4

Persecution

The refugee claimant must apprehend a form of harm which can be characterized as "persecution". This chapter examines the basis for the choice of persecution as the key definitional criterion in the Convention, and attempts to sketch a framework for determining when particular forms of mistreatment are of sufficient gravity to be classified as persecutory. Whereas Chapter 3 focused on the evidentiary standard which should be applied in assessing a claim to refugee status, this chapter is concerned with the substantive nature of the harm that refugee law is intended to confront.

The persecution standard evolved from the legitimate concern first stated in the 1938 Convention concerning the Status of Refugees coming from Germany[1] to exclude from protection those persons who were leaving their country for "reasons of purely personal convenience."[2] The Constitution of the International Refugee Organization[3] rephrased this principle in positive terms, and required the putative refugee to show "valid objections" to returning to her country of origin, which might include fear of persecution.[4] The modern Convention, in turn, adopted the basic approach of the IRO precedent,[5] but made persecution the exclusive benchmark for international refugee status.[6]

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[1] 192 L.N.T.S. 59.

[2] G. Melander, "The Protection of Refugees" (1974), 18 Scandinavian Studies in Law 153, at 159.

[3] G.A. Res. 62, U.N. Doc. A/64/Add. 1, at 97.

[4] The IRO also recognized as "valid objections" compelling family reasons arising out of prior persecution, infirmity or illness, and objections of a political nature: *supra*, note 3. In practice, IRO policy extended protection as well to persons who feared discrimination: T. Cox, "Well-Founded Fear of Being Persecuted: The Sources and Application of a Criterion of Refugee Status" (1984), 10 Brooklyn J. Intl. L. 333, at 339.

[5] "[The] definition of the term 'refugee' referred to those who were victims of persecution 'as a result of events' in Europe prior to 1 January 1951. That phrase was derived from the Constitution of the International Refugee Organization, and had a recognized meaning which everyone understood": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.7/SR.173, at 5, August 12, 1950. *See also* Y. Shimada, "The Concept of the Political Refugee in International Law" (1975), 19 Japanese Ann. Intl. L. 24, at 35.

[6] The narrowing of the grounds for protection was noted by the Director-General of the International Refugee Organization, who argued that the exclusive reliance on fear of persecution, ". . . will exclude persons having IRO valid objections of [a] political nature and [who object to return] for compelling family reasons, thus militating against persons of undoubted political

While it is true that the persecution-based standard permitted the identification of the victims of Naziism,[7] it also spoke to the ideology-charged atmosphere which dominated the thinking of the Western states that prepared the Convention.[8] The malleable persecution-based standard could be interpreted to embrace most of the emigrant dissidents from adversary states in the East Bloc,[9] and would thus promote the immigration of Eastern Europeans to Western states then experiencing acute manpower shortages.[10] Moreover, because a finding that a refugee claimant faces the possibility of persecution implies censure of the state of origin, each recognition of refugee status would simultaneously support efforts to stigmatize as injurious the political systems in the Communist countries of origin.[11]

Our continuing reliance[12] on the persecution-based standard in an age when

sincerity. . .": Cable from the Director-General of the I.R.O., U.N. Doc. E/AC.32/L.16, at 1, January 30, 1950. In the result, the Convention definition ". . . clearly does not include everyone outside his or her country in a situation of distress and unable to return home": P. Hyndman, "The 1951 Convention Definition of Refugee: An Appraisal with Particular Reference to the Sri Lankan Tamil Claimants" (1987), 9 Human Rts. Q. 49, at 52.

[7] "These instruments center on a definition of 'refugee' that was designed to secure the humanitarian objective of relieving the victims of Nazi persecutions": J. Garvey, "Toward a Reformulation of International Refugee Law" (1985), 26 Harvard Intl. L.J. 483, at 483.

[8] K. Brill, "The Endless Debate: Refugee Law and Policy and the 1980 Refugee Act" (1983), 32 Cleveland State L.Rev. 117, at 137. *Accord* G. Melander, *supra*, note 2, at 160: "Owing to the boycotting by the East European states of the organs of the United Nations, . . . the Refugee Convention [was] drafted by Western states only. It was quite natural to claim persecution in the country of origin. All the refugees emanated from East European states. Countries of asylum, i.e. Western states, were not obliged to take any political considerations into account. The relations between Eastern and Western states at that time could hardly have been worse."

[9] It has been noted that the drafters "wished to create an instrument for the protection of persons who had escaped from, or did not wish to return to, specific countries in which, in the common opinion of the Parties, conditions of persecution prevailed at the time the Convention was concluded": C. Pompe, "The Convention of 28 July 1951 and the International Protection of Refugees" (1956), Rechtsgeleerd Magazyn Themis 425, published in English as U.N. Doc. HCR/INF/42, May 1958.

[10] "In establishing a legal and organizational framework to deal with the refugee problem, the Western powers were not only guided by a humanitarian concern for Europe's refugees. For ideological reasons, they had to identify anyone who had moved from Eastern Europe as a victim of communist rule. For economic and political purposes, they had to facilitate the removal of many refugees from the shattered states of Western Europe to the labour-hungry countries of the New World": Independent Commission on International Humanitarian Issues, *Refugees: The Dynamics of Displacement*, p. 32 (1986).

[11] "Neither was the judgemental and polemical character of such a definition. . . seen as posing a serious problem, since it was the time of the Cold War, when such an approach would serve from the Western point of view, as a useful means of stigmatising the Communist regimes of Eastern Europe as persecutors": G. Coles, "Approaching the Refugee Problem Today", in G. Loescher and L. Monahan, eds., *Refugees and International Relations*, pp. 374-75 (1989).

[12] "It could be argued that in practice the element of 'persecution' is no longer being regarded as an essential element in the definition of a 'refugee', and that while lip-service is still paid to this element, it is no longer considered by some States to be a *sine qua non*. . . . However, this may be an over-simplification": G. Coles, "Background Paper for the Asian Working Group on the International Protection of Refugees and Displaced Persons", p. 99 (1980, unpublished).

refugee states of origin and destination are frequently politically compatible has compromised the ability of refugee law to afford broadly based protection.[13] In contrast to the cold war assumption of valid reasons for departure, refugee recognition today may be denied for reasons of foreign policy,[14] or at least be conditioned by an unspoken view that an allied state is unlikely to act in a persecutory way. As Goran Melander has noted, "[r]ather than expose itself to the disapproval of the country of origin, a government may deny a person the status of refugee."[15] The challenge is to recast the notion of "persecution" in a manner which is consonant with modern political realities, and which genuinely enables governments to conceive of refugee protection as a humanitarian act which ought not to be a cause of tension between states.[16]

4.1 Persecution as the Sustained or Systemic Violation of Basic Human Rights Resulting from a Failure of State Protection

The traditional Canadian formulation of the persecution standard focuses on the existence of persistent harassment[17] by or with the knowledge of the authorities of the state of origin.[18] It involves the "constant infliction of some mental or physical cruelty",[19] "persistent or urgent efforts to harm or cause

[13] The Convention definition has been described as ". . . a definition partly stripped of political feeling though not yet raised to the purely humanitarian and politically neutral level where protection is afforded to the legally unprotected human being as such": C. Pompe, *supra*, note 9, at 13. *See generally* J. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" (1990), 31(1) Harvard J. Intl. L. 129.

[14] "[G]ranting refugee status can be a delicate political matter. It can be seen as involving a comment upon the internal affairs of the country from which the person has fled, and to amount, in effect, to a statement that there may be reasons why people within the country fled could fear persecution. . . . Because of the negative imputation which this carries, and the possible detrimental effect upon the relationships existing between the country of refuge and that of origin, many States are hesitant to grant refugee status for considerations of a political nature": P. Hyndman, "Refugees Under International Law with a Reference to the Concept of Asylum" (1986), 60 Australian L.J. 148, at 149.

[15] *Supra*, note 2, at 159.

[16] "Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States. . .": Preamble to the *Convention Relating to the Status of Refugees*, 189 U.N.T.S. 2545, entered into force April 22, 1954 ("*Convention*").

[17] "[T]he essential element is the harassment inflicted on the person by, or with the tacit or formal consent of, the authorities of the country of his nationality. . .": *Moise Danilo Bahamondes Peralta*, Immigration Appeal Board Decision 79-1082, C.L.I.C. Notes 18.9, December 12, 1979, at 3, *per* J.-P. Houle. *Accord Wladyslaw Zastawny*, Immigration Appeal Board Decision 77-1125, July 2, 1977; *Luis Enrique Toha Seguel*, Immigration Appeal Board Decision 79-1150, C.L.I.C. Notes 28.8, November 13, 1980; and *Arulvelrajah Rajanayagam*, Immigration Appeal Board Decision M84-1390, December 31, 1984.

[18] *Zahirdeen Rajudeen v. Minister of Employment and Immigration* (1985), 55 N.R. 129 (F.C.A.).

[19] *Marc Georges Sévère* (1974), 9 I.A.C. 42, at 47, *per* J.-P. Houle.

to suffer",[20] and "pursuit with enmity",[21] such as to provoke "an irrepressible fear of asking the authorities . . . for protection".[22] The Immigration Appeal Board succinctly stated the core of the test in its judgment in the case of *Gladys Maribel Hernandez*:[23]

> The criteri[on] to establish persecution is harassment, harassment that is so constant and unrelenting that the victims feel deprived of all hope of recourse, short of flight, from government by oppression.[24]

The equation of persecution with harassment highlights the need to show a sustained or systemic risk, rather than just an isolated incident of harm.[25] It does not, however, advance understanding of the nature of the harms within the scope of persecution.

It is generally acknowledged that the drafters of the Convention intentionally left the meaning of "persecution" undefined[26] because they realized the impossibility of enumerating in advance all of the forms of maltreatment which might legitimately entitle persons to benefit from the protection of a foreign state.[27] Bits and pieces of insight into the intended meaning of "persecution" can nonetheless be gleaned from the Convention's drafting history.

First, the drafters clearly viewed persecution as a sufficiently inclusive concept to capture the spectrum of phenomena which had induced involuntary migration during and immediately after the Second World War, ranging from

[20] *Shafiqur Mohammed Rahman,* Immigration Appeal Board Decision M84-1073, C.L.I.C. Notes 74.4, September 11, 1984, at 4, *per* G. Loiselle.

[21] *Mascime Mouryoussef,* Immigration Appeal Board Decision 80-1036, C.L.I.C. Notes 21.8, March 24, 1980, at 2, *per* J. Scott.

[22] *Jose Mariano Aguilar Vides,* Immigration Appeal Board Decision M83-1009, February 3, 1983, at 2, *per* J.-P. Houle. *Accord David Ignacio Casado Molina,* Immigration Appeal Board Decision M83-1028, April 13, 1983, at 1, *per* G. Loiselle, which defined as persecution "acts committed by or with the tacit consent of the authorities of [the] country of origin — actions that have given rise to an unconquerable fear of repression against which [the claimant] would not be able to seek protection from the government authorities. . . ."

[23] Immigration Appeal Board Decision M81-1212, January 6, 1983.

[24] *Id.,* at 5, *per* G. Loiselle.

[25] *Ana Vilma Irrarrazabal Olmedo,* Immigration Appeal Board Decision T80-9327, September 22, 1980; affirmed by Federal Court of Appeal Decision A-650-80, April 8, 1981; *Luis Omar Reyes Ferrada,* Immigration Appeal Board Decision T81-9476, September 18, 1981, affirmed by Federal Court of Appeal Decision A-572-81, May 3, 1982; *Shaugin Ajwal Singh,* Immigration Appeal Board Decision V87-6244X, June 16, 1987.

[26] "The term 'persecution' has nowhere been defined and this was probably deliberate": P. Weis, "The concept of the refugee in international law" (1960), 87 J. du droit intl. 928, at 970. *Accord* 1 A. Grahl-Madsen, *The Status of Refugees in International Law,* p. 193 (1966): "It seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise; or in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men."

[27] *Id. See also* C. Fong, "Some Legal Aspects of the Search for Admission into Other States of Persons Leaving the Indo-Chinese Peninsula in Small Boats" (1981), 52 British Y.B. Intl. L. 53, at 92.

the deprivation of life and liberty inflicted by the Nazis,[28] to the ideological conformism imposed by the communist states.[29] From the beginning, there was no monolithic or absolute conceptual standard of wrongfulness, the implication being that a variety of measures in disregard of human dignity[30] might constitute persecution. Refugee status was premised on the risk of serious harm,[31] but not on the possibility of consequences of life or death proportions.[32] In addition to the Convention's acceptance of deprivation of basic civil and political freedoms as sufficient cause for international concern, serious social and economic consequences were also acknowledged to be within the purview of persecution.[33]

Second, the intention of the drafters was not to protect persons against any and all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state to

[28] [I]n no case could the victims of racial persecution be compelled to resume their former nationality or resettle in the countries where they had suffered so bitterly": Statement of Mr. Rochefort of France, 11 ESCOR (406th mtg.) at 276, August 11, 1950.

[29] "As to refugees, both present and future, arriving in central and western Europe from eastern European lands, he considered that, having regard to the terms of the draft convention and the observations of the High Commissioner for Refugees, the non-governmental organizations need have no fear that such refugees would not be covered by the present text": Statement of Mr. Warren of the U.S.A., U.N. Doc. A/CONF.2/SR.21, at 15, July 14, 1951.

