties enshrined in Articles 2-33 of the RC do not oblige States to ensure refugees and asylum-seekers the full enjoyment of their human rights, but rather only oblige them to accord refugees treatment that is "at least as favourable as that accorded to their nationals..."⁶²

An authoritative guide on the standards of a potential IFA is that produced by the Program in Refugee and Asylum Law at the University of Michigan Law School, entitled the *Michigan Guidelines on Internal Protection Alternatives*. The *Michigan Guidelines on IPA* establishes three criteria by which protection ought to be measured prior to deciding upon the feasibility of an IPA. The first refers to whether or not the IPA represents an “antidote” to the persecution feared. The second refers to whether the applicant is certain to be free from persecution in the IPA, or whether the site of the IPA simply represents a reduced risk of persecution. And third, asks if the local conditions in the IPA at least meet the minimum standard of protection afforded by the RC (i.e. “most favourable treatment accorded to nationals”).⁶³ (Storey 1998)

Websites

Michigan Guidelines on IPA

<http://www.refugeelawreader.org/files/pdf/230.pdf>

“Who not having a Nationality and Being outside the country of his former habitual residence...”

IRL in general and the RC in particular are intended to afford protection to those who lack it from their own governments. What however, of those individuals who have no government, *per se*? “To have a government” means to be a citizen of a particular state. Stateless persons can make no such possessive claim. Hathaway therefore astutely poses the question whether stateless persons are necessarily and by definition refugees, to the extent that they do not enjoy any national protection? Or, on the contrary, are stateless persons excluded from refugee status because their predicament is a result not of a failure on the part of a national government to protect them but rather is the result of not having any state whose duty it is to protect them?⁶⁴

The RC does not explicitly mention stateless persons and the rights and protection that they ought to be afforded. According to Hathaway, they were deliberately excluded from the Convention as they were thought by the drafters to represent a less urgent cause than that of refugees. Since the drafting of the RC, the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness were drafted, providing protection and enshrining rights specifically for stateless persons.

In order to qualify for refugee status, a stateless person must establish that she enjoys a relationship with a state, similar to that of a citizen to her national state. For this reason, the RC included the phrase: “country of his former habitual residence.” The logic is that this country, that of his former habitual residence, would be the country to which he would be returned should his application for refugee status fail. This is a particularly relevant point of reference when considering states’ obligation to respect the principle of *non-refoulement*.

According to Hathaway, the pertinent issue on which the determination of refugee status hinges is the applicant’s right to return.⁶⁵ If a stateless refugee has no country of habitual residence and no country of nationality, then she has no right to return and cannot therefore qualify as a refugee under the RC. She would have to seek protection under the Convention on Statelessness, which indubitably grants fewer rights and benefits than does the RC. That being said, states have an obligation to respect, protect, and fulfill the human rights of all individuals within their jurisdiction, both citizen and stateless alike.

2.1.2 Refugees “sur place”

The RC does not distinguish between those individuals who have fled the prospect of persecution and those who, already abroad, cannot return to their country of origin for fear of persecution.

The latter are referred to as “refugees *sur place*.” Such a situation generally occurs when there has been a fundamental change of circumstances in the individual’s country of origin, such as civil war, or when the nature of the individual’s activities since having left their country would place them at risk of persecution upon return. The applicant must demonstrate that their actions have or are likely to come to the attention of the authorities in their country of origin and that such actions once discovered, would not be tolerated.

2.1.3. Cessation Clauses

The cessation clauses in Article 1C of the RC describe the situations under which a refugee ceases to be a refugee and thereby loses her claim to international protection. As noted by the UNHCR in their Handbook, of the six clauses, the first four reflect a change in circumstances resulting from the individual’s own behaviour/ actions. The last two, (5) and (6) are brought about by a change of circumstances in the refugee’s country of origin, such that the basis for her claim to international protection no longer exists. These are referred to as the “ceased circumstances clauses.” According to the Executive Committee such clauses are not to be applied lightly and that in order to invoke one, “there must have been a change in the refugee’s country of origin, which is fundamental, durable, and effective. Fundamental changes are considered as effective only when they remove the basis of the fear of persecution.”⁶⁶

The clauses listed in Article 1C represent an exhaustive list and consequently, UNHCR warns that they ought to be used restrictively.⁶⁷ No other reason may be given by a state to withdraw an individual’s refugee status. This is an important reminder given the current practice of states to use the availability of an IFA as a basis for the denial of refugee status.

Moreover, there is no cessation clause listed in the RC that refers to those individuals who may represent a danger to national security or to public order. This is important especially since the adoption of the European Council Directive in which Article 14(4)(a)(b) suggests that a refugee may cease to enjoy the rights and benefits of refugee status if it is determined by the Member state that she constitutes a “danger to the security of the Member State” or a “danger to the community of the Member State.” Such a clause is not in line with and in fact represents a denigration of the state obligations enshrined in the RC, to which all EU Member states are party.

2.1.4. Exclusion Clauses

Given that exclusion clauses deny a person international protection and will likely result in their deportation to their country of origin or perhaps to a third country, such clauses can only be considered after having considered the inclusion clauses listed in Article 1A of the RC. The principle of *non-refoulement* requires this insofar as an applicant who has established a well-founded fear of persecution may not be returned to a situation of danger. The exclusion clauses are enumerated in Article 1 D, E, and F of the RC.

Article 1D is fairly straightforward. It excludes any individuals who receive protection and assistance from any UN agency, other than the UNHCR. Such protection was previously provided by the United Nations Korean Reconstruction Agency (UNKRA), and is currently provided by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

It is important to note that, in regards to UNRWA, the agency is only working in certain areas of the Middle East, and that consequently any Palestine refugee outside the Middle East or in an area of the Middle East where UNRWA is *not* mandated to operate, must be given due consideration in refugee status applications.

Article 1E applies to those individuals who might otherwise have qualified as a refugee under the RC but who have been granted protection, and certain rights and freedoms in a third country. Such individuals may be residents of a third country, yet they are not full citizens of that country.

The most contentious exclusion clause is probably Article 1F, which refers to those individuals who are not considered to be deserving of international protection. This clause helps to preserve the asylum system and to prevent it from being used as a means of escape for fugitives from justice. While UNHCR warns that such clauses have an exceptional quality and therefore ought to be invoked in a restrictive manner, their use has become increasingly more common in the wake of the September 11, 2001 terrorist attacks on the United States of America. That they are to be used in a restrictive manner is evidenced by the burden of proof placed upon states. An asylum state must demonstrate that there are “serious reasons” for considering that the applicant falls under one of the categories mentioned. Such a threshold is higher than that of Article 33(2) RC, which obliges states to demonstrate only “reasonable grounds.” Nevertheless, the threshold remains quite low to the extent that there is no requirement that the applicant be formally charged or convicted in their country of origin.⁶⁸ Suspicion alone, provided that it is based upon “serious reasons” is sufficient to exclude an applicant from international protection.

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.
The RC adheres to the definitions of these crimes as established by the International Law Commission and enshrined within the Rome Statute. A discussion of these definitions is necessary so as to adequately grasp the scope of this exclusion clause.

Crimes against peace

A crime against peace involves the planning of and/or participation in an unlawful war. Prior to 1928, war was, by definition, legal, to the extent that it was considered to be a legitimate means of foreign policy. However, in 1928 the General Treaty for the Renunciation of War as an Instrument of National Policy, known as the Kellogg-Briand Pact, was signed. Nonetheless, while war was generally prohibited it remained lawful in certain specific situations: (1) wars of self-defence; and (2) war as an instrument of international policy- i.e. the Just War doctrine. With this as a basis, the UN set out to draft a Charter that could overcome some of the Pact’s shortcomings. The end result was Article 2(4) of the UN Charter.

The definition of Use of Force.

Article 2(4) of the UN Charter defines the use of force as force directed against the “territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the UN.” If the qualifications of “territorial integrity” and “political independence” are taken separately, there is considerable likelihood that one will arrive at a rigid interpretation of the article, thereby blunting its effect. For example, the use of force by State A within the boundaries of State B, may not be considered to represent a violation of territorial integrity so long as State B does not physically lose a piece of its territory.

Likewise, in regards to “political independence,” consider the situation if State A exercises force in rescuing some of its nationals from State B by sending in military troops. State A might argue that as soon as their nationals are safe they will leave, and that consequently their continuing military presence does not constitute a violation of the political independence of State "B." As these examples demonstrate, if Art. 2(4) is not read as a whole, then a legion of loopholes are

likely to emerge. Individual applicants who may indeed be guilty of having used force in contrast to the UN Charter may then slip through the cracks and be granted refugee status.

Perhaps the most important qualification in the definition is that regarding “manners inconsistent with the UN.” This qualification obliges that Art. 2(4) be read together with Art.1 of the UN Charter, in which the purpose of the UN is defined as the “maintenance of international peace and security.” Similarly, Art. 2(4) is inseparable from Art.2(3) in which States are urged to seek peaceful resolution to their disputes. Reading Art.2(4) as a whole demonstrates that there was no intention in the UN to restrict the all-embracing prohibition of the threat or use of force. Given the wording of Art. 2(4), some states have interpreted it as a green light for the use of force that does not violate either territorial integrity or political independence and furthermore is not against the purpose of the UN. The classic example is the use of force in the name of human rights. These invasions represent a revamped version of the “just war doctrine.” However, no state is empowered to use force unilaterally, in the name of human rights or any other matter. According to the Charter, the UNSC alone is legally competent to authorize forcible humanitarian intervention.

War crimes

War crimes have been punished within domestic law since the beginning of criminal law and were the first to be prosecuted pursuant to IL. While first defined in the Hague Conventions and the Nuremberg Charter, they have subsequently been defined in the 1998 *Rome Statute*. The category of “war crimes” includes within its scope those isolated acts committed by individual soldiers acting without direction or upon guidance from superiors. The scope of the category is, however, limited by Article 8.1 which states that: “*in particular* when committed as part of a plan or policy or as part of large-scale commission of such crimes.” The inclusion of the words “in particular” implies that states who wish to deny refugee status to those individuals who participated in or planned war crimes, must demonstrate that such crimes were intended to be widespread.

Crimes Against Humanity (CAH).

While the *Rome Statute* does list the sorts of activities that constitute crimes against humanity, the list is not an exhaustive one. The clause “*other inhumane acts*” leaves the Statute open for further development. This was used in the *Akayesu* decision by the ICTR to include the crime of forced nakedness of Tutsi women under the category “crimes against humanity.” However, under the *Rome Statute* this clause is limited by the clause: “of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” The concept of “crimes against humanity” is furthermore, limited because of the threshold that must be demonstrated by prosecutors, or in this case, by decision makers during the refugee status determination procedures.

The *threshold* for crimes against humanity has several components. First of all, the act must be “*part of a widespread or systematic attack.*” Second, the attack must be *directed at civilians*, thereby distinguishing it from war crimes which are directed against combatants or civilians. Third, it must be carried out, “*pursuant to or in furtherance of a State or organizational policy to commit such attack.*” This phrase reflects the increasing awareness that many atrocities in times of conflict are committed by non-State actors. Fourth, the perpetrator must have “*knowledge of the attack.*” This is otherwise referred to as “*mens rea,*” or intent requirement. The special intent required under the definition of crimes against humanity does create several potential loopholes for perpetrators of such atrocities who seek international protection as a refugee.

