

REFUGEE PROTECTION FOR PEOPLE WITH MENTAL DISABILITIES  
UNDER INTERNATIONAL LAW

by

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## ABSTRACT

The major international instrument providing asylum to refugees is the 1951 *Convention relating to the Status of Refugees* and its 1967 *Protocol relating to the Status of Refugees* (collectively, the Refugee Convention). The Refugee Convention provides international protection to individuals fleeing persecution in their countries of origin. This thesis argues that the continuing cruel, degrading, discriminating, and inhumane treatment of people with mental disabilities in some countries of the world constitutes persecution under the Refugee Convention. Furthermore, this thesis argues that the language of the Refugee Convention and recent developments in case law relating to the scope of the “particular social group” category support the right of individuals with mental disabilities to seek international protection if they fear being persecuted on account of their particular mental disability. As a result, individuals who fear such treatment for reasons of their mental disability should be entitled to refugee protection.

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## CHAPTER ONE Introduction and Thesis Overview

*Most of the greatest evils that man has inflicted upon man have come through people feeling quite certain about something which, in fact, was false.*

--- Bertrand Russell

### 1.1 Introduction

Throughout history, persons with mental disabilities have been labelled, among other things, as “dangerous,” “sub-human” or “undesirable,” and subjected to intolerance, neglect, discrimination, abuse, and degrading and inhumane treatment. On July 18, 2002, the front page of the *Daily Mirror* showed a picture of a four year old girl in India tied to the wall of a village mosque by a rope around her neck. In full glare of the sun, she sat naked in the dirt and was starved of food and water.<sup>1</sup> Three days after the picture was taken, the girl died “nameless, unwanted and unloved.” The little girl’s crime was twofold: she was “mentally subnormal” and female.<sup>2</sup>

The death of this little girl is only one horrific example of the inhumane treatment that many people with mental disabilities face in many parts of the world today. In many countries, the mentally disabled are involuntarily committed and detained in psychiatric institutions and forced to live in horrible conditions. In many cases, these individuals are denied fundamental human rights such as life, liberty and security of the person. Examples of mistreatment include forced sterilization, physical and sexual abuse, malnutrition, starvation, experimentation, inhumane living conditions, drugging, seclusion, and limited contact with the outside world. The death of this unnamed girl and the deplorable living conditions that many of the world’s mentally disabled face exemplifies a betrayal of trust and loss of common decency with respect to how able-bodied people both perceive and interact with the mentally disabled. It also serves as a reminder that protecting the human rights of the mentally disabled requires more than simply access to better rehabilitation, education or transportation. In order for protection to be

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<sup>1</sup> Anton Antonowicz “Hung out to Die” *Daily Mirror* (18 July 2002) at 1, 4.

<sup>2</sup> *Ibid.* at 1.

meaningful, it must be expanded to include the most fundamental of human rights, such as, life, liberty, security of the person and freedom from degrading and inhumane treatment.<sup>3</sup>

Due to the lack of an adequate system of effective international protection, the granting of asylum has become the primary means of protecting individuals facing human rights abuses.<sup>4</sup> The major international instrument providing asylum to refugees is the 1951 *Convention relating to the Status of Refugees* and its 1967 *Protocol relating to the Status of Refugees*<sup>5</sup> (collectively, the Refugee Convention). The Refugee Convention provides protection to individuals who face persecution in their countries of origin. According to the Refugee Convention, a refugee is a person who “owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion ... is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”<sup>6</sup> In order for an applicant to be granted asylum, he or she must comply with the required elements of this definition. Of central importance is that the treatment from which the refugee applicant is seeking a safe haven amounts to persecution. In addition, the persecution itself must be objectively “well-founded” in that the individual in question is unwilling or unable to rely on the protection of his or her country of origin.

In many respects, the underlying purpose of the Refugee Convention is the international protection of human rights. In its landmark decision of *Ward v. Canada (Attorney-General)*<sup>7</sup> the Supreme Court of Canada adopted the view that the purpose of the Refugee Convention is to provide a level of surrogate or substitute human rights protection to individuals whose country of origin does not or cannot provide:

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<sup>3</sup> Richard Light, “Disability and Human Rights: The Persistent Oxymoron” in Anna Lawson and Caroline Gooding, eds. *Disability Rights in Europe: From Theory to Practice* (Oxford; Portland, Oregon: Hart Publishing, 2005) 9 at 9-10.

<sup>4</sup> Mark Gibney, “Certain Violence, Uncertain Protection” in Danièle Joley ed. *Global Changes in Asylum Regimes* (New York: Palgrave/Macmillan, 2002) 15 at 26.

<sup>5</sup> *Convention relating to the Status of Refugees*, 189 U.N.T.S. 2545, entered into force April 22, 1954 and the *Protocol relating to the Status of Refugees*, 606 U.N.T.S. 8791, entered into force October 4, 1967. [Hereinafter collectively referred to as the Refugee Convention].

<sup>6</sup> Refugee Convention, at Article 1A(2).

<sup>7</sup> *Ward v. Canada (Attorney-General)* (1993), 103 D.L.R. (4<sup>th</sup>) 1 (S.C.C.).

At the outset, it is useful to explore the rationale underlying the international refugee protection regime, for this permeates the interpretation of the various terms requiring examination. International refugee law was formulated to serve as a back-up to the protection one expects from the State of which an individual is a national. It was meant to come into play only when that protection is unavailable and then only in certain situations.<sup>8</sup>

The United Kingdom House of Lords has recently echoed the Canadian view by holding that the goal of asylum law is to restore the basic level of human rights protection that is owed to refugee claimants:

The general purpose of the convention is to enable the person who no longer has the benefit of protection against persecution for a convention reason in his own country to turn for protection to the international community.<sup>9</sup>

Based on these viewpoints, it is clear that the Refugee Convention is a curative branch of international human rights law. Its express purpose is to guarantee that individuals, whose fundamental human rights are not protected on account of one of the enumerated grounds, are entitled to seek surrogate protection in any state party to the Refugee Convention.<sup>10</sup>

Although there are no readily available statistics, it can be safely assumed that there are countless refugees and immigrants with mental disabilities living in jurisdictions outside their country of origin. Many who are faced with the possibility of removal back to their country of origin may not wish to return based on the fear that they will be “persecuted” because of their mental disability. However, a liberal reading of the Refugee Convention and recent developments in international refugee protection suggests that they may not have to.

With the concept of surrogate protection in mind, this thesis argues that the continuing cruel, degrading, discriminating, and inhumane treatment of people with mental disabilities in some countries of the world constitutes persecution under the Refugee Convention. As a result, individuals who fear such treatment for reasons of their mental disability should be entitled to refugee protection. Furthermore, this thesis argues that the language of the Refugee Convention and recent developments in case law relating to the scope of the “particular social group”

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<sup>8</sup> *Ibid.* at 12.

<sup>9</sup> *Horvath v. Secretary of State for the Home Department*, [2000] 3 All E.R. 577 (House of Lords) at 581, per Lord Hope of Craighead.

<sup>10</sup> James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005) at 5.



category support the right of individuals with mental disabilities to seek surrogate protection if they fear being persecuted on account of their particular mental disability. My focus is primarily on Canada and the United States as both jurisdictions offer a rather liberal interpretation of the Refugee Convention.

## 1.2 Thesis Overview

Chapter Two provides an historical overview of international refugee protection from ancient times to the present. This chapter discusses the movement of refugee protection from areas of religious inviolability to that of the sovereign right of nations to control entry to and exit from their territory. The evolving concept of refugeehood, as understood by the international community is examined, specifically, the shift from defining refugees in relation to specific ethnic or national origins to an individualized definition focusing on the lack of state protection that a refugee would normally expect from his or her state.

Although states party to the Refugee Convention are bound to adhere to its provisions, the international community only recognizes an individual's right to seek asylum with no accompanying duty on states to in fact grant protection.<sup>11</sup> Consequently, states still maintain their sovereign right to control entry and access to their respective territory. In addition, states are left to their own accord as to how they will implement the Refugee Convention and how to determine who deserves protection. In light of this fact, Chapter Three examines the basis behind states granting refugee protection to non-nationals. In this chapter, I discuss the major approaches that have been used to explain the refugee concept and its relationship with the international community. I will argue that the human rights approach constitutes a consistent and principled basis for granting refugee protection and best explains the willingness among states to grant asylum notwithstanding their right to control their borders.

With the human rights approach in mind, Chapter Four examines the development of the globalization of disability rights law. In this chapter I discuss the growing shift within the international community towards viewing people with mental disabilities as subjects of human

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<sup>11</sup> Article 14 of the Universal Declaration of Human Rights, adopted 10 December, 1948, U.N.G.A. Res. 217A(III), (hereinafter, UDHR) provides for "the right to seek and enjoy in other countries asylum from persecution." Although there is no duty in international law for a state to permit entry to a foreign alien, states must, at a minimum, allow the applicant to make his or her case for protection before being deported.

rights protection. In particular, I consider how the human rights model of disability is now reflected in many international declarations and instruments. I also document the United Nations' current efforts to enact a binding treaty on the rights of people with disabilities. Although the growing emphasis on the human rights of the disabled is definitely a step in the right direction, I argue that the international community must do more to protect this group. As a result, I suggest that the granting of refugee protection to people with mental disabilities who are persecuted because of their mental disability would provide an additional level of protection.

As noted above, in order to qualify for refugee protection an applicant must be unable or unwilling to return to his or her country of origin due to a "well-founded fear of being persecuted." In Chapter Five I discuss the meaning of the term "persecution." This chapter argues that a violation of a person's fundamental human rights will almost always amount to persecution. In addition, the requisite standard of proof necessary to prove that an applicant's fear is objectively "well-founded" is analysed.

With the "well-founded fear of persecution" concept in mind, Chapter Six examines the historical and continued inhumane treatment of people with mental disabilities in certain parts of the world. In this chapter I consider the plight of the mentally disabled abroad, focusing on documented incidents of abuse, mistreatment and neglect that were the result of either active government participation or failure on the part of the government to offer sufficient protection. I will argue that the continued mistreatment, neglect, abuse and discrimination faced by many people with mental disabilities constitutes persecution as contemplated under the Refugee Convention and as established in recent case law.

Although the mentally disabled are subjected, in many cases, to acts that amount to persecution, in order for them to be granted protection under the Refugee Convention the persecution itself must be linked to one of the five enumerated grounds. In Chapter Seven I give an overview of these grounds. The terms, "race," "nationality," "religion," and "political opinion," are briefly dealt with, whereas "membership of a particular social group" is examined in greater detail. Based on scholarly and judicial interpretations, I will argue that people with mental disabilities constitute a "particular social group," thus, making them eligible for refugee protection.

Chapter Eight ends the study by concluding that since people with mental disabilities constitute a “social group,” those who have a “well-founded fear of persecution” on account of their mental disability should qualify for refugee status. In addition, I address the concerns of those in opposition to the granting of refugee protection to the mentally disabled. I argue that the numerous elements that an applicant must establish in order to be granted refugee status prevents the granting of protection to those who do not genuinely face a “well-founded fear of persecution.”

## CHAPTER TWO      Historical Background

### 2.1 Ancient Times

Throughout history, individuals have searched for refuge and the custom of granting asylum, in a formal sense, can be traced back to antiquity. In ancient times, holy places, by virtue of their divine nature, were regarded as inviolable by those seeking safety and protection.<sup>12</sup> In Ancient Greece, many temples offered asylum to those ‘on the run,’ granting protection not only to the innocent victims of persecution, but also to fugitives from the law. The majority of Greek city-states had patron gods and the temple devoted to the patron god was generally recognized as a place of asylum. In addition, many Greek temples offered protection to foreign nationals fleeing from justice in their homeland.<sup>13</sup>

According to Ancient Greek culture and religion, the gods owned everything inside sacred temples. Since the gods’ possessions were of a divine nature and taboo for mere mortals, sanctuaries held the status of inviolability. This concept was commonly referred to as *asylon hieron*.<sup>14</sup> If a troubled person entered a holy temple, he or she was protected by *asylia*. Those who took refuge in temples and other holy sites were regarded as suppliants under divine protection.<sup>15</sup> An individual who entered a temple crossed over the boundary of the divined, placing himself at the judgment of the patron god rather than the laws of the city-state.<sup>16</sup> Although fugitives could not be forcibly removed, many were often starved into surrender.<sup>17</sup> The protection afforded by temples was not, however, granted as of right. Those who sought refuge were generally required to provide proof as to their innocence or justifiable need for protection. Simply entering a temple and supplicating oneself to the altar or high priest was not

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<sup>12</sup> S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971) at 5.

<sup>13</sup> *Ibid.* at 9.

<sup>14</sup> Ulrich Sinn, “Greek Sanctuaries as Places of Refuge” in Nanno Marinatos and Robin Hagg, eds., *Greek Sanctuaries: New Approaches* (New York: Routledge, 1993) at 90.

<sup>15</sup> Norman McLaren Trenholme, *The Right of Sanctuary in England* (Columbia: University of Missouri, 1903) at 4.

<sup>16</sup> Kent J. Rigsby, *Asylia: Territorial Inviolability in the Hellenistic World* (Los Angeles: University of California Press, 1996) at 2.

<sup>17</sup> Trenholme, *supra* note 15 at 4.

enough. The one supplicated to was free to choose whether or not to grant protection. At the end of the day, the asylum seeker's claim had to be just.<sup>18</sup>

Because of the sacrilegious nature of violating the safe-haven of the temples and the fear of retribution from the gods above, asylum in Ancient Greece became more of an abuse than a protective benefit. Asylum claims became so frequent that they obstructed the proper course of justice, as the protection afforded to some of the worst criminals encouraged crime and lawlessness.<sup>19</sup>

The Roman conquest of the Ancient Greek Empire brought about a significant change in the protection afforded to criminals. The Romans feared that the Greek concept of asylum would interfere with civic tranquility,<sup>20</sup> and efforts were introduced by the Emperor Tiberius to suppress many facets of the Greek system.<sup>21</sup> The Romans introduced a more regulated system of protection which did away with many of the Greek abuses. The practice of seeking refuge in temples and other holy sites soon diminished as Roman law paid little attention to religious sentiment when it came to punishing convicted criminals. The right of asylum for wrongdoers was strictly limited to temporary protection until a formal inquisition or trial took place, thus saving him immediate punishment or vengeance.<sup>22</sup> To the Romans, asylum was first and foremost for the protection of the misguided and unfortunate victims of violence. Overall, the Roman concept of asylum was more in line with the Roman idea of the state and its laws and customs.<sup>23</sup>

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<sup>18</sup> Rigsby, *supra* note 16 at 10. See also Matthew Eben Price, *A Political Conception of Asylum* (Ph. D. Thesis, Harvard University, 2005) [unpublished] at 44.

<sup>19</sup> Trenholme, *supra* note 15 at 5. See also Price, *supra* note 18 at 45.

<sup>20</sup> Rigsby, *supra* note 16 at 2.

<sup>21</sup> Trenholme, *supra* note 15 at 5.

<sup>22</sup> *Ibid.* at 6-7.

<sup>23</sup> *Ibid.* at 6-7.

## 2.2 Pre-Modern Era

With the rise of nation-states and the move towards viewing man as the center of all things, religious asylum was viewed as “antithetical to the idea of sovereignty and, therefore, would not continue to subsist.”<sup>24</sup> Thus, the basis of asylum shifted from areas of religious inviolability to that of the sovereign right of nations to control their borders.

The first true refugees were the French Huguenots who fled France in 1685, after King Louis XIV repealed the Edict of Nantes, a proclamation that had tolerated religious minorities in France. In response, Friederich Wilhelm, Marquis of Brandenburg, issued his Edict of Potsdam which allowed the French Huguenots to establish themselves in his territory.<sup>25</sup> Soon after, the Huguenots were allowed to establish themselves in other non-Catholic parts of Europe. In 1708, the English Parliament passed an Act similar to the Edict of Potsdam whereby refugees were invited to establish themselves in England.<sup>26</sup> The French Revolution ushered in a new era for asylum protection. No longer was Europe primarily divided along Catholic and Protestant religious lines. A new division between monarchies and republics emerged setting the stage for a new era of international politics. This era saw an increase in the development of international extradition treaties and a nation’s right to control its borders, granting access to whomever it wanted and refusing to give up an asylum seeker to the suppliant’s country of origin.<sup>27</sup> During its revolutionary period, France argued that states were under an international duty to extend protection to the oppressed, especially those fighting to protect liberal ideals.<sup>28</sup>

Although extradition of wanted criminals was no longer objected to by the beginning of the 19<sup>th</sup> century, the violation of those seeking political asylum was begrudged by many states as

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<sup>24</sup> Sinha, *supra* note 12 at 15.

<sup>25</sup> Laura Barnett, “Global Governance and the Evolution of the International Refugee Regime” (2002) 14 Int’l J. Refugee L. 238 at 239.

<sup>26</sup> Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol. II (Leyden: A.W. Sijthoff, 1977) at 8.

<sup>27</sup> *Ibid.* at 8-10.

<sup>28</sup> Sinha, *supra* note 12 at 19.

“an affront to the dictates of humanity.”<sup>29</sup> In 1833, a general international rule that extraditions should not apply to political offenders came to fruition in the Belgium Law on Extradition. This law restricted the right to extradite individuals wanted by other governments by setting out conditions on which extradition treaties could be concluded and individual extraditions granted.<sup>30</sup> The Belgium Law rules were later incorporated in the 1834 extradition treaty signed between France and Belgium. In 1848, Switzerland followed the Belgium lead by incorporating the non-extradition of political offenders principle into its federal law, with the Netherlands following suite in 1849.<sup>31</sup> Soon, even non-liberal states felt an obligation to respect the growing international norm of granting political asylum.<sup>32</sup>

### 2.3 Post-World War I Period

The post – World War I era, saw the birth of the modern day approach to refugee protection. At its core, the development of refugee protection, as we know it today, was the by-product of European political culture. The first truly international standards for dealing with refugees were devised by European states dealing with growing refugee flows in the aftermath of World War I.<sup>33</sup> In the aftermath of the Great War, Europe set its eyes on establishing a set of normative rules to deal with the massive population displacements of the post-war era. Russians comprised the largest group of post-war refugees, primarily stemming from the events of the 1917 Russian Revolution and the civil war that followed. The vast number of political refugees who crossed over into adjacent states raised concerns for immediate relief and the issue of their legal status in international law.<sup>34</sup> Another sizable group was the over 300,000 Armenian refugees who were forced to flee from Turkey.<sup>35</sup>

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<sup>29</sup> *Ibid.*

<sup>30</sup> Grahl-Madsen, *supra* note 26 at 10.

<sup>31</sup> *Ibid.*

<sup>32</sup> Sinha, *supra* note 12 at 20.

<sup>33</sup> James C. Hathaway, “A Reconsideration of the Underlying Premise of Refugee Law” (1990) 31 Harv. Int’l L. J. 129 at 134.

<sup>34</sup> Louise W. Holborn, “The Legal Status of Political Refugees, 1920 – 1938” (1938) 32 A.J.I.L. 680 at 681.

<sup>35</sup> Hathaway, *supra* note 33 at 136.

By virtue of Article 25 of the League of Nations Covenant, the member states had agreed to work with international Red Cross organizations to improve health and alleviate suffering throughout the world.<sup>36</sup> In a letter dated February 20, 1921, the President of the International Committee of the Red Cross, Gustav Ador, petitioned the Council of the League of Nations to take an active leadership role in assisting the post-WWI refugees. In Ador's opinion, the League of Nations was well suited to solve the refugee problem which was well "beyond the power of exclusively humanitarian organizations."<sup>37</sup> In addition, the President recommended that a Commissioner for the Russian refugees be appointed.<sup>38</sup> The Czechoslovakian Government responded by recommending that the best solution for all involved would be to appoint a High Commissioner, furnished with the necessary powers to define the legal status of refugees, and to assist in the relief effort.<sup>39</sup>

The Council of the League of Nations met on June 27, 1921 and made the determination to follow up on Ador's recommendation and appoint a High Commissioner for Russian Refugees. Within two months time, Dr. Fridjof Nansen accepted the position.<sup>40</sup> Chief among Dr. Nansen's tasks were to coordinate the relief effort for the refugees and to secure a definition of the legal status of the refugees.<sup>41</sup>

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<sup>36</sup> Atle Grahl-Madsen, "The League of Nations and the Refugees" in Peter Macalister-Smith and Gudmundur Alfredsson, eds., *The Land Beyond: Collected Essays on Refugee Law and Policy by Atle Grahl-Madsen* (The Hague: Martinus Nijhoff Publishers, 2001) 126 at 127.

<sup>37</sup> Letter from the President of the Comite International de la Croix-Rouge, League of Nations O.J. March/April 1921, at 227.

<sup>38</sup> *Ibid.*

<sup>39</sup> League of Nations O. J. July/August, 1921, at 487. See also Holborn, *supra* note 34 at 682.

<sup>40</sup> Grahl-Madsen, *supra* note 36 at 127. Nansen would serve as High Commissioner for 9 years, until his death in 1930. There is no doubt that Nansen was a highly respected statesman, contributing much of his time and energy to numerous humanitarian causes. As Atle Grahl-Madsen noted: "By selecting Nansen for the post of High Commissionere for Russian Refugees, the League of Nations was assured of the highest degree of integrity, impartiality, initiative, and deep humanitarian concern in its refugee operation. All around, the humanitarian and non-political character of the High Commissioner's efforts was recognized": *Ibid.*

<sup>41</sup> Holborn, *supra* note 34 at 683.



Since most of the refugees lacked any identity papers, the most pressing concern for Dr. Nansen was to develop an appropriate means of issuing identity papers to the Russian refugees in order to assist their travel through host nations. In July 1922, an International Intergovernmental Conference was held, whereby a system for issuing identity papers to Russian refugees was established. These documents were similar to national passports and were commonly referred to as "Nansen Passports."<sup>42</sup>

By 1924, Dr. Nansen reported to the Council of the League of Nations that over 300,000 Armenians were in a similar position as that of the Russian refugees and were in need of identification certificates. The League of Nations responded by adopting an Arrangement on May 31, 1924, providing for the extension of the Nansen Passport system to the Armenian refugees.<sup>43</sup> Both the 1922 Russian Arrangement and the 1924 Armenian Arrangement were supplemented and amended by another Arrangement adopted on May, 12, 1926. The importance of this amendment is that it provided a new definition as to who fell within the boundaries of the Nansen Passport system. The definitions were as follows:

*Russian:* Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality.

*Armenian:* Any person of Armenian origin formerly a subject of the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality.<sup>44</sup>

The Russian Arrangement was acceded to by 53 governments and the Armenian Arrangement acceded to by 39 governments.<sup>45</sup> As can be seen, the central theme of both definitions is the lack of genuine "state protection" from the refugee's country of origin. In addition, the lack of another nationality emphasizes the fact that the refugee in question lacks any additional form of

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<sup>42</sup> *Ibid.* at 684. Nansen had originally set forth a proposal regarding the issuance of identity papers to the Council of the League of Nations on March 17, 1922. See *Arrangement with respect to the issue of certificates of identity to Russian Refugees*, signed at Geneva, July 5, 1922, 355 L.N.T.S. 238.

<sup>43</sup> *Ibid.* at 684.

<sup>44</sup> *Arrangements relating to the Issue of Identity Certificates to Russian and Armenian Refugees, supplementing and amending the previous Arrangements dated July 5, 1922, and May 31, 1924*, signed at Geneva, May 12, 1926, 2004 L.N.T.S. 48 at 49.

<sup>45</sup> Grahl-Madsen, *supra* note 36 at 129.

international protection.<sup>46</sup> In 1928, the identification system was extended once again to other refugees, specifically, Assyrian, Assyro-Chaldaean and assimilated refugees and Turkish refugees.<sup>47</sup>

Overall, the Nansen passports played an important role in protecting refugees as they enabled them to travel to different countries in hopes of finding employment or joining friends or relatives who were willing to assist them.<sup>48</sup> The passport system also allowed governments to keep track of the number of refugees seeking refuge in their territory. After Nansen's death in 1930, a new office was created to continue his work and vision. The Nansen International Office of Refugees began its humanitarian work in April, 1931. This office was instrumental in introducing a more formal convention regarding the legal status of refugees in 1933.<sup>49</sup>

## 2.4 The 1933 Convention

With the growing world-wide economic depression, the expulsion by certain governments of refugees with expired identification certificates, and the lack of uniformity in the international treatment of refugees, the quest began for a more binding instrument for the protection of refugees.<sup>50</sup> In recognition of the necessity of instituting a more permanent system of refugee protection in the international arena, the 12<sup>th</sup> Assembly of the League of Nations began discussions regarding the adoption of a formal refugee convention. The difference between the adoption of a convention, as opposed to another Arrangement, was that a convention would have a binding effect on all signatory states.<sup>51</sup> The newly established International Office for

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<sup>46</sup> James C. Hathaway, "The Evolution of Refugee Status in International Law: 1920 – 1950" (1984) 33 I.C.L.Q. 348 at 353.