[30] [W]hat is persecution in the particular case is a question of fact. Other measures in disregard of human dignity might also constitute persecution": P. Weis, *supra,* note 26, at 970. *Accord* Y. Shimada, "The Concept of the Political Refugee in International Law" (1975), 19 Japanese Ann. Intl. L. 24, at 37; and M. Chemille-Gendreau, "Le concept de réfugié en droit international et ses limites" (1981), 28 Pluriel 3, at 9.

[31] "The word persecution is generally taken to exclude individuals who face discrimination or maltreatment other than of a very serious kind": R. Plender, "Admission of Refugees: Draft Convention on Territorial Asylum" (1977), 15 San Diego L.Rev. 45, at 53. *Accord* K. Petrini, "Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Claim" (1981), 56 Notre Dame Lawyer 719, at 723; and D. Gross, "The Right of Asylum Under United States Law" (1980), 80 Columbia L.Rev. 1125, at 1136, who characterizes persecution as involving more than "minor disadvantage or trivial inconvenience".

[32] "Because persecution is a factual question, the official must have broad latitude in making the determination as to whether the person claiming the benefit is in fact persecuted. It is clear, however, that 'persecution' is not restricted solely to physical abuse or incarceration": A. Fragomen, "The Refugee: A Problem of Definition" (1970), 3 Case Western Reserve J. Intl. L. 45, at 54.

[33] This point was established in an exchange between the representative of the American Federation of Labor and the delegate of France during the drafting of the Convention. Mr. Stolz of the AFL ". . . recalled that people sometimes left their country for social or economic reasons, an eventuality which was not specifically mentioned [in the Convention]". Mr. Rain of France replied that he ". . . thought that the nature of the persecution should be described in very broad terms. In actual practice he felt sure that the people referred to by the AF of L representative would be recognized as refugees": U.N. Doc. E/AC.32/SR.17, at 3-4, February 6, 1950. Indeed, European determination authorities readily recognized such claims in the early years of the Convention's life: *see* A. Grahl-Madsen, *supra,* note 26, at 201-09.

its own population.[34] As a holistic reading of the refugee definition demonstrates, the drafters were not concerned to respond to certain forms of harm *per se*, but were rather motivated to intervene only where the maltreatment anticipated was demonstrative of a breakdown of national protection.[35] The existence of past or anticipated suffering alone, therefore, does not make one a refugee, unless the state has failed in relation to some duty to defend its citizenry against the particular form of harm anticipated.[36]

These basic tenets — a liberal sense of the types of past or anticipated harm which might warrant protection abroad,[37] and a fundamental preoccupation to identify forms of harm demonstrative of breach by a state of its basic obligations of protection — are of continuing relevance today. For persecution to remain a meaningful concept, it must be interpreted in the light of these principles as they apply in modern context.[38] As noted by the Committee on Population and Refugees of the Council of Europe:

> . . . the concept of persecution should be interpreted and applied liberally and also adapted to the changed circumstances which may differ considerably from those existing when the Convention was originally adopted. . . . [A]ccount should be taken of the relation between refugee status and the denial of human rights as laid down in different international instruments.[39]

This approach will not eliminate the danger of political distortion inherent in the retention of the persecution standard,[40] but it may at least prevent the Convention from becoming a mere anachronism.

Drawing on these basic precepts, persecution may be defined as the sustained or systemic violation of basic human rights[41] demonstrative of a failure of state protection.[42] A well-founded fear of persecution exists when one reasonably anticipates that remaining in the country may result in a form of serious harm[43] which government cannot or will not prevent,[44] including either "specific hostile acts or. . . an accumulation of adverse circumstances such as discrimination existing in an atmosphere of insecurity and fear".[45] The balance of this chapter examines the nature of basic human rights which constitute a state's duty of protection, the application of these standards in a number of specific contexts, and the circumstances in which a state may be said to have failed in its duty to ensure those basic human rights.

[34] This concern is most clear in the early formulations of the generalized refugee definition. The British draft, for example, provided that the Convention would apply to "unprotected persons" (U.N. Doc. E/AC.32/L.2, at 1, January 17, 1950), while the French draft spoke of persons who were "unwilling or unable to claim the protection of [their] country" (U.N. Doc. E/AC.32/L.3, at 3, January 17, 1950). As finally agreed to, the Convention extends only to a person who is ". . . unable or. . . unwilling to avail himself of the protection" of his or her country of origin: *Convention, supra*, note 16, at Art. 1(A)(2).

[35] "This limitation on the definition of refugee owes its origin to the fact that the refugee is designated as a person who stands in need of international protection because he or she is deprived of that in his or her own country": R. Plender, *supra*, note 31, at 54.

[36] "The concept of persecution is usually attached to acts or circumstances for which the government . . . is responsible . . . [and which] leave the victims virtually unprotected by the agencies of the State": C. Fong, *supra*, note 27, at 92.

[37] "The term 'persecution', used in the Refugee Convention and Protocol as well as in the UNHCR Statute, has never been officially defined, but the drafters of the Convention clearly conceived it in a liberal way": A. Grahl-Madsen, "Identifying the World's Refugees" (1983), 467 Annals A.A.P.S.S. 11, at 15.

[38] "Motives for leaving home countries and seeking asylum have changed from the standard persecution arguments of European refugees; motives have become increasingly complex and mixed, not always linked to persecution in the European sense": M. Chamberlain, "The Mass Migration of Refugees and International Law" (1983), 7 Fletcher Forum 93, at 104.

[39] Cited in remarks by J. Thomas in A. Woods, ed., "Refugees: A New Dimension in International Human Rights", (1976) 70 A.S.I.L.P. 58, at 69.

[40] *See* text *supra* at note 12 ff.

4.2 The Nature of a State's Duty of Protection

It is axiomatic that we live in a highly imperfect world, and that hardship and even suffering remain very much a part of the human condition for perhaps the majority of humankind. It is also true that there is no universally accepted standard of quality of life, nor of the role that a government should play in meeting the hopes and needs of its citizenry.[46] This plurality of

[41] The Preamble to the Refugee Convention commences with a specific reference to the interrelationships between refugee protection and international human rights law: "The High Contracting Parties, [c]onsidering that the Charter of the United Nations and the Universal Declaration of Human Rights . . . have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. . . . Have agreed as follows": *Convention, supra*, note 16, at Preamble. *Accord* S. Young, "Who is a Refugee? A Theory of Persecution" (1982), 5 In Defence of the Alien 38, at 46: "But before the law can infer an intent at harassment, a standard of duty by which we measure the misfeasance or nonfeasance is necessary. Fortunately such a standard exists in the International Covenant. . . ."

[42] "[T]he acts must be committed by the government (or the party) or organs at its disposal, or the behaviour must be tolerated by the government in such a way as to leave the victims virtually unprotected by the agencies of the State": C. Fong, *supra*, note 27, at 92. *See generally* Section 4.5, *infra*.

[43] "[P]ersecution is also very much a question of degree and proportion, requiring relation of the general notion to commonly accepted principles of human rights": G. Goodwin-Gill, "Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the UNHCR" (1980), Michigan Y.B. Intl. L. Studies 291, at 298.

[44] "[T]he intent necessary for a finding of persecution can be imputed to a government. Persecution would thus arise not only from a conscious intent to harm (malfeasance) but also from misfeasance or nonfeasance": S. Young, *supra*, note 41, at 45. *Accord* G. Goodwin-Gill, *supra*, note 43, at 298-99, in which the author notes that persecution comprehends "failure (voluntary or involuntary) on the part of the state authorities to prevent or suppress [private] violence".

[45] D. Anker and M. Posner, "The Forty Years Crisis: A Legislative History of the Refugee Act of 1980" (1981), 82 San Diego L.Rev. 1, at 67.

[46] "The way of achieving [the] assault on injustice has to be through a scheme of obligations under international law. The particulars of this accountability, however, must be drafted differently for different societies. Each government's acts are to be evaluated in terms of the conditions of its society as determined by that society's preferred values and structures of social organization": S. Sinha, "Human Rights: A Non-Western Viewpoint" (1981), 67 Archiv für Rechts und Sozial Philosophie 76, at 89-90.

experience and outlook restricts any attempt to define in absolute terms the nature of the duty of protection which a state owes to its people, as is clear from the deference that international law consistently pays to both cultural distinctiveness and sovereign autonomy.[47]

Nonetheless, the international community has recognized that there are certain basic rights, including both freedoms from interference and entitlements to resources, which all states are bound to respect as a minimum condition of legitimacy.[48] This recognition led to the adoption of common international standards of acceptable behaviour, which governments have agreed to accept as limitations on claims of cultural heterogeneity and autonomy of action. While it is true that international law binds sovereign states only to the extent that they agree to be bound,[49] the breadth of the emerging international law of human rights is unquestionably impressive.

Among the myriad treaties, declarations, rules and other standards adopted by states, the International Bill of Rights, consisting of the Universal Declaration of Human Rights,[50] the International Covenant on Civil and Political Rights,[51] and the International Covenant on Economic, Social, and Cultural Rights,[52] is central. More than any other gauge, the International Bill of Rights is essential to an understanding of the minimum duty owed by a state to its nationals. Its place derives from the extraordinary consensus achieved on the soundness of its standards, its regular invocation by states,

[47] "No matter how much one may vilify state sovereignty, the argument that a supranational legal authority is viable, or latent, is a very difficult one to make: One must first establish, in the context of United Nations law for example, that Article 2(7) of the Charter is invalid and no longer applies to human rights. . . . [T]his is no mean feat, involving as it does a wholesale redefinition of the sources of international obligation by substituting majority rule for state consent as the ultimate basis of legal validity in the system": J. Watson, "Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law" (1979), 3 U. Illinois L. Forum 609.

[48] "[T]he strict doctrine of national sovereignty has been cut down in two crucial respects. First, how a state treats its own subjects is now the legitimate concern of international law. Secondly, there is now a superior international standard, established by common consent, which may be used for judging the domestic laws and the actual conduct of sovereign States within their own territories and in the exercise of their internal jurisdictions, and may therefore be regarded as ranking in the hierarchy of laws even above national constitutions": P. Sieghart, *The International Law of Human Rights*, p. 15 (1983).

[49] *Supra*, note 47.

[50] U.N.G.A. Res. 217A (III), December 10, 1948 ("UDHR"). Article 14 of the UDHR provides for "the right to seek and enjoy in other countries asylum from persecution." In reliance on this provision, it may be argued that "[t]he asylum provision assures that where a member state fails to abide by the [other UDHR-based] standards, the individual at risk will be able to find sanctuary in another member state": A. Helton, "Persecution on Account of Membership in a Social Group as a Basis for Refugee Status" (1983), 15 Columbia Human Rts. L.Rev. 39, at 56.

[51] U.N.G.A. Res. 2200 (XXI), December 19, 1966, entered into force March 23, 1976 ("ICCPR").

[52] U.N.G.A. Res. 2200 (XXI), December 19, 1966, entered into force January 3, 1976 ("ICESCR").

and its role as the progenitor for the many more specific human rights accords.[53] Reference to the International Bill of Rights in deciding whether or not a state has failed to provide basic protection in relation to core, universally recognized values is moreover consistent with the Convention's own Preamble and General Assembly Resolution 2399 (XXIII).[54]

The use of a human rights standard for determining the existence of persecution is not accepted by all. The most conservative position, argued by Karl Zink, is that only a narrow subset of human rights violations can constitute persecution, namely, deprivation of life[55] or physical freedom.[56] This position is often inappropriately tied to a narrow and literal reading of Article 33 of the Convention, which prohibits the return of a refugee to "the frontiers of territories where his life or freedom would be threatened. . . ."[57] Atle

[53] "The Universal Declaration not only reflects a consensus of world opinion on the nature of the fundamental rights and freedoms belonging to every individual, but also expresses a unanimity of belief in the principle that the inherent dignity and worth of the human person requires respect for and protection of that person's rights. Since its adoption, the Declaration has achieved an international status far beyond the early expectations of its drafters. The Declaration has been referred to in numerous international instruments, and it has been made directly or indirectly a part of the constitutions of a number of states. . . . From an international law perspective, one is justified in maintaining that the Declaration, which technically has only the force of moral persuasion, has now become a part of customary international law and, thus, legally binding on all states": V. Saari and R. Higgins Cass, "The United Nations and the International Protection of Human Rights: A Legal Analysis and Interpretation", (1977) California W. Intl. L.J. 591, at 597. The two Covenants on Human Rights, which carry the precepts of the Universal Declaration forward in detailed and binding form, have now been ratified by 92 (ICESCR) and 87 (ICCPR) state parties: J.-B. Marie, "International Instruments Relating to Human Rights: Classification and Chart Showing Ratifications as of 1 January, 1989" (1989), 10 Human Rights L.J. 111-12.