Self-defence

In the context of individual criminal responsibility, Article 31(1)(c) of the *Rome Statute* precludes individual criminal responsibility if the person who committed the acts, acted:

reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.

An asylum applicant who attempts to deny criminal responsibility and therefore qualify for refugee status must demonstrate that the threat against which they were defending themselves is imminent and real. Implied within the term “essential” used in Article 31(1)(c) is the notion that self-defence must be taken as a last resort. Furthermore, in an act of self-defence, the means used must be proportional to the harm inflicted.

Force Majeure

Criminal responsibility for states may be precluded by reasons of *force majeure*.⁶⁹ The International Law Commission’s *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* explains the meaning of this phrase as, “the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.”⁷⁰

In the context of individual criminal responsibility, Article 31 (1)(d) of the *Rome Statute* is pertinent. It confirms that a person shall not be criminally responsible if:

The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: i) made by other persons; ii) constituted by other circumstances beyond that person’s control.

According to Hathaway, the threat must be such that: “a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.”⁷¹ If an asylum applicant causes greater harm to others than he himself fears, *force majeure* is not an available excuse. In *Ramirez v. Canada*, it was found that “the harm to which he [Ramirez] would have exposed himself by some form of dissent or non-participation was clearly less than the harm actually inflicted on the victims.”⁷² Consequently his application for refugee status was denied.

Lack of Knowledge of Wrongfulness

The third way in which an individual who participated in illegal acts could preclude his guilt was if he or she were to plead ignorance or a lack of knowledge of the wrongfulness of the act. Such an exception cannot be applied in regards to crimes against humanity, which by their very nature preclude any potential doubt as to their wrongfulness. The ILC in the *Draft Articles*, affirms that nothing can preclude the wrongfulness of a state, or in this case an individual, if the action involves the violation of a preemptory norm of general international law or international human rights law.⁷³ A case in point is *A, B, & C v. Chief Executive Department of Labour*, Federal

Court of New Zealand, in which a former Peruvian police officer was denied refugee status based upon his previous participation in torture and other crimes against humanity. The court clarified that under no circumstances is torture justifiable.⁷⁴ Similarly, in the *Tadic* decision, the ICTY found that crimes in question were so heinous that no one could have pretended that they were ever legally justifiable.

Superior Orders

The preclusion of individual criminal responsibility is codified in Article 33 of the Rome Statute, which states that:

The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility, unless:

- a) the person was under a legal obligation to obey orders of the Government or the superior in question
- b) The person did not know that the order was unlawful;
- c) The order was not manifestly unlawful.

In the context of IRL, the question of compulsion to obey has several features. In the case *Equizabal v. Canada* it was argued that “the defence of obedience to superior orders based on compulsion is limited to imminent, real, and inevitable threats to the subordinate's life ...”⁷⁵ The determinative issue then, is how to determine when threats become so imminent, real, and inevitable that they rise to the level of compulsion that disables a subordinate from forming a culpable state of mind. The notion of “manifestly unlawful” was further fleshed out in *Equizabel* as an order that: “offends the conscience of every reasonable right-thinking person, it must be an order which is obviously and flagrantly wrong.”

Key cases

Equizabal v. Canada (Minister of Employment and Immigration), File No. A-443-93, 26 May 1994, para. 23.

Websites

Rome Statute of the International Criminal Court, 1998

<http://www.un.org/law/icc/statute/romefra.htm>

International Law Commission, Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001).

<http://www.un.org/law/ilc/convents.htm>

“Serious Non-Political Crime”

Article 1F(b) of the RC excludes from its ambit, those individuals who have committed a “serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.” According to the UNHCR, the aim of this provision is to protect countries of refuge from the dangers of admitting serious criminals. Both the nature and the purpose of the crime must be evaluated in order to determine whether the crime was “non-political,” committed for reasons of personal gain, or in contrast whether it was committed in order to fulfill political objectives. In order to constitute a political crime there must be a close causal link between the actions taken and the objective and purpose stated. Similarly, it is the political element that must

be predominant. In regards to a serious non-criminal crime, the RC stipulates that it must have been committed outside of the country of refugee, which usually implies that it has been committed in the applicant's country of origin. If the crime is committed within the territory of the country of refuge, the applicant is subject to due process and the laws of that country.

Admittedly, it is difficult to define "crime" in a manner that would be acceptable to all peoples from different cultures and societies. The UNHCR has sought to define it in a broad enough manner so as to accommodate cultural variations of the term, while at the same maintain a narrow enough definition so that the clause remains exceptional. The crime must be a capital crime or a "a very grave punishable act."⁷⁶

A political crime may, in addition, only be considered as such, if the crime committed is in proportion to the stated objective and purpose. When acts are of a particularly horrific nature, the proportionality will be incredibly difficult to prove.

Likewise, decision-makers in the country of refuge are obliged to strike a balance between the nature of the presumed offence and the degree of persecution feared by the applicant. If an applicant has a well-founded fear of persecution, than the crime committed must be grave in order to exlude her. Moreover, if it is determined that she has a well-founded fear of persecution, the principle of *non-refoulement* prohibits the country of refuge from returning her to her country of origin, despite the fact that she is subject to exclusion. **See Section 1.3.1**

The nature of the alleged offence must be carefully examined in order to discern whether the applicant is a fugitive from justice or on the contrary, whether her criminal character is outweighed by her status as a *bona fide* refugee.

"Acts Contrary to the Purposes and Principles of the United Nations"

Article 1F(c) of the RC excludes from consideration those individuals convicted of "acts contrary to the purposes and principles of the United Nations." The purpose of the UN is enshrined in the preamble of the UN Charter and includes the affirmation of "faith in fundamental human rights" and human dignity. Member states are to "save succeeding generations from the scourge of war," to establish and maintain the conditions for justice, to respect IL and obligations rising from therein, and to "promote social progress." Acts that violate such purposes and principles are the very acts already listed in paragraphs (a) and (b) of Article 1F of the RC. Individuals who commit war crimes, crimes against humanity or serious non-political crimes are clearly individuals who have committed acts contrary to the purposes and principles of the UN. It is states that are responsible for the obligations enshrined in the preamble of the UN Charter. As such, acts contrary to such purposes are acts that are committed by state authorities. Such an interpretation is confirmed by UNHCR in their *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*.⁷⁷ This clause is aimed at those individuals who previously had been in positions of authority and were involved in committed persecutory acts, and who then became themselves refugees.

2.1.5. Penalties (Article 31 of the Refugee Convention)

The particular situation of refugees is such that they may be obliged to enter a country illegally. They are escaping actual or potential persecution and consequently are not always able to secure the visas, identity papers, etc. that are necessary to enter a country of asylum legally. This is recognized by the UNHCR and also by all of those states who are party to the RC. Article 31 states that:

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.

Article 31 specifically mentions only refugees. However, UNHCR has reports that refugees recognized by their Office as “mandate refugees” are not recognized as such by the country of asylum and are subsequently detained on the basis of illegal presence.⁷⁸ In addition to refugees, this provision must be interpreted to include asylum-seekers so as to avoid emptying the clause of any meaning. Furthermore, refugee status is of declaratory nature.

“Penalties”

“Penalties” are not defined in Article 31(1). However, according to the Vienna Convention on the Law of Treaties 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.”⁷⁹ Consequently, the object and purpose of Article 31(1) is the prohibition of penalties imposed upon refugees for illegal entry. The implication then is that the term “penalties” be interpreted in a broad manner so as to prohibit both penal and administrative penalties.

Illegal Entry or Illegal Entrance

The penalties prohibited are those imposed as a result of “illegal entry or illegal entrance.” According to Goodwin-Gill, illegal entry involves the use of false or falsified documents, the use of methods of deception, and clandestine entry, such as entrance as by smugglers, traffickers, or as a stowaway. That a refugee must have “good cause” for illegal entry refers to the element of well-founded fear. Given that she fled with such a fear in mind, it is only logical that she may not have had the opportunity to gather the documents necessary to legalize her entry. Illegal presence, on the other hand implies that the applicant arrived lawfully but remained illegally, for example after the elapse of permitted time.⁸⁰

“Directly”

That the refugee must arrive directly ought to be interpreted according to the specifics of each case. Due to various risks during the journey, a refugee may have had to stop in other countries along the way. Similarly, that the refugee must present herself “without delay” to the relevant authorities is also a term that can only be defined with reference to the facts and circumstances of the particular case. The putative state of asylum must consider the extent to which the refugee had access to advice in the state in which they previously were and whether or not that state was a transit country.⁸¹

Detention

Despite the fact that penalization of refugees and asylum-seekers is prohibited under IRL and that detention clearly qualifies as a penalization, states have increasingly resorted to such a practice. Asylum-seekers may be detained either during the pre-admission state or held in an anticipation of transport to a safe third country, as stipulated in the EU Dublin Convention for example. If a government is concerned that the applicant constitutes a threat to national security or public order, pursuant to Article 32(1) RC, the applicant may also be detained. Many states consider

detention as a legitimate response to actual or perceived abuse of the immigration system or perceived threats to national security. This practice has been consistently criticized by the UNHCR and the Executive Committee:

The Executive Committee deplors that many countries continue routinely to detain asylum-seekers (including minors) on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status; notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention.⁸²

Arbitrariness

The Executive Committee's comments emphasize the notion of arbitrariness and inconsistencies with established human rights standards. Arbitrary detention violates the universal human right to liberty and security of person. Article 9(1) of the ICCPR specifies that: "no one shall be subject to arbitrary arrest and detention." Arbitrariness is described in the ICCPR Article 9 as a detention that is not established by law, of which the detainee is not informed of the reasons for his or her arrest, during which the detainee is not brought promptly before a judge and during which he is not brought to trial or released within a "reasonable time."⁸³ Similarly, UNHCR specifies that in regards to the detention of asylum-seekers, detention may be arbitrary if it is not in accordance with the law, if it is not proportional or if it is for an indefinite period of time.⁸⁴ While some states have established a maximum amount of time for detention, after which the applicant must be released if no decision has been made regarding her admission or removal, other countries have established no such limit. Examples of the latter include Denmark, Finland, the Netherlands, and the United Kingdom. In addition, detention must be subject to judicial or administrative review.

Justifiable Detention

It is important to note that Article 31(2) does establish limited bases for justifying the detention of asylum-seekers and refugees. The clause can only be interpreted, however, to imply detention of an administrative nature. According to the *UN Standard Minimal Rules for the Treatment of Prisoners*, administrative prisoners ought to be kept separate from criminal detainees. Nevertheless, states frequently do not comply with this regulation, resulting in the detention of asylum-seekers together with common criminals. That detention has become common practice means that states often do not have the institutional capacity to "house" the detainees. Consequently, regular prisons are regularly used.