<sup>47</sup> *Arrangement concerning the Extension to other Categories of Refugees of certain Measures taken in favour of Russian and Armenian Refugees*, signed at Geneva, June 30, 1928 (2006 L.N.T.S. 65). Thirteen governments acceded to the Assyrian Arrangement, see Louise W. Holborn, *Refugees: A Problem of our Time* (Metuchen, N.J.: The Scarecrow Press, Inc, 1975) at 9.

<sup>48</sup> Holborn, *supra* note 34 at 684.

<sup>49</sup> Grahl-Madsen, *supra* note 36 at 131.

<sup>50</sup> Holborn, *supra* note 34 at 689.

<sup>51</sup> Hathaway, *supra* note 46 at 357.

Refugees recommended that the definitions used in the Arrangements of 1926 and 1928 be incorporated in the new convention.<sup>52</sup> On October 28, 1933, the Convention Relating to the International Status of Refugees was signed at Geneva.<sup>53</sup> The 1933 Convention improved upon Nansen's achievements, in particular, the continued issuance of identity certificates.<sup>54</sup> The Convention also allowed for the re-entry to the state issuing the certificate,<sup>55</sup> secured free and ready access to courts of law,<sup>56</sup> provided favourable treatment in respect of welfare and relief, including medical treatment,<sup>57</sup> and created refugee committees.<sup>58</sup> However, the cornerstone of the Convention was the introduction of the *non-refoulement* principle in binding form. Article 3, in part, stated the following:

Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order.

The 1933 Convention was ratified by eight governments and eventually served as a model for the Refugee Convention that followed.

## 2.5 German Refugees

In Germany, the rise of Hitler and Nazism created another refugee problem. As a result of the 1935 Saar plebiscite, thousands of Germans fled the territory before it was annexed by the German Government. Many of the German refugees who fled Germany after Hitler came to power were primarily political refugees and persons of the Jewish race. Up to the beginning of

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Convention Relating to the International Status of Refugees*, signed at Geneva, October 28, 1933, 3663 L.N.T.S. 201. [Hereinafter, 1933 Convention].

<sup>54</sup> *Ibid.* at Article 2.

<sup>55</sup> *Ibid.* at Article 2.

<sup>56</sup> *Ibid.* at Article 6.

<sup>57</sup> *Ibid.* at Article 9.

<sup>58</sup> *Ibid.* at Article 15. See also Gilbert Jaeger, "On the History of the International Protection of Refugees" (2001) 83 Int'l Rev. Red Cross 727 at 730.

WWII, over a quarter of a million people left Germany seeking protection in other countries.<sup>59</sup> The German refugees, because of their particular circumstance, were not eligible for Nansen passports, nor could they be given identity papers similar to those given to persons with no or doubtful nationality. Many German nationals, therefore, were in the precarious position of trying to travel without identification papers and facing the risk of being sent back to Germany.<sup>60</sup> Understanding that a new approach was necessary, an intergovernmental conference was held regarding the movement of German refugees throughout Europe.

The first Arrangement dealing specifically with the German refugees was signed on July 4, 1936.<sup>61</sup> This allowed for the issuance of identification certificates similar to the original Nansen passports. Although this Arrangement did have some positive elements, it was understood by member states that more had to be done. After holding another conference regarding this matter in 1937, the Council of the League of Nations adopted a Convention relating specifically to the German refugees. On February 10, 1938, the Convention concerning the Status of Refugees coming from Germany, was signed at Geneva.<sup>62</sup> The 1938 Convention was very much a mirror image of the 1933 Convention.

As can be seen from the review above, the major focus of the post-WWI era was conceptualizing the legal status of refugees and defining the limits of protection. Although there were many positive elements with respect to the group specific Arrangements, there were some major drawbacks. For example, a major shortcoming of the Arrangements adopted by the League of Nations was the lack of universality in their acceptance and lack of uniformity in their application. The more comprehensive and binding the international agreement was, the fewer the number of governments willing to ratify it. For example, although fifty-six governments eventually agreed to recognize the Arrangement relating to Russian certificates, only eight governments ratified the more binding 1933 Convention, and only three ratified the

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<sup>59</sup> Holborn, *supra* note 47 at 13.

<sup>60</sup> Holborn, *supra* note 34 at 692.

<sup>61</sup> *Provisional Arrangement concerning the Status of Refugees coming from Germany*, signed at Geneva, July 4<sup>th</sup>, 1936, 3952 L.N.T.S. 77.

<sup>62</sup> *Convention concerning the Status of Refugees coming from Germany*, signed at Geneva, February 10, 1938, 4461, L.N.T.S. 61. [Hereinafter, 1938 Convention].

1938 Convention. In addition, many ratifications were made subject to reservations.<sup>63</sup> Overall, however, the efforts of visionaries, such as Dr. Nansen, helped pave the way for the coming of the 1951 Convention. The Arrangements, although not as binding on the international community as some would have hoped for, were able to focus international attention on finding specific solutions to the problems facing refugees and clearly established important legal precedents for future agreements, such as, the Refugee Convention.<sup>64</sup>

## 2.6 Post-World War II Era

After the creation of the United Nations in 1945, the need to address the serious nature of the refugee problem in Europe became a top priority. As the plight of the refugees in Europe worsened, the United Nations took the initiative to create a central agency to oversee the maintenance of refugees. The United Nations Economic and Social Council was charged with the task of finding an appropriate solution. In 1946, it recommended to the UN General Assembly that it create a new agency, the International Refugee Organization (IRO). In 1947, the IRO was formally established and it officially took over the responsibility of refugees in 1947 after the dissolution of the United Nations Relief and Rehabilitation Administration.<sup>65</sup> Drawing upon the earlier refugee conventions, the IRO's refugee definition introduced the "fear of persecution" element into its refugee analysis. The definition also included individuals who were unwilling or unable to avail themselves of the protection of their home state.<sup>66</sup>

The post WWII era also saw the need for a major overhaul of the refugee concept in international law. In response to this, the United Nations High Commissioner for Refugees (UNHCR) was established on January 1, 1951 and it succeeded the IRO as the principal United

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<sup>63</sup> Holborn, *supra* note 47 at 16.

<sup>64</sup> *Ibid.* at 17.

<sup>65</sup> In November, 1943, the United Nations Relief and Rehabilitation Administration (UNRRA) was established as a temporary administrative organ for the return of prisoners, and for the repatriation of exiles and displaced people in Europe. By July, 1947, UNRRA had assisted in the return of some 7 million displaced individuals to their homelands. However, there still remained over 2 million refugees who could not be repatriated and UNRRA was not in the position to assist these people because its mandate was primarily focused on repatriation. See Holborn, *supra* note 47 at 25.

<sup>66</sup> Roz Germov and Francesco Motta, *Refugee Law in Australia* (New York: Oxford University Press, 2003) at 9.

Nations organ for refugee protection.<sup>67</sup> The UNHCR's chief mandate was, and still is, to find permanent solutions for the worlds' refugees.<sup>68</sup>

Drawing upon the previous refugee definitions, the UNHCR Statute defined refugees as follows:

Any other person who is outside the country of his nationality or if he has no nationality, the country of his former habitual residence, because he has or had a well founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.<sup>69</sup>

In addition to creating a central administrative arm for refugee protection, there was also a growing desire for establishing a universal refugee definition. On March 2, 1948, the Economic and Social Council requested the United Nations Secretary General to oversee a study of the post-WWII refugee problem and to recommend protective measures which the United Nations could initiate. In response to the study, the Economic and Social Council appointed an *ad hoc* Committee on August 8, 1949. Chief among its objectives was the preparation of a consolidated convention relating to the international protection of refugees.<sup>70</sup> The *Ad Hoc* Committee on Refugees and Stateless Persons, consisting of 13 states, held its first session in New York from January 16 to February 16, 1950. Chief among its achievements, the Committee produced a draft Convention relating to the Status of Refugees. The goal of this draft Convention was to provide a uniform definition for the legal status of refugees that would supersede the previous international Conventions on the subject.<sup>71</sup> On December 14, 1950, following the third review of the draft Convention, the General Assembly adopted Resolution 429(V) calling for a Conference of Plenipotentiaries to be convened and finalize the draft

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<sup>67</sup> The IRO was officially dissolved in 1952.

<sup>68</sup> Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996) at 7.

<sup>69</sup> Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res. A/RES/428, at Chapter 2, Article 6(a).

<sup>70</sup> Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (New York: Institute of Jewish Affairs, World Jewish Congress, 1953) at 4.

<sup>71</sup> Germov and Motta, *supra* note 66 at 13.

Convention.<sup>72</sup> From July 2- 25, 1951, the Conference of Plenipotentiaries, consisting of representatives from 27 states, met in Geneva. The final draft was eventually signed on July 28, 1951.<sup>73</sup> The states adopted the newly drafted Refugee Convention by a vote of twenty-four to zero.<sup>74</sup>

The framers analysed and amended each section of the draft Convention, putting forward their own views and recommendations regarding the Refugee Convention's articles.<sup>75</sup> A major concern among many states was the acceptance of too vague of a definition that would amount to the adoption of a 'blank cheque.'<sup>76</sup> In order to alleviate this concern, the representatives decided to include a temporal and geographic limitation restricting the use of the definition to events occurring in Europe before January 1, 1951.<sup>77</sup> Despite the numerous debates and difficulties that arose during the final drafting period, the Plenipotentiaries were able to produce a comprehensive and legally binding text on the international protection of refugees. Article 1A of the newly adopted Refugee Convention defined a refugee as follows:

A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

- (1) Has been considered a refugee under the Arrangements of 21 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization.

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfill the conditions of paragraph 2 of this section.

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<sup>72</sup> *Ibid.* at 14.

<sup>73</sup> Refugee Convention, *supra* note 5.

<sup>74</sup> Robinson, *supra* note 70 at 5.

<sup>75</sup> For a detailed discussion of the recommendations see Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary* (Cambridge: Cambridge University Press, 1995).

<sup>76</sup> Kazimierz Bem, "The Coming of a 'Blank Cheque' – Europe, the 1951 Convention, and the 1967 Protocol" (2004) 16 Int'l J. Refugee L. 609 at 610- 612.

<sup>77</sup> The restriction of the definition to events occurring before January 1, 1951, was introduced in order to alleviate the fear that some states had about signing a "blank check" regarding their obligations towards future refugees. See Paul Weis, "Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees" (1953) 30 Brit. Y. B. Int'l L. 478 at 479.

- (2) As a result of events occurring before 1 January 1951 and owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
- B. (1) For the purposes of this Convention, the words 'events occurring before 1 January 1951' in Article 1 section A, shall be understood to mean either:  
 (a) 'events in Europe before 1 January 1951', or  
 (b) 'events occurring in Europe or elsewhere before 1 January 1951' and each Contracting State shall make a declaration at the time of signature, ratification, or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

As time passed, new refugee crises arose that did not have a connection to events occurring in Europe before 1951. In light of this fact, the UNHCR campaigned for the removal of the temporal and geographical limitations of the Refugee Convention. In 1967, the Protocol Relating to the Status of Refugees was formally signed and entered into force.<sup>78</sup> Article 1(2) of the 1967 Protocol provides the following:

- (2) For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in article 1 A (2) were omitted.

It should be noted, however, that states party to the 1951 Refugee Convention are under no obligation to sign and ratify the 1967 Protocol. States have the option of signing and ratifying the 1951 Refugee Convention only, or the 1967 Protocol only, or both.<sup>79</sup> Therefore, with the adoption of the 1967 Protocol, Article 1A(2) of the Refugee Convention, for all intents and purposes, and for the purposes of this thesis, defines a refugee as a person who:

owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

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<sup>78</sup> *Supra* note 5.

<sup>79</sup> The United States, for example is only party to the 1967 Protocol.



It must be noted however, that even though an individual may fall within the above mentioned definition, he or she may still be excluded if certain conditions apply. Article 1F of the Refugee Convention lists a number of serious crimes that, if committed, will keep an individual from being granted refugee protection. This article applies to individuals who have done the following:

- (a) committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) committed a serious non-political crime outside the country of refuge prior to their admission to that country as a refugee;
- (c) been guilty of acts contrary to the purposes and principles of the United Nations.

Overall, the Refugee Convention has established an international standard for refugee protection as it remains the most comprehensive international treaty for the protection of vulnerable groups facing persecution. However, although states party to the Refugee Convention are bound to adhere to its provisions, states still maintain their sovereign right to control entry and access to their respective territory. States are left to their own accord as to how they will implement the Refugee Convention and how to determine who deserves protection. Furthermore, the international community only recognizes an individual's right to seek asylum with no accompanying duty on states to in fact grant protection.<sup>80</sup> In light of this fact, what is basis for a state to grant refugee protection to a non-national? The next chapter will analyse this question.

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<sup>80</sup> UDHR at Article 14, *supra* note 11.

### CHAPTER THREE Basis for Granting Refugee Protection

Since states are not obligated to allow entry or stay to aliens seeking refuge in their territory, what explains the fact that thousands of refugees are granted asylum each year? What compels states, such as Canada and the United States, to grant asylum to refugees even though they are generally committed to policies that restrict immigration? Over the years, scholars have contemplated these issues and have fashioned different approaches regarding the rationale behind the granting of asylum. The following chapter examines some of the major approaches. I will discuss which approach best explains why states grant refugee protection and which one offers the greatest protection for asylum seekers within the international community.

#### 3.1 Diplomatic Protection

Paul Weis, a noted scholar of refugee law, has argued that refugees are granted protection because they lack diplomatic protection. According to this theory, refugees are unprotected because they lack the benefit of diplomatic protection since they are persecuted by their country of origin. The absence of this form of protection is the essential element for refugee status.<sup>81</sup> Weis separates these “unprotected refugees” into two categories: 1) *de jure* stateless persons (i.e. no nationality); and 2) *de facto* stateless persons (i.e. individuals who are not stateless, but still lack any state protection).<sup>82</sup>

With this framework in mind, Weis argues that the purpose of refugee law is to solve the problem of the lack of diplomatic protection due to state persecution. In other words, an individual lacks diplomatic protection because he or she lacks a nationality and nationality is necessary in order to exercise diplomatic protection.<sup>83</sup> In light of the fact that refugee claimants lack any form of diplomatic protection, they cannot live in foreign jurisdictions as ordinary

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<sup>81</sup> Weis, *supra* note 77 at 480. According to Weis, “two conditions are essential for the quality of refugee: residence outside the country of nationality or former nationality and lack of diplomatic protection by any State”: *ibid*.

<sup>82</sup> Paul Weis, “The International Status of Refugees and Stateless Persons” (1956) 83 J.D.I. 4 at 6.

<sup>83</sup> Weis, *supra* note 77 at 480. See also Niraj Nathwani, *Rethinking Refugee Law* (New York: Martinus Nijhoff Publishers, 2003) at 8.

aliens. As a result, the need for surrogate protection is serious enough to justify the granting of asylum.<sup>84</sup>

In light of today's refugee reality, Weis's theory does not sufficiently explain the rationale behind the granting of refugee status. As some have argued, his theory is somewhat dated.<sup>85</sup> This is primarily due to the rising importance of human rights protection. At the time that Weis formulated his theory on the granting of refugee status (1950s and 1960s), the international community lacked an effective system for the protection of human rights. Therefore, it can be argued that diplomatic protection for nationals residing outside their country of origin was primarily the only form of international protection to rely on.<sup>86</sup> Since the formulation of Weis's theory, however, a number of human rights instruments have been adopted which has dramatically changed the shape of the international community.<sup>87</sup> In addition, diplomatic protection, in today's world, does not really amount to much. As Niraj Nathwani has noted:

"Refugees might typically lack diplomatic protection. However, it must be pointed out that this sort of protection is in any case, very inefficient and reserved only for a privileged few. The lack of diplomatic protection, thus, does not distinguish a refugee from other migrants adequately enough to justify refugee law."<sup>88</sup>

As stated above, Weis argues that refugee status is an appropriate substitute for the lack of diplomatic protection a refugee receives from his or her country of origin. However, since diplomatic protection can only be granted by the refugee's country of origin, the diplomatic protection theory leads to a narrowing of the concept behind state responsibility in relation to persecution. Thus, an underlying premise of this theory is that only persecution by the state would qualify, since only this category of persecution could lead to a lack of diplomatic protection. However, this does not adequately represent the current refugee situation. As high

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<sup>84</sup> Paul Weis, "The Concept of the Refugee in International Law" (1960) 87 J.D.I. 928 at 974.

<sup>85</sup> See for example, Nathwani, *supra* note 83 at 11.

<sup>86</sup> *Ibid.* at 10.

<sup>87</sup> See for example, the UDHR, *supra* note 11, the International Covenant on Civil and Political Rights, U.N.G.A. Res. 2200 (XXI), December 19, 1966, entered into force March 23, 1976 (hereinafter "ICCPR"), and the International Covenant on Economic, Social, and Cultural Rights, U.N.G.A. Res. 2200 (XXI), December 19, 1966, entered into force January 3, 1976 (hereinafter "ICESCR").

<sup>88</sup> Nathwani, *supra* note 83 at 10.

level courts have stated, the State is no longer to be viewed as the sole proprietor of persecution.<sup>89</sup> Overall, Weis's theory is not the best explanation as to why, in today's international reality, states grant refugee status in light of the international norm of restrictive migration policies.

### 3.2 Atle Grahl-Madsen – *De Facto* Statelessness

Atle Grahl-Madsen's conception of refugee focuses primarily on an international political refugee perspective.<sup>90</sup> In the course of his analysis, Grahl-Madsen draws a distinction between "international political refugees" and other classes of aliens such as ordinary migrants, fugitives of justice and stateless persons.<sup>91</sup> He characterizes a refugee as an individual whose ties with his or her country of origin have been severed. The essential characteristic is that "the normal bond of trust, loyalty, protection, and assistance between an individual and the government of his home country has been broken."<sup>92</sup> In addition, the refugee's relationship with the said state is characterized by the fact that trust has been replaced with fear and loyalty with hatred.<sup>93</sup>

With the severance of these special ties, refugees are essentially stateless persons. This "statelessness," according to Grahl-Madsen, is the key to understanding refugee law. The refugee, however, is not "stateless" because the country of origin no longer exists, but rather, a

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<sup>89</sup> See for example *Ward*, *supra* note 7 and *R. v. Immigration Appeal Tribunal and another, ex parte Shah; Islam and others v. Secretary for the Home Department* [1999] 2 All ER 545 (H.L.). [Hereinafter *Shah and Islam*]. This is not to suggest that the state has only been the sole proprietor of persecution up to this point in time. Rather, it is simply a reference to the fact that courts have now clearly stated that persecution may stem from the actions of non-state actors – a reality that has always existed but only recently acknowledge by high levels of court. See Nathwani, *supra* note 83 at 16.

<sup>90</sup> This focus is not surprising considering the fact that Grahl-Madsen's theory was developed during the Cold War period. The issues of refugees and the granting of asylum were generally viewed as the result of the East-West standoff. Refugees enjoyed strategic importance in the foreign policy considerations of the industrialized western states.

<sup>91</sup> Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol. 1 (Leyden: A.W. Sijthoff, 1966) at 73.

<sup>92</sup> *Ibid.* at 79.

<sup>93</sup> *Ibid.* at 78.

refugee is “stateless” due to the fact that she cannot benefit from her nationality abroad. Asylum, therefore, is granted based on the premise that the individual in question has no state whether *de jure* or *de facto*. As a result, a refugee cannot rely on the state for protection since his or her relationship with the state has already been severed.

Under the theory of *de facto* statelessness, the granting of refugee status is an effective substitute for the lack of the benefits of nationality the refugee claimant once had. However, like the diplomatic theory outlined above, this theory also leads to a narrowing of state responsibility in relation to persecution. Again, the overriding presumption is that only persecution by the country of origin would qualify since only such persecution would lead to the lack of benefits of nationality abroad.<sup>94</sup> Another problem with Grahl-Madsen’s theory is that he operates from the premise that if the refugee’s country of origin still provides some benefit to the individual in question, then the bonds have not been broken and thus there is no need for protection. In other words, the focus is on whether the refugee is *de facto* stateless, if there is any link that still connects the refugee to his home country in a beneficial manner, then he is not a person who deserves refugee protection.

In light of this fact, it can be argued that Grahl-Madsen’s emphasis on the severance of ties with the country of origin is not as relevant to the definition of refugeehood as it may have once been. With the changing landscape of the post-Cold War era, this theory is also dated. Although this theory still offers a rational way of approaching the issue of refugeehood, the theory is no longer in line with the landscape of the international community. A refugee’s objective is to find a safe haven, not necessarily to search for a state because one is no longer available. The end of the Cold War and the growing tide of Third World refugees have shifted the focus to a human rights/humanitarian analysis of refugeehood.

### 3.3 Human Rights Approach

The preamble to the Refugee Convention invokes the UDHR<sup>95</sup> as a means by which states “have affirmed the principle that human beings shall enjoy fundamental rights and freedoms

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<sup>94</sup> However, as noted above, the State is no longer the sole proponent of persecution. See note 9 above.

<sup>95</sup> UDHR, *supra* note 11.

without discrimination.” The human rights approach, therefore, is concerned with protecting vulnerable people who have no choice but to leave their country of origin. The central premise here is that a form of humane protection can reasonably be accommodated within the framework of the Refugee Convention. As one author has noted: “[c]ontemporary refugee law ... is primarily human rights law.”<sup>96</sup>

One of the leading scholars in this field of refugee law is James C. Hathaway. In *The Law of Refugee Status*,<sup>97</sup> Hathaway seeks a new understanding of refugee law, in particular, the meaning of the term “persecution.” One of Hathaway’s goals is to introduce a concept of humane protection that can reasonably be accommodated within the refugee determination process. He states the following at page 108: “refugee law ought to concern itself with actions which deny human dignity in any key way, and ... the sustained or systemic denial of core human rights is the appropriate standard.”<sup>98</sup> Hathaway notes that extending the Refugee Convention to include everyone in danger of being harmed, no matter the source of persecution, would undoubtedly be a position that the western industrialized nations would be unwilling to accept. In other words, he is developing his rationale within the realistic confines of state sovereignty and restrictive immigration policies.<sup>99</sup>

Persecution, according to Hathaway, is the key to understanding refugeehood and the basis for offering protection. Hathaway defines persecution as “the sustained or systemic failure of state

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<sup>96</sup> Jack I. Garvey, “Toward a Reformulation of International Refugee Law” (1985) 26 Harv. Int’l L. J. 483, at 483.

<sup>97</sup> James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991).

<sup>98</sup> *Ibid.*

<sup>99</sup> “Refugee law is a politically pragmatic means of reconciling the generalized commitment of states to self-interested control over immigration to the reality of coerced migration ... The challenge for states has always been the definition of refugee status – the exception to the rule – in terms which are sufficiently broad to encompass those whose need to move is unassailable, yet simultaneously to tailor and constrain the scope of the refugee class to meet the self-interested pre-occupations of asylum states”: *ibid.* at 231. See also Andrew Shacknove, “Who is a Refugee,” (1985) *Ethics* 274 at 281, who defines a refugee as a person whose country of origin has “failed to secure [his or hers] basic needs. There is no justification for granting refugee status to individuals who do not suffer from the absence of one or more of these needs. Nor is there reason for denying refugee status to those who do. Moreover, because all of these needs are equally essential for survival, the violation of each constitutes an equally valid claim to refugeehood.”

protection in relation to one of the core entitlements which has been recognized by the international community.”<sup>100</sup> These core entitlements are the basic human rights which the international community has established as being worthy of protection.<sup>101</sup> Within the refugee determination process, attempts have been made to categorize or prioritize rights into separate groups. In turn, this has led some to argue that a hierarchy of basic human rights exists within the international community and refugee law. The argument is that this hierarchy has created the notion that there exist certain basic human rights that cannot, under any circumstance, be violated as opposed to other rights which are of secondary importance. In other words, certain human rights take precedence over other rights.<sup>102</sup> Hathaway discusses the emergence of a hierarchy of rights contained in the International Bill of Human Rights which consists of the UDHR,<sup>103</sup> the ICCPR<sup>104</sup> and the ICESCR.<sup>105</sup>

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<sup>100</sup> Hathaway, *supra* note 97 at 112. See also *Rajudeen v. Canada (Minister of Employment & Immigration)*, [1984] F.C.J. No. 601 (F.C.A.).