[54] The Preamble to the Convention invokes the Universal Declaration of Human Rights as the means by which states "have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination." As noted by the European Court of Human Rights in *Golder v. United Kingdom* (1975), 1 E.H.R.R. 524, at para. 34, the preamble of an international convention may be used to determine its object and purpose. This principled approach to refugee determination was endorsed in U.N.G.A. Res. 2399 (XXIII), December 6, 1968, which called on states to treat "new refugee situations in accordance with the principles and spirit of the Declaration on Territorial Asylum and the Universal Declaration of Human Rights." *Accord* P. Hyndman, "The 1951 Convention Definition of Refugee" (1987), 9 Human Rights Q. 49, at 61.

[55] This narrow view was advocated by the Swiss Government during the drafting of the Refugee Convention: "The Swiss Federal Government regarded as refugees all aliens whose lives are in danger for political reasons, and who, to escape that danger, were compelled to seek refuge in Switzerland": Statement of Mr. Schurch of Switzerland, U.N. Doc. A/CONF.2/SR.20, at 13, July 13, 1951.

[56] Zink interpreted persecution ". . . so as to mean only deprivation of life or of physical freedom. In the former category he includes enforced, protracted unemployment in the absence of other means of livelihood, but he excludes attacks on a person's physical integrity, unless such attacks may lead to the victim's death or implies loss of physical freedom": 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 193 (1966).

[57] *Convention, supra*, note 16, at Art. 33(1). Grahl-Madsen soundly refutes this view: "The quoted phrases were absolutely not conceived of as a more precise formulation of the concept

Grahl-Madsen adopts only a slightly more liberal view, arguing without explanation that the restriction or denial of such rights as freedom of thought, conscience and religion, freedom of opinion and expression, and freedom of peaceful assembly and association are outside the ambit of persecution.[58]

The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.[59] This position has been specifically endorsed in the Canadian case law.[60] The judgment in *Luis Enrique Toha Sequel*,[61] for example, noted that in discussing persecution, ". . . we are not talking about physical torture alone, but about any act intended to deny or trample on a person's fundamental rights."[62] The Federal Court of Appeal has agreed, as is clear from the decision in *Alfredo Manuel Oyarzo Marchant v. Minister of Employment and Immigration*:[63]

> . . .the Board . . . appears to imply . . . that it defined "persecution" as necessarily requiring deprivation of the applicant's liberty. If this is so, then the Board erred in law, in my view, in applying such a restrictive definition.[64]

What rights are appropriately considered to be basic and inalienable? Within the International Bill of Rights, four distinct types of obligation exist.

of 'persecution.' It was apparently the intention of the Ad Hoc Committee that the words 'life and freedom' should be given a very broad interpretation. . . and that any kind of 'persecution' which may entitle a person to the status of Convention 'refugee' shall be considered a 'threat to life or freedom' in the sense of Articles 31 and 33. In other words, we may look to Article 1 in order to determine the scope of Articles 31 and 33, but not *vice versa*": A. Grahl-Madsen, *supra*, note 56, at 196.

[58] *Id.*, at 195.

[59] "I see human rights as the principal indices of human well-being, the recognition of which has been considered by the international community as the foundation of freedom, justice and peace. . . . Accordingly, the refugee problem, as any other political problem, should be approached from the perspective of human rights in order to determine the basic legal and moral nature of the problem and of the solution required": G. Coles, "The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry", in A. Nash, ed., *Human Rights and the Protection of Refugees Under International Law*, p. 196 (1988). *Accord*, e.g., J. Vernant, *The Refugee in the Post-War World*, p. 8 (1953); G. Melander, *Eligibility Procedures in Western European States*, p. 7 (1976); G. Goodwin-Gill, *The Refugee in International Law*, p. 38 (1983); and A. Ghoshal and T. Crowley, "Refugees and Immigrants: A Human Rights Dilemma" (1983), 5 Human Rts. Q. 327, at 329.

[60] *See, e.g., Felix Salatiel Nuñez Veloso*, Immigration Appeal Board Decision 79-1017, August 24, 1979 ("against his basic and inalienable human rights"); *Jose del Rosario Perez Gomez*, Immigration Appeal Board Decision M79-1179, June 2, 1980 ("a serious infringement of basic human rights and such infringement is equivalent to persecution"); and *Jose Mariano Aguilar Vides*, Immigration Appeal Board Decision M83-1009, February 3, 1983 ("flouting of his fundamental rights").

[61] Immigration Appeal Board Decision 79-1150, C.L.I.C. Notes 28.8, November 13, 1980.

[62] *Id.*, at 3, *per* J.-P. Houle.

[63] [1982] 2 F.C. 779 (C.A).

[64] *Id.*, at 782, *per* Heald J. *Accord Luis Rene Amayo Encina v. Minister of Employment and Immigration*, [1982] 1 F.C. 520 (C.A.).

First in the hierarchy are those rights which were stated in the Universal Declaration, translated into immediately binding form in the ICCPR,[65] and from which no derogation whatsoever is permitted, even in times of compelling national emergency.[66] These include freedom from arbitrary deprivation of life,[67] protection against torture or cruel, inhuman, or degrading punishment or treatment,[68] freedom from slavery,[69] the prohibition on criminal prosecution for *ex post facto* offences,[70] the right to recognition as a person in law,[71] and freedom of thought, conscience, and religion.[72] The failure to ensure these rights under any circumstances is thus appropriately considered to be tantamount to persecution.

Second are those rights enunciated in the UDHR and concretized in binding and enforceable form in the ICCPR,[73] but from which states may derogate during a "public emergency which threatens the life of the nation and the existence of which is officially proclaimed".[74] These include freedom from arbitrary arrest or detention;[75] the right to equal protection for all,[76] including children[77] and minorities;[78] the right in criminal proceedings to a fair and public hearing and to be presumed innocent unless guilt is proved;[79] the protection of personal and family privacy and integrity;[80] the right to internal movement and choice of residence;[81] the freedom to leave and return to one's country;[82] liberty of opinion, expression, assembly, and association;[83]

[65] "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant. . . . Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps. . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant": ICCPR, *supra*, note 51, at Art. 2(1)-(2).

[66] "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant. . . [but] [n]o derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision": ICCPR, *supra*, note 51, at Art. 4(1)-(2).

[67] ICCPR, *supra*, note 51, at Art. 6.

[68] Art. 7.

[69] Art. 8.

[70] Art. 15.

[71] Art. 16.

[72] Art. 18.

[73] *See* note 65, *supra*.

[74] ICCPR, *supra*, note 51, at Art. 4(1).

[75] Arts. 9-10.

[76] Arts. 3 and 26.

[77] Art. 24.

[78] Art. 27.

[79] Art. 14.

[80] Arts. 17 and 23.

[81] Art. 12(1).

[82] Art. 12(2)-(4).

[83] Arts. 19-22.

the right to form and join trade unions;[84] and the ability to partake in government,[85] access public employment without discrimination,[86] and vote in periodic and genuine elections.[87] The failure to ensure any of these rights will generally constitute a violation of a state's basic duty of protection, unless it is demonstrated that the government's derogation was strictly required by the exigencies of a real emergency situation, was not inconsistent with other aspects of international law, and was not applied in a discriminatory way.[88] Where, for example, the failure to respect a basic right in this category goes beyond that which is strictly required to respond to the emergency (in terms of scope or duration), or where the derogation impacts disproportionately on certain subgroups of the population, a finding of persecution is warranted.[89]

Third are those rights contained in the UDHR and carried forward in the International Covenant on Economic, Social, and Cultural Rights. In contrast to the ICCPR, the ICESCR does not impose absolute and immediately binding standards of attainment, but rather requires states to take steps to the maximum of their available resources to progressively realize rights[90] in a non-discriminatory way.[91] The basic values protected are the right to work,[92]

[84] Art. 22.

[85] Art. 25(a).

[86] Art. 25(c).

[87] Art. 25(b).

[88] Permissible derogation is limited to acts which are ". . . strictly required by the exigencies of the situation, provided that such measures are not inconsistent with [the state's] other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin": ICCPR, *supra*, note 51, at Art. 4(1). Moreover, emergency situations must be officially declared, and formal notice of derogation given to the Secretary-General of the United Nations: *Id.*, at Art. 4(1)-(3).

[89] A group of experts in international law was convened by the International Commission of Jurists in 1984 to draft *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.* The consensus achieved was intended to reflect the existing state of international law with respect to the scope of the limitation clauses, and the type of situations which qualify as public emergencies: U.N. Doc. E/CN.4/1984/4, reproduced at (1986), 36 I.C.J. Review 48.

[90] "Each State Party to the Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures": ICESCR, *supra*, note 52, at Art. 2(1). This obligation has recently been interpreted to mean, *inter alia*, that states must, regardless of their level of development, ensure respect for minimum subsistence rights for all, and that in assessing the adequacy of measures undertaken, "attention shall be paid to equitable and effective use of and access to the available resources", including those available through international cooperation and assistance: *The Limburg Principles*, Principles 0.10-0.13, reported at (1986), 37 I.C.J. Review 43.

[91] "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status": ICESCR, *supra*, note 52, at Art. 2(2).

[92] ICESCR, *supra*, note 52, at Art. 6.

including just and favourable conditions of employment, remuneration, and rest;[93] entitlement to food,[94] clothing,[95] housing,[96] medical care,[97] social security,[98] and basic education;[99] protection of the family, particularly children and mothers;[100] and the freedom to engage and benefit from cultural, scientific, literary, and artistic expression.[101] While the standard of protection is less absolute than that which applies to the first two categories of rights, a state is in breach of its basic obligations where it either ignores these interests notwithstanding the fiscal ability to respond,[102] or where it excludes a minority of its population from their enjoyment.[103] Moreover, the deprivation of certain of the socio-economic rights, such as the ability to earn a living, or the entitlement to food, shelter, or health care will at an extreme level be tantamount to the deprivation of life or cruel, inhuman or degrading treatment,[104] and hence unquestionably constitute persecution.

Fourth, a few of the rights recognized in the Universal Declaration were not codified in either of the binding covenants on human rights, and may thus be outside the scope of a state's basic duty of protection. The right to own and be free from arbitrary deprivation of property[105] and the right to be protected against unemployment[106] are examples of rights which are included in this group, and which will not ordinarily suffice in and of themselves as the foundation for a claim of failure of state protection.

[93] Art. 7.

[94] Art. 11(1).

[95] *Id.*

[96] *Id.*

[97] Art. 12.

[98] Art. 9.

[99] Arts. 13-14.

[100] Art. 10.

[101] Art. 15.

[102] "[T]he available resources language should be read as establishing a priority for social welfare. Given the purposes of the Economic Covenant, it is hard to see how the alternative reading would make any sense. It is clear that the drafters of the Economic Covenant wished to impose obligations on states. Yet if the only obligation arising from the Economic Covenant was that a state could spend what it wanted on social welfare, then this would be no obligation at all and the drafters would have failed in their goal": D. Trubek, "Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs", in T. Meron, ed., *Human Rights in International Law*, p. 215 (1984).

[103] "Some obligations under the Covenant require immediate implementation in full by all States parties, such as the prohibition of discrimination in article 2(2) of the Covenant": *The Limburg Principles, supra*, note 90, at Principle 0.7.

[104] "To take a central example, that of the relationship between ICCPR 6(1) and ICESCR 11(1), the question is whether the 'right to life' can be interpreted to include a 'right to an adequate standard of living,' various aspects of the latter right thus falling to be adjudicated in the name of the former. If sustainable, such an interpretation generates an implicit overlap between the two articles. . .": C. Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989), 27(4) Osgoode Hall L.J. 769, at 780.

[105] UDHR, *supra*, note 50, at Art. 17.

[106] Art. 23.

In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community.[107] The types of harm to be protected against include the breach of any right within the first category, a discriminatory or non-emergency abrogation of a right within the second category, or the failure to implement a right within the third category which is either discriminatory or not grounded in the absolute lack of resources. The sections which follow examine the application of this general principle in specific contexts.

4.3 Risk to Civil and Political Rights

Under the human rights paradigm, the serious possibility of a violation of a first category right will always constitute a risk of persecution. Thus, the threat of execution,[108] assault,[109] torture,[110] slavery, or enforced conformity of belief[111] exemplifies failure by the state to protect core values.[112] As was cogently noted in the decision of *Philomene Lundy*:[113]

[107] *Accord* M. Gibney and M. Stohl, "Human Rights and U.S. Refugee Policy", in M. Gibney, ed., *Open Borders? Closed Societies? The Ethical and Political Issues*, p. 159 (1988): "Drawing the line on what is or is not persecution has been extremely difficult and politically charged. The position taken here is that there are different levels of persecution (and human rights violations) that are practiced in the world, and such levels ought to be recognized in making refugee admission determinations."

[108] This includes the threat of execution directed against a broadly defined group. In *Kidane Ghebreiyesus*, the Immigration Appeal Board held in relation to an Eritrean from Ethiopia that ". . . a civil war directed against a minority race inside a country, verging on genocide, is without doubt evidence of racial persecution": Immigration Appeal Board Decision 79-1137, C.L.I.C. Notes 20.3, March 21, 1980, at 3, *per* R. Tremblay. *Accord Adan Jeronimo Alvarenga*, Immigration Appeal Board Decision M87-1081, May 20, 1987.