In addition to being in accordance with the UN standards, detention conditions must also be in accordance with those standards established in IHRL. Article 9(1)(4) ICCPR refer to the right to liberty and security of person. Sub-paragraph (1) establishes the negative obligation upon states not to arbitrarily arrest or detain someone. Positive obligations are also imposed, to the extent that the state must establish a functioning legal system so that they are in accordance with their obligations under sub-paragraph 4. Moreover, the HRC confirmed that the obligation to treat detained individuals with respect and dignity and to create the modalities and conditions of detention so as to ensure such respect is not dependent upon the material resources of a particular state.⁸⁵ Similarly, the HRC affirms that Article 9(4) ICCPR must be read together with Article 2(3) ICCPR, the right to an effective remedy.

Justifiable bases as enumerated in the *Executive Committee's 1986 Conclusion on Detention of Refugees and Asylum-Seekers* include: to verify identity; to determine the elements of the claim; to deal with cases where refugees have destroyed their travel and/or identity documents or have

used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order. In order for a state to justify detention, the reasons why must be clearly established in national law, which in turn must be in accordance with international human rights law and IRL. Importantly, there should be a legislative presumption against detention. In other words, detention ought to be a practice of last resort. (Goodwin-Gill 2003)

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3.0 ALTERNATIVE STANDARDS SPECIFIC TO REFUGEES - THE REGIONAL LEVEL

The standards for the definition of “refugee” and the protection that ensues from such a categorization are not limited to those enshrined in the 1951 Convention. Indeed, many scholars maintain that the RC is inadequate in today’s day and age. Of particular importance are the 1969 OAU Refugee Convention and the 1984 Cartagena Declaration. Judge Arboleda, at the Inter-American Court of Human Rights, argues that: “the internationally accepted refugee definition has proven inadequate to deal with the problems posed by the millions of externally displaced persons in the third world.” As a result, regional definitions, such as those presented by the CD and the OAU Convention have been advanced. They represent, in the words of Arboleda, “concrete attempts to adapt international refugee law to existing refugee problems.”⁸⁶ Likewise, standards drawn from the body of International Humanitarian Law are being cited in efforts to expand the scope of protections afforded to asylum-seekers and refugees.

3.1 African Standards

Human rights standards in the context of Africa are enshrined in the 1969 African Charter on Human and Peoples’ Rights. Of importance is that the Charter covers economic, social and cultural rights as well as civil and political rights. The African Charter also covers ‘third generation rights’ and gives due importance to the assumption that a person has duties as well as rights in a given community. Also of note is the 1990 *African Charter on the Rights and Welfare of the Child* extends state obligations. Article 23 of this Charter specifically provides for the protection of refugee children. It reaffirms the importance of family unity and obliges states to undertake efforts aimed at family reunification. Interestingly, the protections enshrined in Article 23 are also afforded to internally displaced children, including those displaced by natural disaster and “breakdown of economic and social order.”

Of utmost importance in terms of refugee protection is the *1969 Convention Governing the Specific Aspects of Refugee Problems in Africa*, known as the OAU Convention. This Convention must be viewed in relation to human rights instruments such as the *African Charter on Human and Peoples’ Rights*. The obligation of states to receive and secure refugees may arguably extend to all OAU countries, regardless of whether they are signatories to the 1969 Convention.

3.1.1. The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa

The drafters of the OAU Convention sought to complement rather than replace the 1951 Convention. This is reflected in Articles 9 and 10 of the Preamble, which stress that the 1951

Convention 'constitutes the basic and universal instrument relating to the status of refugees' (Article 9 Preamble). Cognizant of the political climate in which the RC was drafted, the drafters of the OAU Convention sought to de-politicize the issue of refugee crises as well as the concept of asylum. This is reflected in Article 2(2), which states: '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.' Moreover, Article 2(6) states that 'for reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.' This provision was intended to discourage the setting up of refugee camps on borders, thereby increasing tensions and friction between the sending and receiving states.

In relation to other protective instruments, the Convention is somewhat lacking in some areas. For instance, the Convention does not contain any provision specifically prohibiting discrimination on the basis of gender (Article 4). Nor does it contain provisions dealing with internally displaced persons (IDPs), insofar as IDPs are not 'compelled to leave his place of habitual residence in order to seek refuge in another place outside of his country of origin or nationality' [Article 1(2)]. In this sense, the 1969 Convention does not address the gap of protection for IDPs that is also present in the 1951 Convention.

While the Convention contains specific provisions providing for 'burden-sharing' between member states (Article 2(4)), this has not been reflected in reality. The Convention does allow scope for *prima facie* refugee determination in situations of mass influx, particularly relevant in the African context. Since the adoption of the 1969 OAU Convention, there have been few additional legal or judicial developments. The development of refugee law and the enhancement of the protection of refugees within Africa have been largely left in the hands of national governments and domestic courts.

Unique Aspects

Unique aspects of this Convention, as compared with the 1951 UN Refugee Convention and 1967 Protocol are, *inter alia*:

- 1) It contains an absolute prohibition of *refoulement*, unlike the 1951 UN Refugee Convention, which allows for an exception to be made in times of national emergency or when national security is at stake.
- 2) It contains a prohibition of subversive activities (Article 3(1)(2)). This clause is considered essential in the African context given the increasing militarization and politicization of refugee camps. The Convention does not provide for a sanctions regime to deal with breaches of this article.
- 3) Perhaps the most celebrated feature of the 1969 OAU Convention is its expanded definition of who is a 'refugee.' In comparison to the 1951 Convention, the OAU definition focuses more on the objective circumstances which compel flight. The fear of danger is not linked to the individual's personal subjective reaction to a perceived adversity. In addition, the definition includes accidental situations not based on deliberate state action. Likewise, the source of danger need not be actions of the state or of its agents. In so doing, the OAU definition highlights the causal element of refugee situations, the jeopardy of human rights of those fleeing, as opposed to emphasizing the motive for flight, as is done in the 1951 Convention.
- 4) The OAU definition permits *prima facie* group determination, eradicating the requirement that an individual establish a personal and individual risk of persecution.
- 4) It is the first international instrument to codify the principles of voluntary repatriation. Article 5 demonstrates that the drafters of the Convention envisioned that repatriation would take place in an organized manner, planned and supported by both sending and receiving states. However, the

UNHCR has stated that the majority of refugees return of their own initiative. There is no provision stipulating that there must be a fundamental change in circumstances and human rights standards in the home country, prior to promoting, encouraging, or even allowing for repatriation to occur.

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3.2. Inter-American Standards

The most progressive element of the Inter-American system of protection is the refugee definition enshrined within the 1984 Cartagena Declaration. However, international protection within the region must also be understood in the context of the protection of human rights at the Inter-American level. Of utmost importance is the inclusion within the American Convention on Human Rights (Article 22(7)) of the right to seek and be granted asylum. The UDHR grants individuals only the right to seek asylum. The importance of Article 22(7) of the ACHR cannot be over-stated. All states signatory to the ACHR are obliged to afford protection to asylum-seekers, regardless of whether they are signatories to the Cartagena Declaration. The collective expulsion of refugees and asylum-seekers is also prohibited according to Article 22(9) of the ACHR.

3.2.1 1984 Cartagena Declaration

The CD was drafted in order to complement and build upon the protection already afforded to some by the 1951 Convention. It was heavily influenced by the Organization for African Unity's (OAU) *1969 Convention on the Specific Aspects of Refugee Problems in Africa*, improving upon some of its provisions, and retracing steps in others. With the advent of the CD, the terminology of IRL was significantly changed. The definition was broadened, while simultaneously expanding states' obligations towards a wider variety of individuals and groups. Conclusion No.3 of the CD reads as follows:

...the definition or concept of a refugee to be recommended for use in the region is one in 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 violations of human rights or other circumstances which have seriously disturbed public order.

Basis for the Granting of Refugee Status

The 1951 Refugee Convention requires that an individual asylum seeker demonstrate a "well-founded fear of persecution" based upon one of the five Convention grounds. The onus is on the individual asylum seeker to convincingly demonstrate the nexus between subjective fear and objective reasons for such fear. This linkage between subjective fear and objective conditions was completely eradicated in the OAU Convention refugee definition, which leaves open the possibility that the basis or rationale for the harm may be indeterminate.

The CD refugee definition represents something of a compromise between the all-inclusive OAU Convention definition, which defers to an individual's perception of peril and the Convention standard. It accepts claims in which the rationale for harm is indeterminate, however this acceptance is qualified. In Conclusion No.3, it is stipulated that an individual must demonstrate that they have "fled their country because their lives, safety or freedom have been threatened..." In other words, an individual must be personally at risk. Under the CD, it is implied that an individual or group of applicants must demonstrate that there is a "prospective" threat to their lives, security, or liberty. However, the "threat" provided for in the CD refugee definition establishes a threshold that is significantly lower than the "well-founded fear" element of the 1951 Convention.

Generalized Violence, Foreign Aggression, and Internal Conflicts as grounds

The CD marks a step forward in the development of IRL by formalizing the general consequences of armed conflict as a basis for refugee status. This is not to say that previous to the establishment of the CD, individuals fleeing risks emanating from such situations were not afforded protection. State practice has repeatedly accommodated these victims. Nevertheless, the inclusion of such individuals and groups under the RC required a liberal interpretation of the text of the treaty. The broadened definition of the CD provides textual clarity, thereby preempting efforts by states to prevent individuals who are fleeing their countries because of civil war, internal violence, or general disregard for human rights from acquiring protection under the 1951 Convention.

Human rights grounds

The grounds for granting asylum stipulated in the CD referring to "massive violations of human rights" is in some ways analogous to the general term "persecution" used in the RC, neither of which provide a definition for the term. Given the general qualification in the CD that any violation must threaten life, liberty, or security, it can be assumed that the drafters assumed that "massive violations of human rights" or "persecution" fundamentally includes the threat of deprivation of life or physical freedom. Yet, the International Conference on Central American Refugees (CIREFCA), in its *Principios y Criterios*, stipulates that "massive violations of human rights" can and does include other rights, including economic, social, and cultural rights provided that a link is made to the subjective element of "threat to life, liberty, or security." Therefore, measures such as the imposition of serious economic disadvantage, denial of employment opportunities, the denial of access to education, professions, and so forth ought to be included as measures that could potentially lead to the granting of refugee status.

Cessation and Exclusion in the Cartagena Declaration

Some have argued that the CD is too expansive because, *inter alia*, it contains no cessation or exclusion clauses. While it is true that no specific provisions are included, this does not imply that cessation and exclusion do not apply to refugees under the CD. According to the Executive

Committee of UNHCR (ExComm), the underlying rationale for cessation clauses is that: “refugee status should not be granted for a day longer than was absolutely necessary, and should come to an end...if, in accordance with the terms of the Convention or the Statute, a person had the status of *de facto* citizenship, that is to say, if he really had the rights and obligations of a citizen of a given country.”⁸⁸ That an individual may cease to be protected under the CD is implied by the Declaration's affirmation of voluntary repatriation of refugees in Conclusion No.12. In addition, Conclusion No.3 indicates that the CD simply adds to the elements of the RC. Cessation clauses are provided for in Article 1C of the RC and exclusion clauses in Article 1F. The text of the CD indicates that these same provisions apply to individuals applying under the CD. Indeed, all that the CD really does is broaden the inclusion clauses, by expanding the definition.