<sup>101</sup> “I see human rights as the principle 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 the resolution 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* (Montreal: Canadian Human Rights Foundation, 1988) 195 at 196. See also Shacknove, *supra* note 99 at 284: “refugee status should only be granted to persons whose government fails to protect their basic needs, who have no remaining recourse other than to seek international restitution of these needs, and who are so situated that international assistance is possible.”

<sup>102</sup> This has been a major criticism for some: “The human rights approach leads to practical problems, which arise due to the proliferation of human rights. If all human rights violations were to give rise to refugee status, it is clear the rich Western States will not be able to pursue their restrictive immigration policy. Thus, the need arises to emphasize some human rights violations and disregard others. In effect, it might be necessary to rank human rights violations”: Nathwani, *supra* note 83 at 22.

<sup>103</sup> *Supra* note 11.

<sup>104</sup> *Supra* note 87.

<sup>105</sup> *Supra* note 87. Hathaway is not the only scholar to stress this notion of a hierarchy of rights: Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (University of Minnesota Press: Minneapolis, 2000) states that in relation to the 1951 Convention, irrespective of the protocol, “[t]he definition implicitly promulgated a hierarchy of rights, privileging the political and civil rights of protection from *persecution* over economic, cultural, and social rights and scales of violence broader than individual persecution,” at 9 (emphasis in original); M. Gibney and M. Stohl, “Human Rights and U.S.

In the first category are rights stated in the UDHR and codified in binding form in the ICCPR and from which no derogation whatsoever is permitted, even in times of national emergency.<sup>106</sup> The following rights are included within this category: freedom from arbitrary deprivation of life;<sup>107</sup> protection against torture or cruel, inhuman, or degrading punishment or treatment;<sup>108</sup> freedom from slavery;<sup>109</sup> the prohibition of criminal prosecution for *ex post facto* offences;<sup>110</sup> and freedom of thought, conscience, and religion.<sup>111</sup> Any violation of these rights will always constitute persecution.<sup>112</sup>

The second category contains those rights stated in the UDHR and also codified within the ICCPR but from which states are allowed to derogate in the course of a "public emergency."<sup>113</sup> The following rights are included within this category: freedom from arbitrary arrest or detention;<sup>114</sup> the right to equal protection for all;<sup>115</sup> the right in criminal proceedings to a fair and public hearing and to be presumed innocent unless guilt is proved;<sup>116</sup> the protection of

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Refugee Policy" in M. Gibney, ed., *Open Borders? Closed Societies? The Ethical and Political Issues*, (New York: Greenwood Press, 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" at 159.

<sup>106</sup> ICCPR, *supra* note 87 at Art. 4.

<sup>107</sup> *Ibid.* at Art. 6.

<sup>108</sup> *Ibid.* at Art. 7.

<sup>109</sup> *Ibid.* at Art. 8.

<sup>110</sup> *Ibid.* at Art. 16.

<sup>111</sup> *Ibid.* at Art. 18.

<sup>112</sup> Hathaway, *supra* note 97 at 109.

<sup>113</sup> ICCPR, *supra* note 87 at Art. 4.

<sup>114</sup> *Ibid.* at Arts. 9, 10.

<sup>115</sup> *Ibid.* at Arts. 3, 26.

<sup>116</sup> *Ibid.* at Art. 14.



personal and family privacy and integrity;<sup>117</sup> the right to internal movement and choice of residence and the freedom to leave and return to one's country;<sup>118</sup> the right to liberty of opinion, expression, assembly and association;<sup>119</sup> the right to form and join trade unions;<sup>120</sup> the ability to partake in government;<sup>121</sup> the right to vote in periodic and genuine elections;<sup>122</sup> and the ability to access public employment without discrimination.<sup>123</sup> According to Hathaway, a state's failure to guarantee these rights will generally amount to a violation, unless the state can demonstrate that derogation was the result of an emergency, was not applied in a discriminatory fashion, and was not inconsistent with international law.<sup>124</sup>

The third category in the hierarchy contains rights which are listed in the UDHR and are codified in the ICESCR. The following rights are included within this category: the right to work;<sup>125</sup> just and favorable conditions of employment, remuneration, and rest;<sup>126</sup> entitlement to food, clothing and housing;<sup>127</sup> medical care;<sup>128</sup> social security;<sup>129</sup> basic education;<sup>130</sup> protection of the family, particularly children and mothers;<sup>131</sup> and the freedom to engage and benefit from

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<sup>117</sup> *Ibid.* at Arts. 17, 23.

<sup>118</sup> *Ibid.* at Art. 12.

<sup>119</sup> *Ibid.* at Arts. 19-22.

<sup>120</sup> *Ibid.* at Art. 22.

<sup>121</sup> *Ibid.* at Art. 25.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> Hathaway, *supra* note 97 at 110.

<sup>125</sup> ICESCR, *supra* note 87 at Art. 6.

<sup>126</sup> *Ibid.* at Art. 7.

<sup>127</sup> *Ibid.* at Art. 11.

<sup>128</sup> *Ibid.* at Art. 12.

<sup>129</sup> *Ibid.* at Art. 9.

<sup>130</sup> *Ibid.* at Arts 13, 14.

<sup>131</sup> *Ibid.* at Art. 10.

cultural, scientific, literary, and artistic expression.<sup>132</sup> Unlike the ICCPR, the ICESCR only requires states to realize these rights in a non-discriminatory fashion, subject to the availability of resources. According to Hathaway, a state is in breach of its obligations under this category if it “ignores these interests notwithstanding the fiscal ability to respond, or where it excludes a minority of its population from their enjoyment.”<sup>133</sup>

The fourth and final category contains those rights listed in the UDHR but which have not been codified in any binding force in either the ICCPR or the ICESCR. Such rights include the right to be protected from unemployment<sup>134</sup> and the right to own and be free from arbitrary deprivation of property.<sup>135</sup> According to Hathaway, these rights are likely outside the scope of a state’s duty of protection. Therefore, a violation of these rights will not ordinarily, in and of themselves, give rise to persecution or refugee status.<sup>136</sup>

Niraj Nathwani argues against the human rights theory because he believes it narrows state responsibility which in turn restricts the scope of the refugee concept in the international community. In Nathwani’s opinion, “the proliferation of human rights entails that not all human rights violations can give rise to refugee status. Otherwise, states could not pursue their restrictive immigration policy.”<sup>137</sup> Therefore, certain human rights violations are emphasized over others. In particular, civil and political rights are viewed as more important than economic and social rights. According to Nathwani, this is due to the fact that economic and social rights affect more people and thus come into conflict with the restrictive immigration policies of the industrialized Western nations.<sup>138</sup>

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<sup>132</sup> *Ibid.* at Art. 15.

<sup>133</sup> Hathaway, *supra* note 97 at 111.

<sup>134</sup> UDHR, *supra* note 11 at Art. 17.

<sup>135</sup> *Ibid.* at Art. 23.

<sup>136</sup> Hathaway, *supra* note 97 at 111.

<sup>137</sup> Nathwani, *supra* note 83 at 73.

<sup>138</sup> *Ibid.*

Although this is a valid criticism, on the whole, the human rights perspective is an appropriate way to analyze refugee law in the post-Cold War era. Within the international community, the focus has shifted from viewing persecution as stemming primarily from political reasons to a more human aspect of each individual's right to live life with certain basic rights. This approach is also in line with judicial determinations in the area of refugee law of many common law jurisdictions.<sup>139</sup> Recently, domestic courts have stated that international human rights, in particular the concept of non-discrimination, provides an appropriate framework within which to determine the parameters of refugee protection.<sup>140</sup>

To reiterate, states are under no legal obligation to grant asylum to refugees. In an ideal world, states would allow entry and stay to all refugees who seek protection. In reality, however, states party to the Refugee Convention continue to implement restrictive immigration policies. Although granting refugee protection based on the human rights approach will still exclude some claimants from protection, this approach allows for a more humane distribution of "substitute protection" to those who have no alternative.<sup>141</sup> To a great extent, refugee law has been at the forefront of the international human rights movement. Specific challenges, such as gender-related persecution, have been analyzed with much success within this framework.<sup>142</sup> In many cases, granting refugee protection has provided an effective remedy for victims of human rights violations. This trend will likely continue as long as the refugee determination process continues to be developed within this framework.<sup>143</sup> The human rights approach may also

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<sup>139</sup> See for example, *Ward*, *supra* note 7 and *Shah and Islam*, *supra* note 89.

<sup>140</sup> See Mark R. von Sternberg, *The Grounds for Refugee Protection in the Context of International Human Rights and Humanitarian Law* (New York: Martinus Nijhoff, 2002) at 10. See also *Ward*, *supra* note 7 and *Shah and Islam*, *supra* note 89 whereby both Courts held that the concept of human rights protection and anti-discrimination principles are essential to understanding the Refugee Convention.

<sup>141</sup> "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" in the sense that it is a response to disenfranchisement from the usual benefits of nationality," Hathaway, *supra* note 97 at 124 (footnotes omitted).

<sup>142</sup> It is now generally accepted among the Western states that women who face certain forms of persecution form a "particular social group" worthy of protection: see Deborah Anker, "Boundaries in the Field of Human Rights: Refugee Law, Gender, and the Human Rights Paradigm" (2002) 15 Harv. Hum. Rts. J. 133 at 138.

<sup>143</sup> *Ibid.* at 150-151.

provide the basis for expanding refugee protection in areas that all too often have been overlooked – economic and social rights.

### 3.4 Necessity-based Approach

Niraj Nathwani has recently published a book which analyses the purpose of refugee law.<sup>144</sup> In this book the author argues that the prevailing theories relating to refugees are not adequate to explain why states grant asylum in light of restrictive immigration policies. In Nathwani's opinion, the prevailing theories should be replaced and his objective is to formulate a new theory of refugee law. In particular, his aim is to "achieve an interpretation of the refugee concept that is stringent and convincing, and supports the advocates of a generous refugee policy in the rich West."<sup>145</sup> His answer is to replace the prevailing approaches with a "necessity-based" understanding of refugee law.

This "necessity-based" understanding stems from an individual's choice as to whether he or she could realistically have chosen to stay in the country of origin. According to Nathwani, this is the dividing line between a voluntary migrant and a person seeking refugee protection. Whereas the voluntary migrant has a choice to stay and endure potential hardships, realistically, the refugee cannot choose to stay. The difference between the two choices is captured by this concept of necessity.<sup>146</sup>

Nathwani analyses the concept of necessity in the realm of criminal law. He notes that criminal law allows for the lawful defense of necessity under certain circumstance where the defendant in question had no other choice but to commit the criminal offence at issue. Nathwani's contention, therefore, is that if an accused's argument is considered convincing enough to

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<sup>144</sup> *Supra* note 83.

<sup>145</sup> *Ibid.* at 85.

<sup>146</sup> *Ibid.* at 28-29. See also p. 30: "The concept of necessity points to cases in which the actor's freedom of choice is severely restricted... a refugee cannot be expected to stay and suffer persecution. The concept of necessity points to reasons of action which are so strong and overwhelming that no other course of action could be reasonably expected from the individual."

warrant exempting the act from criminal responsibility, then it would have even more strength in refugee law.<sup>147</sup> He sums this concept as follows:

It would be odd if immigration rules should prevail where even criminal rules give way. Since necessity is recognized in criminal law as a general defence, it is even more convincing to argue that necessity should lead to an exemption from deterrence of the immigration control system, like deportation and punishment.<sup>148</sup>

Linked to the necessity concept is the refugee claimant's subjective fear element. In this regard, Nathwani downplays the relevance of the objective arm of the "well-founded fear" requirement of the Refugee Convention. His argument is that an objective test is not the appropriate means of deciding whether or not to grant refugee status to a claimant. He asserts that the measurement of probability that matters is subjective and not objective:

"What matters is the refugee's own assessment of the probability of detection and punishment and not an objective view of these. This subjective element is essentially linked to emotions... the fear of persecution (or the fear of refoulement which leads to persecution) is such a state of mind."<sup>149</sup>

This argument resonates throughout the book and seems to be the essential argument to Nathwani's thesis. According to Nathwani, decision-makers should focus on the subjective element of the claimant's story and how she or he perceives the situation and potential threat of persecution while giving little if any weight to objective factors. Therefore, claimants who believe that they have no real choice but to leave their country of origin should be granted asylum. As long as the claimant subjectively perceives the risk of persecution to be genuine and connected to one of the five Convention grounds, then he or she should be granted refugee status.<sup>150</sup>

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<sup>147</sup> *Ibid.*, at 29-30.

<sup>148</sup> *Ibid.* at 30. See also p. 149: "the necessity approach to interpreting the refugee concept explains that all forms of harm, that are accepted in legal theory to excuse a criminal offence, should also be sufficient to constitute refugee status. In addition, all forms of harm which make life intolerable should be accepted as giving rise to refugee status."

<sup>149</sup> *Ibid.* at 41 (emphasis in the original).

<sup>150</sup> "the necessity theory explains why the frame of mind of the refugee is crucial in refugee recognition procedures and cannot be ignored, especially if the risk of persecution cannot be objectively and totally excluded upon return to the country of origin. If the extent of fear is reasonable and a person of average firmness in the situation of the claimant would have reacted similarly, this fear should be sufficient to grant refugee status": *ibid.* at 149.

Overall, Nathwani offers an interesting argument but falls short of developing a concrete means of explaining why states grant, or should grant, refugee status to certain individuals in light of the fact that most states implement restrictive immigration policies. The approaches to refugee law that Nathwani critiques, already, in some degree, encompass the concept of necessity. For example, Grahl-Madsen's theory and the human rights approach operate with the assumption that refugees leave their state of origin because it was *necessary* and now it is *necessary* for the state of refuge to grant refugee protection.<sup>151</sup> Therefore, this theory does not really add anything new save for the recommendation that the refugee determination process become primarily a subjective-oriented process. Although this recommendation is laudable, it will likely not be supported by refugee host states who already operate from a restrictive immigration standpoint.<sup>152</sup> Focusing just on the subjective elements fear will likely make the Refugee Convention into a "self-defining" mechanism.<sup>153</sup>

In addition, Nathwani's subjectively conceived notion of necessity fails to address the fact that the objective arm of the refugee determination process is not very high. For example, in *Adjei v. Canada*<sup>154</sup> the Canadian Federal Court of Appeal held that the proper test in determining the objective arm of "well-founded fear" of persecution is whether there is a "reasonable chance" that persecution would take place, or "good grounds" for fearing persecution. The Court also stressed the fact that a claimant need not prove that persecution will take place on the balance of probabilities, but that there must be more than a minimum possibility of persecution. This concept could also be expressed as a "reasonable" or even a "serious possibility."

Nathwani also fails to note that objective evidence relating to a claimant's fear of persecution can be beneficial in many respects. For example, some claimant's do not make good witnesses due to language and cultural differences and the stress of recounting traumatic events.

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<sup>151</sup> James C. Hathaway, (2004) 98 A.J.I.L 616 at 619-620.

<sup>152</sup> Under this rationale there is no real limit on granting refugee status if at the end of the day the decision-makers must solely rely on the claimant's subjective element of fear. In reality the objective arm is still necessary since state sovereignty entails that there will be restrictions on the granting of refugee status.

<sup>153</sup> Hathaway, *supra* note 151 at 620.

<sup>154</sup> *Adjei v. Canada (Minister of Employment and Immigration)* (1989), 7 Imm. L.R. (2d) 169 (Fed. C.A.).

Objective evidence, in many cases, will help the claimant make his or her case more credible and help fill in any gaps. In many cases, evidence of a poor human rights record is a powerful tool in corroborating a claimant's testimony that he or she is at risk.<sup>155</sup> Mark Gibney has also made the case for the importance of objective evidence in refugee determination proceedings. One of his studies reveals a strong relationship between levels of human rights abuses and the phenomenon of refugee flight.<sup>156</sup> His argument is that the most violent countries in the world produce nearly all the world's refugees, thus refuting the myth in Western states that the majority of asylum seekers are abusing the system (back door immigration). Gibney argues that most of the violence that refugees encounter is quite predictable and the details of it are known with certainty, based on examination of country reports. This leads him to conclude that "[i]n the absence of any other form of effective international mechanisms, refugee relief has been almost the sole means of protecting the suffering from human rights abuses."<sup>157</sup>

### 3.5 Conclusion

As is evident from the above discussion, the diplomatic protection and *de facto* statelessness approaches to refugee protection, although useful, are dated and do not adequately represent the motivation behind granting refugee status in today's refugee determination environment. In addition, Nathwani's necessity-based approach, although interesting, fails to add anything new as it is essentially a hybrid of the human rights perspective. Overall, the human rights approach, in relation to the refugee determination process, constitutes a consistent and principled basis for granting refugee status and best explains the willingness among states to grant protection notwithstanding their right to control their borders.

Refugee determination, based on human rights principles, offers an appropriate means for reconciling the sovereign right of states to implement restrictive immigration policies with the reality that those seeking protection will find a way to enter the territory of the refuge state. In addition, granting refugee status on the human rights rationale also legitimizes a state's claim

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<sup>155</sup> As Hathaway has noted: "the best evidence that an individual faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country of origin": Hathaway, *supra* note 97 at 97.

<sup>156</sup> See Mark Gibney, "Certain Violence, Uncertain Protection" in Danièle Joly, ed., *Global Changes in Asylum Regimes* (New York: Palgrave Macmillan, 2002) 15 at 16.

<sup>157</sup> *Ibid.* at 26.

to being democratic and liberal. It legitimizes the state in the sense that it upholds certain values, such as freedom and equality, that liberal democratic states have argued are essential to the proper functioning of a free and democratic society.<sup>158</sup>

The chief criticism of the human rights approach has been that it has failed to adequately address two major challenges: “ (i) the Western States’ lack of motivation to receive refugees; and (ii) the need to create a hierarchy of human rights for the purposes of refugee law in order to take account of the restrictive immigration policy of the rich States of the West.”<sup>159</sup>

Although there is some truth to this statement, on the whole, the criticism is rather harsh. As recent case law has shown, the human rights approach to refugee determinations has provided additional protection to certain persecuted groups (e.g. victims of gender-related persecution) that were not necessarily envisioned by the framers of the Refugee Convention. In light of the fact that states are free to implement their own refugee determination process, as long as they do not violate the *non-refoulement* principle, the human rights approach provides a “unifying theory binding different bodies of national jurisprudence.”<sup>160</sup> This is evident from the analysis provided in *Shah and Islam*.<sup>161</sup>

In today’s post-Cold War political environment and the ever increasing presence of non-state agents of persecution, the human rights approach to refugee determination offers the best rationale as to why states grant refugee protection despite any obligation under international law to do so. With its preamble grounded in the concept of non-discrimination, the Refugee Convention encompasses an ever evolving definition of refugeehood. It is imperative, therefore, that the human rights approach continues to play an integral role in the

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<sup>158</sup> See Liza Schuster, *The Use and Abuse of Political Asylum in Britain and Germany* (London: Frank Cass, 2003) at 56-57. See also Nathwani, *supra* note 83 at 20: “Ultimately, the legitimacy of the State of refuge depends on the legitimacy of the state system as a whole. The duty derives from the claims of the State of refuge to exercise power legitimately in a world divided into states. States are obliged to assist refugees in order to justify their own legitimacy in a world made up of States.”

<sup>159</sup> Nathwani, *supra* note 83 at 26.

<sup>160</sup> Anker, *supra* note 142 at 136.

<sup>161</sup> See also Refugee Appeal No. 71427/99, [2000] N.Z.A.R. 545, and *Minister for Immigration and Multicultural Affairs v. Khawar*, [2000] F.C.A. 1130, two other high profile refugee cases that dealt with gender-related persecution paralleling the human rights approach of *Shah and Islam*, *supra* note 89. See *Shah and Islam* discussion, *infra*.



refugee determination process as it offers the greatest protection for asylum seekers within the international community.

## CHAPTER FOUR      International Protection of People with Disabilities

Throughout history, people with mental disabilities have been stigmatized, marginalized and severely mistreated. Although the adoption of the International Bill of Human Rights<sup>162</sup> has had a profound worldwide impact on the protection of human rights and equality, persons with disabilities are not specifically mentioned as a distinct group vulnerable to violations of human rights. In fact, none of the equality provisions of the International Bill of Human Rights include disability as a protected ground. When reference is made to disabilities, it is usually in the context of social security or preventative measures.<sup>163</sup> Until very recently, people with mental or physical disabilities have been largely ignored in relation to anti-discrimination and human rights law. For much of the twentieth century, recognition of the disabled as a group has generally been confined to the charity and social welfare domain. This had the effect of viewing persons with disabilities as unfortunate victims of luck who, out of pity, needed social assistance.<sup>164</sup> Seldom were persons with disabilities viewed as equals and worthy of the same human rights protection afforded to able-bodied persons and the right to participate as full members of society. However, during the last twenty-five years, there has been a significant shift in the international arena in viewing persons with disabilities as subjects of human rights protection. This chapter will review some of the significant steps the international community has taken in establishing an appropriate level of human rights protection for the mentally and physically disabled. In particular, I discuss the international community's adoption of various, declarations, standards, and instruments, as well as the United Nations' recent efforts to enact a binding treaty on the rights of people with disabilities.

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<sup>162</sup> As previously noted, the International Bill of Human Rights generally refers to the UDHR, *supra* note 11, the ICCPR, *supra* note 87, and the ICESCR, *supra* note 87.

<sup>163</sup> See for example, UDHR, *supra* note 11 at Article 25 and ICESCR, *supra* note 87 at Article 12. In addition, Articles 3, 5, 6, 7, 8, 9, 10, 12, 25, and 26 of the UDHR contain basic provisions for the protection of human rights of patients, although none specifically make reference to mentally ill patients. Similarly, Article 7 of the ICCPR, *supra* note 87 prohibits torture and cruel, inhuman or degrading treatment or punishment and states that "no one shall be subjected without his free consent to medical or scientific experimentation."

<sup>164</sup> As Arlene Kanter has noted: "Discrimination against people with disabilities and their exclusion from society leads to economic hardship and a loss of their productive capacity to society. It also leads to the perpetuation of stereotypes of people with disabilities as objects of pity and charity, but not as human beings entitled to political, social, and civil rights: Arlene S. Kanter, "The Globalization of Disability Rights Law" (2003) 30 Syracuse J. Int'l L. & Com. 241 at 246.

#### 4.1 International Declarations

Since the adoption of the United Nations Charter<sup>165</sup> and the UDHR, the international human rights movement has predominantly focused its attention on the activities of able-bodied visible minorities. The initial concern was the protection of rights based on race, ethnicity, religion, gender and so forth. However, during the last twenty-five years, there has been a steady shift from focusing on the needs of able-bodied minorities toward addressing the particular issues faced by persons with mental and physical disabilities.<sup>166</sup> The United Nations has been the chief catalyst, playing a pro-active role in establishing global recognition of human rights for individuals with disabilities.

In 1971, the United Nations adopted the *Declaration on the Rights of Mentally Retarded Persons*<sup>167</sup> (1971 Declaration). Despite its outdated use of the term “mentally retarded” the 1971 Declaration marks the first time that the United Nations formally recognized the rights of people living with mental disabilities. It embodies the principles of community integration, individualized treatment, equality, due process of law and provides the foundation for an international set of guidelines regarding the treatment and respect for the human dignity of people with mental disabilities.<sup>168</sup> The 1971 Declaration proclaims that individuals with “mental retardation” have “the same rights as other human beings.”<sup>169</sup> They also have rights to a “decent standard of living”<sup>170</sup> and legal protection from “abuse and degrading treatment.”<sup>171</sup> Most importantly, the 1971 Declaration recognizes the need for community integration and

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<sup>165</sup> Entered into force 24 October, 1945.

<sup>166</sup> Harold Hongju Koh & Lawrence O. Gostin, “Introduction: The Human Rights Imperative” in Stanley S. Herr, Lawrence O. Gostin & Harold Hongju Koh, eds. *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* (Oxford: Oxford University Press, 2003) 1 at 2.

<sup>167</sup> *Declaration on the Rights of Mentally Retarded Persons*, A/RES/2856 (XXVI), U.N. Doc. A/8429 (1971).

<sup>168</sup> See Stanley S. Herr, “Rights of Disabled Persons: International Principles and American Experiences” (1980-81) 12 Colum. H.R.L. Rev. 1 at 5.

<sup>169</sup> 1971 Declaration, *supra* note 167 at Article 1.

<sup>170</sup> *Ibid.* at Article 3.