[109] The threat of rape, for example, is a sufficient basis to fear persecution, as is noted in the decision of *Maria Veronica Rodriguez Salinas Araya*, Immigration Appeal Board Decision 76-1127, January 6, 1977, at 8, *per* J.-P. Houle: "[T]hreats such as these are degrading and constitute quite clearly an attack on the moral integrity of the person and, hence, persecution of the most vile sort." *Accord Philomene Lundy*, Immigration Appeal Board Decision M87-1496X, November 26, 1987.

[110] "[T]he right of persons not to be subjected to torture or inhuman or degrading treatment may be considered a peremptory rule of customary international law": K. Hailbronner, "Non-Refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?" (1986), 26(4) Virginia J. Intl. L. 857, at 887.

[111] Guy Goodwin-Gill has argued that notwithstanding its non-derogable character, the denial of freedom of worship may be equated with persecution only in certain circumstances: *see* G. Goodwin-Gill, "Entry and Exclusion of Refugees" (1980), Michigan Y.B. Intl. L. 291, at 298-99.

[112] Persecution ". . . would encompass threats to life and liberty, so that execution, detention, and torture are readily included. . .": G. Goodwin-Gill, *supra*, note 111, at 298. *Accord* I. Foighel, "Legal Status of the Boat People" (1979), 48 Nordisk Tidsskrift for Intl. Ret. 217, at 221; F. Marino-Menendez, "El concepto de refugiado en un contexto de derecho internacional general" (1983), 35(2) Revista española de derecho internacional 337, at 354.

[113] Immigration Appeal Board Decision M87-1496X, November 26, 1987.

> . . . Nothing can justify the use of violence against persons, for the purpose either of exercising or of retaining power. Oppression by all those who abuse their power will always be unacceptable and reprehensible, especially where the power is maintained by force. . . .[114]

Similarly, the real risk of a human rights violation of the second category — arbitrary arrest or detention,[115] denial of freedom of movement,[116] opinion, association, or privacy[117] for example — is usually to be equated with persecution. The only exception is short-term,[118] emergency derogation of a non-discriminatory nature from a second category right, which under international law is insufficient to establish the absence of state protection. In general, Canadian courts have recognized the need to view any sustained attack on one's physical, moral, or intellectual integrity as probative of persecution.[119] As stated in the decision of *Charles Kwado Amoah*:[120]

> . . . it is not necessary for an individual to be beaten or tortured for him to have a feeling of persecution. It is sufficient if his fundamental freedom, his feelings of membership in a particular social group or the expression of his opinions are threatened for a well-founded fear to arise in him.[121]

[114] *Id.*, at 1, *per* J. Blumer.

[115] "[T]he applicant stated under oath that on none of the occasions he was arrested and detained was he formally charged and he was never summoned for trial. This constitutes a serious infringement of basic human rights and such infringement is equivalent to persecution": *Jose del Rosario Perez Gomez*, Immigration Appeal Board Decision M79-1179, June 2, 1980, at 3, *per* J.-P. Houle. *Accord Fernando Alejandro Cordova Seguel*, Immigration Appeal Board Decision 76-1157, August 11, 1977; *Jose Mariano Aguilar Vides*, Immigration Appeal Board Decision M83-1009, February 3, 1983. On the other hand, the Board inexplicably chose to ignore evidence of arbitrary detention in an Indian case involving repeated mass arrests consequent to demonstrations of political opposition: *Harpal Gill Singh*, Immigration Appeal Board Decision T83-10185, December 12, 1983.

[116] This would include mass expulsions of minority groups, ". . . when the expelled minority is hostile to the belief system of the dominant group": G. Beyer, "The Political Refugee: 35 Years Later" (1981), 15 Intl. Migration Rev. 26, at 26.

[117] In the case of *Noe Aguillar Martinez*, it was decided that the illicit search of the family home on six occasions, in tandem with repeated questioning of the wife about her husband's whereabouts, was "tantamount to persecution": Immigration Appeal Board Decision M80-1145, November 20, 1980, at 4, *per* J.-P. Houle.

[118] Grahl-Madsen, for example, draws an arbitrary standard for determining when emergency detention is of sufficient duration to amount to persecution: "When it comes to threats to freedom, it is hoped that my old conclusion still holds good: that imprisonment or detention for a period of three months or more constitutes persecution": A. Grahl-Madsen, "International Refugee Law Today and Tomorrow" (1982), 20 Archiv des Völkerrechts 411, at 422.

[119] [P]ersecution does not consist solely in physical torture; an essential element of persecution is harassment. . . . Any repeated or sustained attack on not only a person's physical integrity, but also on his moral integrity, constitutes persecution. . .": *Juan Alejandro Araya Heredio*, Immigration Appeal Board Decision 76-1127, January 6, 1977, at 6-7, *per* J.-P. Houle. *Accord Fernando Alejandro Cordova Seguel*, Immigration Appeal Board Decision 76-1157, August 11, 1977, at 6; *Jose del Rosario Perez Gomez*, Immigration Appeal Board Decision M79-1179, June 2, 1980; *Andrzej Staniszewski*, Immigration Appeal Board Decision M87-1024X, April 22, 1987.

[120] Immigration Appeal Board Decision M87-1500X, November 2, 1987.

[121] *Id.*, at 2, *per* J. Blumer.

Three types of confusion exist in relation to the application of the human rights framework in the context of threats to life or freedom. On the one hand, theorists such as Paul Weis have taken an overly inclusive position, arguing that "[a] threat to life or freedom. . . will always be persecution. . . ."[122] This view overlooks the possibility of a constrained, non-discriminatory[123] abrogation of human rights of the second category during an emergency situation, such as the imposition of temporary restrictions on freedom of assembly or internal movement. As discussed above,[124] such a short-term suspension of rights may not be demonstrative of a failure of state protection, in which case it will not suffice as the basis for establishing a fear of persecution.

Second and conversely, a number of Canadian decisions have failed to recognize the rule that a threat to life or freedom is generally to be equated with persecution. In *Romilio Dictmart Aranda Diaz*,[125] for example, the Board dismissed a Chilean claim in which military personnel invaded the applicant's home and treated his family roughly, causing the claimant's wife to miscarry. This action, coupled with subsequent regular police visits and interrogations, was adjudged insufficient to establish refugee status. Fellow Chilean *Hector Eduardo Contreras Guttierez*[126] fared no better. Even though he had been badly beaten and tortured on several occasions during unlawful detentions, the Immigration Appeal Board characterized the incidents as merely part of "massive security measures",[127] and noted that the claimant ". . . was not disabled in any way in the alleged beatings and torture he received and admitted there were no scars"![128] A third example is the decision in *Raman Kumar Chopra,*[129] an Indian claimant who was twice beaten by police in addition to imprisonment and regular police harassment, but who in the Board's view was not persecuted. These cases illustrate a discomforting tendency to demand proof of impending harm substantially in excess of the limits established by international human rights norms.[130]

[122] P. Weis, "The concept of the refugee in international law" (1960), 87 J. du droit intl. 928, at 970. *Accord* I. Foighel, *supra*, note 112, at 221.

[123] UNHCR correctly confines Weis' principle to discriminatory situations: "[A] threat to life or freedom *on account of race, religion, nationality, political opinion or membership of a particular social group* is always persecution" [Emphasis added]: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, p. 14 (1979).

[124] *See* text *supra* at notes 88-89.

[125] Immigration Appeal Board Decision V80-6225, C.L.I.C. Notes 23.7, July 30, 1980.

[126] Immigration Appeal Board Decision V80-6220, C.L.I.C. Notes 30.11, March 16, 1981.

[127] *Id.*, at 9, *per* W. Hlady.

[128] *Id.*, Member Bruce Howard authored a powerful dissenting opinion in which he found that the claimant had suffered in an "unspeakable manner" and was "systematically tortured in body, mind and spirit": *Id.*, at 15, *per* B. Howard.

[129] Immigration Appeal Board Decision M83-1196, November 7, 1983. *Accord Karthigesu Sivanesan*, Immigration Appeal Board Decision M84-1513, January 7, 1985, in which three arrests and detentions, one including torture, were considered to be insufficient evidence of persecution.

[130] *See, e.g.*, F. Marino-Menendez, *supra*, note 112, at 354.

Third, the Immigration Appeal Board has on occasion inappropriately dismissed claims of risk to civil and political rights because they were grounded in the advocacy of socio-economic welfare. For example, in *Meril Meryse,*[131] the risk of imprisonment or torture faced by the claimant in consequence of his lobbying for economic reform in Haiti was dismissed as merely a desire for "economic betterment";[132] evidence of possible military harassment of a Ghanaian because of his membership in a pressure group demanding better economic conditions led to a negative finding because "his protests were directed against economic rather than political considerations";[133] and fear of assault due to the claimant's withdrawal from "a vicious system of political patronage" in Guyana was deemed to raise economic concerns outside the scope of the refugee definition.[134] These judgments fail to focus on the central concern of risk to physical, moral, or intellectual integrity, and demonstrate an unhealthy predisposition to question the possibility of a need for protection where socio-economic issues are involved. To be preferred is the type of reasoning found in the decision of *Grimaldo Remigio Corcuera Guzman,*[135] involving a Peruvian claimant who was detained for organizing political demonstrations in support of the rights of the poor. The Immigration Appeal Board found the applicant to be ". . . in a category of persons subject to harassment in the form of attacks on his basic rights"[136] and determined him to be a Convention refugee.

Critics argue that the relative ease of establishing a risk of persecution on the basis of a threat to life or freedom privileges these aspects of human dignity in relation to social, economic, and cultural rights.[137] This observation, while correct, accurately reflects the current hierarchical state of the international law of human rights.[138] Rather than downgrading the seriousness with which we view risks to civil and political liberties, however, the more

[131] Immigration Appeal Board Decision M73-2608, April 30, 1975.

[132] *Id.*, at 24, *per* J. Scott.

[133] *Jim Martin Kwesi Mensah,* Immigration Appeal Board Decision V79-6136, August 7, 1979, at 3, *per* C. Campbell; initially set aside on other grounds by Federal Court of Appeal Decision A-527-79, May 2, 1980, but ultimately affirmed on other grounds subsequent to rehearing in Federal Court of Appeal: (1981), 36 N.R. 332.

[134] *Omar Khan*, Immigration Appeal Board Decision V80-6223, C.L.I.C. Notes 25.9, July 24, 1980, at 3, *per* C. Campbell.

[135] Immigration Appeal Board Decision M82-1265, September 30, 1983.

[136] *Id.*, at 4, *per* R. Tremblay.

[137] F. Marino-Menendez, *supra*, note 112, at 354.

[138] "[O]f the Universal Declaration's 25 paragraphs dealing with specific rights, 6 were devoted to economic, social, and cultural rights. In principle the emphasis attached to these rights by the socialist and some other countries had been recognized. . . . In practice, however, the UN was to neglect economic, social, and cultural rights as a serious field of endeavour for the next two decades. . . . While the recent development of concern with economic rights has been interpreted by some commentators as resulting in 'the elimination of civil and political rights from serious international consideration,' an attempt to restore balance into the treatment of the two sets of rights had in fact been long overdue": P. Alston, "The Universal Declaration at 35: Western and Passé or Alive and Universal?" (1983), 31 I.C.J. Rev. 60.

constructive direction for reform would seem to be the broadening of our perspective on those socio-economic rights which, like issues of life and freedom, ought reasonably to be considered central to a state's basic duty of protection.

4.4 Risk to Economic, Social, and Cultural Rights

Just as the serious risk of violation of civil and political liberties indicates a lack of state protection, so too does failure to respect social, economic, and cultural rights. This position is often misunderstood to imply that everyone who is poor, or who leads a life with few material advantages, can successfully advance a claim to refugee status. For example, Scott Burke has challenged the propriety of refugee claims grounded in the denial of socio-economic rights on the basis that ". . . hundreds of millions of people, including the entire Third World . . . suffer the deprivation of the 'rights' set forth in the Covenant [on Economic, Social, and Cultural Rights],"[139] thus implying a right to asylum "for anyone from an economically backward society."[140] Kenneth Brill has pointedly observed that "[o]ne of the main reasons for not expanding the refugee definition to encompass others besides political persecutees is that this would open the floodgates to the kind of economic migrants that our immigration system has sought to exclude."[141] These characterizations demonstrate a fundamental misperception of the nature of economic, social, and cultural human rights.

Unlike the Civil and Political Covenant,[142] the International Covenant on Economic, Social, and Cultural Rights[143] does not create obligations that states are required to fulfil immediately upon accession. Rather, the duty of each state party is simply "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",[144] and to "guarantee that the rights enunciated. . . will be exercised without discrimination of any kind. . . ."[145] Thus, the Covenant creates two kinds of duty. First, a government must marshal national and international resources[146] and give priority

[139] S. Burke, "Compassion Versus Self-Interest: Who Should Be Given Asylum in the United States?" (1984), 8 Fletcher Forum 311, at 320.

[140] *Id.*, at 319.

[141] K. Brill, "The Endless Debate" (1983), 32 Cleveland State, L. Rev. 117.

[142] *Supra*, note 51.

[143] *Supra*, note 52.

[144] ICESCR, *supra*, note 52, at Art. 2(1).

[145] Art. 2(2).