The CD was inspired by the *OAU 1969 Convention on the Specific Aspects of Refugee Problems in Africa*, which contains cessation and exclusion clauses in Article 1(4) and 1(5) respectively. That the OAU Convention is expressly mentioned as a "precedent" for the CD indicates that the CD would include those cessation and exclusion provisions provided for in that instrument to the extent that they were regionally appropriate (i.e. excluding Arts. 1(4)(f)(g) and (5)(c), which are purely regional in character).

Finally, the inclusion clauses of the Declaration can be applied "*a contrario sensu*."⁸⁹ In other words, when the conditions that gave rise to flight disappear, refugee status ceases, unless the individual has particular reasons to maintain their status. In order to determine the validity of such reasons, recourse must be had to the RC. Cessation clauses are implied in the CD: “if the conditions that caused flight have fundamentally changed, the ‘refugee’ is no longer a ‘refugee,’ and all things being equal, can be required to return home like any other foreign national.”⁹⁰ If the conditions have fundamentally changed, yet the individual applicant wishes to maintain their refugee status, they must demonstrate that a nexus exists between the facts and the particular individual applicant such that a "well-founded fear of persecution" exists. In order to establish this, decision-makers in respective countries must consider Art. 1 of the 1951 Convention and all of its implications.

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3.3. European Standards

The expanded refugee definitions established within the African and Inter-American systems was not replicated at the European level. In contrast, Europe has sought to restrict the application of the existing RC. Many *bona fide* refugees are not granted refugee status but are instead granted “humanitarian status,” and “exceptional leave to remain;” statuses which do not accord the same level of protection as does the RC. European states are increasingly implementing “non-arrival” policies, designed to prevent asylum-seekers from entering without proper documentation. Examples include visa requirements and carrier sanctions. **See section 2.1.5.** For those few asylum-seekers who do manage to arrive at their borders, European states have adopted what

UNHCR refers to as “diversion policies.” Most common amongst such policies is the development of “safe third country” lists. **See section 1.3.1** . Furthermore, many states have resorted to implementing deterrent procedures, such as the automatic detention of asylum-seekers, the denial of social assistance, and the restriction of access to employment.

Whereas the right to seek and obtain asylum is provided for in the African and Inter-American regions, the European Convention on Human Rights [ECHR] does not contain even a reference to the right to asylum. As a result, the right to seek asylum is not a right, which asylum-seekers can seek to vindicate at the European Court of Human Rights, the supervisory body of the ECHR. Asylum-seekers and refugees have, however, been successful in hampering European states’ efforts at deportation by linking the general prohibition of *non-refoulement* with the right to be free from torture, cruel, inhuman, or degrading treatment, which is enshrined in Article 3 of the ECHR. **See Sections 1.4.3 and 6.5.2**

3.3.1. Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

As Western European countries attempt to achieve closer economic and political integration, so too have they sought to harmonize immigration and asylum policies in the hopes that this will lead to better burden sharing among EU member-states. With the expiration of the 1997 Treaty of Amsterdam and the subsequent adoption of the European Council Directive, such harmonization in the area of asylum procedures is well on its way to being complete.

Upon the expiration of the Treaty of Amsterdam, the Council developed and the EU member countries adopted the *Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection*. The Directive came into force on 20 September 2004. The Directive is binding upon all Member States, save Denmark. States are obliged to bring into force the domestic legislation necessary prior to the 10 October 2006. The Directive also outlines the minimum standards of rights and benefits attached to the protection granted and also the benefits that accrue to family members of refugees or benefits of subsidiary protection. Whereas EU Member States re-affirmed the importance accorded to “absolute respect to seek asylum” at the European Council Meeting in Tampere in 1999, the right to enjoy or be granted asylum was conspicuously omitted from the Directive.

Positive Aspects of the Directive

The Directive outlines only those *minimum* standards to which Member States must adhere and the Council confirms in preambular paragraph 8 that: “It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions...”. Moreover, the establishment of such minimum conditions is a positive step towards improving asylum procedures in those countries, which are new members of the EU and whose current asylum procedures do not meet even these minimum standards.

The Directive constitutes the first international legally-binding treaty, which establishes a duty for Member States to grant subsidiary protection (SP) to those in need of protection. Furthermore, the Directive defines “acts of persecution” in a broad manner. Article 9(1)(a) does not limit persecution to “threats to life or freedom,” but rather refers more broadly to “severe violations of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the ECHR.” Sub-paragraph 2 establishes a non-exhaustive list of the various forms which persecution can take. Gender-specific and child-specific violence are mentioned, as is disproportionate or discriminatory prosecution. That the list is not exhaustive is illustrated by the

use of the term “*inter alia*” in the introductory sentence of sub-paragraph 2. Similarly, Article 30 establishes provisions aimed specifically at protecting unaccompanied minors. Furthermore, the principle that assessments should be carried out on an individual basis is also something to be applauded.

Article 11 deals with cessation clauses under the Directive. The clauses mirror those enshrined within the RC. However, sub-paragraph 2 makes explicit what is not in the RC, and that is that in order to apply the “ceased circumstances” provisions, the changes in the applicant’s country of origin must be of a non-temporary and significant character. Such a clarification is welcome. Nevertheless, many critics argue that the minimum standards agreed upon in the Directive amount to a meeting of the minds at the lowest common denominator. Indeed, several of the provisions are cause for serious concern as they represent a denigration of the protection standards afforded under the RC.

Definition of a Refugee

Article 2(c) of the EC Directive adopts a very similar definition of a “refugee” that is enshrined within Article 1A of the RC. However, in contrast to the latter, which applies to “any person,” the definition of refugee in the Directive is confined to “third party nationals or stateless persons.” Effectively this excludes from consideration a national of any EU Member State. Article 2(f) contains the same restriction for those entitled to SP.

Article 2(d) specifies that “refugee status” implies the recognition of a Member state of an applicant as a refugee. In other words, while the Directive stipulates “refugee status is declaratory,”⁹¹ in order to first be categorized as such, a particular applicant must satisfy the criteria laid out in Article 2(b).

This is particularly relevant to those categorized as “deserving of subsidiary protection.” These are individuals who do not satisfy the conditions of “what is a refugee” as stipulated in 2(b) and the RC, and whose status therefore is not declaratory, but rather is dependent upon a particular state’s consideration of their situation. Subsidiary protection status (SPS) means that one is eligible for protection but is not legally entitled to such protection, as is a *bona fide* refugee. The substance of the relevant provisions in the Directive further demonstrates the tenuous situation of those characterized as having SPS.

Assessment of Applications for International Protection

Article 4(3)(d) refers to those claims which are “manifestly unfounded.” In asylum proceedings, the Court must determine whether the actions taken in the country of residence give rise to a well-founded fear of persecution or whether they are merely a “pretext” for application. This notion of a “pretext” was developed in the Australian jurisprudence, specifically *Somaghi v. Minister of Immigration, Local Government, and Ethnic Affairs*. Here the Appeal Judge stated that: “... a person whose sole ground for refugee status consists of his own actions in his country of residence designed *solely* to establish the circumstances that may give rise to his persecution if he should return to the country of origin...”⁹² According to Article 20(7) of the Directive, an applicant would also be excluded for the same reasons from the benefits of SP.

Nevertheless, this notion of “pretext” confuses the issue. The central question remains whether or not the applicant has, at the moment of application, a genuine fear that she would be persecuted upon return. According to the object and purpose of IRL, which is to protect refugees, whether or not the applicant engineered the circumstances or whether they were engaged in good faith is irrelevant.

An individual will not be eligible for international protection if they are able or willing to seek protection from their national government. This is enshrined within the RC and is the key to understanding international protection as a subsidiary form of protection. Only States are legally bound to offer adequate protection. However, according to Article 7(b) of the Directive, an actor of protection includes “parties or organizations, including international organizations, controlling the State or a substantial part of the territory of the state.” This is particularly problematic when an asylum state is considering rejecting a claim on the basis of there being an IFA. Similarly, Article 8(1) of the Council Directive establishes the existence of an IFA as a basis for the rejection of a claim.

Exclusion Clauses

Article 12 of the EC Directive deals with exclusion clauses and represents a regression of the protections afforded in the RC. Article 1F(b) of the RC excludes from refugee status those who have committed a serious, non-political crime outside the country of asylum. Those applicants who commit a serious, non-political crime within the territory of the asylum state are entitled to due process and are subject to the legal proceedings established within that country. In contrast, Article 12(2)(b) of the Council Directive stipulates that if an applicant commits a serious, non-political crime within the territory of the state of asylum, but prior to having been accorded refugee status, precisely “prior to having been issued a residence permit,” then the exclusion clause applies. This results in a curious situation in which, while preambular paragraph 14 establishes refugee status as declaratory, Article 12(2)(b) implies that refugee status is accorded only once a state has issued a residence permit. Therefore, all of the rights and benefits that accrue from refugee status and to which refugees are entitled under IRL are suspended until such a time as the state issues a residence permit.

Similarly, those individuals applying for SP can be excluded for having committed a “serious crime.”⁹³ This clause is not qualified by “non-political” nor is it situated, in that the crime need not be committed outside of the country of asylum. Consequently, a person who is entitled to SP due to the threats which they face may be excluded from such protection for having committed any type of crime, including political ones, either in the country of origin, the country of asylum, or any transit state. If the crime was committed within the territory of the asylum state or transit state, presumably the individual would not be entitled to due process rights but rather would simply be excluded from protection. This is in violation of Articles 14 and 16 of the ICCPR which obliges states to ensure for “all individuals within its territory and subject to its jurisdiction.”⁹⁴

Article 14 of the Council Directive is also cause for concern to the extent that it widens the exclusion clauses provided for in the RC. Article 14 permits the refusal of refugee status on national security grounds, prior to conducting an assessment into the claimant’s application.

Qualification for SP

Individuals who are threatened with “serious harm” are entitled to SP. Serious harm is defined in Article 15 and includes “capital punishment or execution,” “torture, cruel, inhuman or degrading treatment,” and “serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.” Note the qualifying term is “individual.” The implication is that if a large number of people are affected, then “serious harm” within the meaning of Article 15 of the Directive will not be established. The rationale for this is not simply that a large number of people are affected but rather is due to the indiscriminate nature of the harms inflicted or feared. **See section 4.0**

Additionally problematic is the absence of any mention of “systemic or sustained violation of human rights” as a basis for a claim of serious harm.⁹⁵ The inclusion of such a term would have been consistent with Member States’ obligations under the ECHR and other international human rights treaties.

Moreover, persecution for a Convention reason can and does occur in the situations described in Article 15. The concern is that such individuals will not be granted the refugee status to which they would be entitled, but rather would simply be granted SP under Article 15. SPS is a residuary status and does not offer the same level of protection and benefits as are offered *bona fide* refugees. SPS should be granted only to those who *clearly* fall outside of the Convention/Directive definition.