<sup>171</sup> *Ibid.* at Article 6.

social involvement by holding that the “mentally retarded person should live with his own family or with foster parents and participate in different forms of community life.”<sup>172</sup>

In 1975, the United Nations went a step further by adopting the *Declaration on the Rights of Disabled Persons*,<sup>173</sup> (1975 Declaration) calling for national and international action to protect the human rights of all persons with mental and physical disabilities. The overriding emphasis of the 1975 Declaration is the recognition that the disabled have the inherent right to have their human dignity respected. The protected rights enumerated in the 1975 Declaration are granted regardless of the origin, type or seriousness of one's disability. In particular, persons with disabilities have the same “fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and as full as possible.”<sup>174</sup> More importantly, the 1975 Declaration affirms that the disabled have the same civil, political, social and economic rights as all other human beings.<sup>175</sup> It also stresses the importance of governments introducing measures in order to assist in the “social integration or reintegration” of persons with disabilities in the community.<sup>176</sup> Above all, the 1975 Declaration encourages the disabled to live in an environment where their special needs are taken into consideration in order for them to “become as self reliant as possible.”<sup>177</sup> Although the language of both Declarations may be dated and narrow-minded,<sup>178</sup> they still provide a positive step forward in the growing recognition of human rights for persons with disabilities.

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<sup>172</sup> *Ibid.* at Article 4.

<sup>173</sup> *Declaration on the Rights of Disabled Persons*, A/RES/3447 (XXX), U.N. Doc. A/10034 (1975).

<sup>174</sup> *Ibid.* at Article 3.

<sup>175</sup> *Ibid.* at Articles 4, 7.

<sup>176</sup> *Ibid.* at Article 6. Measures include, *inter alia*, the right to medical, psychological and functional treatment, education and counselling.

<sup>177</sup> *Ibid.* at Articles 5, 8. See also Stanley S. Herr, “From Wrongs to Rights: International Human Rights and Legal Protection” in Stanley S. Herr, Lawrence O. Gostin & Harold Hongju Koh, eds., *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* (Oxford: Oxford University Press, 2003) 115 at 121.

<sup>178</sup> Theresia Degener, for example, has argued that the underlying theme of both declarations was that the disabled, as a community, were people with medical problems, dependant on social welfare programs and in need of segregated institutions and services: Theresia Degener, “Disability as a Subject of International Human Rights Law and Comparative Discrimination

## 4.2 International Year for Disabled Persons

A major turning point in the history of the treatment of persons with disabilities came when the United Nations declared 1981 to be the International Year for Disabled Persons.<sup>179</sup> The major goal of this initiative was the “full participation” and equality of persons with disabilities throughout the world. The resolution established five key objectives to be carried out during that year. Chief among them was the desire to help persons with disabilities “in their physical and psychological adjustment to society.”<sup>180</sup> In response, many countries established national committees to study, advise, and help implement changes to improve and ensure appropriate levels of services to the disabled in areas such as health care, education, and welfare. More importantly, the Year for Disabled Persons also marked the inclusion of disabled persons themselves in the planning and advising phases regarding services.<sup>181</sup>

A major outcome of the International Year for Disabled Persons was the establishment of the World Programme of Action Concerning Disabled Persons<sup>182</sup> (WPA). The WPA is a global strategy to enhance disability prevention, rehabilitation and equalization of opportunities, which pertains to full participation of persons with disabilities in social life and national development. The WPA contains one of the first international statements regarding the equalization of opportunities for persons with disabilities. The WPA defines equalization of opportunities as “the process through which the general systems of society, such as the

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Law” in Stanley S. Herr, Lawrence O. Gostin & Harold Hongju Koh, eds., *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* (Oxford: Oxford University Press, 2003) 151 at 155.

<sup>179</sup> A/RES/31/123, of December 16, 1976, U.N. Doc.A/31/39 (1976).

<sup>180</sup> *Ibid.* at Article 2(a)). The other objectives were: a) to promote international efforts to provide proper assistance, training, care and guidance to ensure the full integration of persons with disabilities in society; b) encourage and facilitate the participation of persons with disabilities in everyday life tasks; c) educate the public regarding the right of persons with disabilities to fully participate in society; and d) promote effective measures for the prevention of disability and for the rehabilitation of disabled persons: at Article 2.

<sup>181</sup> Peter Mittler, “Meeting the Needs of People with an Intellectual Disability: International Perspectives” in Stanley S. Herr, Lawrence O. Gostin & Harold Hongju Koh, eds., *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* (Oxford: Oxford University Press, 2003) 25 at 38.

<sup>182</sup> A/RES/37/52, of 3 December 1982.

physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sport and recreational life, are made accessible to all.”<sup>183</sup>

In order for governments around the world to implement the objectives outlined in the WPA, the United Nations General Assembly declared the period between 1983- 1992 the United Nations Decade of Disabled Persons.<sup>184</sup> An important outcome of this decade was the adoption of another resolution by the United Nations providing guidelines relating to the education and employment of persons with disabilities.<sup>185</sup> The Decade for Disabled Persons, also saw the appointment of two Special Rapporteurs, Erica-Irene Daes and Leandro Despouy,<sup>186</sup> who put together the first international reports<sup>187</sup> regarding the living conditions of person with mental and physical disabilities. Both reports found widespread human rights abuses of persons with mental disabilities.<sup>188</sup> Their reports revealed appalling living conditions and mistreatment of the disabled, mostly in developing countries. In addition, the Rapporteurs noted that the disabled

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<sup>183</sup> United Nations, *World Programme of Action Concerning Disabled Persons*, online: <<http://www.un.org/esa/socdev/enable/diswpa01.htm>> (last accessed May 20, 1996).

<sup>184</sup> A/RES/37/53, of 3 December 1982.

<sup>185</sup> See Tallinn Guidelines for Action on Human Resources Development in the Field of Disability, G.A. Res. 44/70 of 8 December 1989. These guidelines promote the full participation of persons with disabilities within all levels of society.

<sup>186</sup> Both were appointed by the United Nations Human Rights Commission.

<sup>187</sup> See United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Principles, Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental Ill-Health or Suffering from Mental Disorder*, Report prepared by Special Rapporteur: Erica-Irene A. Daes, U.N. Doc. E/CN.4/Sub.2/1983/17/Rev.1 U.N.; Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights and Disability*: Report by Special Rapporteur: Leandro Despouy, U.N. Doc. E/CN.4/Sub.2/1991/31.

<sup>188</sup> Examples of serious violations of international human rights noted in Despouy’s report are as follows: amputation as a form of punishment; institutionalization of persons with disabilities; institutional abuse, such as, the misuse of drugs; forced sterilization and female circumcisions (female genital mutilation): Despouy, *supra* note 187 at para. 174. In response to such practices, Despouy concludes that no “religious tenet or other cultural factor could justify or excuse such acts, which they regard as being contrary to binding human rights standards prohibiting torture and other cruel, inhuman or degrading treatment or punishment,” *ibid*. According to Daes’s report, in some States, “persons are detained involuntarily and are used as guinea pigs for new scientific experiments,”: Daes, *supra* note 187 at para. 225.

experienced discrimination in almost every facet of life. In particular, the Reports revealed discrimination in employment, education, housing, public transportation and accommodations, and communications.

### 4.3 Principles for the Protection of Persons with Mental Illness

In 1991, the United Nations adopted the *Principles for the Protection of Persons with Mental Illness*<sup>189</sup> (Principles). Although not of a binding nature, the Principles do serve as an interpretative aid with respect to international treaty obligations and persons with mental disabilities. In particular, they play an integral role in the development of customary international law in the human rights protection of mental health.<sup>190</sup> The overriding theme of the Principles is that that all persons have the right to the best available mental health care and that all persons with mental disabilities have the right to be treated with respect and human dignity.<sup>191</sup> According to the Principles, persons with mental illnesses have a number of civil and political rights, such as, the right to confidentiality,<sup>192</sup> the right to privacy,<sup>193</sup> freedom of religion and communication,<sup>194</sup> freedom from forced labour,<sup>195</sup> and access to information.<sup>196</sup> Further, the Principles incorporate protective criteria for the involuntary admission of persons with mental illness to mental health facilities.<sup>197</sup>

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<sup>189</sup> *Principles for the Protection of Persons with Mental Illness*, A/RES/46/119, U.N. Doc. A/46/49 (1991).

<sup>190</sup> Eric Rosenthal & Leonard S. Rubenstein, "International Human Rights Advocacy under the 'Principles for the Protection of Persons with Mental Illness'" (1993) 16 Int'l J.L. & Psychiatry 257 at 268.

<sup>191</sup> Principles, *supra* note 189 at Principle 1.

<sup>192</sup> *Ibid.* at Principle 6.

<sup>193</sup> *Ibid.* at Principle 13.

<sup>194</sup> *Ibid.* at Principle 13.

<sup>195</sup> *Ibid.* at Principle 13.

<sup>196</sup> *Ibid.* at Principle 19.

<sup>197</sup> An individual may only be admitted on an involuntary basis under the following circumstances: 1) the individual has been diagnosed as having a mental illness in accordance with internationally accepted medical standards; 2) due to the mental illness, there is a serious risk of harm to that individual or to other persons; and 3) in cases of severe mental illness and

The Principles apply to all persons with mental disabilities whether or not they have been institutionalized. A major component of the Principles is the issue of community integration. Major emphasis is placed on the right of all persons with mental illnesses to “live and work, as far as possible, in the community”<sup>198</sup> and “to be treated and cared for, as far as possible, in the community in which he or she lives.”<sup>199</sup> The focus on community rehabilitation and integration is strengthened by the obligation of all States to treat patients “in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs.”<sup>200</sup>

To date, the Principles encompass the most direct expression of human rights protection in relation to persons with mental disabilities issued by the United Nations.<sup>201</sup>

Although the Principles are not legally binding, they have been used as an interpretive aid in relation to the rights of persons with disabilities in the human rights context. In fact, the Inter-American Commission on Human Rights has held that the Principles are the “most complete standards for protection of the rights of persons with mental disabilities at the international level.”<sup>202</sup> The Principles also “serve as a guide to States in the design and/or reform of mental health systems and are of utmost utility in evaluating the practices of existing systems.”<sup>203</sup>

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impaired judgment, the failure of committal would lead to a serious deterioration of the individual's mental health: *ibid* at Principles 4, 16.

<sup>198</sup> *Ibid.* at Principle 3.

<sup>199</sup> *Ibid.* at Principle 7.

<sup>200</sup> *Ibid.* at Principle 9.

<sup>201</sup> Rosenthal & Rubenstein, *supra* note 190 at 268.

<sup>202</sup> *Victor Rosario Congo v. Ecuador*, Case 11.427, Report No. 63/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev., April 13, 1999, at para. 54 note 8, online: <<http://www.law.wits.ac.za/humanrts/cases/1998/ecuador63-99.html>> (last accessed May 25, 2006).

<sup>203</sup> *Ibid.*



#### 4.4 Standard Rules

In 1993, the United Nations General Assembly adopted the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*<sup>204</sup> (Standard Rules). This was by far one of the major achievements of the Decade of Disabled Persons. Although not of a legally binding nature, the Standard Rules provide a strong political and moral commitment of Member States to take the necessary action to achieve equalization of opportunities for persons with disabilities. The Standard Rules are an important tool for policy-making and international co-operation.<sup>205</sup> The purpose of the Standard Rules is:

... to ensure that girls, boys, women and men with disabilities, as members of their societies, may exercise the same rights and obligations as others. In all societies of the world there are still obstacles preventing persons with disabilities from exercising their rights and freedoms and making it difficult for them to participate fully in the activities of their societies. It is the responsibility of States to take appropriate action to remove such obstacles. Persons with disabilities and their organizations should play an active role as partners in this process.<sup>206</sup>

Although not specifically directed at persons with mental disabilities, the Standard Rules provide human rights protection for persons with any type of disability. By concentrating on the “equalization of opportunities” and “full participation” in society for persons with disabilities, the Standard Rules embrace a wider approach to the rights of persons with disabilities than the Principles.<sup>207</sup> The Standard Rules promote the use of effective medical care, in particular, preventative treatment given by adequately trained and equipped medical personnel.<sup>208</sup> They provide a guiding philosophical blueprint regarding government policies and program in order to support the “full participation and equality for persons with disabilities.”<sup>209</sup> They emphasize that States should promote the full participation of all persons

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<sup>204</sup> *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, A/RES/48/96, U.N. Doc. A/48/627 (1993).

<sup>205</sup> See U.N., *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, online: <<http://www.un.org/esa/socdev/enable/dissre00.htm>> (last accessed May 20, 2006).

<sup>206</sup> Standard Rules, *supra* note 204 at para. 15 of Introduction.

<sup>207</sup> *Ibid.* at para. 14 of Introduction.

<sup>208</sup> *Ibid.* at Rule 2.

<sup>209</sup> *Ibid.* at Rule 15.

with disabilities in family life, and in cultural, recreational, and religious activities.<sup>210</sup> In addition, the Standard Rules call upon all governments to initiate procedures to bring legislation and governmental policies and programs regarding persons with disabilities in line with international human rights standards.<sup>211</sup> Above all, the Standard Rules encourage States to raise awareness about persons with disabilities, their rights, needs and full participation and contribution in society.<sup>212</sup> Unlike the Principles, the Standard Rules also provide for a Special Rapporteur and committee to oversee their implementation.

According to the Committee on Economic, Social, and Cultural Rights, the Standard Rules provide a “particularly valuable reference guide in identifying more precisely the relevant obligations of States parties under the Covenant [ICESCR].”<sup>213</sup> Although the Standard Rules are not binding, they can become international customary rules when applied by a great number of States with the intention of respecting a rule in international law.<sup>214</sup> Overall, the Standard Rules incorporate a much broader approach to the rights of the disabled than the Principles, focusing on the equalization of opportunities and the right of persons with disabilities “to remain within their local communities.”<sup>215</sup>

#### 4.5 General Comment No. 5

An important source regarding the interpretation of international conventions are General Comments issued by treaty-based committees or oversight bodies. Although General Comments are non-binding, they do provide an official interpretation of the particular convention at issue. Comments dealing specifically with the rights of persons with disabilities

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<sup>210</sup> *Ibid.* at Rules 9-12.

<sup>211</sup> *Ibid.* at Rule 14.

<sup>212</sup> *Ibid.* at Rule 1.

<sup>213</sup> Committee on Economic, Social and Cultural Rights, *Report on the Tenth and Eleventh Session, General Comment No. 5 (1994): Persons with Disabilities*, U.N. Doc. E/1995/22-E/C.12/1994/20 at para 7. [Hereinafter General Comment].

<sup>214</sup> Standard Rules, *supra* note 204 at para. 13 of Introduction.

<sup>215</sup> *Ibid.* at para. 27 of Introduction.

are considerable in their language and scope.<sup>216</sup> In 1994, the Committee on Economic, Social, and Cultural Rights issued General Comment No. 5<sup>217</sup> (General Comment) which emphasizes the importance and relevance of the ICESCR to the protection of persons with mental and physical disabilities. In particular, the Committee emphasized the important role that the Principles and the Standard Rules play in “ensuring the full range of human rights for persons with disabilities.”<sup>218</sup> The Committee also made it clear that Article 2(2) of the ICESCR, which offers protection against discrimination based on “other status”, applies to discrimination based on disability.<sup>219</sup>

After reviewing the implementation of United Nations’ initiatives, such as the WPA and the U. N. Decade of Disabled Persons, the General Comment concludes that “persons with disabilities are very often denied the opportunity to enjoy the full range of economic, social and cultural rights recognized in the Covent [ICESCR].”<sup>220</sup> It also notes that States Parties have devoted very little attention to the rights of person with disabilities and have failed to take “decisive concerted measures that would effectively improve the situation of persons with disabilities.”<sup>221</sup> The General Comment is also critical of the fact that there is no universally accepted definition of “disability”<sup>222</sup> and that major shifts in policy and program efforts for the disabled is required in every Member State.<sup>223</sup>

With this General Comment, the United Nations has officially recognized that persons with disabilities are fully covered by the ICESCR. More importantly, it has recognized that in order

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<sup>216</sup> Eric Rosenthal & Arlene Kanter, “The Right to Community Integration for people with Disabilities Under United States and International Law” in Mary Lou Breslin and Silvia Yee, eds., *Disability Rights Law and Policy: International and National Perspectives* (Ardsley, N.Y.: Transnational Publishers, 2002) 309 at 336.

<sup>217</sup> General Comment, *supra* note 213.

<sup>218</sup> *Ibid.* at para. 7.

<sup>219</sup> *Ibid.* at para 5.

<sup>220</sup> *Ibid.* at para. 1.

<sup>221</sup> *Ibid.* at para. 2.

<sup>222</sup> *Ibid.* at para. 3.

<sup>223</sup> *Ibid.* at para. 8.

to realize these protective rights, it must encourage the enactment of domestic anti-discrimination laws.<sup>224</sup>

#### 4.6 Disabilities Convention

The lack of a binding international treaty regarding the rights of persons with disabilities, has led to growing pressure from disability rights activists for the United Nations to adopt a convention dealing specifically with the rights of the disabled. Recently, there has been a positive step forward in initiating the necessary measures to reach such a goal. On December 19, 2001, the United Nations General Assembly adopted Resolution 56/168, regarding a “Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities.”<sup>225</sup>

At the time of writing, the Ad Hoc Committee has met seven times.<sup>226</sup> During the first two meetings, the Ad Hoc Committee solicited views and suggestions from Member States and international organizations regarding the drafting of a convention. After the second meeting, a Working Group<sup>227</sup> was established with the aim of preparing and presenting a draft text of the proposed convention. During the third through the sixth meeting, the Ad Hoc Committee completed two readings of the draft text. At the seventh meeting, the Ad Hoc Committee considered a Working Text proposed by the Chair. An eight meeting is schedule to take place

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<sup>224</sup> Stanley S. Herr, *supra* note 177 at 123.

<sup>225</sup> U.N. Doc. A/56/583/Add.2. The primary objective of the resolution was to:

... establish an Ad Hoc Committee, open to the participation of all Member States and observers of the United Nations, to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach in the work done in the filed of social development, human rights and non-discrimination ... (at para. 1).

<sup>226</sup> 1<sup>st</sup> Session, July 29 - August 9, 2002; 2<sup>nd</sup> Session, June 16 – 27, 2003; 3<sup>rd</sup> Session, May 24 – June 4, 2004; 4<sup>th</sup> Session, August 23 – September 3, 2004; 5<sup>th</sup> Session January 24 – February 4, 2005; 6<sup>th</sup> Session August 1 – 12, 2005; 7<sup>th</sup> Session January 16 – February 3, 2006.

<sup>227</sup> The Working Group includes policy makers, persons with disabilities, human rights advocates and experts.

from August 14 – 26, 2006 in order to finalize the Committee's negotiations with Member States based on a revised version of the Working Text.<sup>228</sup>

According to the Working Text, the purpose of the proposed convention is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, and to promote respect for their inherent dignity.”<sup>229</sup> In order to achieve these goals, the proposed Convention provides a blueprint for non-discrimination and equality,<sup>230</sup> special recognition of women and children with disabilities,<sup>231</sup> the right to life, liberty and security of the person,<sup>232</sup> freedom from cruel, inhuman or degrading treatment or punishment,<sup>233</sup> and the right to inclusion in all aspects of community and social affairs.<sup>234</sup> Recognizing that persons with disabilities, especially women and girls, are often at a greater risk of becoming victims of violence, abuse, neglect or exploitation, the Working Text obliges all States Parties to institute the necessary measures to protect persons with disabilities both inside and outside the home. In particular, States Parties are under an obligation to “take all appropriate measures to prevent all forms of exploitation, violence and abuse.” In relation to victims of such acts, the Working Text requires States to provide for their physical, cognitive and psychological recovery, rehabilitation and social reintegration.<sup>235</sup> Above all, the Working Text provides a framework for the protection of persons who are institutionalized. In order to

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<sup>228</sup> See United Nations Report, Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, online: <<http://www.un.org/esa/socdev/enable/rights/adhoccom.htm>> (last accessed May 19, 2006).

<sup>229</sup> See Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its seventh session, A/AC.265/2006/2, Annex II, (Working Text) at Article 1, online: <<http://www.un.org/esa/socdev/enable/rights/ahc7report-e.htm>> (last accessed May 26, 2006).

<sup>230</sup> *Ibid.* at Article 5.

<sup>231</sup> *Ibid.* at Articles 6, 7.

<sup>232</sup> *Ibid.* at Articles 10, 14.

<sup>233</sup> *Ibid.* at Article 15.

<sup>234</sup> *Ibid.* at Articles 19, 27, 29, 30.

<sup>235</sup> *Ibid.* at Preamble and Article 16.

protect persons from cruel, inhuman or degrading treatment, persons with disabilities are to be protected from “forced interventions or forced institutionalization,”<sup>236</sup> and to be free from medical or scientific experimentation without the free and informed consent of the person concerned.<sup>237</sup>

Although it is not certain whether the proposed convention will ever be adopted, the passage of an internationally binding treaty would definitely have a positive impact on the millions of persons with disabilities throughout the world. The adoption of such a convention would not only assist in providing additional protection from human rights abuses for persons with disabilities, it would also play an integral role in shaping government policies and programs. Above all, it would provide the basis for viable remedies for persons with disabilities. The major argument in favour of a convention on the rights of persons with mental and physical disabilities is that it would not only create binding law but that it would foster the recognition of the human dignity of persons with disabilities and help reduce disability discrimination.<sup>238</sup> In addition, it would increase resources and attention from the United Nations and governments throughout the world to anti-discrimination issues. Finally, a binding convention would emphasize the fact that persons with disabilities is not a social welfare issue but rather a human rights issue.<sup>239</sup>

Even if the proposed Convention is never adopted, the United Nations has established an important framework for protecting the interests of persons with mental and physical disabilities. The existing United Nations resolutions and declarations, the Standard Rules, the Principles, and the General Comment, have already established a basis for the protection

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<sup>236</sup> *Ibid.* at Article 17.

<sup>237</sup> *Ibid.* at Article 15. Protection of economic, social and cultural rights also features prominently in the Working Text. The proposed convention protects the right to privacy, (Article 22); ensures the right to freedom of expression and opinion, (Article 21), education, (Article 24) health, (Article 25) work and employment, (Article 27); and encourages the participation of persons with disabilities in public, political and cultural life, (Articles 29, 30).

<sup>238</sup> Some have argued that the current system of resolutions, principles and standards amount to nothing more than a “toothless tiger”: see Theresia Degener & Gerard Quinn, “A Survey of International, Comparative and Regional Disability Law Reform” in Mary Lou Breslin and Silvia Yee, eds. *Disability Rights Law and Policy: International and National Perspectives* (Ardsley, N.Y.: Transnational Publishers, 2002) 3 at 18.

<sup>239</sup> *Ibid.*

against discrimination for persons with disabilities under international law.<sup>240</sup> As more and more countries adopt domestic laws<sup>241</sup> that deal with discrimination against the disabled, and as the international community as a whole, primarily through the arm of the United Nations, pays greater attention to the interests of the disabled and looks to the existing international documents for guidance, the human rights of persons with disabilities may soon become part of customary international law. The present framework is also an important catalyst in the paradigm shift regarding how the world views persons with disabilities. For most of the twentieth century, issues regarding persons with disabilities were analysed in the confines of the medical model. That is, persons with disabilities were primarily viewed as objects in need of medical treatment. The disability itself, as opposed to the individual, was the focal point of discussion. Today, there is clearly a shift away from the medical model to that of the social model. In other words, persons with disabilities are now being viewed as worthy subjects of international human rights protection. As Theresia Degener has argued, “[t]o treat disability as a legally recognized discrimination category implies an acknowledgement that disabled people are people with rights, not problems.”<sup>242</sup> Although the growing emphasis of the human rights of persons with disabilities is definitely a step in the right direction, there is clearly more that the international community can do in order to greater protect persons with mental disabilities. The granting of refugee protection to persons who are persecuted because of their mental disability would provide an additional level of human rights protection. The subsequent chapters will consider this in greater detail.

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<sup>240</sup> Rosenthal & Kanter, *supra* note 216 at 341.

<sup>241</sup> Within the last decade, over 40 Member States of the United Nations have adopted some form of domestic anti-discrimination law for the protection of persons with disabilities. See for example, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6., the Australian *Disability Discrimination Act 1992* (Cth.), the *Disability Discrimination Act 1995* (U.K.), 1995, c. 50., and the *Americans with Disabilities Act*, 42 U.S.C. § 12101 (1990). For an excellent overview of this subject matter see Theresia Degener, “Disability Discrimination Law: A Global Comparative Approach” in Anna Lawson & Caroline Gooding eds. *Disability Rights in Europe: From Theory to Practice* (Oxford: Hart Publishing, 2005) 87.

<sup>242</sup> Degener, *supra* note 241 at 90.