[146] "[I]n evaluating the performance of any state under the principle of progressive realization, would it not be proper to take into account a decision not to use available international assistance to meet social needs?. . . [T]he legislative history of the Economic Covenant indicates that the broader meaning of 'available resources' was intended: the official history explicitly says that this clause was meant to include international aid": D. Trubek, "Economic, Social and Cultural Rights in the Third World", in T. Meron, ed., *Human Rights in International Law*, pp. 215-16 (1984).

to the expenditure of those resources in achieving the full realization of human rights.[147] Second, and more commonly related to refugee claims, states must implement socio-economic rights on a non-discriminatory basis, and may not, for example, limit basic educational opportunities to members of certain minority groups, or deny the right to work to members of an opposition political party. It must be emphasized, however, that the persistence of non-discriminatory poverty or hardship does not constitute *per se* a violation of the Covenant.[148]

In addition to this carefully circumscribed duty, the substantive scope of most socio-economic rights is far from a guarantee of prosperity for all. By way of example, the mandatory scope of the right to health only obligates states to work to reduce infant mortality, improve hygiene, control diseases, and establish basic medical services.[149] Similarly, the right to education requires universal access only to primary education, with further opportunities conditioned by circumstances.[150]

Taken together, these carefully crafted qualifications within the ICESCR mean that an absence of state protection can be said to exist only where a government fails to ensure the non-discriminatory allocation of available resources to meet the most basic of socio-economic needs. It is in this context that refugee protection becomes relevant — not as a means of guaranteeing access to "the good life", but rather only to vindicate the right of everyone to those social, economic, and cultural attributes which are essential to human dignity.

4.4.1 Persecution Distinguished from Hardship

A line is therefore drawn between migration for reasons of "personal convenience"[151] or in search of improved living conditions, and migration driven by fear of a human rights violation tantamount to persecution. Because economic hardship is not necessarily a contravention of human rights norms, it is correct to exclude from refugee protection persons whose sole motivation for migration is the desire to leave generalized, difficult economic conditions, or who only wish the opportunity to build a more economically secure life.[152] Such persons are economic migrants, not refugees:

[147] *Id.*

[148] "[R]efugees are challenging a policy . . . and a conception of refugeehood that denies special consideration to persons fleeing civil war or mass poverty attributable in part to policies of friendly authoritarian regimes": K. Brill, *supra*, note 141, at 126.

[149] ICESCR, *supra*, note 52, at Art. 12.

[150] Art. 13.

[151] This distinction can be traced to the 1938 *Convention concerning the Status of Refugees coming from Germany*, 192 L.N.T.S. 59, which excluded from refugee status those persons who had left Germany for "reasons of purely personal convenience."

[152] "Clearly a person is not a refugee if that person is outside his or her own country simply

> The apprehension or calculation of the hardships which may be the lot of an entire group of people; and the reasonable desire to improve one's condition in life, either psychologically, socially or morally, are not sufficient. . . .[153]

This principle is, however, subject to two major qualifications.

First, economic deprivation which is discriminatory in the sense of being directed against or experienced only by a minority within a state can be demonstrative of persecution. As discussed in more detail in the next section, it is clear that where economic suffering has a political, racial, or otherwise disfranchising impact, its victims may qualify as refugees.[154] As noted by Michael Schulteis:[155]

> . . . economic depression or persecution may also find expression in poverty, both absolute and relative, but they are a consequence of the system itself. For example, in some developing countries political and economic policies marginalize and impoverish local populations by depriving them of economic resources and political voice.[156]

In circumstances of this sort, where serious economic hardship is specific in its oppressive impact, a violation of human rights in the nature of persecution is established.[157]

The second qualification relates to persons who have a genuine fear of persecution, but who may *also* wish to improve their economic position or live in a country which enjoys conditions of prosperity. They need to leave their own country because their basic human rights are genuinely at risk, but they choose to seek protection in a country of social or economic opportunity. While the Immigration Appeal Board has occasionally appeared determined to deny such claims,[158] the fact of this auxiliary motivation is quite

because he or she is able to earn a better living in the new country": P. Hyndman, "Refugees Under International Law with a Reference to the Concept of Asylum" (1986), 60 Australian L.J. 148, at 149.

[153] *Louis-Paul Mingot* (1973), 8 I.A.C. 351, at 367, *per* J.-P. Houle. *See also Marc Michel Cylien*, Immigration Appeal Board Decision 73-12462, March 21, 1974 ("desire to find better economic conditions"); set aside on other grounds by Federal Court of Appeal Decision A-163-80, September 30, 1980.

[154] M. Posner, "Who Should We Let In?" (1981), 9 Human Rts. 16, at 18.

[155] M. Schulteis, "A Continent in Crisis: Migrants and Refugees in Africa", paper prepared for Conference on "The African Context of Human Rights" (1987, published).

[156] *Id.*, at 10.

[157] G. Jaeger, "The Definition of 'Refugee': Restrictive versus Expanding Trends", [1983] World Refugee Survey 5, at 7. *Accord* D. Anker and M. Posner, "The Forty Year Crisis" (1981), 82 San Diego L. Rev. 1, at 67.

[158] *See, e.g., Harbhajan Washir Singh*, Immigration Appeal Board Decision T79-9454, December 7, 1982, in which the Board commented adversely on the claimant's desire to seek employment in Canada; *Christolene Permaul*, Immigration Appeal Board Decision T83-9310, April 13, 1983, which pointed out the high rate of unemployment in the claimant's country of origin before dismissing her claim; and *Munir Mohamad Adem Suleiman*, Immigration Appeal Board Decision V81-6246, November 16, 1983, which recounts a series of serious threats against the claimant, a member of the Eritrean Liberation Front, but rejects his claim after noting that he wished the opportunity to go to school in Canada.

irrelevant to the issue of refugee status, as was eloquently stated in the decision of *Guillermo Lautaro Diaz Fuentes:*[159]

> A superficial examination of the appellant's testimony both at the special inquiry and at the appeal hearing might suggest that the appellant is seeking material security above all, and that he might be what is called. . . an "economic migrant". . . . But we must not consider this testimony out of context; on the contrary, what we must find out is whether behind apparent personal and economic motives there exists a fear of persecution. . . . The distinction between an economic migrant and a refugee is not always easy to establish, but what is important to keep in mind is that if a person is a refugee, the fact that he also is or may be an economic migrant does not deprive him of his status as a refugee.[160]

This position has been approved by the Federal Court of Appeal decision in *Abeba Teklehaimanot v. Immigration Appeal Board,*[161] in which Mr. Justice Pratte held that there is no incompatibility in law between refugee status and the desire to establish oneself as a permanent resident of Canada.

In sum, while the rule that economic migrants are to be distinguished from refugees is well-recognized, care must be taken to ensure that both the victims of economic oppression and refugees who seek the assistance of states of relative economic prosperity are not excluded from protection.

4.4.2 Defining a Breach of Economic, Social, or Cultural Rights

Thus far the argument has been that persecution may result from breach of a core social, economic, or cultural right; that socio-economic human rights are abrogated only where a state either neglects their realization in the face of adequate resources, or implements them in a discriminatory way; and that the existence of generalized hardship is neither a sufficient nor a disqualifying factor in defining the existence of socio-economic persecution. It remains, then, to examine in more detail the circumstances in which a threat to basic economic, social, or cultural rights is tantamount to persecution.

First, purely financial grievances do not constitute persecution,[162] this principle being a subset of the rule that core principles of human rights do not include a right to private property.[163] The case of *Jose Salvador Ficciella Munizaga*[164] involved a wealthy pro-Allende Chilean businessman whose opportunities and patronage had evaporated after the *coup d'état*, leading him to claim that he was being economically punished by the new regime.

[159] (1974), 9 I.A.C. 323.

[160] *Id.*, at 343.

[161] Federal Court of Appeal Decision A-730-79, September 8, 1980.

[162] *See* C. Wydrzynski, *Canadian Immigration Law and Procedure*, p. 320 (1983). In some earlier international refugee accords, however, a threat against freedom, life or property was deemed to be of sufficient gravity to warrant protection: *see* Y. Shimada, "The Concept of the Political Refugee in International Law" (1975), 19 Japanese Ann. Intl. L 24, at 36.

[163] *See* text *supra* at note 105.

[164] Immigration Appeal Board Decision 79-1222, C.L.I.C. Notes 14.14, December 13, 1979.

The Board correctly observed that it would not ". . . look into all business transactions of the applicant in his native country and pronounce whether he has real financial grievances. . . [because] [e]ven if he has, it is not equivalent to persecution".[165] Similarly, a claim grounded solely on the actual or anticipated confiscation of property or damage to goods, without any attendant risk to personal security or basic livelihood, is not of sufficient gravity to warrant the granting of refugee status.

Second, and also incapable of establishing persecution, are circumstances in which the rights at risk are related to core entitlements, but the threat does not go to the heart of the right as elaborated in international law. For example, the Board regularly characterized as insufficient the concerns of non-communist Eastern Europeans who were relegated to inferior accommodation and were denied access to the full range of food and other amenities available to adherents of the ruling party. These claims have been accurately assessed as raising the spectre of discrimination short of persecution.[166] Polish claimant *Helena Olearczyk,*[167] for example, had been a member of Solidarity, and refused to join the ruling Communist Party. The Board found that

> . . . indeed she has been the victim of some harassment. Her superiors exercised some control over her union activities and it is probable that she was denied promotions and employment benefits. However, this harassment cannot be considered persecution in the sense of the Convention.[168]

This judgment was affirmed on judicial review, the Federal Court of Appeal noting that it agreed with the Board's view "that the harassment described was not sufficiently serious to amount to persecution".[169] Because socio-economic rights are intentionally defined in international law in terms of minimally acceptable standards, not every instance of unfairness broadly related to an enumerated right will support a finding of persecution.[170] While,

[165] *Id.*, at 2, *per* F. Glogowski.

[166] *See* R. Howard, "Contemporary Canadian Refugee Policy: A Critical Assessment" (1980), 6 (2) Cdn. Public Policy 361, at 363. *See also Josef Ligas*, Immigration Appeal Board Decision 75-10390, December 19, 1975; *Tadeusz Jakubowski*, Immigration Appeal Board Decision V79-6197, October 4, 1979; *Zdzislaw Liedtke*, Immigration Appeal Board Decision V80-6383, December 10, 1980; *Henryk Stanley Komisarski*, Immigration Appeal Board Decision V81-6162, May 28, 1981; *Jaroslaw Jozef Litwinski*, Immigration Appeal Board Decision V81-6322, October 8, 1981.

[167] Immigration Appeal Board Decision M87-1897X, February 9, 1988.

[168] *Id.*, at 2, *per* J. Cardinal. *Accord Andrzej Matuszewski*, Immigration Appeal Board Decision V80-6058, at 2, *per* C. Campbell; reversed on other grounds by Federal Court of Appeal Decision A-163-80, September 30, 1980.

[169] *Helena Olearczyk v. Minister of Employment and Immigration* (1990), 8 Imm. L.R. (2d) 18, at 19, *per* Hugessen J.

[170] In the United States, for example, only "*substantial economic disadvantage* caused by the foreclosure of economic opportunity constitutes persecution under the refugee statutes" [Emphasis added]: Note, "Political Legitimacy in the Law of Political Asylum" (1985), 99 Harvard L.Rev. 450, at 460. *Accord* A. Fragomen, "The Refugee: A Problem of Definition" (1970), 3 Case Western Reserve J. Intl. L. 45, at 54; D. Gross, "The Right of Asylum Under United States Law" (1980), 80 Columbia L. Rev. 1125, at 1135. *But see Kovac v. I.N.S.,* 407 F. 2d 102, at 107 (9th Cir. 1969) in which the claim of a Yugoslavian chef forced to work as an unskilled cook was recognized as evincing a fear of persecution.

for example, the rights to food and shelter are among those recognized in the ICESCR,[171] it is only an "adequate standard of living"[172] that is guaranteed by law, not access to the full range of desirable commodities and services.

The third category includes those claims which evince a serious risk to core human rights, and hence justify a finding of fear of persecution. The classic example is economic proscription,[173] the fundamental breach of the right to work established by Article 23 of the Universal Declaration[174] and Articles 6 and 7 of the ICESCR.[175] Even the most conservative theorists agree that the sustained or systemic denial of the right to earn one's living is a form of persecution,[176] which can coerce or abuse as effectively as imprisonment or torture.[177] This has been recognized by the Federal Court of Appeal in judgments such as *Luis Rene Amayo Encina v. Minister of Employment and Immigration,*[178] involving a Chilean socialist who was subjected to constant surveillance at work following the military coup, ultimately fired from his job, and blocked by a system of official clearances from obtaining other employment. The Federal Court found the claimant to be a Convention refugee, noting that ". . . over a period of years [he] suffered persecution from various sources at his place of work and, after his discharge therefrom, during his period of unemployment prior to coming to Canada, all as a result of his former political activities and beliefs".[179]

Traditionally, however, the economic proscription principle has been nar-

[171] ICESCR, *supra*, note 52, at Art. 11(1).

[172] *Id.*

[173] *See generally* J. Hathaway and M. Schelew, "Persecution by Economic Proscription: A New Refugee Dilemma" (1980), 28 Chitty's L.J. 190.

[174] *Supra*, note 50.

[175] *Supra*, note 52.