Content of International Protection

Article 21 of the Directive deals with *non-refoulement*. The Directive re-affirms the importance of this principle and links it by way of the phrase “in accordance with other international obligations” with provisions of IHRL. Article 21(1)(2) permits derogation from the principle, in a manner similar to the RC. However, a state may not *refoule* someone if they are to face torture, cruel or inhuman or degrading treatment. The reference to other international obligations infers as much. Under IHRL, *non-refoulement* is a principle from which no derogation is justified under any circumstances.

Throughout this section of the Directive, the rights accruing to refugees are ensured at a much higher degree than are those accruing to individuals with SPS. The Directive affirms the importance of family unity (Article 23) and yet does not contain any provision detailing the right to family reunification for those with SPS. Furthermore, the Directive leaves it to state discretion whether to accord rights and benefits to “close relatives” of the main beneficiary. The requirement that such family members must have lived with and be “entirely or mainly” dependent upon the main beneficiary limits the notion of family to a significant degree.⁹⁶

Articles 24 through 29 deal with economic and social rights of those individuals with refugee status and those with SPS. In all cases, the rights of the latter are significantly reduced in comparison to the rights of the former. Article 26 limits the rights of individuals with SP to access employment. Member states are permitted to take into account the current labour market prior to authorizing an individual with SP to engage in employment. Likewise, individuals under SP may receive only limited social assistance benefits and limited health care.⁹⁷ Their access to integration programmes is also limited by the fact that access is authorized selectively, depending upon the state’s determination of propriety.⁹⁸ Similarly, the duration of their residence permits may be curtailed.⁹⁹ This clearly demonstrates the denigrated nature of the protection afforded to those with SP as opposed to those accorded refugee status.

Key cases

R v. Hammersmith & Fulham London Borough Council, 17 Feb. 1997

R v. SOS Home Department Ex parte Krishnan Rajaratnam [29 July 1997]

R v. Secretary of State for Social Services ex parte Joint Council for the Welfare of Immigrants [1996]

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http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_304/l_30420040930en00120023.pdf

European Council of Refugees and Exiles. Information Note on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. IN1/10/2004/ext/CN
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European Convention on Human Rights
Human and Constitutional Rights Resource Page
http://www.hrcr.org/docs/Eur_Convention/euroconv.html

4.0 INTERNATIONAL HUMANITARIAN LAW

Hitherto, individuals or groups who are fleeing situations of generalized violence, civil conflict, man-made disasters and so forth, have not generally acquired refugee status under the RC. Nevertheless, IHL can be of particular use in the refugee context, providing additional protection for civilians in times of war. IHL draws the line between acceptable and unacceptable behaviour during a given conflict. If a particular action is taken and violates IHL, then any particular individual violated by the said behaviour need not establish a personal risk under IRL in order to receive protection. However, if the said behaviour affects an individual in a negative manner and yet the action taken is not in violation of IHL, then the individual will need to establish how they were personally at risk.

4.1 *Exceptionality approach*

The critical question is whether victims of war ought to be considered as refugees. According to the UNHCR, there is nothing in the RC that precludes victims of war from acquiring refugee status, provided that they demonstrate a "well-founded fear" based upon one of the five Convention grounds. Those individuals who are fleeing persecution in times of war, but are unable to link their persecution with one of the five Convention grounds, must rely upon the protection afforded to civilian non-combatants in the Geneva Conventions and Protocols I and II. In their *Handbook on Procedures and Criteria for Determining Refugee Status*, the UNHCR stipulate, in paragraph 164, that¹⁰⁰:

Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol.²² They do, however, have the protection provided for in other international instruments, e.g. the Geneva Conventions of 1949 on the Protection of War Victims and the 1977 Protocol additional to the Geneva Conventions of 1949 relating to the protection of Victims of International Armed Conflicts.²³

The *Handbook* then qualifies this provision with reference to "special cases", thereby highlighting their exceptionality.

If it is determined that such a claimant does not face differential victimization on the basis of one of the five Convention grounds, they must rely upon a state's humanitarian considerations and other forms of extra-conventional protections against *refoulement*. Such protection is, however, much more limited than that afforded under the RC; is dependent upon a state's good will; and is usually intended to be temporary.

4.2 Differential risk approach

Several states apparently fear that by providing for refugee status on the basis of armed conflict or generalized violence, the floodgates will be opened. Speaking against making the RC applicable to situations of armed conflict and generalized violence, the SCC in *Isa v. S.C.C.* argued that¹⁰¹:

Many if not most, civil war situations are racially or ethnically based. If racially motivated attacks in civil war circumstances constitute a ground for Convention refugee status, then all individuals on either side of the conflict will qualify.

This decision implies that an applicant must emphasize their subjective fear, as opposed to the objective conditions leading to their flight. In other words, they must prove that they are at a greater risk when compared with the risks that all other citizens face on account of the armed conflict or civil war. The presumption made in the above decision of the SCC is that there can be no differential risk if the political, racial, religious, national, or other motivation for the harm simply arises out of the conflict itself.

This approach results in the paradoxical situation that while it is accepted that many civil wars are fought for discriminatory motives, the persecution that results is too indiscriminate to amount to "persecution" within the meaning of the RC. Moreover, it implies the doubtful assertion that it is not persecution if it affects a broad group of people.¹⁰²

4.3 A Balanced Approach

The shortcomings of these restrictive approaches can be overcome by paying greater attention to the principles of IHL. Reference to IHL is explicit in Article 1(F) of the RC, in regards to exclusion clauses however IHL is rarely referred to in regards to the inclusion clauses in the RC.

Attention to IHL norms within refugee status determination procedures requires that decision-makers examine the objective situation in the country of origin so as to determine from which sort of conflict the individual or group is fleeing. Decision-makers would be obliged to apply the principles of IHL to government forces and belligerent groups alike. IHL makes a five-fold classification of armed conflict under which different norms apply depending upon the nature of the conflict. The five categories are: (1) traditional armed conflict, defined in common Article 2 of the Geneva Conventions; (2) those conflicts waged in the context of racist and/or colonial regimes and alien occupation, as defined in Article 1(4) of the Additional Protocol I of 1977; (3) those conflicts between a state and organized armed groups under responsible command and who have control over a territory, as defined in Additional Protocol II; (4) those conflicts falling under common Article 3 of the Geneva Conventions, referring to non-international conflicts, and ; (5) riots, internal disorder, and tensions subject to national laws and minimal international law standards. The latter category marks the threshold below which common Article 3 does not apply because the level of internal violence is too low.

When faced with making a determination regarding the nature of the internal conflict, decision-makers are required to examine the conditions in the country of origin on a case-by-case basis. In this case, IHL may provide greater protection to the extent that a wide range of IHL norms enjoy the status of non-derogable norms. In contrast, a list of similar

norms in IHRL hinges precisely on whether there is a war or "public emergency" in which case these rights can be limited. That decision-makers examine objective conditions in the country-of-origin, is not a ridiculous demand, as such information must be considered anyway before returning an individual if she is deemed not deserving of refugee status.

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5.0 INTERNALLY DISPLACED PEOPLES

One unifying characteristic of all individuals and groups who are characterized as “refugees” is their identity as a moving entity and that the aim of their movement is to escape danger. This notion of space becomes crucial when one examines the plight of the internally displaced peoples (IDPs). Like refugees, IDPs are fleeing danger in search of an area in which they will be better protected. They may be threatened by persecution based upon one of the five grounds enshrined in the RC. On the other hand they may be escaping civil war, internal disturbances, and/or generalized violence. They may also be leaving an area due to devastation wrought by natural or man-made disasters, development projects, or government-sponsored “relocation schemes.” The main differentiating factor between an IDP and a refugee is that an IDP has *not* crossed an international border. An IDP is **not** “outside the country of his nationality” or “outside the country of his former habitual residence.”

Given that IDPs remain within the territory of the country of their nationality or country of habitual residence, it may be assumed that they will receive assistance and protection from their national government; and that a state will protect the rights and freedoms of all those individuals and groups within its jurisdiction. For a state or an international organization, such as the UNHCR, to enter the territory of another state without invitation, in an attempt to protect individuals therein, is likely to be interpreted by the putative state as a violation of their political and territorial sovereignty.

However, it is no coincidence that often the government in question does *not* protect them, as they are obliged to do so under international law. Due to their association with a particular group, religion, ethnicity, nationality and so forth, IDPs are often viewed by the State as a threat. Ultimately, the reasons for their displacement are, more often than not, the same reasons that lead to refugee flight.

5.1 “Refugee-Like situations.”

The UNHCR restricts its understanding of IDPs to “those in refugee-like situations,” where “refugee” is understood according to the definition enshrined in Article 1A of the RC. However, the *1992 Report of the UN Secretary General* identifies IDPs as: “persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who are within the territory of their own country.”

There are several limitations inherent within this definition. First of all, individuals are not necessarily fleeing “suddenly or unexpectedly” nor are they necessarily fleeing in large numbers. Likewise, many are not “forced to flee” *per se*, but rather are expelled, such as the Bosnian Muslims. Consequently, Francis Deng, UN Special Representative of the UNSG on IDPs, suggests that the term “internally displaced” be replaced by the term “forcibly moved.”¹⁰⁴

As with refugees, there must be a determination of when IDP status ceases to be applicable. Just as no one wants to remain a refugee forever, presumably no one wants to be an IDP forever. That being said, Deng alleges that many IDPs prefer to remain as such rather than seek refugee status, given the increasing difficulties involved in acquiring such status. Nevertheless, the question of when an IDP ought no longer to be considered “displaced” is pertinent. The common assumption, and the one that parallels the logic behind “voluntary repatriation,” is that once an individual voluntarily returns home, they are no longer considered to be an IDP. However, there are both push and pull factors involved in repatriation efforts, and the notion of *voluntariness* alone cannot bring about a cessation of protection.

Perhaps a more appropriate suggestion is that an individual is no longer internally displaced when they have resettled locally or when the conditions that caused their displacement have changed in a significant manner, so that the reasons for the initial displacement no longer exist. Local resettlement and a change of circumstances must be evaluated in terms of how able the person is to sustain themselves and how able the state is to offer protection.

5.2. International Protection of IDPs

It is only since the 1980s that IDPs have been a significant matter of concern for the international community. There continues to be no international body mandated to protect IDPs. The International Committee of the Red Cross [ICRC] has, hitherto fulfilled this role, but only within the context of actual armed conflicts.

In addition, IDPs are protected within the framework of international human rights instruments and their supervisory bodies. However, these bodies are limited in their enforcement capabilities and individuals are only able to make claims under those treaties to which the state in which they are residing is party. Furthermore, the majority of human right principles are subject to derogation in times of national emergency or during internal disturbances. It is precisely in such times of insecurity that people are forcibly moved. Additionally, IHRL and treaty bodies are state-centric to the extent that it is only states that can be held accountable under these treaties. Movement that is coerced by non-state actors will remain outside the scope of their jurisdiction unless it can be proven that the state was unwilling to afford protection.

In an effort to offer better protection to IDPs and in recognition of this growing area of concern, the UNSG, in 1992, appointed Francis Deng as the Special Representative on IDPs. Six years later, in 1998, Deng presented the *Guiding Principles on Internal Displacement*. These identify the specific needs of IDPs and the specific obligations upon states and non-state actors towards these populations. While not binding in law, the Guiding Principles have gained significant recognition within the UN, among states and NGOs, and within regional bodies.