## CHAPTER FIVE      Well-Founded Fear of Persecution

As noted in Chapter Two, in order to qualify for refugee protection, an applicant must be unable or unwilling to return to his or her country of origin due to “a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.” Therefore, the essential question that must be answered in any refugee claim, is whether the harm feared by the refugee claimant amounts to persecution. However, the term “persecution” is not defined in the Refugee Convention. The likely reason for this is that the framers did not want to restrict its application, thus, allowing states a wide discretion in application of the term. In this chapter I survey the meaning of the term “persecution” and the requirement that the fear of persecution be “well-founded.”

### 5.1 Persecution Defined

An underlying objective of the Refugee Convention, as outlined in its preamble, is the international community’s commitment to the protection of human rights without discrimination.<sup>243</sup> Based on this objective, an assumption can be made that the Refugee Convention is to be read in an expansive and liberal manner. This does not mean, however, that every individual who faces some harm in his or her country of origin is entitled to refugee status. The feared harm must still amount to persecution. Without persecution there can be no refugee protection.<sup>244</sup>

From a historical standpoint, the term “persecution” was not included in any of the refugee protection instruments adopted between the two World Wars.<sup>245</sup> The first time the notion of persecution entered the realm of refugee protection was in the IRO definition.<sup>246</sup> As noted in Chapter Two, the concept was later adopted by both the UNHCR and the by the Conference of Plenipotentiaries who drafted the present version of the Refugee Convention.

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<sup>243</sup> See *Ward*, *supra* note 7 at 733.

<sup>244</sup> Hathaway, *supra* note 97 at 103.

<sup>245</sup> See for example the discussion in Chapter Two regarding the following: the 1926 Arrangement, the 1928 Arrangement, the 1933 Convention, and the 1938 Convention.

<sup>246</sup> See Chapter Two.



Although the framers opted to incorporate the term "persecution" into the refugee definition, the Refugee Convention itself does not define the term and there exists no universally accepted definition of the term.<sup>247</sup> In light of this fact, some have argued that the term was intentionally left undefined in order to allow for a flexible interpretation. As Grahl-Madsen has stated: "it seems as if the drafters ... 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."<sup>248</sup>

When applying the refugee definition to an applicant, of primary importance is ascertaining whether the harm feared is serious enough to amount to "persecution." Exactly when a serious act crosses the line into the realm of persecution is far from clear. Although persecution is not a defined term, Article 33 of the Refugee Convention does provide a starting point to determine its scope. Article 33(1) reads as follows:

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

In line with this article, there is general agreement among the UNHCR and scholars that a threat to life or freedom for reasons of one of the enumerated grounds will always amount to persecution for the purposes of the Refugee Convention.<sup>249</sup> Beyond this, however, views differ on the precise meaning of the term. A brief review of the general themes regarding this subject matter will assist in reaching some common ground.

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<sup>247</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1979, re-edited 1992) at para. 51. [Hereinafter: *Handbook*].

<sup>248</sup> Grahl-Madsen, *supra* note 91 at 193. According to Paul Weis, "The term "persecution" has nowhere been defined and this was probably deliberate": Weis, *supra* note 84 at 970.

<sup>249</sup> Paragraph 51 of the UNHCR *Handbook*, *supra* note 247, states the following: "From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution"; "A threat to life or freedom on one of the grounds stated in the Statute and the Convention will always be persecution": Weis, *supra* note 84 at 970; "[t]he core meaning of persecution readily includes the threat of deprivation of life or physical freedom": Goodwin-Gill, *supra* note 68 at 68.

The UNHCR, with its mandate to protect international refugees, has attempted to interpret the meaning of the term "persecution." In its opinion, besides a threat to life or freedom for reasons of one of the enumerated grounds, other serious human rights violations will amount to persecution.<sup>250</sup> In addition, persecution may arise from the cumulative effect of a series of acts, which, on their own, may not necessarily amount to persecution.<sup>251</sup> As Hathaway has argued, international human rights instruments, such as the UDHR, the ICCPR and the ICESCR, provide the framework upon which to determine whether "persecution," as it relates to the Refugee Convention, has occurred.<sup>252</sup> If it is established that a claimant has suffered a violation of an internationally recognized core human right, the persecution arm of the refugee definition will likely be met. Thus, according to Hathaway, persecution is defined as the "sustained or systematic violation of basic human rights demonstrative of a failure of state protection."<sup>253</sup> However, Hathaway also realizes that not all violations of the International Bill of Human Rights<sup>254</sup> will amount to persecution. The right violated and the level of harm associated with that violation must be analysed in light of the particular circumstances at hand. As the UNHCR *Handbook* states: "[w]hether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case."<sup>255</sup> In addition, mere discrimination, without being severe enough to amount to a "substantially prejudicial nature" will not amount to persecution.<sup>256</sup>

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<sup>250</sup> *Handbook*, *supra* note 247 at para 51. Along the same line, Weis has argued that "[o]ther measures in disregard of human dignity may also constitute persecution": Weis, *supra* note 84 at 970. In *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs* (1989), 169 CLR 379 (H.C.A.), Dawson J. acknowledged the *Handbook's* view that serious violations of human rights may constitute persecution. See also Nina Chandy, *Gender Persecution as a Basis for Refugee Status: Internationally and in Canada* (LL.M. Thesis, Dalhousie University, 1997) [unpublished] at 36.

<sup>251</sup> *Handbook*, *supra* note 247 at para 53. See also *Singh v. I.N.S.*, 94 F. 3d 1353 (9<sup>th</sup> Cir., 1997) at 1358: "while a single incident in some cases may not rise to the level of persecution, the cumulative effect of several incidents may constitute persecution." See also Chandy, *supra* note 250 at 37.

<sup>252</sup> See discussion in Chapter Three.

<sup>253</sup> Hathaway, *supra* note 97 at 104-105 footnote omitted.

<sup>254</sup> See note 162.

<sup>255</sup> *Handbook*, *supra* note 247 at para. 52.

<sup>256</sup> *Ibid.* at paras. 54-55.

In Canada, Hathaway's approach of linking persecution with the concept of human rights was adopted in *Ward*<sup>257</sup> and later reiterated in *Chan*.<sup>258</sup> As Justice LaForest stated in *Chan*:

This point [human rights protection] was underscored in *Ward* where it was stated that "[u]nderlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination." In that case, this court endorsed an approach in which the concern of refugee law ought to be the denial of human dignity in any key way with the sustained or systemic denial of core human rights as the appropriate standard.<sup>259</sup>

According to Guy S. Goodwin-Gill, another noted scholar of refugee law, "attempting to list all known measures of persecution" is futile. However, he offers a meaningful analysis of the term as follows:

"Persecution within the Convention thus comprehends measures, taken on the basis of one or more of the stated grounds, which threaten deprivation of life or liberty; torture or cruel, inhuman, or degrading treatment; subjection to slavery or servitude; non-recognition as a person (particularly where consequences of such non-recognition impinge directly on an individual's life, liberty, livelihood, security, or integrity); and oppression, discrimination, or harassment of a person in his or her private, home, or family life."<sup>260</sup>

In Australia, both the Federal Court of Appeal and the High Court have examined the term "persecution" on numerous occasions. A noteworthy analysis of the term is the much quoted statement of McHugh J. in *Chan Yee Kin*, who stated:

"The term 'persecution' is not defined by the Convention or the Protocol. But not every threat of harm to a person or interference with his or her rights for reasons of race, religion, nationality, membership of a particular social group or political opinion constitutes 'being persecuted.' The notion of persecution involves selective harassment. It is not necessary, however, that the conduct complained of should be directed against a person as an individual. He or she may be 'persecuted' because he or she is a member of a group which is the subject of systematic harassment ... Nor is it a necessary element of 'persecution' that the individual should be the victim of a series of acts. A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a

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<sup>257</sup> *Supra* note 7.

<sup>258</sup> *Chan v. Canada (Minister of Employment and Immigration)* (1995), 128 D.L.R. (4<sup>th</sup>) 213 (S.C.C.).

<sup>259</sup> *Ibid.* at 241.

<sup>260</sup> Goodwin-Gill, *supra* note 68 at 69.

member of a class, he or she is “being persecuted” for the purposes of the Convention. The threat need not be the product of any policy of the government of the person’s country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution ... Moreover, to constitute “persecution” the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute “persecution” for the purposes of the Convention and Protocol. Measures “in disregard” of human dignity may, in appropriate cases, constitute persecution.”<sup>261</sup>

Since there is “no limit to the perverse side of human imagination,” very little can be gained from developing a list of known forms of persecution.<sup>262</sup> Thus, the majority of the statements made by both courts and scholars regarding the term “persecution” are descriptive rather than definitive of what constitutes persecution as contemplated by the Refugee Convention. They do not define at what point harm or discrimination pass into the realm of persecution. Nonetheless, important factors have been identified which assist in the final determination of a refugee claimant’s case.

First, a threat to an individual’s life or freedom will always constitute persecution. Second, persecution will include more than just threats to life or freedom. Under certain circumstances, persecution may include oppressive acts directed at a claimant’s fundamental human rights or human dignity. Third, the harm feared must be of a serious nature that amounts to “more than occasional instances of physical abuse.”<sup>263</sup> Fourth, persecution may stem from a single act or arise from the cumulative effect of a series of acts. Fifth, random or isolated cases of harassment will likely not meet the persecution threshold. In other words, there generally must be an element of systematic discrimination or harassment. Finally, persecution must be distinguished from prosecution. Individuals fleeing from punishment of a common law offence will normally not fall within the refugee definition.<sup>264</sup>

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<sup>261</sup> *Chan Yee Kin*, *supra* note 250 at 429-430.

<sup>262</sup> Goodwin-Gill, *supra* note 68 at 69.

<sup>263</sup> *Nelson v. I.N.S.*, 232 F. 3d 258 (1<sup>st</sup> Cir., 2000) at 265.

<sup>264</sup> Paragraph 56 of the *Handbook*, *supra* note 247 states the following: “Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim – or potential victim – of injustice, not a fugitive from justice”.

## 5.2 Well-Founded Fear

The Refugee Convention not only requires that the claimant have a fear of “persecution” but also that the fear be “well-founded.” The “well-founded” element of the refugee definition contains both a subjective and objective component. The subjective component deals with the claimant’s own experience of fear. Paragraphs 40 and 41 of the UNCHR *Handbook* discuss the manner in which one may evaluate a claimant’s fear as follows:

40. An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure.

41. Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences – in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.

The objective element of fear requires an analysis of whether the claimant’s fear is “well-founded” – i.e., whether the harm feared is likely to arise should the claimant be returned to his or her country of origin. The claimant bears the onus of establishing the objective criteria for believing that the anticipated risk of harm will happen. The *Handbook* explains this element of the refugee definition as follows:

As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgment on conditions in the applicant’s country of origin. The applicant’s statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant’s country of origin – while not a primary objective – is an important element in assessing the applicant’s credibility. In general, the applicant’s fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.<sup>265</sup>

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<sup>265</sup> *Handbook*, *supra* note 247 at para. 43.

The objective component is by far the more important of the two. Of central importance to the objective component is the likelihood that the claimant will face persecution if sent back to his or her country of origin. Accordingly, the focus of this analysis revolves around the issue of the degree of state protection.

### 5.3 Level of State Protection

Generally speaking, a state's obligation to extend refugee protection will only arise when a claimant's country of origin is unable or unwilling to provide the requisite level of protection to diminish the likelihood that the claimant will suffer persecution should he or she be denied refugee status. A contentious matter in the current refugee determination process is the relevance of state protection and whether or not a claimant is at risk of being persecuted. Where the state itself is the source of the persecution that is feared, the question regarding whether there is adequate state protection does not usually arise. The reason is simple: "[a]ctive persecution by the state is the very reverse of protection."<sup>266</sup> Thus, it is in the context of persecution at the hands of non-state actors that the issue of the level of state protection is most relevant to the refugee determination process.

Recently, the issue of non-state agents of persecution has played a major role in many refugee determination proceedings. As already noted, the general view is that refugee protection is granted as a form of surrogate protection because the asylum applicant's country of origin has failed or will fail to give protection.<sup>267</sup> As Guy Goodwin-Gill has stated, "the degree of protection normally to be expected of government is either lacking or denied."<sup>268</sup> In cases where the state itself is the agent of persecution, this is not really an issue. It is generally a forgone conclusion that the state will not protect the asylum applicant if he or she is sent back because the state is the means of the persecution. In cases involving non-state agents of persecution, such as a husband abusing his wife, the case is harder to make.<sup>269</sup> Although the

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<sup>266</sup> *Horvath, supra* note 9 at 514 per Lord Clyde.

<sup>267</sup> Hathaway, *supra* note 97 at p. 124.

<sup>268</sup> Guy Goodwin-Gill, "Non-Refoulement and the New Asylum Seekers" (1986) 26 Va. J. Int'l L. 897 at 901.

<sup>269</sup> As one author has noted: "The non-state actor, particularly because of his myriad shapes, presents unique analytical challenges to asylum law. Though citizens have a right to protection from threats, when the agent of persecution is not the state, it is uncertain when the state's

majority of Western states recognize non-state actors as falling within the Refugee Convention, some states do not recognize this form of persecution and refuse to grant refugee protection.<sup>270</sup>

The UNHCR has stated that the Refugee Convention extends to cases of persecution by non-state agents where the persecution is either tolerated by the home state or where the state is unable or unwilling to provide protection. In particular, the UNHCR has stated the following in its *Handbook*:

Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.<sup>271</sup>

The Refugee Convention does not address the *source* of the asylum seekers fear of persecution and there is no official link required between persecution and state authority.<sup>272</sup> Therefore, “to insist that persecution be attributed to the State, is to impose an unjustifiable ‘additional restriction.’”<sup>273</sup>

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failure rises to an unacceptable level and warrants an asylum grant”: Michael G. Heyman, “Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence” (2003) 36 U. Mich. J. L. Ref. 767 at 788.

<sup>270</sup> A number of countries such as the United Kingdom and Canada have recognized non-state forms of persecution as a basis for refugee protection. Recently, courts in the United Kingdom have stated that persecution, in relation to the Refugee Convention, may emanate from non-state actors; see Sylvie Da Lomba, *The Right to seek Refugee Status in the European Union* (New York: Intersentia, 2004) at 6.

<sup>271</sup> *Handbook*, *supra* note 247 at para. 65.

<sup>272</sup> Goodwin-Gill, *supra* note 68 at 72.

<sup>273</sup> Guy Goodwin-Gill, “The Margin of Interpretation: Different or Disparate?” (1990) 11 Int’l J. Refugee L. 730 at 731. In addition: “Linking persecution exclusively to the state has a number of consequences; in practice, it leads to the denial of protection to those who, for example, may face the threat of genocide or other violations of human rights ... it [also] requires reading into the refugee definition an additional element, mainly, that of attribution or accountability”: *Ibid.* at 730.

A majority of common law jurisdictions, such as Canada, Australia, United Kingdom and the U.S., have adopted what is commonly referred to as the “protection theory” in the refugee determination process. This theory recognizes persecution by both state and non-state agents.<sup>274</sup> Under this theory, the asylum applicant must only show that the State has merely failed to provide the necessary protection in relation to the feared persecution. However, some Member States have followed the more restrictive “accountability theory.”<sup>275</sup> Unlike the protection theory, this theory does not grant refugee protection to those fearing persecution at the hands of certain non-state actors.<sup>276</sup> In relation to non-state actors, the accountability theory will generally only grant refugee protection where the State is *unwilling but able* to protect against persecution by non-state actors. The significance of this theory is “that it replaces the more embracing ‘*unable or unwilling* to protect’ standard in paragraph 65 of the UNHCR *Handbook* with a more demanding ‘*unwilling but able* to protect’ requirement.”<sup>277</sup>

In relation to the issue of state protection, Hathaway notes that the Canadian Immigration and Appeal Board has identified four scenarios in which it can be said that there is a lack of state protection: 1) the state concerned has committed the persecution; 2) the state concerned has condoned the persecution; 3) the state concerned has tolerated the persecution; and 4) the state concerned has not tolerated or condoned the persecution but has either refused or has been unable to provide the necessary protection.<sup>278</sup> The relevance of a state’s unwillingness or inability to offer protection to the refugee determination process has been discussed in a number of cases. For our purposes, it will suffice to discuss the holding of the important UK House of Lords decision in *Horvath*.<sup>279</sup> In that case, the court held that in order for persecution

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<sup>274</sup> Jennifer Moore, “Whither the Accountability Theory: Second-Class Status for Third-Party Refugees as a Threat to International Refugee Protection” (2001) 13 Int’l J. Refugee L. 32 at 34.

<sup>275</sup> For example, until very recently, both France and Germany were proponents of this theory. However, with the recent harmonization of EU Asylum laws, both now apply the “protection theory.”

<sup>276</sup> Jennifer Moore, *supra* note 274 at 34-35. See also Rosemary Byrne, Gregor Noll & Jens Vedsted-Hansen eds., *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (New York: Kluwer Law International, 2002) at 416.

<sup>277</sup> Jennifer Moore, *supra* note 274, at 35.

<sup>278</sup> Hathaway, *supra* note 97 at 129.

<sup>279</sup> *Supra* note 9.



to fall within the meaning of the Refugee Convention, there has to be a lack of state protection because either the state is the source of the persecution or because the state is unable to provide the requisite level of protection. As Lord Hope of Craighead stated:

I would hold therefore that, in the context of an allegation of persecution by non-state agents, the word "persecution" implies a failure by the state to make protection available against the ill-treatment or violence which the person suffers at the hands of his persecutors. In a case where the allegation is of persecution by the state or its own agents the problem, of course, does not arise. There is a clear case for surrogate protection by the international community. But in the case of an allegation of persecution by non-state agents the failure of the state to provide the protection is nevertheless an essential element. It provides the bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of the consistency of the whole scheme.

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To sum up therefore on this issue, I consider that the obligation to afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals. I think that it follows that, in order to satisfy the fear test in a non-state agent case, the applicant for refugee status must show that the persecution which he fears consist of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection. The applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well founded, do not entitle him to the status of refugee.<sup>280</sup>

Based on the court's analysis, if the state is not the source of the harm feared or is not indifferent to it, then an inquiry must be made of the sufficiency of state protection to determine whether the claimant will be a victim of persecution. The importance of this concept and the court's analysis is that it is grounded on the concepts of human rights and anti-discrimination. In other words, a State is expected to provide a basic level of protection against human rights violations. Although the level of protection need not be perfect, an examination must be made as to whether the State has provided the necessary level of protection. Undoubtedly, the requisite level of protection must be determined case-by-case taking into account the particular facts at hand. In *Shah and Islam*,<sup>281</sup> another important case dealing with the issue of non-state agents of persecution, Lord Hoffman summarized the relationship

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<sup>280</sup> *Ibid.* at 497-499.

<sup>281</sup> *Shah and Islam*, *supra* note 89.

between state protection and persecution as follows: "Persecution = Serious Harm + the Failure of State Protection."<sup>282</sup>

#### 5.4 Standard of Proof

A final issue that must be discussed is the standard of proof required for the applicant to establish a well-founded fear of persecution. The United States position for many years was that the applicant had to prove a well-founded fear of persecution on a balance of probabilities. This position changed, however, with the United States Supreme Court's decision in *Cardoza-Fonseca v. I.N.S.*<sup>283</sup> In that case, the "balance of probabilities" standard was rejected and replaced with the more flexible "reasonable possibility" test. The Court stated its preference for this standard in the following manner:

There is simply no room in the United Nations definition for concluding that because an applicant has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening. ... As we pointed out in *Stevic*, a moderate interpretation of the "well-founded fear" standard would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."<sup>284</sup>

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<sup>282</sup> *Ibid.* at 565 per Lord Hoffman affirming the formula provided in *Gender Guidelines for the Determination of Asylum Claims in the UK* (Refugee Women's Legal Group, July 1998). Lord Hoffman expanded upon this concept by offering the following example:

...suppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organized by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question "Why was he attacked?" would be "because a competitor wanted to drive him out of business." But another answer, and in my view the right answer in the context of the Convention, would be "he was attacked by a competitor who knew that he would receive no protection because he was a Jew" at 565.

<sup>283</sup> *Cardoza-Fonseca, v. I.N.S.*, 480 U.S. 421 (U.S.S.Ct., 1987).

<sup>284</sup> *Ibid.* at 440.

The reasonable possibility standard of *Cardoza-Fonseca* was considered by the UK House of Lords in its decision in *Sivakumaran*.<sup>285</sup> The context in which the court analysed the requisite standard of proof was the reverse of the context in *Cardoza-Fonseca*. Instead of considering a standard that was too restrictive, the House of Lords had to consider a Court of Appeal standard that was viewed as too liberal as it emphasised the claimant's subjective fear component over the objective element. The House of Lords unanimously rejected the primarily subjective standard, opting for a more objectively identifiable standard.<sup>286</sup> To a large extent, Lord Keith of Kinkel adopted the holding in *Cardoza-Fonseca*, with a slight modification: "[i]n my opinion the requirement that an applicant's fear of persecution should be well founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a convention reason if returned to his or her own country."<sup>287</sup> Although in substantial agreement with Lord Keith of Kinkel, both Lord Goff of Chieveley and Lord Templeton were more restrictive in their analysis as they held that the appropriate standard is one where there is a "real and substantial danger of persecution."<sup>288</sup>

In Canada, the leading case regarding the requisite standard of proof is *Adjei v. Minister of Employment and Immigration*.<sup>289</sup> In that case, the Federal Court of Appeal also rejected the "balance of probabilities" standard and adopted the more liberal "reasonable chance" standard. MacGuigan J.A. described the standard as follows:

It was common ground that the objective test is not so stringent as to require a *probability* of persecution. In other words, although an applicant has to establish his case on a balance of probabilities, he does not nevertheless have to prove that persecution would be more likely than not ... The parties were agreed that one accurate way of describing the requisite test is in terms of "reasonable chance": is there a reasonable chance that persecution would take place were the applicant returned to his country of origin?

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<sup>285</sup> *R v. Secretary of State for the Home Department, ex parte Sivakumaran*, [1988] 1 All E.R. 193 (H.L.).

<sup>286</sup> See Hathaway, *supra* note 97 at 78.

<sup>287</sup> *Sivakumaran*, *supra* note 285 at 197-198.

<sup>288</sup> *Ibid.* at 199 per Lord Templeman and at 202 per Lord Goff of Chieveley.

<sup>289</sup> *Supra* note 154.

What is evidently indicated by phrases such as “good grounds” or “reasonable chance” is, on the one hand, that there need not be more than a 50 per cent chance (*i.e.*, a probability), and on the other hand, that there must be more than a minimal possibility. We believe this can also be expressed as a “reasonable” or even a “serious possibility”, as opposed to a mere possibility.<sup>290</sup>

In reaching its decision, the court rejected the “real and substantial” standard adopted by the UK House of Lords in *Sivakumaran* because of its ambiguity and for setting too high a standard.<sup>291</sup>

In *Ponniah v. Canada (Minister of Employment & Immigration)*<sup>292</sup> Desjardins J.A. expanded upon the *Adjei* standard as follows:

“Good grounds” or “real chance” is defined in *Adjei* as occupying the field between upper and lower limits; it is less than a 50 per cent chance (*i.e.* a probability), but more than a minimal possibility. There is no intermediate ground: what falls between the two limits is “good grounds”. If the claimant, as the Board said, “may face slightly more than a mere possibility” of persecution, he had crossed the lower limit and had made his case of “good grounds” or a “reasonable chance” for fearing persecution.<sup>293</sup>

Overall, both Canada and the United States have adopted the more liberal approach. If there is a “reasonable chance or possibility” that the claimant will suffer persecution if sent back, then the fear will be classified as “well-founded.” This position is also in line with the overriding opinion of many scholars who have rejected the restrictive “balance of probabilities” test in favour of such standards as “good reasons,”<sup>294</sup> “reasonable grounds,”<sup>295</sup> a “real chance,”<sup>296</sup> or a “serious possibility.”<sup>297</sup> Hathaway prefers the “reasonable possibility” as the appropriate test as

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<sup>290</sup> *Ibid.* at 172-173.

<sup>291</sup> *Ibid.* at 173-174.

<sup>292</sup> *Ponniah v. Canada (Minister of Employment & Immigration)* (1991), 132 N.R. 32 (F.C.A.).

<sup>293</sup> *Ibid.* at 34.

<sup>294</sup> Paul Weis, *supra* note 84 at 970.

<sup>295</sup> Theodore N. Cox, ““Well-Founded Fear of Being Persecuted”: The Sources and Application of a Criterion of Refugee Status” (1984) 10 Brook. J. Int’l L. 333 at 351-352.