[176] Zink, for example, recognized "protracted forced unemployment" as a form of persecution: B. Roberts, "Can the Boat People Assert a Right to Remain in Asylum?" (1980), 4 U. Puget Sound L.R. 176. *Accord* A. Grahl-Madsen, "International Refugee Law Today and Tomorrow" (1982), 20 Archiv des Völkerrechts 411, note 118, at 422: "States may still be prepared to regard economic proscription (on an individual basis and for clearly political reasons) — so severe as to deprive a person of all means of livelihood — as persecution in the sense of the Convention. . . ."

[177] "[P]ersecution. . . should include forms of economic harassment that make it impossible for certain minorities to earn a living. Being prevented from earning a living is just as great a persecution as imprisonment": G. Gilbert, "Right of Asylum: A Change of Direction" (1983), 32 I.C.L.Q. 633, at 645. In the United States, it has been recognized that the impairment of an individual's ability to earn a livelihood amounts to political persecution: *Desir v. Ilchert*, 840 F. 2d 723 (9th Cir. 1988).

[178] Federal Court of Appeal Decision A-720-80, February 27, 1981; setting aside Immigration Appeal Board Decision T80-9349, October 2, 1980. The claim was ultimately rejected on reconsideration by the Immigration Appeal Board on July 9, 1981. *Accord Alfredo Manuel Oyarzo Marchant*, [1982] 2 F.C. 779 (C.A.).

[179] *Id.*, at 2, *per* Urie J.

rowly defined to focus on situations of total exclusion from remunerative employment. In the well-known case of *Jan Piotr Kwiatkowsky,*[180] for example, the claimant alleged a fear of return to Poland on the basis *inter alia* that his religious beliefs and opposition to Communism had resulted in his exclusion from career progress as a teacher. Noting that his dissident status had resulted only in demotion, and not in a denial of his right to work as a teacher, his complaint was characterized as discrimination falling short of persecution.[181] Conversely, forced submission to grossly inappropriate forms of work has been characterized as persecution, as noted in the decision in *Juan Alejandro Araya Heredio:*[182]

> The Convention does not define persecution . . . but it is quite certain that persecution does not consist solely in physical torture; an essential element of persecution is harassment, so much so that real persecution would be present in the case of a person who was denied all opportunity to work or even one who, in order to survive, was forced to accept work manifestly incompatible with his occupational training.[183]

The decision of the Federal Court of Appeal in *Aram Ovakimoglu v. Minister of Employment and Immigration*[184] has adopted this broad reading. The Court characterized the testimony of the Armenian Christian Turkish claimant as "uncontradicted evidence of harassment and persecution which cried out for further exploration"[185] by the Immigration Appeal Board, noting his "difficulties in obtaining and in retaining his employment"[186] and indeed "the lack of possibility for his advancement either in the army or

[180] Immigration Appeal Board Decision M79-1220, C.L.I.C. Notes 18.10, December 13, 1979; affirmed on other grounds by Federal Court of Appeal Decision at (1981), 34 N.R. 237, and the Supreme Court of Canada at (1982), 45 N.R. 116.

[181] *Id.*, at 6. *Accord Tomasz Gozdalski*, Immigration Appeal Board Decision M87-1027X, April 23, 1987.

[182] Immigration Appeal Board Decision 76-1127, January 6, 1977. *Accord* I. Foighel, "Legal Status of the Boat People" (1979), 48 Nordisk Tidsskrift for Intl. Ret. 217, at 221, in which persecution is said to include "lost work, imminent risk of not being able to earn a livelihood, and reduced possibilities of work in relation to qualification."

[183] *Id.*, at 6-7, *per* J.-P. Houle. *But see* the extremely narrow conceptualization of economic proscription applied in the case of *Hua Kien Hui*, Immigration Appeal Board Decision V87-6081X, July 21, 1987, at 6, *per* D. Anderson: "[E]ven though Mr. Hui was classed by the authorities to be of landowner and [Kuo Min Tang] class background, and was consequently required to work on a farm for four years in hard and unpleasant jobs, discrimination of this type does not, in itself, constitute a basis for a well-founded fear of persecution. Political re-education through manual labour, combined with indoctrination classes, is carried on, unfortunately, in many countries and for many large social groups."

[184] (1983), 52 N.R. 67 (F.C.A.); setting aside Immigration Appeal Board Decision T82-9976, January 25, 1983. The claim was rejected on reconsideration by the Immigration Appeal Board in its decision of January 6, 1984.

[185] *Id.*, at 69, *per* Urie J.

[186] *Id.*

in civilian life".[187] This decision takes a holistic view of the substance of the right to work, including both the right to access employment and the right to "just and favourable conditions of work", established by Articles 6 and 7 respectively of the Covenant.[188] Persecution may therefore be established where an individual is prevented from securing any employment, or where the only work which she is permitted to access is, for example, of an extremely dangerous nature or grossly out of keeping with her qualifications and experience.

A problem in applying the economic proscription doctrine can arise where it is difficult to distinguish with precision between the impact of the persecutory acts of the state and the effects of a generally depressed economy. Particularly in the case of refugees from less developed countries, the inability to obtain employment may be the combined result of a general scarcity of work and the efforts of the government or its agent to ensure that whatever minimal opportunities may exist are denied to the refugee. In such circumstances, it is inappropriate to dismiss the claim, as the refugee has still been effectively disfranchised by the state. The fact that initial opportunities were limited is not pertinent to the issue of whether the claimant has been disadvantaged beyond the norm because of the government's persecutory acts.

In contrast, the Immigration Appeal Board has sometimes refused such claims. In the case of *Pedro Ignacio Vera Jiminez,*[189] for example, the Board did not "find it credible that the *sole barrier to employment* for [the claimant] was his political involvement. High unemployment and his lack of work experience are major factors that cannot be discounted as reasons for his lack of success. . . ." [Emphasis added] In the decision of *Ghouse Mahmood Khan Arshad,*[190] the claim was dismissed because "[t]he difficulty in finding work, in this particular case, may be attributable *just as much* to the economic situation in India as to discrimination by the party in power." [Emphasis added] These decisions do not deny that state action was exerted to foreclose economic opportunities, but instead avoid the issue on the ground that conditions would have been difficult even absent governmental interference. Such analysis misses the central issue of whether or not persecution occurred, and results in discrimination against claimants from economically depressed countries.

Forms of economic persecution not related to the right to work enjoy a more ambiguous position thus far in the Canadian jurisprudence. While the decision of the Immigration Appeal Board in *Luis Enrique Toha Seguel*[191] is vague authority for the proposition that the discriminatory denial of educa-

[187] *Id.*

[188] ICESCR, *supra*, note 52.

[189] Immigration Appeal Board Decision 81-9344, November 12, 1981.

[190] Immigration Appeal Board Decision 81-9474, September 18, 1981.

[191] Immigration Appeal Board Decision 79-1150, C.L.I.C. Notes 28.8, November 13, 1980.

tional or health facilities is a form of persecution,[192] other decisions are less encouraging. In *Naresh Persaud Ramsarran,*[193] for example, evidence of racially differentiated access to basic school supplies and emergency hospital care in Guyana was characterized as "drastic discrimination",[194] but not persecution. Similarly, the case of *Urszula Grochowska*[195] portrayed Polish denial of schooling and medical insurance to Gypsies as "extensive discrimination. . . [which] does not constitute persecution within the meaning of the definition of a Convention refugee".[196] These precedents take an overly narrow view of the meaning of persecution, and warrant reconsideration in the light of the human rights paradigm set out above. More in keeping with a holistic notion of human rights is the decision in *Vidya Ajodhia,*[197] involving the state-condoned racially discriminatory allocation of basic foodstuffs in Guyana. In accepting the claim to refugee status of an Indo-Guyanese citizen, the Board noted:

> It may be argued that the unfair distribution of food to Indo-Guyanese is a situation of discrimination rather than persecution. However, in my opinion, the withholding of essential food on a daily basis is clearly indicative of persecution.[198]

4.5 Failure of the State's Duty to Protect Basic Human Rights

Not all persons who have left their country because of risk to basic human rights are refugees. As noted in the introduction to this chapter,[199] refugee law is designed to interpose the protection of the international community only in situations where there is no reasonable expectation that adequate national protection of core human rights will be forthcoming. Refugee law is therefore "substitute protection"[200] in the sense that it is a response to disfranchisement from the usual benefits of nationality.[201] As Guy Goodwin-Gill puts it, ". . . the degree of protection normally to be expected of the government is either lacking or denied".[202]

[192] *Id.*, at 4, *per* J.-P. Houle. *Accord* G. Goodwin-Gill, "Entry and Exclusion of Refugees" (1980), Michigan Y.B. Intl. L. Studies 291, at 298-99: "Depending on the circumstances, persecution may thus comprise less overt measures such as the imposition of serious economic disadvantage, denial of access to employment, to the professions or to education. . . ."

[193] Immigration Appeal Board Decision T83-9371, April 25, 1983 and February 4, 1985.

[194] *Id.*, at 4, *per* J.-P. Houle.

[195] Immigration Appeal Board Decision V84-6217, October 24, 1984.

[196] *Id.*, at 5, *per* D. Anderson.

[197] Immigration Appeal Board Decision M85-1709, November 12, 1987.

[198] *Id.*, at 4, *per* P. Davey.

[199] *See* text *supra* at notes 34-36.

[200] J. Patrnogic, "Refugees — A Continuing Challenge" (1982), Annuaire de droit international médical 73, at 75.

[201] Memorandum from the Secretary-General, U.N. Doc. E/AC.32/2, at 13, January 3, 1950.

[202] G. Goodwin-Gill, "Non-Refoulement and the New Asylum Seekers" (1986), 26 (4) Virginia J. Intl. L. 897, at 901.

This means that in addition to identifying the human rights potentially at risk in the country of origin, a decision on whether or not an individual faces a risk of "persecution" must also comprehend scrutiny of the state's ability and willingness effectively to respond to that risk. Insofar as it is established that meaningful national protection is available to the claimant, a fear of persecution cannot be said to exist. This rule derives from the primary status accorded to the municipal relationship between an individual and her state,[203] and the principle that international human rights law is appropriately invoked only when a state will not or cannot comply with its classical duty to defend the interests of its citizenry.[204] Andrew Shacknove has helpfully phrased this principle in terms of a breakdown of the protection to be expected of the minimally legitimate state:

> Persecution is but one manifestation of the broader phenomenon: the absence of state protection of the citizen's basic needs. It is this absence of state protection which constitutes the full and complete negation of society and the basis of refugeehood.[205]

The balance of this part examines the application of this general rule. First, how does one assess state accountability for the actions of non-governmental groups or private individuals,[206] the impact of which may be to undermine access to national protection? And second, does an individual have a right to protection in her region of origin, or does the state meet its duty by providing adequate protection in some other part of the country?

4.5.1 Agents of Persecution

The most obvious form of persecution is the abuse of human rights by organs of the state, such as the police or military.[207] This may take the form of either pursuance of a formally sanctioned persecutory scheme, or non-conforming behaviour by the official agents which is not subject to a timely and effective rectification by the state.[208] In such cases, it is clear that the

[203] 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, pp. 97-101 (1966).

[204] "The general definition must be seen as a product of the legal and political philosophy of the 18th, 19th and early 20th centuries in the western countries. The major terms of this philosophy were the State and the Individual, and the respective rights and duties of the State and the Individual. . .": P. Hartling, "Concept and Definition of 'Refugee' — Legal and Humanitarian Aspects" (1979, unpublished).

[205] A. Shacknove, "Who is a Refugee?" (1985), 95 Ethics 274, at 277.

[206] The *travaux préparatoires* of the Convention do not establish any distinction between persecution at the hands of the government and persecution by private citizens: J. van der Veen, "Does Persecution by Fellow-Citizens in Certain Regions of a State Fall Within the Definition of 'Persecution' in the Convention Relating to the Status of Refugees of 1951?" (1980), 11 Netherlands Y.B. Intl. L. 167, at 170.

[207] "The source of the persecution is not limited. It may emanate from the government or a third party. Obviously, it will be much easier to show that the fear of persecution is well-founded if the government of the State of origin is perpetrating it. . . ": G. Gilbert, "Right of Asylum: A Change of Direction" (1983), 32 I.C.L.Q. 633, at 645.

[208] In *Jit Dhaliwal Singh*, for example, the claimant's father-in-law, who had been an active

citizen can have no reasonable expectation of national protection, since the harm feared consists of acts or circumstances for which governmental authorities are responsible.[209] As noted in the decision of *Ganganee Janet Permanand:*[210]

> The abuse of power by agents of the State or their unwillingness to discharge their duties in respect to a particular citizen or group of citizens could indeed constitute persecution. However, to be so, such practices must be carried out systematically and with the overt or covert concurrence of the state.[211]

Similarly, there is no meaningful protection when a government supports[212] or condones[213] privately inflicted violations of core human rights. But for this notion of vicarious responsibility, ill-willed states could deprive their victims of recourse to refugee protection simply by contracting out their agenda of harm to unofficial instrumentalities. Thus, the actions of thugs linked to the government[214] or of party members acting in concert with those in

Akali Dal supporter, died after being beaten by police; the claimant's wife was subsequently murdered by thugs from the opposition political party, with no adequate police response. In the circumstances, the Board held that the claimant ". . . had every reason to fear that if he was set upon by supporters of the Congress Party on his way home he could not expect to invoke successfully the protection of the police": Immigration Appeal Board Decision T85-9358, June 8, 1987, at 5, *per* E. Townshend.