5.3. *UNHCR and IDPs*

As a result of the lack of an international organization mandated to protect and assist IDPs, much of the responsibility has fallen to the UNHCR. Although UNHCR's Statute makes no reference to IDPs, Article 9 recognizes that the High Commissioner may "engage in such activities...as the General Assembly may determine, *within the limits of the resources placed at his disposal.*" The last part of this clause is important. There are many who feel that saddling an already overburdened and under-financed UNHCR with more responsibilities will result in the denigration of the protection of refugees. Likewise, if the UNHCR is involved to a great extent with IDP populations, its activities may be construed as obviating the need for international protection and asylum. Those "developed" states that are desperately seeking to reduce the number of asylum-seekers who arrive at their borders may take UNHCR's involvement as a sign that refugee flows ought to be stopped at the source and refugees made to stay in their country-of-origin where they may seek UNHCR assistance. Similarly, with the increasing references made to an IFA as a basis for denial of refugee status, if the UNHCR is heavily involved in providing protection in a given area of a particular state, the asylum state may interpret this area to represent a viable IFA and deny an asylum-seeker on that basis.

Despite these misgivings, there can be no doubt that efforts aimed at better protecting and assisting IDPs must be pursued. At present, international response is patchy at best and wholly inadequate at worst. Deng and Cohen, in their book *Masses in Flight*, make a plea for a better division of labour among the various UN agencies and NGOs so that efforts aimed to address the needs of IDPs are more targeted.¹⁰⁵ (Deng & Cohen 1998)

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6.0 **SUPERVISION OF IRL**

6.1. *Development of the Supervisory Bodies of IRL*

Perhaps the primary interest of all states is their national security. Inextricably linked with security issues are matters related to immigration, insofar as refugees, immigrants, even tourists, challenge the power of the State to define and control the population within its territory. IRL in its initial form and to the extent that it seeks to create binding obligations upon states constitutes what James Hathaway refers to as: "a humanitarian exception to the protectionist norm."¹⁰⁶

In 1943 the Allied powers created the United Nations Relief and Rehabilitation Association (UNRRA). The allied powers provided the Association with logistical and material support. UNRRA's mandate was to assist in the relief and rehabilitation of devastated areas and to assist all those individuals and groups who were displaced, not simply those who were considered as refugees. The United States of America provided 70% of UNRRA's budget.

In 1947 UNRRA was dissolved and replaced by the International Refugee Organization (IRO). The IRO was created as a non-permanent UN agency, with a mandate of three-years. With its creation, greater emphasis was placed on threats to personal freedom as a basis for flight. The IRO was concerned not merely with repatriation as was UNRRA, but was also involved in the identification, registration and classification, care and assistance, transport, resettlement in third countries, and re-establishment of refugees.¹⁰⁷ The IRO exclusively assisted European refugees

until its dissolution in 1952. Despite its closure, there was a general agreement amongst members of the international community for the need to continue cooperating in dealing with refugee issues. Disagreement, however, raged over the objective such cooperation should fulfill.

6.2. UNHCR

Cold War tensions permeated all UN discussions regarding the formation of a new international organization mandated to assist refugees. Simultaneously, negotiations on the development of an instrument of international law focusing on refugees were taking place. Like its predecessor the IRO, the Office of the United Nations High Commissioner for Refugees (UNHCR) was established as a subsidiary organ of the United Nations General Assembly (UNGA). Its mandate was a temporary one, lasting for three years, although it was eligible for renewal provided that such a renewal was passed by a UNGA resolution.

Article 2 of the UNHCR's Statute, located in UN General Assembly resolution 428(V) of 14 December 1950, describes the Office's mandate:

The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting governments and, subject to the approval of the governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.¹⁰⁸

As an international organization, the UNHCR works entirely within the legal framework of the RC. It is clear from the UNHCR's mandate that the Office is to provide humanitarian and legal protection, rather than political protection.¹⁰⁹ According to the Office's supporters, this "neutrality" allowed it to work effectively amidst the tensions of the Cold War. On the other hand, many question the extent to which a non-political body can effectively deal with highly politically entrenched issue-area of refugees.

6.2.1. Limitations

The financial and political limitations that constrained the UNHCR in its early years continue to do so. Unlike other UN agencies that are automatically funded in the budget approved by the UNGA, UNHCR is obliged to seek voluntary contributions from states and is dependent upon a small UNGA budget and on a small "emergency" fund. Its legal existence and fiscal support must be renewed annually by a UNGA vote. Its status as a subsidiary organ of the GA means that it can never truly shed the grip of state influence and as a result its independence is seriously hampered. The inherent links between a state's sovereignty and its control over entry and exit of its territory play out in the Office's mandate to the extent that the UNHCR must be formally invited by host governments into their territory in order to carry out assistance. The end result is a situation in which the UNHCR is obliged to be non-political in its operations and yet is, at the same time, governed by political interests.

6.2.2. Protection and the Pursuit of Durable Solutions

In addition to providing humanitarian assistance and protection, the UNHCR is mandated to seek "durable solutions." The Executive Committee of the UNHCR has repeatedly affirmed the importance of voluntary repatriation "*when feasible*, as the preferred durable solution to refugee problems, and has called upon the High Commissioner and States to continue their cooperative efforts to achieve this solution *whenever feasible*."¹¹⁰ In principle, most States and individuals

would affirm the claim that all individuals have the right to return to their homeland. The UNHCR verifies this implicit consensus: "In international human rights law, the basic principle of voluntary repatriation is the right to return to one's country."¹¹¹ However, difficulties arise when individuals are repatriated to their country of origin when there has *not* been a fundamental change in circumstances, to the extent that the primary causes of refugee flight have been addressed and resolved.

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6.3 Executive Committee of the High Commissioner's Program (ExComm)

The ExComm, comprised of 66 government representatives, was created so as to address gaps in the protection of refugees. The body meets annually to discuss current issues in efforts of international protection and issues conclusions. These conclusions lack the force of law yet nonetheless carry weight as they represent a consensus achieved in an international forum.

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6.4 Supervision by Human Rights Treaty Bodies

While the UNHCR is the body created by the RC, it is not a treaty body in the same sense as is the Human Rights Committee, for example. Under the RC, there is no right to individual communication and there is no body authorized to deal with such communications, even if they were permitted. The RC refers to the ICJ as the appropriate forum for the resolution of dispute. However, individuals do not have standing before the ICJ. Furthermore, no state has ever made use of this mechanism. Consequently, the importance of IHRL for refugees and asylum-seekers, both in terms of standard setting and in terms of supervision, cannot be over-stated.

6.4.1. Soft Law versus Hard Law

A strictly positivist interpretation of the views of human rights treaty bodies would conclude that they are not legally binding and that their status is no more than that of a mere recommendation to the extent that the various treaty bodies have no means of enforcing their decisions. However, this view is inaccurate. Treaty bodies are comprised of legal experts and as such their writings are considered within IL as a subsidiary source of law.¹¹² Moreover, the various treaty bodies are

established by their respective treaties, or in optional protocols. Therefore, states party to these treaties, or to these optional protocols, are indirectly bound to comply with treaty body decisions. The views of such bodies are a representation of the provisions of the treaty and as such, in order to act in “good faith” and comply with treaty obligations, states must comply with their recommendations. If a state refuses to comply, they could be deemed to have acted in violation of the customary legal principle of *pacta sunt servanda*, (i.e. that a state must act in accordance with their treaty obligations).

Similarly, an obligation conferred upon states by IL is the obligation to provide effective domestic remedies for individuals. If an individual is seeking redress with one of the treaty bodies, it is evident that such domestic remedies do not exist, given that such bodies require the exhaustion of domestic remedies prior to consideration of an individual petition. Consequently, the state has failed in one of its primary obligations. This acts as a motivation for states to “make good” by complying with the treaty body’s judgements.

6.4.2 Enforcement

Empirical evidence exists pointing to states’ willingness to comply with treaty body judgments. Frequently their views have resulted in changes being made in national legislation and state practice. In several cases, individuals have been released from prison and compensation has been paid to victims of human rights violations. Should a state refuse to comply, the relevant body can publish this fact, thereby employing the mobilization of shame technique. Given that the world is increasingly interconnected and interdependent, states are not keen to be blacklisted. The politics of shame *has* proven to be effective.

In addition, the Inter-American Commission and Court of Human Rights, the European Court of Human Rights, and the newly established African Court on Human and People’s Rights produce legally binding interpretations of the various rights enshrined in international human rights treaties as well as in regional human rights treaties, such as the ACHR, the ECHR, and the AfCHPR. When states violate human rights, these courts can hold them accountable. In addition, these courts have been successful in turning over national decisions to reject a particular applicant’s claim for refugee status. States’ obligations under IRL are being supervised by these regional arrangements, providing additional protection to asylum-seekers and refugees.

6.4.3 Individual Redress at the Universal Level

Just as the rights of refugees are supervised by human rights treaty bodies, these same bodies provide refugees with a means to seek vindication of violations committed. Of particular relevance to the protection of refugees’ rights is the individual complaint procedures. Individual complaint procedures differ under the various human rights conventions. However, there are three requirements that all conventions have in common: 1) the alleged violating state must have ratified the Convention invoked by the individual; 2) the rights allegedly violated must be covered by the Convention concerned; and 3) proceedings before the relevant body may only be initiated after all domestic remedies have been exhausted. Furthermore, individual petitioners must themselves be the victim or are representing the victim. Claims cannot be anonymous or manifestly ill-founded. These same requirements are reiterated in the procedures for individual redress at the regional level. **See Section 6.5**

Individual communications are allowed under CAT and CERD, and the Optional Protocols for ICCPR and CEDAW. In the case of the ICCPR and the CEDAW, a state recognises the Committee’s competence by becoming a party to the Optional Protocol. In the case of the CAT and the CERD, states recognise the Committee’s competence by making an express declaration under Articles 22 and 14 respectively. Given that human rights treaties oblige states to respect,

protect, and ensure the rights not simply of their citizens, but of all individuals within their jurisdiction, refugees may also submit complaints against an asylum state provided that the rights they claim to have been violated are the rights enshrined in the appropriate treaty.

6.5 Regional Supervisory Mechanisms

The regional standards discussed in section 3.0 are supervised by regional bodies, whose mandates it is to ensure state compliance with the respective treaties. As already mentioned, refugees are entitled to those human rights enshrined in the universal treaties, and regional conventions and charters. In addition, refugees enjoy rights, which attach to their particular status as refugees and asylum-seekers. Regional supervisory bodies enjoy a broad mandate to supervise the implementation of human rights in general. However, they are also responsible for interpreting conventions and charters under their jurisdiction in such a way as to be to the advantage of refugees and asylum-seekers. With the exception of the Bureau for Refugees at the African level, there are no regional bodies specifically devoted to refugee issues.