<sup>296</sup> Arthur C. Helton, “Persecution on Account of Membership in a Social Group as a Basis for Refugee Status” (1983) 15 Colum. H. R. L. Rev. 39 at 56 and Grahl-Madsen, *supra* note 91 at 181.

<sup>297</sup> Goodwin-Gill, *supra* note 68 at 36-37.

it is a suitable “compromise between respect for the Convention’s commitment to anchor protection decisions in objectively observable risks and the need simultaneously to avoid the establishment of an inappropriately high threshold of concern.”<sup>298</sup>

## 5.5 Conclusion

As is evident from the above discussion, the core concept of the Refugee Convention is protection against the infliction of “persecution” on the basis of one of the five enumerated grounds. Without persecution, there is no need for international protection. Although there is no universally accepted definition of “a well-founded fear of persecution” there is substantial consensus on a few important matters. First, threats to a claimant’s life or freedom will always constitute persecution. Second, depending on the facts at hand, serious violations of fundamental human rights may form the basis of a valid refugee claim. Third, the concept of “well-founded” primarily involves an objective analysis of the particular facts at hand. In other words, there must be an air of reality to the harm feared. Fourth, the level of state protection is a relevant component of the “persecution” analysis. When the state concerned is the source of the persecution, then the lack of protection is self-evident. Persecution may also be established even though the state concerned is not the source. The bridge between persecution by the state and persecution by non-state actors will likely be met if the objective analysis reveals that the state concerned either condones or is indifferent to the harm feared. Fifth, there must be a “reasonable chance” or “reasonable possibility” that the claimant will suffer persecution if sent back to his or her country of origin. With this framework in mind, it is necessary to proceed to an analysis of whether international incidents of mistreatment of people with mental disabilities amounts to persecution under the Refugee Convention.

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<sup>298</sup> Hathaway, *supra* note 97 at 79-80.

## **CHAPTER SIX      International Mistreatment of People with Mental Disabilities**

Throughout history, persons with mental disabilities have been labelled, among other things, as “dangerous,” “sub-human” or “undesirable,” and subjected to intolerance, neglect, discrimination, abuse, and degrading and inhuman treatment. In many countries of the world, people with mental disabilities are involuntarily committed and detained in psychiatric institutions, and forced to live in horrible conditions. In many cases, persons with mental disabilities are denied fundamental human rights such as life, liberty and security of the person. Examples of mistreatment include forced sterilization, physical and sexual abuse, malnutrition, starvation, experimentation, inhumane living conditions, drugging, seclusion, and limited contact with the outside world. The Refugee Convention was adopted in order to protect individuals who have a well-founded fear of persecution. An examination of the abuses that persons with mental disabilities face throughout the world clearly illustrates that many of these people suffer “persecution” as contemplated by the Refugee Convention. The following chapter reviews some of the severe forms of mistreatment people with mental disabilities have suffered and how these specific acts of cruelty rise to the level of “persecution” as contemplated by the Refugee Convention.

### **6.1 Eugenics and Sterilization**

The word eugenics comes from the Greek word meaning “well-born” or “of good stock.” Although definitions of the term may vary, essentially, eugenics refers to a social policy or philosophy that is committed to improving the genetic stock of the human race. This movement was very influential in many parts of the world during the first half of the twentieth century. Eugenics theory was originally founded upon the rediscovery of Mendelian theories on genetics which hypothesized that many forms of mental illness, such as “retardation” and “criminality,” were inherited through the Mendelian framework of dominant and recessive genes.<sup>299</sup> Based on this theory, eugenicists advocated the use of sterilization as a panacea in order to cleanse society of the “feeble-minded” during the early part of the twentieth century. The argument in favour of eugenics sterilization was based on the assumption that certain people in society are more desirable than others and that certain traits are hereditary. The

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<sup>299</sup> Richard K. Sherlock and Robert D. Sherlock, “Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives” (1982) 60 N.C.L. Rev. 943 at 945.

assumption here was that by limiting the procreation ability of persons with mental disabilities, the inferior gene pool would eventually be limited or eliminated altogether. This general belief, coupled with the advances in surgical techniques permitting sterilization, triggered the widespread enactment of sterilization laws in many countries.<sup>300</sup>

The first country to rigorously undertake a program of eugenic sterilization was the United States. By the early 1900s, the eugenics movement gained prominence in the United States with the establishment of many eugenics societies. These societies advocated the use of sterilization in order to cleanse society by taking away the ability of the "feeble minded" to procreate. In turn, many states adopted eugenic sterilization laws which resulted in the involuntary sterilization of thousands of people.<sup>301</sup> The first American eugenic sterilization law was passed in Indiana in 1907. By 1937, a total of 31 states in America had enacted some form of sterilization law.<sup>302</sup> In 1927, the constitutional validity of eugenic sterilization laws was upheld by the U.S. Supreme Court when it ruled in favour of Virginia's sterilization law in *Buck v. Bell*.<sup>303</sup>

The case involved a woman by the name of Carrie E. Buck who had been admitted to a Virginia State institution due to her mental disability. It was alleged that Buck's mother also had a mental disability. She was classified as having the mental age of a nine year old and had recently given birth to a child. The child was also alleged to have a mental disability. Fearing that Buck would have another "feeble-minded" child, the superintendent of the institution recommended that Buck be sterilized pursuant to the Virginia sterilization statute. The board approved this recommendation. Buck's appointed guardian appealed the decision and challenged the constitutionality of the Virginia law. The case eventually reached the United States Supreme Court. By an 8-1 majority, the Supreme Court upheld the constitutionality of the Virginia sterilization law. Justice Oliver Wendell Holmes wrote the majority judgment. In

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<sup>300</sup> *Ibid.*

<sup>301</sup> Between 1900 and 1920 an estimated 3,200 institutionalized individuals were subjected to eugenic sterilization in the United States: Philip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* (Baltimore: John Hopkins University Press, 1991) at 71.

<sup>302</sup> *Ibid.* at 26.

<sup>303</sup> *Buck v. Bell*, 274 U.S. 200 (U.S.S. Ct. 1927).

an often quoted statement, Justice Holmes asserted the following words regarding the sterilization of persons with mental disabilities:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes ... Three generations of imbeciles are enough.<sup>304</sup>

With this victory in hand, the eugenics sterilization movement moved into high gear. By 1963, it is estimated that over 60,000 individuals were sterilized under state sterilization laws in the United States. The majority of sterilizations took place during the 1930s.<sup>305</sup>

The eugenics movement was not only a U.S. phenomenon. The movement was strong in many other countries of the world such as Canada, Germany, Denmark, Sweden, Norway, Finland, Mexico, Japan and France. All of these countries adopted some form of a eugenics sterilization law.<sup>306</sup> In Canada, Alberta and British Columbia were the only provinces to enact eugenic sterilization legislation. In 1928, Alberta enacted the *Sexual Sterilization Act*<sup>307</sup> (the Alberta Act). Initially, the Alberta Act only permitted sterilization when consent was given by the individual in question or by the legal guardian of the individual. However, in 1937, an amendment was passed allowing for the involuntary sterilization of persons deemed mentally defective.<sup>308</sup> The reasons for the sterilization of institutionalized persons were to reduce the risk of transmission of any mental disease, disability or deficiency to offspring and to lessen the risk of mental injury, either to such persons or their offspring.<sup>309</sup> Although the Alberta Act was

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<sup>304</sup> *Ibid.* at 207.

<sup>305</sup> Reilly, *supra* note 301 at 103.

<sup>306</sup> *Ibid.*

<sup>307</sup> S.A., 1928 c. 37.

<sup>308</sup> *An Act to Amend the Sexual Sterilization Act*, S.A. 1937, c. 47.

<sup>309</sup> *Ibid.* at ss. 4, 5.



eventually repealed in 1972,<sup>310</sup> an estimated 2,800 persons were sterilized over a 43 year period.<sup>311</sup>

In 1933, British Columbia enacted its own *Sexual Sterilization Act*<sup>312</sup> (B.C. Act). The B.C. Act was very similar in scope with its Alberta counter-part. The B.C. Eugenics Board<sup>313</sup> had to unanimously decide in favour of sterilization based on the risk that “procreation by the inmate [institutionalized person] would be likely to produce children who by reason of inheritance would have a tendency to serious mental disease or mental deficiency.”<sup>314</sup> Under the B.C. legislation, however, consent of the institutionalized person was required in all cases of sterilization.<sup>315</sup> The B.C. Act was repealed in 1973.<sup>316</sup>

Undoubtedly, the most infamous eugenic sterilization program in the 20th century took place in Nazi Germany. When the Nazis gained power in Germany in 1933, they quickly enacted the *Law for the Prevention of Hereditarily Diseased Offspring* in order to purify the German race of defective persons. During the period between 1933 -1945, an estimated three and one-half million people were sterilized.<sup>317</sup> By 1939, the Nazis introduced a more grim method of cleansing German society of the mentally disabled –medical mass murder. Operation T-4 was the official Nazis program for exterminating persons with mental disabilities. The Nazis called the killing of persons with “lives not worth living” as “mercy killings” or “euthanasia.” Persons who were subjected to the German law included individuals who were diagnosed as having any one of the following conditions: schizophrenia, manic-depressive disorder, feeble-mindedness,

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<sup>310</sup> S.A. 1972, c. 87.

<sup>311</sup> Reilly, *supra* note 301 at 105.

<sup>312</sup> S.B.C. 1933, c. 59.

<sup>313</sup> The Board was comprised of three appointed members which included a judge, a psychiatrist and a social worker: *ibid.* at s. 4.

<sup>314</sup> *Ibid.* at s. 5.

<sup>315</sup> *Ibid.* at s. 6. If the patient was not capable of giving consent, then the consent of the spouse, parent, guardian, or the Provincial Secretary was necessary: *ibid.*

<sup>316</sup> S.B.C. 1973, c.79.

<sup>317</sup> Reilly, *supra* note 301 at 109.

epilepsy, Huntington's chorea (dementia), or chronic alcoholism.<sup>318</sup> From 1939 – 1941, it is estimated that Operation T-4 alone was responsible for the deaths of 70,000 people with mental disabilities.<sup>319</sup> In 1941, Operation T-4 was halted due to growing public outcry of the killings. However, many physicians continued killing institutionalized persons with mental disabilities throughout Germany.<sup>320</sup> Although there are no accurate numbers available regarding the total number of persons with mental disabilities who were put to death, it is estimated that over 200,000 were eventually killed between 1939 and 1945.<sup>321</sup>

Although eugenic policies are in disfavour in many countries of the world, it is still strong in China. In 1994, China passed the Maternal and Infant Health Care Law which came into force on June 1, 1995.<sup>322</sup> According to the Chinese Public Health Ministry, the purpose of the law was “to give birth to healthy future generations; the essential content is health care for mother and child.”<sup>323</sup> The law required pre-marital screenings for “serious genetic diseases” and “relevant mental disorders.”<sup>324</sup> Individuals who were diagnosed as having serious disorders deemed medically unsuitable for reproduction were not allowed to marry unless they agreed to sterilization or taking long-term contraceptive measures. If a prenatal test revealed that a mother was carrying a fetus with a serious defect or somatic disorder, then termination was

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<sup>318</sup> See, *Deadly Medicine: Creating the Master Race* (online exhibition), online: <<http://www.ushmm.org/museum/exhibit/online/deadlymedicine/narrative/index.php?content=biological>> (last accessed June 8, 2006).

<sup>319</sup> See, Michael Burleigh, “Psychiatry, German Society, and the Nazi ‘Euthanasia’ Programme” (1994) 7 *Social History of Medicine* 213 at 226.

<sup>320</sup> Hugh Gregory Gallagher, “Slapping Up Spastics: The Persistence of Social Attitudes Toward People with Disabilities” (1995) 10 *Issues in Law and Medicine* 401 at 402.

<sup>321</sup> Initially, individuals were killed by carbon monoxide poisoning in gas chambers. Other forms included, starvation, drug overdose and poisoning in the institutions, and execution. According to one secret document, 1,857 “retarded German patients” were sent to Poland to be executed: Reilly, *supra* note 301 at 105, 110.

<sup>322</sup> “Western eyes on China’s eugenics law,” Editorial, *The Lancet* (July 15, 1995) available on Lexis in ALLNWS database.

<sup>323</sup> Steven Musfon “China Softens Bill on Eugenics” *Washington Post* (December 30, 1993) A17.

<sup>324</sup> *Ibid.* Mental disorders included, schizophrenia, manic-depressive psychoses and other severe psychoses: *ibid.*

recommended.<sup>325</sup> In 2004, due to foreign criticism and growing public disapproval, China repealed the legislation.<sup>326</sup>

Despite the repeal of this legislation, there is still concern that sterilizations will continue in China. Many provinces and local governments have legislation that authorizes sterilization of persons with disabilities.<sup>327</sup> In 1986, for example, the province of Gansu enacted a law called the *Law for the Compulsory Sterilization of Idiotic, Slow-witted, Stupid and Deranged People*.<sup>328</sup> The law requires the sterilization of persons with an IQ below 49. According to one report, an estimated 5,000 persons were sterilized due to this law from 1986-1991.<sup>329</sup> In the province of Henan, persons with serious mental or hereditary diseases are strictly forbidden from bearing children and must be sterilized.<sup>330</sup> With respect to pregnant women with mental disabilities, the pregnancy must be terminated.<sup>331</sup>

## 6.2 International Conditions

Investigations by journalists and advocacy groups such as Mental Disabilities Rights International<sup>332</sup> (MDRI) have revealed inhumane living conditions and human rights violations

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<sup>325</sup> *Ibid.*

<sup>326</sup> Anoaleta Bezlova "Eugenics-China: Old Fears Return about 'Quality' of the Race" IPS-Inter Press Service, Beijing, (May 13, 2004) available on Lexis in ALLNWS database.

<sup>327</sup> For example, the Provinces of Shandong, Jilin, Gansu, Shanxi, and Henan all have laws that prevent persons with disabilities from procreating: see Gail Rodgers, "Comment: Ying and Yang: The Eugenic Policies of the United States and China: Is the Analysis that Black and White?" (1999) 22 Hous. J. Int'l L. 129 at 159.

<sup>328</sup> John Pomfret "China Clarifies Its Law on Sterilization" *Washington Post* (August, 18, 1998) z10.

<sup>329</sup> *Ibid.*

<sup>330</sup> Henan Family Planning Rules and Regulations, approved by the 15th meeting of the seventh Henan Provincial People's Congress Standing Committee on 12th April 1990: see "Henan Family Planning Rules and Regulations," BBC Summary of World Broadcasts, (June 4, 1990) available on Lexis in ALLNWS database.

<sup>331</sup> Henan Family Planning Rules and Regulations, at Article 22.

<sup>332</sup> Mental Disabilities Rights International is a Washington-based advocacy group dedicated to promoting the worldwide human rights protection of persons with mental disabilities. The

of persons with mental disabilities in psychiatric institutions, hospitals, social care homes, and other segregated institutions for persons with mental disabilities. These reports have revealed horrendous living conditions and degrading treatment of institutionalized persons with mental disabilities. Countries such as Mexico, Uruguay, Hungary, Peru, Turkey, Russia, Japan and Romania and the Serbian province of Kosovo have been the subject of reports by MDRI and journalists. The following section briefly summarizes the major findings of these reports.

The inclusion of these reports, however, is not to portray these areas as “barbaric” or lacking of “civility.” In addition, the specific acts of mistreatment noted below should not be viewed as exceptional incidents that only occur in non-Western or non-common law jurisdictions. Rather, the objective here is to raise awareness of well-documented incidents of abuse of the mentally disabled, in particular, recent incidents of abuse.

The overall objective of this section is to determine whether the specific acts of mistreatment mentioned in these reports constitutes “persecution” as contemplated under the Refugee Convention and not whether the persecution itself is “well-founded” due to the lack of state protection or cultural diversity. As such, the particular legal systems and the socio-political environments of these areas are not analysed here. The reason for this limitation is that the “well-founded” arm of the refugee definition, as noted in Chapter Five, is determined on a case-by-case basis, taking into consideration the relevant background situation of the refugee applicant.

### **6.2.1 Russia**

The conditions in Russia have not really changed since the fall of Communism. Under the Soviet regime, mentally ill patients were routinely beaten by orderlies with criminal backgrounds and denied access to bathroom facilities unless a bribe was paid. There was also very little by way of psychotherapy or recreational time. In many respects, many Soviet institutions were basically prisons.<sup>333</sup>

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organization has published some of the finest reports available regarding the plight of persons with mental disabilities throughout the world: See MDRI website at [www.mdri.org](http://www.mdri.org).

<sup>333</sup> See, “The Global Willowbrook” *New York Times* (Jan. 16, 2000) at SM58.

Recently, the abuse of children with mental disabilities has been well documented. These children, who are viewed by many as “useless to society,” are locked away in institutions that lack proper funding and qualified medical help.<sup>334</sup> Many children suffer from malnutrition, and lie naked on floors or iron beds or are tied in straightjackets.<sup>335</sup> Children who are classified as “imbeciles” and “uneducable” are relegated to spending indefinite amounts of time in “lying down rooms” with shabby clothing, dirty sheets, little food and the ever present smell of urine.<sup>336</sup> With the lack of any physical activity many children in Russia’s institutions develop muscle atrophy. In extreme cases, children’s bodies develop pretzel-like formations as limbs get locked into physically contorted positions.<sup>337</sup>

### 6.2.2 Kosovo

Similar to the situation in Russia, MDRI has documented degrading and inhumane conditions in many psychiatric institutions and social care facilities in Kosovo. Although conditions in all

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<sup>334</sup> Vanora Bennett, “Russia’s Forgotten Children” *Los Angeles Times* (Feb. 22, 1997) at A1.

<sup>335</sup> Sharon LaFraniere, “The gulags for children – Mentally disabled are warehoused in Russia’s orphanages” *Toronto Star* (Oct. 02, 1999) at L1.

<sup>336</sup> Mental Disability Rights International, *Children in Russia's Institutions: Human Rights and Opportunities for Reform* (1999) at 20, online: <http://www.mdri.org/publications/Russia1.html> (last accessed June 17, 2006).

<sup>337</sup> *Ibid.* Human Rights Watch has also documented the abuse of children in Russia, especially those with mental and physical disabilities. In one of its reports, Human Rights Watch noted the following:

Once officially labeled as retarded, Russian orphans face another grave and consequential violation of their rights around the age of four, when they are deemed “ineducable,” and warehoused for life in psychoneurological *internaty*. In addition to receiving little to no education in such *internaty*, these orphans may be restrained in cloth sacks, tethered by a limb to furniture, denied stimulation, and sometimes left to lie half-naked in their own filth. Bedridden children aged five to seventeen are confined to understaffed lying-down rooms as in the baby houses, and in some cases are neglected to the point of death. Those who grow to adulthood are then interned in another “total institution,” where they are permanently denied opportunities to know and enjoy their civil and political rights:

Human Rights Watch, *Abandoned to the State: Cruelty and Neglect in Russia’s Orphanages* (New York: Human Rights Watch, 1998) at 2.

intuitions observed were poor, the worst was the Shtime social care facility.<sup>338</sup> MDRI investigators observed many patients living in filth, surrounded by the smell of urine and feces. In fact, many of the residents slept in soiled or urine covered sheets.<sup>339</sup> The only form of treatment at Shtime is the use of psychotropic medication. However, the report revealed that there was no staff psychiatrist at the facility and the drugs were often administered to patients on orders more than two years old and by untrained staff.<sup>340</sup>

Besides the unregulated use of drugs in Shtime facility, the report revealed a disturbing amount of physical violence and sexual abuse in many psychiatric intuitions and facilities.<sup>341</sup> In Shtime and other facilities, staff and patients reported many incidents of rape and physical abuse. However, due to fear of further abuse or loss of employment many of the patients and staff members at these institutions do not officially report any of these incidents.<sup>342</sup> In one incident, a Norwegian Red Cross worker witnessed a woman being raped by a male patient in a hallway. When the Red Cross worker asked staff members why they did not intervene, they responded that “she must have asked for it” and that such incidents were a common occurrence.<sup>343</sup> In another incident, a female patient was raped after staff members locked her in a room with a male patient in order to “calm her down.”<sup>344</sup>

### 6.2.3 Turkey

In Turkey, a two year investigation by MDRI revealed that thousands of people with mental disabilities are locked away and out of public view and suffer numerous human rights

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<sup>338</sup> Mental Disability Rights International, *Not on the Agenda: Human Rights of People with Mental Disabilities in Kosovo*, (2002) at 6, online: <http://www.mdri.org/pdf/KosovoReport.pdf> (last accessed June 17, 2006).

<sup>339</sup> *Ibid.* at 6.

<sup>340</sup> *Ibid.* at 7. According to the investigators, the unregulated administration of drugs to patients is clearly a violation of international human rights standards: *ibid* at 7.

<sup>341</sup> *Ibid.* at 8.

<sup>342</sup> *Ibid.*

<sup>343</sup> *Ibid.* at 10.

<sup>344</sup> *Ibid.* See also “UN ‘ignored’ abuse at Kosovo mental homes” *The Guardian* (August 8, 2002) at 2.

violations, including, being subjected to treatment that amounts to torture.<sup>345</sup> Some of the worst examples of human rights violations include: arbitrary detention,<sup>346</sup> starvation and dehydration,<sup>347</sup> and the physical restraint and seclusion of both children and adult patients.<sup>348</sup> However, the most serious human rights violation observed in Turkey was the continued use of unmodified electroconvulsive therapy (ECT)<sup>349</sup> without the aid of muscle relaxants or anaesthesia. At the Bakirköy psychiatric institute, ECT is used on a regular basis as a form of treatment for depression.<sup>350</sup> The Chief of the ECT Centre at Bakirköy stated the following as the reason for its use:

*We use ECT for people with major depression. Patients with major depression feel that they need to be punished. If we use anaesthesia the ECT won't be as effective because they won't feel punished.*<sup>351</sup>

In many cases, terrorized patients are dragged into the ECT room in straightjackets and held down by staff members during the procedure.<sup>352</sup> The use of this form of treatment without the

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<sup>345</sup> Mental Disability Rights International, *Behind Closed Doors: Human Rights Abuses in the Psychiatric Facilities, Orphanages and Rehabilitation Centers of Turkey* (2005) at iii, online: <<http://www.mdri.org/projects/turkey/turkey%20final%209-26-05.pdf>> (last accessed June 17, 2006).

<sup>346</sup> According to investigators, all residents of Turkey's psychiatric institutions are arbitrarily detained in violation of international law: *ibid.* at iii.

<sup>347</sup> According to some institutional staff members, children have died from starvation and dehydration. In addition, investigators witnessed many children emaciated from starvation: *ibid.* at iv.

<sup>348</sup> Children are tied to beds or cribs, many of them permanently restrained. In many instances, both legs and both arms are tied down: *ibid.* at v.

<sup>349</sup> ECT is used on individuals who do not respond well to conventional treatment plans. It involves the administration of electricity to the brain: *ibid.* at iii – iv. The use of ECT without a muscle relaxant or anaesthesia is considered to be very painful and dangerous for the patient: *ibid.* at 2.

<sup>350</sup> ECT has also been used as treatment for the following conditions: schizophrenia, bipolar disorder, eating disorders, obsessive compulsive disorder, post-partum depression, personality disorders and persons classified as mentally retarded: *ibid.* at 8-9.

<sup>351</sup> *Ibid.* at 23, italics original.

<sup>352</sup> *Ibid.* at iv. A 28 year old former patient at Bakirköy described his experience as follows: "They hold you down, they hold your arms, they hold your head and they put cotton in your mouth. I heard them say 70 to 110 volts. I felt the electricity and the pain, I felt like dying": *ibid.* at 2.

aid of anaesthesia violates internationally accepted medical standards.<sup>353</sup> According to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, this form of ECT is no longer viewed as acceptable treatment in modern day psychiatric practice and violates the European Convention Against Torture.<sup>354</sup> Estimates regarding the use of ECT in Turkey have been very high. In 1997, the European Committee for the Prevention of Torture noted that up to twenty percent of the patients at Bakirköy were treated with ECT.<sup>355</sup> According to MDRI's statistical investigation up to thirty-three percent of the patients at three major psychiatric institutions, including Bakirköy, received ECT at least once.<sup>356</sup> At the Dokuz Eylül University Hospital, MDRI concluded that up to forty percent of patients were subjected to the treatment.<sup>357</sup>

#### 6.2.4 Peru

In Peru, MDRI found numerous human rights violations of people with mental disabilities. Violations include inhumane and degrading treatment in psychiatric institutions, lack of informed consent, and discrimination with respect to social and health services.<sup>358</sup> Specifically, investigators in Peru noted the improper use of ECT in the Noguchi Institute. Investigators documented that up to three times per week, numerous patients were subjected to unmodified ECT without the use of muscle relaxants or anaesthesia.<sup>359</sup> Seclusion of patients in the same institute was also a major concern to investigators. The investigators revealed instances in which they saw patients in seclusion who appeared over drugged, or dehydrated.<sup>360</sup>

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<sup>353</sup> *Ibid.* at 2.