[209] C. Wydrzynski, "Refugees and the *Immigration Act*" (1979), 25 McGill L.J. 154, at 181.

[210] Immigration Appeal Board Decision T87-10167, August 10, 1987.

[211] *Id.*, at 6, *per* P. Ariemma.

[212] "Clearly, direct government encouragement of private oppression will sustain an asylum claim": D. Gross, "The Right of Asylum Under United States Law" (1980), 80 Columbia L. Rev. 1125, at 1139.

[213] "If the atrocities which cause persons to flee are of relatively short duration only, for example, just an episode, and they are effectively put to an end by the government, there may hardly be any reason for considering the persons concerned political refugees. . . . If, on the other hand, the disturbances continue over a protracted period, without the government being able to check them effectively, this may be considered such a 'flaw' in the organization of the State that it may justify . . . recognition of refugee status. . .": A. Grahl-Madsen, *supra*, note 203, p. 192.

[214] The claim of an Indian citizen was based on beatings he received at the hands of "thugs representing the Congress Party" who assaulted him by reason of his membership in the Janta Party. His application was initially dismissed on the ground that "[t]he threats and beatings Mr. Verma described were not from the police but from 'various thugs' some of whom he identified as being members of the Congress Party": Immigration Appeal Board Decision M82-1115, March 28, 1983, at 5, *per* D. Davey. The decision was reversed in the Federal Court of Appeal, which noted that ". . . the Board erred in law in not addressing the effect of the return to power of the Congress Party in 1980 as relevant to the applicant's fear of political persecution", thus acknowledging the sufficiency of toleration of private behaviour as the basis for a fear of persecution: *Surinder Kumar Verma v. Immigration Appeal Board et al.*, Federal Court of Appeal Decision A-481-83, October 27, 1983, at 2, *per* LeDain J. *Accord Fritz Roland*, Immigration Appeal Board Decision M87-1587X, November 9, 1987, at 3, in which member M. Dore ascribed accountability to the Haitian government for the actions of the Tontons Macoutes, in that they were "in the service of the persons in power".

power[215] have been appropriately characterized as persecutory, based on the notion that persecution comprehends actions "by, or with the tacit approval of the government".[216]

Beyond these acts of commission carried out by entities with which the state is formally or implicitly linked,[217] persecution may also consist of either the failure or inability of a government effectively to protect the basic human rights of its populace.[218] Specifically, there is a failure of protection where a government is *unwilling* to defend citizens against private harm, as well as in situations of objective *inability* to provide meaningful protection. This is a somewhat more complex notion, derived from the principle that the legitimacy of a government is inextricably linked to the sufficiency of the protection it affords its citizenry. As argued and accepted in the decision of the French Conseil d'Etat in *Esshak Dankha:*[219]

[215] While some decisions of the Immigration Appeal Board dismissed claims of persecution at the hands of members of the governing party (*see*, e.g., *Nankisore Mangal*, Immigration Appeal Board Decision T82-9141, April 22, 1982, and *Harbhajan Washir Singh*, Immigration Appeal Board Decision T79-9454, December 7, 1982), Federal Court authority appears to accept the propriety of such claims. In *Anthony Andre Williams*, the Immigration Appeal Board dismissed the claim of a St. Lucian who alleged that he had been seriously threatened by members of the governing Labour Party by reason of his work for the opposition United Workers' Party. The Board dismissed the claim, noting that the "threats to which he referred to were [made] by . . . 'rousters' of the Labour Party and not by persons authorized by the Labour Party to carry out these actions": Immigration Appeal Board Decision 81-9029, January 28, 1981, at 1-2, *per* A. Weselak. The Federal Court of Appeal set the decision aside, noting simply that "[i]n light of the Board's statement . . . that there was no evidence of persecution, we cannot be satisfied that the Board did consider the entire record . . . or that if it had, it would necessarily have reached the same conclusion": Federal Court of Appeal Decision A-57-81, June 16, 1981, at 1-2, *per* Heald J.

[216] *Charles Polak*, Immigration Appeal Board Decision 81-3009, April 23, 1981, *per* J. Scott. *Accord*, e.g., *Munir Mohamad Adem Suleiman*, Immigration Appeal Board Decision V81-6246, July 23, 1981; *Juan de la Cruz Cuevas Fuente*, Immigration Appeal Board Decision 79-1117, August 28, 1979; *Nezihi Yilmaz*, Immigration Appeal Board Decision 80-9123, C.L.I.C. Notes 18.14, April 16, 1980.

[217] To the contrary, where the harm feared is strictly private in nature, and the government in the country of origin is both willing and able to afford protection, the requisite degree of state involvement is not established. In *Daniel Cripaul*, for example, the Board correctly denied the claim of a Guyanan Christian whose parents had been the targets of rocks and bottles thrown by other East Indians who objected to their religion. Because there was no evidence of state awareness of the incident, much less complicity or inability to act, the claim of fear of persecution was not made out: Immigration Appeal Board Decision M81-1106, June 4, 1981.

[218] The case of Sri Lankan Tamil *Saam Yagasampanthar Murugesu* was initially refused by the Immigration Appeal Board on the ground that evidence that a person is "discriminated or even persecuted by the religious or racial majority group" cannot establish a fear of persecution: Immigration Appeal Board Decision M82-1142, July 13, 1982, at 3, *per* F. Glogowski. After reversal by the Federal Court of Appeal, the Immigration Appeal Board accepted the claim, noting that ". . . too many persons, especially Tamils, were not given the benefit [of the] legal system. . .": Immigration Appeal Board Decision M82-1142, September 30, 1983, at 8, *per* G. Loiselle.

[219] Decision No. 42.074, May 27, 1983.

> . . . the existence and the authority of the State are conceived and justified on the grounds that it is the means by which members of the national community are protected from aggression, whether at the hands of fellow citizens, or from forces external to the State. [Unofficial translation][220]

Thus, the state which ignores or is unable to respond to legitimate expectations of protection[221] fails to comply with its most basic duty,[222] thereby raising the prospect of a need for surrogate protection.[223] Intention to harm on the part of the state is irrelevant:[224] whether as the result of commission, omission, or incapacity, it remains that people are denied access to basic guarantees of human dignity, and therefore merit protection through refugee law.[225]

The Federal Court of Appeal indicated its support for this comprehensive standard in the decision of *Aram Ovakimoglu v. M.E.I.*,[226] involving a Christian Armenian citizen of Turkey. The Immigration Appeal Board had dismissed the claim because there was no proof of direct harassment by Turkish authorities, although there was evidence that the government had failed to protect the claimant from mob violence inflicted by reason of his nationality and religion.[227] The Federal Court referred the case back to the Board, noting *inter alia* that "the lack of protection available to [the claimant], in common with his fellow Armenians, by the authorities, from harassment,

[220] Conclusions of M. Genevois, Commissaire du Gouvernement, in *Esshak Dankha, supra*, note 219. Reported in F. Julien-Laferrière, "Bulletin de jurisprudence française" (1984), 3 Clunet 119, at 122.

[221] "Persecution may include behaviour tolerated by government in such a way as to leave the victim virtually unprotected by the agencies of the state": Minister of Employment and Immigration, "New Refugee Status Advisory Committee Guidelines on Refugee Definition and Assessment of Credibility" (1982), at Principle 6. *Accord* C. Fong, "Some Legal Aspects of the Search for Admission into Other States of Persons Leaving the Indo-Chinese Peninsula in Small Boats" (1981), 52 British Y.B. Intl. L. 53, at 92.

[222] "The fact therefore must be that the individuals themselves, each in his own personal and sovereign right, entered into a compact with each other to produce a Government. . . founded on a moral theory, on a system of universal peace, on the indefeasible hereditary Rights of Man. . . [and] this is the only mode in which Governments have a right to arise, and the only principle on which they have a right to exist": T. Paine, *Rights of Man* 47 and 154 (1915). *See also* R. Hofman, "Refugee-Generating Policies and the Law of State Responsibility" (1985), 45 Zeitschrift Auslandisches Offentliches 694, at 700.

[223] *Accord* A. Grahl-Madsen, *supra*, note 203, at 192.

[224] "Thus, if groups of citizens perpetrate acts of persecution against other groups, and if the government of the country is either unable or unwilling to provide protection to the victimized, the victims nonetheless will be considered to be the objects of persecution. The fact that the government wishes to provide protection will not alter this situation": P. Hyndman, "The 1951 Convention Definition of Refugee" (1987), 9 Human Rts. Q. 49, at 67.

[225] "Since asylum law is designed to protect those who are unable to protect themselves in their native country, any retrenchment from the 'unable or unwilling' standard would be unwarranted": D. Gross, "The Right of Asylum Under United States Law" (1980), 80 Columbia L. Rev. 1125, at 1139.

[226] (1983), 52 N.R. 67 (C.A.).

[227] Immigration Appeal Board Decision T82-9976, January 25, 1983.

both mental and physical, by Moslem Turks, all because he and others were Armenian Christians"[228] ought to have been taken into consideration.

This holistic standard of state obligation was clearly elaborated in the landmark decision in *Zahirdeen Rajudeen v. Minister of Employment and Immigration*.[229] The evidence at the hearing established that the Sri Lankan claimant was at risk because he was a Tamil Muslim in a society dominated by Sinhalese Buddhists, and that the police were either unwilling or unable to protect him from violence at the hands of Sinhalese mobs. In the Federal Court, Heald J. found that the requisite degree of state complicity was established by evidence of official indifference to the protection of Tamils.[230] The concurring judgment of Stone J. provides a clear statement of the test of the adequacy of state protection:

> . . . an individual cannot be considered a "Convention refugee" only because he has suffered in his homeland from the outrageous behaviour of his fellow citizens. To my mind, in order to satisfy the definition the persecution complained of must have been committed or been condoned by the state itself and consist either of conduct directed by the state toward the individual or in it knowingly tolerating the behaviour of private citizens, *or refusing or being unable to protect the individual from such behaviour.* [Emphasis added][231]

In applying the *Rajudeen* principle, the Immigration Appeal Board has defined four situations in which there can be said to be a failure of state protection:

1. Persecution committed by the state concerned;
2. Persecution condoned by the state concerned;
3. Persecution tolerated by the state concerned;
4. Persecution not condoned or not tolerated by the state concerned but nevertheless present because the state either refuses or is unable to offer adequate protection.[232]

This approach was confirmed in *Surujpal v. M.E.I.*,[233] involving failure by Guyanese authorities to protect members of the People's Progressive Party from politically motivated violence.

[228] *Supra*, note 226, at 69.

[229] (1985), 55 N.R. 129 (F.C.A.).

[230] *Id.*, at 134.

[231] *Id.*, at 135.

[232] *Tezcan Ozdemir*, Immigration Appeal Board Decision M83-1304, C.L.I.C. Notes 77.12, December 18, 1984, at 6, *per* F. Glogowski. On the other hand, the Board has at times reverted to a focus on intentional wrongdoing. In *Arulvelrajah Rajanayagam*, for example, it was inaccurately stated that persecution ". . . implies a deliberate seeking out of an individual or group for mistreatment": Immigration Appeal Board Decision M84-1390, December 31, 1984, at 5, *per* D. Anderson.

[233] "In our view it is not material whether the police directly participated in the assaults or not. What is relevant is whether there was police complicity in a broader sense. . . . It is not required that State participation in persecution be direct; it is sufficient that it is indirect, provided that there is proof of State complicity": (1985) 60 N.R. 73 (F.C.A.), at 75-76.

Obviously, there cannot be said to be a failure of state protection where a government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming:

> A refugee may establish a well-founded fear of persecution when the official authorities are not persecuting him if they refuse or are unable to offer him adequate protection from his persecutors. . . however, he must show that he sought their protection when he is convinced, as he is in the case at bar, that the official authorities — when accessible — had no involvement — direct or indirect, official or unofficial — in the persecution against him.[234]

The Federal Court's decision in *M.E.I. v. Robert Satiacum*[235] further defined the notion of failure of protection by establishing that persecution cannot be said to exist where the absence of protection is remediable through federal control over local inaction or the intervention of a fair and independent judicial process.[236] The test of the sufficiency of protection in Canadian law is thus defined in terms of practical realities: Whatever the formal position of the state, is there a *de facto* failure of protection, grounded in intention, indifference, or incapacity?

Some degree of ambiguity regarding this test is demonstrated in the recent decision of the Federal Court of Appeal in *Attorney General of Canada v. Patrick Francis Ward.*[237] This decision involved a former member of the Irish National Liberation Army (I.N.L.A.), who was unable effectively to secure protection from Irish authorities against the vengeance of his former colleagues after he became an informer for the government. The Immigration Appeal Board had recognized the claim, stating:

> Fear of persecution and lack of protection are also related elements. Persecuted persons clearly do not enjoy the protection of their country of origin and evidence of the lack of protection may create a presumption as to the likelihood of persecution and to the well-foundedness of any fear.[238]

On appeal by the government, the majority decision in the Federal Court of Appeal rejected this reasoning, and held:

[234] *Jose Maria da Silva Moreira*, Immigration Appeal Board Decision T86-10370, April 8, 1987, at 4, *per* V. Fatsis.