6.5.1 African

In regards to the protection and promotion of the rights and freedoms of refugees and asylum-seekers, the most important institution at the African level is the African Commission on Human and Peoples' Rights and the newly established African Court for Human Rights. The New Partnership for Africa's Development (NEPAD) is also important. Although it does not deal explicitly with refugees and asylum-seekers, it does place an obligation upon states to address the root causes of conflict by strengthening regional and sub-regional institutions dealing with the prevention of conflict. Since conflict is one of the major root causes of refugee flows, the obligations imposed by NEPAD upon states enhance the protections afforded to asylum-seekers and refugees.

African Commission and the African Court on Human and Peoples' Rights

As already mentioned the protection of refugees and asylum-seekers cannot be appreciated without recourse to human rights instruments. Of particular importance in this regard is the African Commission on Human and Peoples' Rights, which is the supervisory body of the African Charter of Human and People's Rights.

Under the African system, an individual can lodge a complaint under the African Charter of Human and People's Rights. The complaint is submitted to the Charter's supervisory body: the African Commission on Human and People's Rights. After due consideration, the Commission may submit the claim to the Assembly of Heads of State who then determines the appropriate course of action. The Commission is a quasi-judicial body, not unlike the HRC. Its status and mandate however, severely limits its power as a human rights enforcer. The Commission's functions are limited to examining state reports, considering communications alleging violations, and interpreting the Charter at the request of a State party, the OAU, or any organization recognized by the OAU.

However, the scantiness of the enforcement and compliance control mechanisms at the African level have been significantly improved with the coming into force in January 2004, of the 1998 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights. According to Article 3 of the Protocol, the Court will be competent to interpret the Protocol, the AfCHPR, and any other human rights instrument ratified by the states concerned. Like the Inter-American Court, the African Court has both advisory and judicatory jurisdiction.

Relevant Jurisprudence

Given that the Court has only recently entered into force, it is not surprising that only limited jurisprudence has been developed. Prior to the establishment of the Court it was the Commission who was responsible for developing and publishing recommendations. A case in point is when the Commission found the Government of Rwanda to have been in breach of the African Charter when it expelled Burundian refugees on the basis of their nationality and without a fair trial before a competent tribunal.¹¹³ Likewise, the Zambian Government was found by the Commission to be in breach of their obligations under the Charter by expelling, *en masse* without due process, West African nationals.¹¹⁴ In South Africa in the year 2000, the Durban High Court decided that the Government's practice of refusing refugee status on the basis of their "safe third country" policy was in breach of their obligations under the RC and the 1969 OAU Convention. South Africa was therefore obliged to withdraw the policy. Other decisions at the domestic level in South Africa have reinforced the asylum-seekers' right to receive written reasons when denied refugee status¹¹⁵ and also have confirmed the importance of establishing fair administrative asylum procedures consistent with the RC and the 1969 OAU Convention.¹¹⁶

OAU Bureau for Refugees

At present, the Bureau for Refugees, formally the Bureau for the Placement, Education and Training of Refugees, is the only organization specifically dedicated to refugee issues. However, the Bureau's ability to deal with the complex situation and to provide genuine assistance to refugees is hampered by chronic under-funding, understaffing, and institutional politics. The Bureau is seriously constrained in its role as a representative of refugees due to its location in the Political Department of the OAU Secretariat. Its ability to issue criticisms of its member states is limited as is its ability to urge member states to adhere to their obligations under the 1969 Convention.

Key cases

- Serac v. Nigeria: economic and social rights; interdependence of human rights
- Katangese v. Zaire: peoples' right to self-determination; is this recognized internationally? Would its violation constitute a basis for group refugee status determination?
- Amnesty International v. Zambia: right to leave and return one's country.
- Chad case: derogations in times of national emergency
- Sudanese detention case: conditions and duration of detention; Violation of Art. 2, 4, 5, 6, 7(1), 9, 10, 26 of the AfCHPR.

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African Charter on Human and Peoples' Rights, 1981

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1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

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Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003

http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Protocol%20on%20the%20Rights%20of%20Women.pdf

African Charter on the Rights and Welfare of the Child, 1990

http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf

6.5.2 Inter-American

At the inter-American level, the two most important institutions in matters of human rights are the Inter-American Commission for Human Rights and the Inter-American Court. The Commission is characterised by a unique “dual role,” which reflects its origin as a Charter-based body, later transformed into a treaty body when the American Convention came into force. As an OAS Charter organ, the Commission performs functions in relation to all member states of the OAS (Article 41 Convention) and as a Convention organ its functions are applicable only to states party to the Convention. The Commission can bring a case to the Inter-American Court of Human Rights only under the American Convention and not under the American Declaration. However, it can investigate and issue recommendations to states based upon the Declaration.

Jurisdiction

The Inter-American Court has both contentious and advisory jurisdiction. The Court’s advisory jurisdiction is unique in several ways. In addition to the Inter-American Commission and other authorized bodies of the OAS, all OAS member states, whether Party to the ACHR or not, and even if they have not recognised the jurisdiction of the Court over contentious matters, have the right to request advisory opinions. Furthermore, OAS member states may consult the Court regarding the interpretation not only of the Convention but also of any other treaty pertaining to the protection of human rights in the Americas. They may also consult the Court on the compatibility of their domestic laws, bills and proposed legislative amendments.

Individual Petition

Under the Inter-American system and according to Art.44 of the IACHR, an individual can lodge a complaint with the Inter-American Commission on Human Rights, who can, according to the ACHR, submit the complaint to the Inter-American Court of Human Rights. This procedure is unconditional, meaning that it does not require specific state consent. The petitioner in this case does not have to be the victim. The Inter-American Commission and Inter-American Court are the supervisory bodies for both the ACHR as well as the American Declaration on the Rights of Man. Asylum-seekers and refugees may then submit a claim on the basis of any of the rights enshrined within these two instruments. While the American Declaration was not intended to be a treaty and thus binding in law, according to the Inter-American Court's Advisory Opinion No.10, the Declaration is relevant as an interpretative tool in regards to the ACHR and the Charter of the OAS, both of which are treaties.

Like the European system, an individual applicant under the Inter-American system must submit his or her petition within six months of the delivery of the domestic remedy. However, in the case of *Velasquez-Rodriguez*, the Inter-American Court stated that for the rule of prior exhaustion of domestic remedies to be applicable, the domestic remedies of the State concerned must be available, adequate and effective in order to be exhausted. The Court also opined that upon the

party raising that allegation of non-exhaustion because of the unavailability of due process in the State, the burden of proof shifts to "the State claiming non-exhaustion and it has an obligation to prove that domestic remedies remain to be exhausted and that they are effective." ¹¹⁷

Country Reports

In addition, the Inter-American Commission issues country reports in order to supervise the implementation of rights at the domestic level. Their 2000 Report on Canada specified the situation of refugees and asylum-seekers in Canada. The Commission expressed concern in regards to the status of non-documented asylum-seekers in Canada and also in regards to the lack of appeals process. In addition, the Commission is authorized to conduct on-site visits and has in the past visited refugee populations. Their visits to refugee detention centres have included ones in the United States of America (1962), Honduras (1982), Mexico (1983), French Guyana (1988) and Canada (1997).

Key Cases at the Inter-American Level

The following cases are key in terms of the development of human rights jurisprudence within the Inter-American system. They provide insight into the scope and depth of the rights and freedoms to which all individuals, refugees and asylum-seekers alike, are entitled.

- Velasquez Rodriguez: violation of Articles 1,4, 5, 7 ACHR
- Bamaca Velasquez: violation of Articles. 4, 5, 7, 8, 25, 1 of ACHR and Article 3 common to the Geneva Conventions
- Loayza Tomaya: violation Articles 5, 7 ACHR. Interestingly, in this case the Court attempted to define "degrading treatment."
- Cesti Hurtado: violation of Art. 7(1)(2)(3) ACHR
- Las Palmeras: violation of Art.8 and 25; right of family members of victim to fair trial
- Sanchez: Violation of Art. 1(1), 4,(1) 5(1)(2), 7(1)(2)(3)(4)(5)(6), 8 & 25 ACHR
- Constitutional case Against Peru: violation Art.25
- La Tablada case: Violation of Art. 4, 5(2), 8(2), 25(1) ACHR; relevance of IHL to IHRL and its applicability within human rights courts.
- Juan Carlos Abela v. Argentina: Violation of Art. 25, 27(1), 29(b); no violation of common Art. 3 to the Geneva Conventions; IHL as *lex specialis*.

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<http://www.cidh.oas.org/Basicos/basic2.htm>

American Convention on Human Rights "Pact of San Jose, Costa Rica", 1969
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<http://www.oas.org/juridico/english/Treaties/a-52.html>

Inter-American Convention to Prevent and Punish Torture, 1985
<http://www.oas.org/juridico/english/Treaties/a-51.html>

1984 Cartagena Declaration
<http://www.asylumlaw.org/docs/international/CentralAmerica.PDF>

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6.5.3 European

While various institutions designed to supervise the implementation of state obligations exist at the European level, the most important in terms of the protection of the rights of refugees and asylum-seekers is the European Court of Human Rights. Its importance is underscored by its competence to receive individual petitions and is demonstrated by the significant jurisprudence it has produced.

European Court of Human Rights

The Court enjoys both contentious and advisory jurisdiction relating to the rights enshrined within the European Convention of Human Rights. The ECHR does not enshrine a right to asylum. Consequently, the majority of cases heard before the Court involving refugees and asylum-seekers allege violations of Article 3 of the ECHR, the prohibition of torture, cruel, inhuman and degrading treatment. As this is a non-derogable right under the ECHR, the Court has found in a number of occasions against states that sought to return an asylum-seeker to a country where there was a risk of torture or cruel, inhuman and degrading treatment. The Court has found that such an action would be tantamount to violating the principle of *non-refoulement*.

Individual Petition

Under the European system, an individual may bring a complaint under Art.34 of the ECHR. Prior to the entry into force of Protocol XI (1999), the individual complaint mechanism was optional, subject to state consent. However, it is now mandatory. Under the ECHR, a group of individuals or NGO may also lodge a complaint, provided that it is individualized. An NGO may, therefore, submit a complaint on behalf of a refugee or asylum-seeker. However, there is no right to collective complaints of generalized violations.

Key cases

- Lawless v. Ireland: limitations on derogations, deprivation of liberty
- Ahmed v. Australia: Article 3 ECHR and expulsion of asylum-seeker.
- D v. UK: extrapolation on the scope and depth of Article 3 ECHR.
- Soering v. UK: non-derogable nature of Article 3 ECHR
- Pretty v. UK: the right to life does not imply its negative corollary.
- Aksoy v. Turkey: extrapolation of the term "torture;" non-derogable nature of Article 3 ECHR.
- Kudla v. Poland: conditions and duration of detention; justifiable limitations on the right to freedom
- Kalashnikov v. Russia: extrapolation of Article 3 ECHR.
- Jahn and Others v. Germany: possible justifications for state interference in the enjoyment of individual and group rights.

Websites

Council Directive 2004/83/EC of 29 April 2004

http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_304/l_30420040930en00120023.pdf

JOINT POSITION of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty

on European Union on the harmonized application of the definition of the term “refugee” in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees (96/196/JHA).

http://www.unhcr.bg/euro_docs/en/_26_term_en.pdf

European Council of Refugees and Exiles. Information Note on the Council Directive 2004/83/EC of 29 April 2004.