<sup>354</sup> *Ibid.*

<sup>355</sup> *Ibid.* at 7.

<sup>356</sup> *Ibid.*

<sup>357</sup> *Ibid.*

<sup>358</sup> Mental Disability Rights International, *Human Rights & Mental Health in Peru*, (2004) at 5, online: <<http://www.mdri.org/pdf/Peru%20Report%20-%20Eng%20-%20Final.pdf>> (last accessed June 17, 2006).

<sup>359</sup> *Ibid.* at 12.

<sup>360</sup> *Ibid.* at 11.



### 6.2.5 Romania

The most recent MDRI investigation has taken place in Romania. An 18 month study of the abuse of infants and children with disabilities reveals shocking incidents of neglect, discrimination and inhuman and degrading treatment and punishment. In many state run facilities children with disabilities are kept in permanent restraints, many tied to cribs and lying in their own urine and feces.<sup>361</sup> A statement by one of the MDRI investigators is telling of the abhorrent living conditions of many children at the St. Pantelimon adult psychiatric facility in Braila:

*Staff agreed to unwrap several of the children. One girl, whose name was Adinana, looked to be about four or five years old, but was actually seventeen and weighed no more than 25 pounds (about 10 kilos). As the staff removed the restraint, her skin came off with the sheet, leaving a raw open wound beneath it. Another boy looked to be the size of a baby, but was seven years old. He too, when unwrapped, was wasting away, his legs covered with sores and his fingers chewed and swollen.*<sup>362</sup>

The Sasca Mica facility, although well staffed and relatively warm compared to other facilities, contained horrendous living conditions for many of the children residents. In particular, investigators found 30 teenagers crammed into cribs in one room, most of them with mental or physical disabilities.<sup>363</sup> In another room, the same investigators found a young man chained to his bed.<sup>364</sup> Apparently, the young man was “dangerous” and “violent” and needed to be restrained – which he was, day and night.<sup>365</sup> The overall prospect of many of these children is grim as many end up spending their whole life segregated from society, living in filth and with little if any prospect of rehabilitation.<sup>366</sup>

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<sup>361</sup> Mental Disability Rights International, *Hidden Suffering: Romania's Segregation and Abuse of Infants and Children with Disabilities*, (2006) at 8, online: <http://www.mdri.org/projects/romania/romania-May%209%20final.pdf> (last accessed June 17, 2006).

<sup>362</sup> *Ibid.* at 8-9 italics original. Another investigator had this to say: “I have visited institutions in twenty countries around the world. What I witnessed in Braila was the most disturbing horror I have ever seen. These children were close to death”: *ibid.* at 7, italics original.

<sup>363</sup> *Ibid.* at 11.

<sup>364</sup> *Ibid.* at 12.

<sup>365</sup> *Ibid.*

<sup>366</sup> *Ibid.* at 21-24.

### 6.2.6 Japan

Japan has also had a well documented history of abuse with respect to people with mental disabilities. Prior to the enactment of the 1987 Mental Health Law (the 1987 Act), the Japanese mental health system was described as “seriously inadequate” in relation to human rights protection of institutionalized people with mental disabilities as such individuals lacked the right to have their case reviewed or to be released if they became better.<sup>367</sup> The Mental Hygiene Law of 1950 (the 1950 Act), the precursor to the 1987 Act, provided for the involuntary institutionalization of persons with mental disabilities by order of provincial governors or by request by relatives of the persons in question.<sup>368</sup> In fact, before the enactment of the 1987 Act, over ninety percent of Japan’s institutionalized mental patients had been involuntarily committed.<sup>369</sup> In addition, two-thirds of psychiatric patients were confined to beds in closed or locked wards and subject to very little contact with the outside world.<sup>370</sup> In addition to involuntary commitment, the 1950 Act provided little, if any, monitoring of the living conditions or treatment of institutionalized patients.<sup>371</sup> With virtually no laws protecting the rights of patients with mental disabilities, the Japanese institutional system essentially became a “race of hospital people” who were stigmatized and discriminated against by the rest of society.<sup>372</sup> The lack of protection of mental patients came to the forefront in 1984 when it was revealed that two patients were beaten to death in the Hotokukai Utsonomiya Psychiatric Hospital outside of Tokyo. An investigation into the incident revealed inhumane living

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<sup>367</sup> T.W. Harding, *et al*, *Human Rights and Mental Patients in Japan* (International Commission of Jurists, 1985) at 10, 80. In 1987, the Japanese government enacted the Mental Health Law which introduced both substantive and procedural changes to its mental health care system. The major reason behind adoption of this legislation was the growing criticism, internationally and domestic, of the lack of human rights protection for institutionalized patients.

<sup>368</sup> *Ibid.* at 10.

<sup>369</sup> Stephen M. Salzberg, “Japan’s New Mental Health Law: More Light Shed on Dark Places?” (1991) 14 *Int’l J. L. & Psychiatry* 137 at 139.

<sup>370</sup> *Ibid.* at 139 and Harding, *et al*, *supra* note 367 at 81.

<sup>371</sup> Pamela Schwartz Cohen, “Psychiatric Commitment in Japan: International Concern and Domestic Reform” (1995) 14 *UCLA Pac. Basin L. J.* 28 at 31.

<sup>372</sup> *Ibid.* at 30-31.

conditions and widespread abuse and corruption at the hospital.<sup>373</sup> Upon further investigation of the institution, it was revealed that between 1981 and 1985, a total of 222 patient deaths had occurred.<sup>374</sup>

Other than involuntary commitment and abhorrent living conditions, another issue of major concern has been the involuntary sterilization of persons with mental disabilities. According to one report, doctors in Japan removed the healthy wombs of three “mentally retarded women.” The reason for the hysterectomies was to “prevent the women from undesirable pregnancies.” In many cases, these “undesirable pregnancies” are the result of sexual violence against women in state institutions.<sup>375</sup> According to one victim of involuntary sterilization, hysterectomies are common practice in some institutions.<sup>376</sup>

### 6.3 Well-Founded Fear of Persecution

Persecution undeniably includes psychological and emotional harm and many people with mental disabilities must deal with this on a daily basis. The above examples illustrate that the mistreatment of people with mental disabilities is as degrading and inhumane, if not worse, than the offensive treatment that has been inflicted upon individuals of other groups who have been granted refugee protection.<sup>377</sup> Even a restrictive reading of the term “persecution” would find the offensive mistreatment suffered by the world’s mentally disabled amounts to persecution. In fact, some of the specific harms noted above have constituted persecution in refugee proceedings in both the United States and Canada. A review of the relevant case law dealing with this issue follows.

Sexual assault, an extremely horrific reality for many patients in mental institutions, has formed the basis for refugee protection. Sexual assault amounts to persecution not only because

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<sup>373</sup> Salzberg, *supra* note 369 at 141.

<sup>374</sup> Harding, *et al*, *supra* note 367 at 16.

<sup>375</sup> See “Mentally disabled women’s rights reviewed” *Mainichi Daily News* (June 19, 1993) available on Lexis in ALLNWS database.

<sup>376</sup> *Ibid*.

<sup>377</sup> Arlene Kanter and Kristin Dadey, “The Right to Asylum for People with Disabilities” (2000) 73 Temp. L. Rev. 1117 at 1137.

of its physical abuse but also the associated psychological harm. In *Lopez-Galarza v. INS*,<sup>378</sup> the Court took judicial notice of the fact that rape commonly results in severe and long-lasting psychological sequelae that are complex and characterized by the particular cultural and social context in which the rape occurs.<sup>379</sup> In addition, it was noted that long term effects of rape can include profound feelings of shame, avoidance of situations that trigger memories of the violation, decreased ability to respond to life generally, severe anxiety, mistrust of others and suicidal thoughts.<sup>380</sup> Based on these factual findings and the nature of the sexual violence the female claimant was subjected to, the Court found that she had suffered persecution.<sup>381</sup>

High courts have also held that involuntary sterilization, an ill-fated reality for many people with mental disabilities, amounts to persecution. In *Cheung v. Canada (Minister of Employment and Immigration)*<sup>382</sup> the issue was whether the forced sterilization of women in China, in relation to the government's objective of population control, constituted persecution. The Court held that the forced sterilization of women was persecution as contemplated under the *Canada Immigration Act*.<sup>383</sup> Specifically, the Court noted that forced sterilization is a fundamental violation of human rights as it violates Articles 3 and 5 of the UDHR.<sup>384</sup> In the Court's opinion, the "forced sterilization of a woman is a serious and totally unacceptable violation of her security of the person. Forced sterilization subjects a woman to cruel, inhuman and degrading treatment."<sup>385</sup> Although sterilization of women in China is sanctioned by law, in

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<sup>378</sup> *Lopez-Galarza v. INS* 99 F. 3d 954 (9<sup>th</sup> Cir. 1996).

<sup>379</sup> *Ibid.* at 962.

<sup>380</sup> *Ibid.* at 962.

<sup>381</sup> Although rape is primarily a gender persecution issue that affects more women than men, the persecutory nature of the violent act also pertains to male victims. See *Hernandez-Montiel v. I.N.S.*, 225 F. 3d 1084 (9<sup>th</sup> Cir., 2000) where the Court held that the trauma of rape for male victims is not any less real or severe than for female victims.

<sup>382</sup> *Cheung v. Canada (Minister of Employment and Immigration)* [1993] 2 F.C. 314 (F.C.A.).

<sup>383</sup> R.S.C., 1985, c. I-2.

<sup>384</sup> *Cheung*, *supra* note 382 at 324. Article 3 of the UDHR states that "everyone has the right to life, liberty and security of person." Article 5 states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

<sup>385</sup> *Ibid.* at 324.

the Court's opinion, there is a point at which cruel treatment becomes persecution regardless if the specific act is sanctioned by law – "the forced sterilization of women is so intrusive as to be beyond that point."<sup>386</sup> Overall, the Court held that involuntary sterilization "is such an extreme violation of ... basic human rights as to be persecutory."<sup>387</sup> As Linden J.A. remarked, "[t]here are a few practices that could be more intrusive and more brutal than forced sterilization."<sup>388</sup>

In *Chan v. Canada (Minister of Employment and Immigration)*<sup>389</sup> the Supreme Court of Canada addressed the issue of the involuntary sterilization with respect to a male refugee claimant. The majority of the Court held that the male claimant failed to provide enough evidence to support his alleged fear of being sterilized amounted to a "well-founded fear of persecution." In a strongly worded dissent, however, Justice La Forest addressed the issue of sterilization and its relation to "persecution" as contemplated under the Refugee Convention. Justice La Forest drew the following conclusion:

In my opinion, the sanction of forced sterilization against the appellant in the present case would constitute a gross infringement of the security of the person and readily qualify as the type of fundamental violation of basic human rights that constitutes persecution ... In sum, I think that whatever technique is employed, it is utterly beyond dispute that forced sterilization is in essence an inhuman and degrading treatment involving bodily mutilation, and constitutes the very type of fundamental violation of basic human rights that is the concern of refugee law.<sup>390</sup>

In the United States, high courts and the Board of Immigration Appeals have also held that the forced sterilization of women amounts to persecution under the *Immigration and Naturalization Act* (INA).<sup>391</sup>

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<sup>386</sup> *Ibid.* at 324-325.

<sup>387</sup> *Ibid.* at 325.

<sup>388</sup> *Ibid.* at 324.

<sup>389</sup> *Supra* note 258.

<sup>390</sup> *Ibid.* at 242-243.

<sup>391</sup> The INA's definition of a refugee is essentially a carbon copy of the Refugee Convention. Under the INA, a refugee is a person who "is unable or unwilling to avail himself or herself of the protection of that country because of the persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion": 8 U.S.C. § 1101(a)(42)(A) (2000 Suppl. 2). See, *C-Y-Z*, 21 I. & N. Dec. 915 (B.I.A. 1997); *Qu v. Gonzales*, 399 F. 3d 1195, (9<sup>th</sup> Cir. 2005) and *Y-T-L*, 23 I. & N. Dec. 601 (B.I.A. 2003). In *Y-T-L*, the BIA stated the following: "The act of forced sterilization should not be

In a non-refugee context, the Supreme Court of Canada has also dealt with the issue of forced sterilization of the mentally disabled for non-therapeutic reasons. In *Re Eve*<sup>392</sup> the Court forbid the involuntary sterilization of persons with disabilities by holding that forced sterilization constitutes a “grave intrusion on the physical and mental integrity of the person” and is an “irreversible and serious intrusion on the basic rights of the individual” which leads to “certain physical damage.”<sup>393</sup> A similar finding was noted by the Supreme Court of Colorado in *Matter of Romero*,<sup>394</sup> In that case, the Court stated the following regarding the involuntary sterilization of an incapacitated person for non-therapeutic reasons:

sterilization involves a surgical invasion of bodily integrity. It destroys “an important part of a person’s social and biological identity,” ... can be traumatic for the individual, and can have “long-lasting detrimental emotional effects.”<sup>395</sup>

Besides forced sterilization, the mentally disabled suffer many forms of abuse that violate their human rights, as has been well documented in published reports. The importance of well-documented reports regarding the horrific living conditions of the mentally disabled in many parts of the world came to the forefront in a recent case decided by the U.S. Board of Immigration Appeals (BIA). In *Re Santiago-Carrillo*,<sup>396</sup> the BIA, in an unreported decision, addressed the issue of a mentally disabled refugee claimant fearing persecution if sent back to Mexico. In this case, the claimant was classified as an “abandonado,” a name given to mentally ill people placed in Mexican mental hospitals. At the initial hearing, a California immigration judge granted Santiago-Carrillo a withholding of removal to Mexico based on the fact that he would likely face “persecution” if sent back.

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viewed as a discrete, onetime act, comparable to a term in prison, or an incident of severe beating or even torture. Coerced sterilization is better viewed as a permanent and continuing act of persecution”: at 607. In *Qu v. Gonzales*, the court held the following: “Involuntary sterilization irrevocably strips persons of one of the important liberties we possess as humans: our reproductive freedom,” at 1203.

<sup>392</sup> *Re Eve* (1986), 31 D.L.R. (4<sup>th</sup>) 1 (S.C.C.).

<sup>393</sup> *Ibid.* at 32, 34.

<sup>394</sup> *Matter of Romero*, 790 P. 2d 819 (Colo. S. Ct. 1990).

<sup>395</sup> *Ibid.* at 821.

<sup>396</sup> *Re Santiago-Carrillo* (BIA June 6, 2000, unreported), see: Arlene S. Kanter *et al*, “The Right to Asylum and Need for Legal Representation of People with Mental Disabilities in Immigration Proceedings” (2001) 25 Mental and Physical Disability L. Rep. 511 at 512.

The immigration judge based his decision on a report by MDRI on the Mexican mental health system and the offensive mistreatment of many institutionalized persons in Mexico.<sup>397</sup> The judge held that the conditions in Mexico's mental institutions constituted persecution under the INA.<sup>398</sup> On appeal to the BIA, however, the Board reversed the immigration judge's decision. The BIA held that without "any evidence of any ill will or animus supplying a *motive* for the government to harm the respondent" the institutionalization of Santiago-Carrillo without treatment did not amount to persecution.<sup>399</sup> Instead, the BIA held that upon his return, the Mexican government would institutionalize the claimant in order to "protect both he and society in general."<sup>400</sup>

The BIA's decisions in *Santiago-Carrillo* illustrates how fact driven each refugee case is. In many cases, the final decision rests upon the total evaluation of country conditions and the amount of credible evidence available to establish a "well-founded fear of persecution." However, *Santiago-Carrillo* is a clear example of how too much emphasis on a State's motive can cloud the overall analysis. The MDRI's report on Mexican mental institutions reveals many forms of maltreatment and abuse of patients.<sup>401</sup> Although the Mexican government itself may not have had a personal vendetta against Santiago-Carrillo, the fact that it was indifferent to the conditions of its institutions was the matter that should have been of prime importance. Although the Mexican government has taken steps recently to improve the conditions of its institutions, in the case of Santiago-Carrillo there was a clear likelihood that Santiago-Carrillo would suffer persecution if institutionalized as the immigration judge had initially found. As has been mentioned above, the State need not be the active agent of persecution. A State's policy of neglect regarding the human rights of persons with mental disabilities in institutions is the "bridge" that establishes the "well-founded fear of persecution."<sup>402</sup> In the author's

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<sup>397</sup> *Ibid* at 512.

<sup>398</sup> *Ibid* at 512.

<sup>399</sup> As quoted in Kanter, *supra* note 396 at 512.

<sup>400</sup> *Ibid*.

<sup>401</sup> See, Mental Disability Rights International, *Human Rights & Mental Health : Mexico*, (2000), online: <<http://www.mdri.org/pdf/mexico%20-%20english.pdf>> (last accessed June 29, 2006).

<sup>402</sup> Horvath, *supra* note 9 at 497.

opinion, the BIA failed to take this into consideration by focusing its attention on a *motive* or *intent* to harm the claimant. The decision of the BIA to focus on the motive of the government and its apparent willingness to help “cure” the claimant is in sharp contrast to an earlier decision decided by the Ninth Circuit Court of Appeals in *Pitcherskaia v. I.N.S.*<sup>403</sup>

In *Pitcherskaia*, the claimant was a Russian lesbian who feared being sent back to Russia on account that the police would arrest her and force her to undergo psychiatric treatment in order to “cure” her of her homosexual “illness.” Pitcherskaia testified that on numerous occasions she was arrested by the police, questioned about her sexual orientation, imprisoned and physically beaten.<sup>404</sup> The claimant also testified that her ex-girlfriend was forcibly sent to a state institution for four months in order to change her sexual orientation by subjecting her to such “therapies” as electric shock treatment.<sup>405</sup> Although the BIA acknowledged that involuntary institutionalization, electric shock treatment and drug injections could constitute persecution, it denied Pitcherskaia’s request for asylum based on the fact that she failed to prove that the government had a *motive* to punish or harm her. The Ninth Circuit rejected this reasoning as flawed.

According to the Ninth Circuit, persecution, as contemplated under the Refugee Convention, does not require proof of a motive to inflict harm or to punish. The intent or motive of the persecutor is only relevant in so far as the refugee claimant is required to establish that the reason behind the persecution is linked to one of the enumerated grounds for refugee protection. What matters is the characteristic of the refugee victim and not that of the persecutor.<sup>406</sup> Furthermore, punishment is not a mandatory element of the term “persecution.”<sup>407</sup> The reason for this is straightforward - “punishment” implies that the persecutor believes that the victim has committed some wrong or crime, whereas “persecution” only requires that the persecutor cause the victim harm or suffering.<sup>408</sup> Most importantly, the

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<sup>403</sup> *Pitcherskaia v. I.N.S.*, 118 F. 3d 641 (9<sup>th</sup> Cir., 1997).

<sup>404</sup> *Ibid.* at 644.

<sup>405</sup> *Ibid.*

<sup>406</sup> *Ibid.* at 647.

<sup>407</sup> *Ibid.*

<sup>408</sup> *Ibid.*



court noted that simply calling a specific act “treatment” does not mean it cannot amount to persecution:

The fact that a persecutor believes the harm he is inflicting is “good for” his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution ... Human rights law cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as “curing” or “treating” the victims.<sup>409</sup>

The importance of this decision should not be understated. In many psychiatric institutions and social health care facilities throughout the world, people with disabilities are subjected to treatment plans in order to “cure” their disability. In many instances, these so-called “treatments” are painful and abusive in nature. In many respects the human rights of patients are fundamentally violated. A recent case of the Ninth Circuit Court of Appeals gives an excellent analysis of persecution and human rights and their relationship to the mentally disabled in the context of a refugee claim.

*Tchoukhrova v. Gonzales*,<sup>410</sup> involved a boy named Evgueni who was born with cerebral palsy in Russia. His disability was the result of the gross negligence of the hospital staff. After the staff noticed the disability, they threw Evgueni into a dumpster holding abortion and other medical waste. The staff told the parents that “they didn’t see the reason why he needed to live.”<sup>411</sup> Miraculously, Evgueni survived and was retrieved from the dumpster. During the first months of his life, Evgueni was treated badly and his parents encountered much indifference and hostility from the Russian government and neighbours. Once Evgueni was officially diagnosed as having infantile cerebral palsy, the Russian government forcibly institutionalized Evgueni in an institution for children with birth defects.<sup>412</sup> When Evgueni’s parents visited the institution, they were horrified at the appalling living conditions. The children were wrapped in dirty, wet linens and cried out from hunger. Although many children writhed in pain, none received any attention or care from the staff.<sup>413</sup> After a few months of institutionalization,

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<sup>409</sup> *Ibid.* at 648.

<sup>410</sup> *Tchoukhrova v. Gonzales*, 404 F. 3d 1181 (9<sup>th</sup> Cir. 2005).

<sup>411</sup> *Ibid.* at 1184.

<sup>412</sup> *Ibid.* at 1185.

<sup>413</sup> *Ibid.*

Evgueni's parents were able to secure his release. However, Evgueni continued to suffer discrimination, harassment and abuse.

Due to his disability, Evgueni was denied access to health care and education.<sup>414</sup> Because of the extreme public discrimination and abuse against people with disabilities, which in many ways was encouraged by Russian government policy, Evgueni suffered much abuse whenever he went out in public. Many times he was spat upon, verbally abused and had objects thrown at him.<sup>415</sup> When he was six years old, Evgueni was attacked by several men while he was playing in a park. The attack resulted in a broken arm and severe head trauma and Evgueni had to be hospitalized for two months.<sup>416</sup> Evgueni's parents reported the incident to the police but the incident was never investigated. In addition, the Russian government once again pressured the parents to have him institutionalized.<sup>417</sup> Due to the Russian government's hostility and indifference to Evgueni and other children with disabilities, Evgueni's parents formed an association to raise public awareness of the plight of children with disabilities in Russia. The parents were harassed as stones were thrown at them and their car was vandalized. Again, they reported the incidents to the police, but no action was taken. Evgueni's father was later fired from his job and was told during subsequent interviews to stop advocating for the rights of people with disabilities.<sup>418</sup> Evgueni and his parents eventually fled to the United States where Evgueni's mother filed an application for asylum and withholding of removal and listed Evgueni and her husband as derivative applicants.<sup>419</sup>

Although the immigration judge found the evidence presented to be credible, he held that the harms suffered by the family did not amount to persecution. The BIA, in a summary ruling, adopted the immigration judge's decision and denied the relief sought. The family subsequently filed an appeal with the Ninth Circuit Court of Appeals. The Court held that

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<sup>414</sup> *Ibid.*

<sup>415</sup> *Ibid.* Some times, Evgueni's mother would hear parents yell out to their children, "Get away from that boy, can't you see that he's abnormal" or "Don't get near him, he's sick": *Ibid.*

<sup>416</sup> *Ibid.*

<sup>417</sup> *Ibid.* at 1186.

<sup>418</sup> *Ibid.*

<sup>419</sup> *Ibid.* at 1187.

children with disabilities and parents who care for them are members of a particular social group. Contrary to the decisions of the BIA and the immigration judge, the Ninth Circuit held that the harms Evgueni suffered amounted to persecution. The Court found that documentary evidence supported the evidence presented by the asylum applicants. In particular, reference was made to the 2000 United States State Department Human Rights Report which confirmed that Evgueni's treatment as a child with cerebral palsy reflected the standard practice in Russia.<sup>420</sup> In particular, the court made reference to the following section of the State Department Report:

[T]he prospects of children/orphans who are disabled physically or mentally are extremely bleak. The label of "imbecile" or idiot, which signifies "uneducable," is almost irrevokable. The most likely future is a lifetime in state institutions.<sup>421</sup>

Moreover, the Court took light of the fact that persons with disabilities in Russia face the prospect of "being removed from mainstream society and isolated in state institution[s]," and that they face "immense problems" that are generally created by societal and government prejudice.<sup>422</sup> Overall, the evidence compelled the conclusion that the harm suffered by Evgueni and his family amounted to persecution. First, Evgueni was discarded as human waste because he was "damaged." Second, having survived this horrific neglect, he was forcibly confined to inhumane living conditions in a state institution with other disabled children. Third, after being released to his parents, Evgueni was denied health care for his disability and the right to an education. Finally, Evgueni was physically and mentally abused by members of the public in incidents that the Russian police refused to investigate. According to the Ninth Circuit, the Russian government was "unwilling or unable" to control the acts of those who assault persons with disabilities.<sup>423</sup> Based on the cumulative effect of the above acts,

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<sup>420</sup> *Ibid.* at 1186.