[235] Federal Court of Appeal Decision A-554-87, June 16, 1989.

[236] "*Rajudeen* and *Surujpal v. Minister of Employment and Immigration* . . . both involved the illegal and violent harassment of refugee claimants by intolerant majorities, with police acquiescence or indifference which amounted to State complicity in the persecution. Neither country, Sri Lanka (*Rajudeen*) nor Guyana (*Surujpal*) is a federal state, and in neither case was the judicial system of the country in play. Both cases clearly deal with the kind of law enforcement which may amount to persecution. Neither relates in any way to the judicial process, let alone to a fair and independent judicial process": *Id.*, at 8, *per* MacGuigan J.

[237] Federal Court of Appeal Decision A-1190-88, March 5, 1990; leave to appeal granted by the Supreme Court of Canada on November 8, 1990: Supreme Court Bulletin 2347.

[238] Immigration Appeal Board Decision, T89-10967X, December 2, 1988.

> No such presumption arises. The determination can only be made after an assessment and weighing of the evidence to ascertain whether or not the claimant [has] . . . a well-founded fear of persecution for one of the reasons set out in the definition. Thereafter, the other aspects of inability or unwillingness must be addressed.[239]

While the majority decision employs the language of "state complicity",[240] it would appear that the real concern was the Board's assertion of a *presumption* of fear of persecution in circumstances where state protection is absent. Rather, such a decision is to be made only after "an assessment and weighing of the evidence" to ensure that the absence of protection is attributable to a form of civil or political status protected under the Convention (thereby excluding claims from situations of generalized, undifferentiated violence).[241] In this case, the majority on the Federal Court misconstrued the evidence of a linkage between the harm feared and the claimant's civil or political status,[242] resulting in an unfortunate application of an otherwise valid principle.

Moreover, the carefully reasoned concurring judgment of Mr. Justice MacGuigan lends support to the traditional broad view of the failure of state protection:

> . . . it seems to me to be begging the question to read into the concept of a well-founded fear of persecution that it must emanate from the state or at least involve state complicity. . . . [T]aking into account (1) the literal text of the statute, (2) the absence of any decisive Canadian precedents, and (3) the weight of international authority, the Board's interpretation of the statutory definition is the preferable one. No doubt this construction will make eligible for admission to Canada claimants from strife-torn countries whose problems arise, not from their nominal governments, but from various warring factions, but

[239] *Supra*, note 237, at 15, *per* Urie J.

[240] "The record here clearly shows that the Respondent does not allege state complicity as playing a part in his fear of seeking the protection of the police in either part of Ireland. Rather, he fears that by the very nature of the I.N.L.A. and its methods of operation, the police would be unable to afford that protection": *Supra*, note 237, at 14, *per* Urie J.

[241] *See* Section 5.6.3, *infra*.

[242] "I am unable to conceive that Parliament in adopting the definition of Convention refugee intended it to extend to persons belonging to organizations whose sole raison d'être is by force to overthrow the duly and democratically constituted authority in countries such as the United Kingdom and the Republic of Ireland where unquestionably the rule of law continues to prevail. If that is so the Respondent cannot be a refugee. Mere protestations of repentance are not enough to obviate the incidence of membership. If there is any way he can be legally admitted to this country, it is not, in my opinion, by the device of claiming refugee status": *supra*, note 237, at 20-21, *per* Urie J. This passage completely misconstrues the nature of the case, in that the basis of claim was *not* the claimant's advocacy of terrorism, but rather his explicit *rejection* of the I.N.L.A. The same error is apparent in the majority's definition of the social group to which the claimant belongs: in their view, it is the I.N.L.A. (*supra*, note 237, at 8), whereas in fact his status is more appropriately defined as membership in a class of persons who have renounced the I.N.L.A. in order to lend their support (at great personal risk) to the "democratically constituted authority".

> I cannot think that this is contrary to "Canada's international legal obligations with respect to refugees and. . . its humanitarian tradition with respect to the displaced and the persecuted."[243]

Read in conjunction with the majority decision, this clarification ensures that claims from strife-torn countries should be considered on their merits, but does not suggest admission on that ground alone.[244]

This holistic approach to state protection is mirrored in the case law of the United States,[245] which defines agents of persecution to include "forces the government cannot or will not control".[246] In international human rights fora, too, a failure of national protection has been found in circumstances where there was no evidence of active culpability. For example, the views of the United Nations Human Rights Committee in *Rubio v. Colombia*[247] held a breach of Article 6 of the ICCPR (right to life) to be established due to the state's failure to take appropriate measures to prevent the disappearance and subsequent killing of two persons, and to investigate effectively the responsibility for their murders. The European Court of Human Rights in *Plattform 'Artze Fur Das Legen' v. Austria*[248] found that freedom of peaceful assembly could not be reduced to a mere duty on the part of the state not to intervene, but rather imposed an affirmative obligation on the state to protect lawful demonstrations from those wishing to interfere with or disrupt them. And similarly, in its first judgment, the Inter-American Court of Human Rights held in *Velasquez Rodriguez v. Honduras*[249] that the decisive factor in determining whether or not a state has adequately respected human rights is whether a particular violation of human rights has occurred with the support or connivance of the public authorities, or whether their attitude has enabled the infringement to occur because of the absence of adequate preventive or punitive measures. The duty in Canadian law to assess

[243] *Supra*, note 237, at 13-15, *per* MacGuigan J.

[244] *See* Section 5.6.3, *infra*.

[245] *See in particular McMullen v. I.N.S.*, 658 F. 2d 1312 (9th Cir. 1981.). "Under the *McMullen* standard, an alien must demonstrate not only that he is subject to persecution, but that in some way his native government is responsible for or is unable to prevent the harm threatened": C. Tompkin, "A Criminal at the Gate: A Case for the Haitian Refugee" (1982), 7 Black L.J. 387, at 399. *Accord* D. Gross, *supra*, note 225, at 1139.

[246] *Id.*, at 1315.

[247] Communication 161/1983, November 2, 1987, reported at (1987), 2(3/4) Interights Bulletin 36.1.

[248] Series A, No. 139, June 21, 1988, reported at (1988), 3(2) Interights Bulletin 19.

[249] Series C, No. 4, July 29, 1988, reported at (1989), 28 I.L.M. 291. Indeed, the Court went so far as to hold the state liable to pay compensation to the victim's family: *see* (1989), 4(2) Interights Bulletin 21. This decision is consistent with positions taken earlier by the Inter-American Commission on Human Rights. In *Rubin v. Paraguay*, for example, the Commission held the government responsible because "either through inaction or ineffective actions, [it] had not been able to identify, much less punish, those responsible for the attacks and arbitrariness, thereby leaving the company in a legally defenceless position and virtually bankrupting it": Case No. 9642, March 29, 1987, reported at (1987), 2(3/4) Interights Bulletin 34.

the sufficiency of state protection on the basis of the *de facto* viability of effective recourse to national authorities, rather than looking to specific forms of active culpability, is thus fully consistent with the general international trend.

4.5.2 Regionalized Failure to Protect

A person cannot be said to be at risk of persecution if she can access effective protection in some part of her state of origin. Because refugee law is intended to meet the needs of only those who have no alternative to seeking international protection,[250] primary recourse should always be to one's own state.

The surrogate nature of international protection is clear from the text of the Convention definition itself, which limits refugee status to a person who can demonstrate inability or legitimate unwillingness "to avail himself of the protection of [the home] *state*".[251] That is, the focus of analysis is the relationship between the claimant and her national government. Where there is no *de facto* freedom from infringement of core human rights in a particular region (for example, due to the actions of an errant regional government or forces which make the exercise of national protection unviable), but the national government provides a secure alternative home to those at risk,[252] the state's duty is met and refugee status is not warranted.

The drafting history of the Convention and its companion UNHCR Statute support this interpretation by their insistence on the exclusion of internally protected persons. The French delegate, for example, expressed the view that "there was no general definition covering [internal] refugees, since any such definition would involve an infringement of national sovereignty"[253] and that "[i]t was certain that the United Nations did not intend to apply the provisions of the Convention to national refugees. . . ."[254] Mrs. Roosevelt of the United States noted:

> All credit was due to the governments which bore the heavy burdens of those moves of people unilaterally, but those problems should not be confused with the problem before the General Assembly, namely, the provision of protection for those outside their own countries, who lacked the protection of a

[250] "[R]efugees are, in essence, persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible": A. Shacknove, "Who Is a Refugee?" (1985), 95 Ethics 274, at 277.

[251] *Convention, supra,* note 16, at Art. 1(A)(2).

[252] The rhetoric of protection may not, of course, square with reality: "The public expression by a Minister of a sincere humanitarian conviction is small comfort to an individual refugee who is dodging bullets in the bush": A. Simmance, "Refugees and the Law", [1981] New Zealand L.J. 550, at 550.

[253] Statement of Mr. Rochefort of France, U.N. Doc. E/AC.7/SR.172, at 4, August 12, 1950.

[254] Statement of Mr. Rochefort of France, U.N. Doc. A/CONF.2/SR.24, at 17, July 17, 1951.

> Government and who required asylum and status in order that they might rebuild lives of self-dependence and dignity.[255]

The underlying assumption in the debate was therefore that the existence of sufficient national protection[256] was inconsistent with status as an internationally recognized refugee.

The primacy of domestic protection has been recognized in Canadian jurisprudence as well. In *Karnail Singh,*[257] the claim of a Sikh from the Punjab region of India was denied because of his admission that he could avoid police harassment by moving to a different region of the country. The Immigration Appeal Board enunciated the principle that "[i]f the applicant is able to live in security in some other area of his own country, he is not a refugee from that country."[258] In both *Jainarine Jerome Ramkissoon*[259] and *Bento Rodrigues da Silva,*[260] the Board applied the internal protection principle to situations where uncontrollable private violence was limited in scope to certain regions of the state of origin, with safety available elsewhere in the country.

The logic of the internal protection principle must, however, be recognized to flow from the absence of a need for asylum abroad. It should be restricted in its application to persons who can *genuinely access* domestic protection, and for whom the reality of protection is *meaningful.*[261] In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized.

[255] Statement of Mrs. Roosevelt of the U.S.A., 4 UNGAOR (264th plen. mtg.) at 473, December 2, 1949.

[256] Even the advocates of a more liberal refugee definition focused on the absence of *de facto* protection in the state of origin as a condition precedent to international protection. *See,* e.g., Draft Proposal for Article 1 submitted by the United Kingdom, U.N. Doc. E/AC.32/L.2, at 1, January 17, 1950.

[257] Immigration Appeal Board Decision M83-1189, C.L.I.C. Notes 62.4, November 14, 1983.

[258] *Id.*, at 3, *per* B. Howard.

[259] Immigration Appeal Board Decision T84-9057, June 21, 1984.

[260] Immigration Appeal Board Decision T86-9740, December 10, 1986.

[261] "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": UNHCR, *supra,* note 123, pp. 21-22.

5

Nexus to Civil or Political Status

Refugee law exists in order to interpose the protection of the international community in situations where resort to national protection is not possible. Because it is fundamentally a form of surrogate or substitute protection, the beneficiaries of refugee law have always been defined to exclude those who enjoy the basic entitlements of membership in a national community, and who ought reasonably to vindicate their basic human rights against their own state.[1] Refugees are unprotected persons, not just in the sense that their basic liberties or entitlements are in jeopardy, but more fundamentally because it is impossible for them to work within or even to restructure the national community of which they are nominally a part in order to exercise those human rights.[2] Their position within the home community is not just precarious; there is also an element of fundamental marginalization[3] which distinguishes them from other persons at risk of serious harm. As stated by Rogers Smith:[4]

> The refugee has been cast adrift, usually because his religion, ethnicity, economic aspirations, political beliefs or political alliances in some way stand opposed to his putative government's efforts to create and sustain a strong nation state.[5]

The early refugee accords did not articulate this notion of disfranchisement or breakdown of basic membership rights, since refugees were defined simply by specific national, political, and religious categories, including anti-Communist Russians, Turkish Armenians, Jews from Germany, and others.[6] The *de facto* uniting criterion, however, was the shared marginalization of

[1] "There must be a rupture of normalcy of relations between him and his state, which rupture must derive from events which are political in nature": B. Tsamenyi, "The 'Boat People': Are They Refugees?" (1983), 5 Human Rts. Q. 348, at 360.

[2] "The events which are the root-cause of a man's becoming a refugee derive from the relations between the State and its nationals": J. Vernant, *The Refugee in the Post-War World,* p. 5 (1953).

[3] P. Woodward, "Political Factors Contributing to the Generation of Refugees in the Horn of Africa" (1987), 9(2) Intl. Relations 111, at 112.

[4] R. Smith, "Refugees, immigrants and the claims of the nation-state", [1987] Times Literary Supplement 1422 (December 25-31, 1987).

[5] *Id.*

[6] *See* Chapter 1, *supra,* in particular at notes 18 and 21.