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CONCLUSION

Refugee protection must be analysed, interpreted, implemented, and enforced through a human rights framework. The RC, as the only universal, legally binding instrument to deal specifically with refugees and asylum-seekers, must be considered as a complement to the various human rights treaties, which are applicable to all human beings regardless of status and regardless of their position vis-à-vis the state. The RC on its own, with its various restrictions and derogations, does not provide adequate protection for the human rights of refugees and asylum-seekers. That its scope is limited to those individuals who fall within the definition of a “refugee” provided for in Article 1A of the RC means that there are millions of people who, while in need of protection, are not afforded it.

While it is true that the expanded refugee definitions provided for in the OAU Convention and the CD represent progress within the field of IRL, the level of progress achieved at the practical level is disappointing. Developed states continue to institute restrictive policies aimed at reducing the numbers of refugees who are able to seek asylum. Europe has interpreted the RC restrictively and the policies adopted represent a regressive step in the march towards better protection for refugees.

Finally, the principal problem remains unresolved, namely that refugees exist in the first place. The biggest challenge in addressing the root causes of why refugees exist is a political one. States must interpret existing IRL according to its “object and purpose”- namely “to assure refugees the widest possible exercise of these fundamental rights and freedoms.”¹¹⁸ That they have hitherto preferred a strict textual interpretation is problematic. Improvements in written law, such as the proliferation of human rights treaties, the OAU Convention and the CD, do not automatically translate into an improvement in refugees' lives. Current state policy and restrictive interpretations of IRL and IHRL are a product not of states' lack of ability to provide better protection, but rather of their *lack of will* to do so.

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END NOTES

¹ The Minority Treaties were created by the League of Nations in order to provide protection for those people who were a minority in a State or who had no state. The Treaties outlined the duties that the minorities owed their new states as well as the details for how the state could go about assimilating the minorities into dominant culture.

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² Ibid. 155.

³ *Colombia v. Peru*, 1950 I.C.J.

⁴ Council of Europe's Recommendation No. R (97) 22 of the Committee Members to Member States Containing Guidelines on the Application of the Safe Third Country Concept. 25 November 1997.

⁵ Committee Against Torture, *General Comment No. 01: Implementation of article 3 of the Convention in the context of article 22* : 21/11/97, Paragraphs 5 and 7 respectively.

⁶ UNHCR Note on International Protection, A/AC.96/815, 31 August 1993. para. 20-23.

⁷ Committee Against Torture, *General Comment No. 01: Implementation of article 3 of the Convention in the context of article 22* : 21/11/97, paragraph 3.

⁸ *Mutombo v. Switzerland* Case No.13/1993, 27 April 1994.

⁹ Article 22(5)(b) CAT

¹⁰ *Chahal v. UK*, No. 22414/93, 23 August 1995, para.79

¹¹ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979. 38.

¹² An example is the right to participation in government (Article 25 ICCPR), which is limited to citizens

¹³ Art.23 ICCPR

¹⁴ Art.10 ICESCR

¹⁵ Articles 9, 10 CAT

¹⁶ Art.18 African Charter on the Rights and Welfare of the Child, 1999.

¹⁷ Article 6 American Declaration on the Rights and Duties of Man, 1948.

¹⁸ Art. 17 American Convention of Human Rights, 1969.

¹⁹ Art. 12 European Convention of Human Rights, 1950.

²⁰ UNHCR Handbook. Supra note no. 11, para. 184.

²¹ Goodwin-Gill. *The Refugee in International Law*. Oxford: Clarendon Press, 1983. 2.

²² UNHCR *Handbook* . Supra note no. 11, paragraph 196.

²³ In *Ward v. SCC*, the Court found that a claimant may seek international protection only when national or state protection is unavailable. *Ward v. SCC* [1993] 2 SCR 689 at p. 709.

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- ²⁴ *Horvath v. Secretary of State for the Home Department* 6 July 2000.
- ²⁵ UDHR preambular paragraph 1.
- ²⁶ UNHCR *Handbook*. See *supra* note no. 11., para. 53.
- ²⁷ “Most favourable treatment accorded to nationals...” Article 17 RC.
- ²⁸ *Dudgeon v. UK*, paragraph 54. European Court of Human Rights. 7525/76, 22/10/1981.
- ²⁹ See Article 4 and 19(2) ICCPR.
- ³⁰ *Ward*. See *supra* note no. 23, p. 717.
- ³¹ UNHCR *Handbook*. See *supra* note no. 11, para. 68
- ³² Article 18 ICCPR and Article 18 UDHR.
- ³³ Article 19(3)(a)(b) ICCPR
- ³⁴ UNHCR *Handbook*. See *supra* note no. 11, para. 73.
- ³⁵ *Ibid.*, para. 74.
- ³⁶ *Ward*. See *supra* note no. 23, p. 732.
- ³⁷ *R A v. Immigration and Naturalization Service*, 6/11/1999
- ³⁸ *Ward*. *Supra* note no. 23.
- ³⁹ *Matter of Acosta*, No. A-24159781 INTERIM DECISION: 2986. 3 March 1985.
- ⁴⁰ UNHCR. *Guidelines on International Protection: 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*, para. 29.
- ⁴¹ Hathaway, James. *The Law of Refugee Status*. Toronto: Buttersworths, 1991, 131.
- ⁴² UNHCR Gender Guidelines. *Supra* note no. 40, para.5
- ⁴³ *Ibid*, para. 14
- ⁴⁴ UNHCR Executive Committee Standing Committee, 16th Session. EC/49/SC/CRP.22, 3 September 1999, para. 10.
- ⁴⁵ UNHCR Gender Guidelines. *Supra* note no. 40, para. 6.
- ⁴⁶ UNHCR, ExComm “Refugee Women and International Protection.” General Conclusion No. 39 (XXXVI) – 1985. para.K
- ⁴⁷ *Ward*. *Supra* note 23, 714, emphasis added.
- ⁴⁸ See paragraph 43 of UNHCR *Handbook*, *supra* note no. 11.
- ⁴⁹ Article 10(1)(d). European Council Directive 2004/83/EC of 29 April 2004.
- ⁵⁰ Macklin, Audrey. “Refugee Women and the Imperative of Categories.” 17 *Human Rights Quarterly* 2 (1995): 213-277. 259.
- ⁵¹ UNHCR, Gender Guidelines, *supra* note no.40, para.4
- ⁵² *Ibid*, para. 31.

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- ⁵³ UN Human Development Report 1993.
- ⁵⁴ Macklin, Audrey. *Supra* note no. 50, 265.
- ⁵⁵ Quoted in: UNHCR. *Refugees and the AIDS Pandemic. The State of the World's Refugees 2000.* 253.
- ⁵⁶ *Matter of [Anonymous]*. A 71 498 940 [IJ New York, 31 October 1995].
- ⁵⁷ UNHCR Handbook. *Supra* note no.11, para. 84.
- ⁵⁸ *Ibid*, 692.
- ⁵⁹ UNHCR Handbook, *supra* note no.11, para. 88.
- ⁶⁰ UNHCR Position Paper Relocating Internally as a Reasonable Alternative to Seeking Asylum - (The So-Called "Internal Flight Alternative" or "Relocation Principle," February, 1999. para.7
- ⁶¹ UNHCR Handbook, *supra* note no.11, para. 91
- ⁶² RC, Article 4.
- ⁶³ Michigan Guidelines, para. 13
- ⁶⁴ Hathaway, *supra* note no. 41.
- ⁶⁵ *Ibid*. 62.
- ⁶⁶ UNHCR Executive Committee. Note on Cessation Clauses. 30 May 1997.
- ⁶⁷ UNHCR Handbook, *supra* note no. 11, para. 116.
- ⁶⁸ *Ibid*. para. 149.
- ⁶⁹ Hathaway, *supra* note. No.41, 217.
- ⁷⁰ Article 21 ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts. 1987.
- ⁷¹ Hathaway, *supra* note no. 41, 217.
- ⁷² Ramirez, *supra* note no. 71, 18.
- ⁷³ Draft Article 26 ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts. 1987.
- ⁷⁴ *A, B, & C v. Chief Executive Department of Labour para 37.*
- ⁷⁵ *Equizabal v. Canada* (Minister of Employment and Immigration), File No. A-443-93, 26 May 1994, para. 23.
- ⁷⁶ UNHCR Handbook. *Supra* note no. 11, para 155.
- ⁷⁷ Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugee. HCR/GIP/03/05, 4 September 2003.
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⁹⁰ Goodwin-Gill, supra note no. 83, p. 249.

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⁹⁸ Article 33(2) Ibid.

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¹⁰¹ *Isa v. S.C.C.* [1995], 28 Imm. L.R. (2d) 68 (FCTD). Quoted in Hugo Storey and Rebecca Wallace in: "War and Peace in Refugee Law Jurisprudence." 95 *American Journal of Refugee Law* 2 (2001): 349-366. 351.

¹⁰² Storey, Hugo and Rebecca Wallace. 2001. "War and Peace in Refugee Law Jurisprudence." *American Journal of International Law*, 95:2. 349-366. 353.

¹⁰³ CIREFCA makes the same argument in their interpretative document: *Principios y criterios para la proteccion y asistencia a los refugiados, repatriados, y desplazados Centroamericanos en America Latina*," paragraphs 28-33.

¹⁰⁴ *Ibid.* 17.

¹⁰⁵ *Ibid.*

¹⁰⁶ Hathaway, James. *Supra* note no. 41. 2.

¹⁰⁷ *Ibid.* 16.

¹⁰⁸ UN General Assembly resolution 428(V) of 14 December 1950.

¹⁰⁹ UNHCR's Statute (UN General Assembly resolution 428(V) of 14 December 1950):

"The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting governments and, subject to the approval of the governments, concerned private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities."

¹¹⁰ *UNHCR: INFORMATION NOTE ON THE DEVELOPMENT OF UNHCR'S GUIDELINES ON THE PROTECTION ASPECTS OF VOLUNTARY REPATRIATION- 3 Aug., 1993.* emphasis added. Paragraph (q) Executive Committee. Conclusion No.81 (XLVIII) 1997.

¹¹¹ UNHCR Handbook on Voluntary Repatriation. 4.

¹¹² Article 38 (d) Statute of the International Court of Justice, 1945.

¹¹³ Communication 27/89, 46/91, 49/91, 99/93. *Organisation Mondiale Contre la Torture et al v Rwanda.*

¹¹⁴ Communication 71/92, *Rencontre Africaine pour la Defence de l' Homme v Zambia.*

¹¹⁵ *Pembele v Appeal Board for Refugee Affairs* (unreported, No 15931 CPD, 10 December 1996.

¹¹⁶ *Baramoto v Minister of Home Affairs* (1998 (5) BCLR 562 (W))

¹¹⁷ July 29, 1988. *Velasquez-Rodriguez.* Para 50-60.

¹¹⁸ 1951 Convention Relating to the Status of Refugees, Preambular paragraph 2