<sup>421</sup> *Ibid.*

<sup>422</sup> *Ibid.* at 1187.

<sup>423</sup> *Ibid.* at 1192-1195.

the Court found that the harm to which Evgueni was subjected unquestionably amounted to persecution.<sup>424</sup>

#### 6.4 Conclusion

In many parts of the world, people who are involuntarily confined to psychiatric institutions or other facilities are particularly vulnerable to human rights abuses as they are generally dependent upon these institutions for their medical care and basic needs.<sup>425</sup> As noted above, the essential question which must be asked in any refugee determination proceeding is whether the persecution alleged by the refugee claimant threatens his or her basic human rights in a fundamental manner. In many respects the living conditions, discrimination, prejudice, experimentation and utter neglect of many of the world's mentally disabled undoubtedly meet this burden. Many of the detailed reports by MDRI, Human Rights Watch and the US State Department regarding the inhumane living conditions of people with mental disabilities provide the necessary objective evidence to establish the "well-founded fear of persecution" arm of the refugee definition. In light of the above rulings and documented reports, the involuntary institutionalization in inhumane living conditions, the involuntary sterilization, or other so-called "treatments" such as electroconvulsive therapy or forced sedation, should satisfy the "persecution" arm of the Refugee Convention.<sup>426</sup> With respect to whether a refugee claimant's fear is well-founded, this will always depend on the particular facts at hand. If the State itself is the agent of persecution, in other words, if the State is the primary figure behind involuntarily confining individuals in inhumane conditions, then the "well-founded" element of the refugee definition will easily be met. When the State is not the active agent, the case will always be harder to prove. However, as *Tchoukhrova* illustrates, a mentally disabled refugee applicant should qualify for asylum to the extent that the State is unable or unwilling to control the responsible groups and offer protection. If a State is not able to protect individuals who face physical or mental abuse in the public or private realm, and if those individuals are incapable of seeking redress in the courts, this should qualify as a "well-founded fear of

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<sup>424</sup> *Ibid.* at 1195.

<sup>425</sup> *Human Rights and Mental Health in Peru*, (2004), *supra* note 358 at 14.

<sup>426</sup> Megan A. Murphy, "Give me your tired, your poor, your disabled?: Why the Disabled should Qualify for Asylum under the Immigration and Nationality Act" (2002) 70 Geo. Wash. L. Rev. 854 at 863.

persecution,” as the State’s failure to provide these individuals with protection or redress would amount to an inability or unwillingness to prevent that persecution.”<sup>427</sup>

Overall, the mistreatment faced by many of the world’s mentally disabled amounts to the very type of fundamental violation of basic human rights that is the concern of international refugee protection. The severe forms of mistreatment noted above would clearly amount to persecution under the Refugee Convention and in many circumstances the fear of persecution will be “well-founded.” However, in order for people with mental disabilities to be granted refugee protection the fear of persecution must be linked to one of the five enumerated grounds: race, religion, nationality, membership of a particular social group, or political opinion. If this link does not exist, refugee protection will not be granted, regardless of the serious harm the mentally disabled might suffer. Due to the important nature of this link, an examination of the grounds for refugee status follows.

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<sup>427</sup> *Ibid.*

## CHAPTER SEVEN    Grounds for Refugee Protection

Under Article 1A(2) of the Refugee Convention, a refugee is defined in relation to the reason why he or she fears being persecuted. Under this Article, a refugee claimant must have a well-founded fear of being persecuted for “reasons of race, religion, nationality, membership of a particular social group, or political opinion.” By enumerating specific grounds, the framers of the Refugee Convention clearly sought to limit the scope of refugee protection. This chapter explores the grounds for refugee protection and their role in the refugee determination process. The terms, “race”, “nationality”, “religion” and “political opinion” will be briefly dealt with, whereas “membership of a particular social group” is examined in greater detail. The argument will be made that persons with mental disabilities fall within the “social group” category and, thus, should qualify for refugee protection if they fear “persecution” on account of their disability.

### 7.1 Race

The framers of the Refugee Convention did not define the term “race,” however, from a historical standpoint it is clear that they intended to include Jewish victims of Nazi Germany who were persecuted because of their religion and ethnicity. This historical fact, according to Hathaway, legitimizes the acknowledgment that a broad social meaning of the term includes all persons of identifiable ethnicity.<sup>428</sup> With regard to “race,” the UNHCR is of the opinion that the term should be applied liberally:

Race ... has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as “races” in common usage. Frequently it will also entail membership of a specific social group of common descent forming a minority within a larger population. Discrimination for reasons of race has found world-wide condemnation as one of the most striking violations of human rights. Racial discrimination, therefore, represents an important element in determining the existence of persecution.<sup>429</sup>

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<sup>428</sup> Hathaway, *supra* note 97 at 141.

<sup>429</sup> UNHCR, *Handbook*, *supra* note 247 at para. 68.

In Grahl-Madsen's opinion, the term focuses more on the social prejudice suffered by many ethnic groups, rather than the scientific division of mankind.<sup>430</sup> The concept of race, therefore, is a broad term, capable of various definitions. However, there is general consensus that the term encompasses many aspects that are synonymous with ethnicity and overlaps with the "nationality" and "religion" grounds for refugee protection.

## 7.2 Nationality

Similar to "race," this ground is also given a wide and inclusive interpretation and includes more than just citizenship.<sup>431</sup> Indeed, relying exclusively on the notion of citizenship would likely lead to an absurd conclusion. As Goodwin-Gill has argued, it is difficult to envision a scenario whereby refugee claimants seek protection based on the fact that their country of origin is persecuting them because they are nationals of that country.<sup>432</sup> Overall, "nationality" will generally include the cultural, ethnic and linguistic identifiers that serve to distinguish the individuals concerned.

## 7.3 Religion

Throughout history, religion has been the basis for many forms of persecution. According to international law, the concept of religion includes the right to hold or not to hold any form of belief. For example, Article 18 of the UDHR states:

Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance.<sup>433</sup>

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<sup>430</sup> Grahl-Madsen, *supra* note 91 at 218; "The origin of the phrase makes it quite clear that the word 'race' in the present context denotes not only the major ethnic groups, such as Europeans ('the white race'), Africans ('the black race'), Mongols ('the yellow race'), Red Indians, & c., but also groups which are less easily differentiated, such as Jews, gipsies, & c": *Ibid*.

<sup>431</sup> As the *Handbook*, *supra* note 247 states: "The term "nationality" in this context is not to be understood only as "citizenship," at para. 74.

<sup>432</sup> "The reference to persecution for reasons of nationality is somewhat odd, given the absurdity of a State persecuting its own nationals on account of their membership of the body politic. Those who possess the nationality of another State will, in normal circumstances, be entitled to its protection and so fall outside the refugee definition": Goodwin-Gill, *supra* note 68 at 45.

<sup>433</sup> See also Article 18 of the ICCPR, *supra* note 87.

An individual's decision to adopt or reject a set of beliefs is a personal one and cannot be coerced. As the ICCPR states, "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."<sup>434</sup> According to the UNHCR, religious persecution may assume various forms. These include, for example, "prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community."<sup>435</sup> Since the concept of religion includes both the beliefs one may adhere to and the activities associated with those beliefs, it has been argued that the term, as a ground for refugee protection, includes two dimensions.<sup>436</sup> First is the protection of refugee claimants who face serious harm due to their adherence to a particular religion. In this scenario, it is the social perception that one is a follower of a particular religion that is important. The second dimension includes refugee claimants who face serious harm because they choose to express their religious convictions through such acts as worship, proselytizing or active participation in religious affairs.<sup>437</sup>

#### 7.4 Political Opinion

Generally speaking, a political refugee is one who is being pursued and threatened by the country of origin on account of the claimant's opinion,<sup>438</sup> which is viewed as a threat to the government in question. Although the scope of the term "political opinion" may at times be unclear, the framers of the Refugee Convention conceived the term in a liberal manner.<sup>439</sup> According to Goodwin-Gill, the term "should be understood in the broad sense, to incorporate,

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<sup>434</sup> ICCPR, *supra* note 87 at Article 18(2).

<sup>435</sup> *Handbook*, *supra* note 247 at para. 72.

<sup>436</sup> Hathaway, *supra* note 97 at 146.

<sup>437</sup> Hathaway, *supra* note 97 at 146-47. See also John Vrachnas *et al*, *Migration and Refugee Law: Principles and Practice in Australia* (Cambridge: Cambridge University Press, 2005) at 197.

<sup>438</sup> Article 19 of the UDHR, *supra* note 11 states that: "Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." See also ICCPR, *supra* note 87 at Article 19.

<sup>439</sup> Hathaway, *supra* note 97 at 149.



within substantive limitations now developing generally in the field of human rights, any opinion on any matter in which the machinery of State, government, and policy may be engaged.”<sup>440</sup> In essence, “political opinion” covers individuals who are alleged to have opinions contrary to the government in question. However, it is important to note that a political opinion may be openly expressed or it may be imputed.<sup>441</sup> Therefore, it is not necessarily the holding of a political opinion that is essential, but rather, the perception of the persecutor regarding the refugee claimant’s perceived political opinion.<sup>442</sup>

## 7.5 Membership of a Particular Social Group

This ground for refugee protection has proven to be the one with the least clarity in the refugee determination process. Over the years, varying interpretations have been given regarding its meaning and scope by scholars and jurists in different jurisdictions. The following section analyses the varying interpretations the term has been given by scholars and courts in different jurisdictions and why people with mental disabilities should qualify under this ground of protection.

### 7.5.1 The Vienna Convention and the *Travaux Préparatoires*

In order to allow for differences in language and legal systems of member states, treaties are generally couched in broad terms, which leaves them open to many interpretations. As a starting point, therefore, reference must be made to the general rule regarding treaty interpretation. The *Vienna Convention on the Law of Treaties*<sup>443</sup> sets the framework upon which treaties are to be interpreted by member states. The general rule regarding the interpretation of treaties is found in Article 31 which states the following:

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<sup>440</sup> Goodwin-Gill, *supra* note 68 at 49.

<sup>441</sup> See the Supreme Court of Canada’s discussion of imputed political opinion in *Ward*, *supra* note 7.

<sup>442</sup> According to Hathaway, “any action which is perceived to be a challenge to governmental authority is therefore appropriately considered to be the expression of a political opinion”: Hathaway, *supra* note 97 at 154.

<sup>443</sup> 1155 U.N.T.S. 331 (entered into force January 27 1980). [Hereinafter, *Vienna Convention*].

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>444</sup>

The *Vienna Convention* is based on the premise that a treaty’s text is presumed to be the authentic expression of the framers’ intentions.<sup>445</sup> Thus, Article 31 prohibits the adoption of an interpretation that would defeat the underlying intention of the framers or be inconsistent with the context in which the words are being used.

As part of a “good faith” analysis, recourse may also be made to the legislative history or any preparatory material. Article 32 provides that background material can be employed to confirm the meaning found under Article 31, or to assist in resolving any ambiguity or obscurity or avoid a result that is manifestly absurd or unreasonable. Article 32 reads as follows:

Article 32. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

In order to ascertain the framers’ intention of the Refugee Convention, almost everyone who discusses the “particular social group” category makes reference to its adoption in the *travaux préparatoires*. Historically speaking, the term “particular social group” was initially proposed as an afterthought during the Conference of Plenipotentiaries.<sup>446</sup> The Swedish delegate, Mr. Petren, proposed the term by making the following statement:

In the first place, experience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should be accordingly included.<sup>447</sup>

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<sup>444</sup> *Ibid.* at Article 31, para. 1.

<sup>445</sup> Ian Sinclair, *The Vienna Convention of Treaties*, 2d ed. (Manchester: Manchester University Press, 1984) at 115.

<sup>446</sup> Grahl-Madsen, *supra* note 91 at 219.

<sup>447</sup> U.N. Doc. A/CONF.2/SR.3 at 14.

Other than this brief statement, there is very little in the *travaux préparatoires* regarding this category of refugee protection. This lack of debate or commentary on what has turned out to be one of the most contentious matters regarding the refugee determination process suggests that there was little, if any, controversy about incorporating this category into the Refugee Convention.<sup>448</sup> However, although there might not have been much controversy regarding the adoption of this category, over the years, the term has proven to be the most difficult to define of the five enumerated grounds and has led to much debate among scholars and jurists. An examination of the varying interpretations follows.

### 7.5.2 The *Handbook* and Scholarly Interpretations

The first concrete attempt at interpreting the Refugee Convention can be found in the UNHCR's *Handbook*.<sup>449</sup> Although the *Handbook* is not formally binding on any state, it has played an important part in the development of refugee protection in international law as many tribunals and courts have relied on it in their refugee determinations. However, in relation to its discussion regarding the social group category, the *Handbook*'s discussion is fairly general and open to many interpretations. This is likely the outcome of the lack of serious debate in scholarly or judicial circles at the time of the *Handbook*'s writing. The *Handbook*'s interpretation of the term is as follows:

77. A 'particular social group' normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.

78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very

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<sup>448</sup> Daniel Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar - *Sanchez-Trujillo v. INS*, 801 F. 2d 1571 (9<sup>th</sup> Cir. 1986)" (1987) 62 Wash. L. R. 913 at 925. This lack of precision regarding the meaning of this term is also discussed by T. David Parish. In his opinion, the lack of precision is "particularly striking in light of the highly concrete nature of the terms with which "social group" is listed: race, religion, nationality, and political opinion": T David Parish, "Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee" (1992) 92 Colum. L. Rev. 923 at 927. See also Chieko Takami, *Defining Women as a Particular Social Group in the Canadian Refugee Determination Process* (LL.M. Thesis, McGill University, 2000) [unpublished] at 37.

<sup>449</sup> *Handbook*, *supra* note 247.

existence of the social group as such, is held to be an obstacle to the Government's policies.

79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.<sup>450</sup>

With its general language, the *Handbook's* interpretation has, at times, been criticized as being too general, open to many interpretations and unhelpful.<sup>451</sup> Others, however, have welcomed its general nature, arguing that the definition is "extremely generous" and its "almost boundless interpretation" is evidence that the term was meant to be broad and flexible.<sup>452</sup> Due to the *Handbook's* lack of clear guidance, the interpretation of the term in the international arena has been heavily influenced by case law and scholarly authority.

One of the most liberal approaches regarding the scope of the "particular social group" category has been forcefully advocated by Arthur C. Helton.<sup>453</sup> In his opinion, since this enumerated ground failed to list any specific social groups, the intention of the framers was to incorporate a broad and flexible category that would assist in the protection of refugees. Helton sets out his view of the appropriate interpretation of the term as follows:

The intent of the framers of the Refugee Convention was not to redress prior persecution of social groups, but rather to save individuals from future injustice. The "social group" category was meant to be a *catch-all* which could include all the bases for and types of persecution which an imaginative despot might conjure up.<sup>454</sup>

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<sup>450</sup> *Ibid.* at paras. 77-79.

<sup>451</sup> *Ward*, *supra* note 7 at 29 and *Sanchez-Trujillo v. INS*, 801 F. 2d 1571(9<sup>th</sup> Cir. 1986) at 1576. See discussion, *infra*. See also Mirja A. Trilsch, *Gender-based Persecution and the 'particular social group' Category – an Analysis* ( LL.M. Thesis, McGill University, 2000) [unpublished] at 10.

<sup>452</sup> Parish, *supra* note 448 at 929.

<sup>453</sup> Helton, *supra* note 296.

<sup>454</sup> *Ibid.* at 45. Others have echoed the same sentiment. Isi Foighel refers to the social group category as a "safety-net." According to Foighel, the term "came into existence, inter alia, as a type of safety net in that this category was to include also race and ethnicity and, furthermore, was to operate as a kind of comprehensive provision for the categories of persons, who had a legitimate claim upon being considered refugees in the international sense, although they were not clearly included in the categories specifically mentioned": Isi Foighel, "The Legal Status of the Boat-People" (1979) 48 *Nordic J. Int'l L.* 217 at 222-223. Maureen Graves notes that "narrower constructions, such as "ethnic minority" and "cultural group," were not used." Instead, the framers created "an open-ended formulation which could deal with "evolving,"

In the course of his analysis, Helton makes reference to specific social groups that have been of some concern for the United Nations. In his opinion, where the United Nations has seen fit to prohibit persecution aimed at specific social groups through the adoption of conventions or resolutions, whether defined in statistical, societal, social, or associational terms, it is fair to assume that it also desires to provide refugee protection under the social group arm of the Refugee Convention.<sup>455</sup> By implication, the following groups, according to Helton, are covered by the 'particular social group' category: "women, children, the elderly, the young, the adopted, the illegitimate, the disabled, the family, the worker, the unemployed, the trade unionist, the migrant worker, the slave, the illiterate, and many other groups."<sup>456</sup>

Although Helton is cognizant of the fact that his interpretation may offer an almost limitless scope of the term, he is quick to point out that a broad interpretation does not in and of itself impose a limitless obligation on states party to the Refugee Convention. The framers themselves, Helton argues, restricted the number of potential refugees in a number of ways. First, the "fear of persecution" requirement excludes victims of natural disaster and economic migrants. Second, the exclusionary clause<sup>457</sup> denies refugee protection to those who have committed serious criminal acts. Third, the initial temporal and geographic limitation significantly confined the potential refugee group. Finally, the claimant has to establish an objectively identifiable "well-founded fear." Thus, states party to the Refugee Convention are able to "limit their obligations and at the same time adopt a broad and flexible definition of refugee."<sup>458</sup>

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"creative" forms of persecution": Maureen Graves, "From Definition to exploration: Social groups and Political Asylum Eligibility" (1989) 26 San Diego Law Review 740, at 748-749. The framers seemingly intentional ambiguity, according to T. David Parish, suggests that the term was meant to be a "miscellaneous category, containing everything necessary to fill out a broader category that includes race, religion, nationality, and political opinion as well as many other characteristics. Perhaps the meaning of this term was intended to remain indefinite in order to allow for situations that had been overlooked and to retain flexibility in dealing with future exigencies": T David Parish, *supra*, note 448 at 927-928.

<sup>455</sup> Helton, *supra*, note 296 at 44.

<sup>456</sup> *Ibid.* at 44-45. In support of these specific groups, Helton makes reference to numerous conventions and resolutions of the United Nations relating to each group.

<sup>457</sup> Refugee Convention, *supra* note 5 at Article 1F. See Chapter Two.

<sup>458</sup> Helton, *supra*, note 296 at 53-54.

Helton's view is in substantial agreement with that of Atle Grahl-Madsen. In his classic two volume work on refugees in international law, Grahl-Madsen views the adoption of the social group category as a decision by the framers to "stop a possible gap" in refugee protection. He notes that this particular ground for refugee protection is "of broader application than the combined notions of racial, ethnic, and religious groups."<sup>459</sup> Based on the intention of the framers to protect refugees from persecution for unforeseen reasons, "it seems appropriate," according to Grahl-Madsen, "to give the phrase a liberal interpretation."<sup>460</sup> Grahl-Madsen lists the following examples of groups that would qualify under the social group category: "nobility, capitalists, landowners, civil servants, businessmen, professional people, farmers, workers, members of a linguistic or other minority ... members of certain associations, clubs, or societies."<sup>461</sup>

A common theme regarding the views of both Grahl-Madsen and Helton, is that they both list groups in which people can voluntarily give up membership in order to avoid persecution. For example, the 'trade unionist' or the 'businessman' could give up the activity that singles them out, since one does not necessarily need to maintain such an association or identity in order to survive. However, the onus should not necessarily be on the group that is being singled out to change in order to stop the persecution. It may be more appropriate to grant refugee protection since the claimant's state is unwilling or is unable to stop the persecution. The underlying assumption here is that certain groups should not be required to have to give up certain activities or identities.

Guy Goodwin-Gill also promotes a wide definition for 'social group' membership. Although Goodwin-Gill recognizes that the limited debate regarding the adoption of this category sheds little light on the framers' intention of what groups they intended to protect, he argues that there is "no reason in principle why this ground, like every other, should not be progressively

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<sup>459</sup> Grahl-Madsen, *supra*, note 91 at 220.

<sup>460</sup> *Ibid.* In addition, "Whenever a person is likely to suffer persecution merely because of his background, he should get the benefit of the present provision": *Ibid.*

<sup>461</sup> *Ibid.* at 219. See also Maryellen Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group" (1999) 26 Cornell Int'l L. J. 505 at 514-515.

developed.”<sup>462</sup> Essential to the proper linguistic analysis of the term suggests the inclusion of “people in a certain relation or having a certain degree of similarity, or a coming together of those of like class or kindred interests,” who share common “interests, values, or background ... matters over which members of the group have no control.”<sup>463</sup> Although a comprehensive interpretation would be both impossible and impractical, Goodwin-Gill offers the following analysis:

In determining whether a particular group of people constitutes a ‘social group’ within the meaning of the Convention, attention should therefore be given to the presence of linking and uniting factors such as ethnic, cultural, and linguistic origin.; education; family background; economic activity; shared values, outlook, and aspirations. Also highly relevant are the attitude to the putative social group of other groups in the same society and, in particular, the treatment accorded to it by State authorities. The importance of, and therefore the identity, of a social group may well be in direct proportion to the notice taken of it by others – the view which others have of us – particularly at the official level. The notion of social group thus possesses an element of open-endedness potentially capable of expansion in favour of a variety of different classes susceptible to persecution.<sup>464</sup>

This definition is particularly important for its emphasis on the ‘social perception’ of the group in question. In many cases, it is the perception of the group as posing some threat to those in power or society at large that essentially leads to persecution. Society at large may perceive a specific group as different, but it will be a non-issue as long as there is no threat attached to the group. In addition, treatment of the group by society at large or State authorities amounting to persecution can play a key role in identifying a ‘particular social group.’<sup>465</sup>

A more moderate view on the social group concept can be found in James Hathaway’s *The Law of Refugee Status*. In his discussion of the ‘particular social group’ category, Hathaway

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<sup>462</sup> Goodwin-Gill, *supra* note 68 at p. 47.

<sup>463</sup> *Ibid.*

<sup>464</sup> *Ibid.* at 47-48, footnotes omitted. Daniel Compton holds a similar view to that of Goodwin-Gill. After reviewing the *Oxford English Dictionary* definition for ‘social,’ he argues that the term ‘social group’ implies a “recognized grouping within society, a group that shares some common experience”: Compton, *supra* note 448 at 922-924.

<sup>465</sup> Goodwin-Gill, *supra*, note 68 at 362. Echoing the importance of the external perception of a particular social group, Compton, *supra* note 448 at 932 also states: “An externally-defined group is one that is largely identified by the perceptions of those outside of it. The group may have particular points of view or customs, but it is found to be cognizable because circumstances external to it have isolated it from the rest of society,” footnotes omitted.

rejects two approaches. The first is the restrictive approach based on equating social group with the other four grounds (race, religion, nationality and political opinion). According to Hathaway, this type of analysis is largely redundant and makes the 'social group' concept superfluous.<sup>466</sup> The second is the all-embracing 'safety-net' approach advocated by Helton. Although the approach is "seductive from a humanitarian perspective," a deeper analysis reveals that it does not stand on firm ground.<sup>467</sup> The main reason for this is that it "eliminates the need to consider the issue of a linkage between fear of persecution and civil or political status."<sup>468</sup> The adoption of an open-ended approach was not the intention of the framers. According to Hathaway, the framers "intended to establish a demarcation between those whose fear was attributable to civil or political status (refugees) and those whose concern to flee was prompted by other concerns (not refugees)."<sup>469</sup> Unlike Helton, Hathaway argues that based on the comments made by the Swedish delegate at the Conference of Plenipotentiaries, the Refugee Convention was intended to protect refugees from *known* forms of harm. Thus, the liberal approach has "gone too far."<sup>470</sup>

Hathaway prefers a middle ground approach which avoids defining the 'social group' category in a redundant or all-inclusive manner. His approach echoes that of the BIA of the United States in its decision in *Matter of Acosta*.<sup>471</sup> According to Hathaway, three types of groups can give rise to claims of persecution based on the 'social group' category:

(1) groups defined by an innate, unalterable characteristic; (2) groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change; and (3) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it. Excluded, therefore, are groups defined by a characteristic

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<sup>466</sup> Hathaway, *supra* note 97 at 157-158.

<sup>467</sup> *Ibid.* at 159.

<sup>468</sup> *Ibid.*

<sup>469</sup> *Ibid.*

<sup>470</sup> *Ibid.* See also Takami, *supra* note 448 at 41.

<sup>471</sup> *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985) see discussion, *infra*. See also Takami, *supra* note 448 at 41-42.



which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights.<sup>472</sup>

The adoption of this standard is necessary in order to fully respect the framers' intention – grounding refugee protection to claims based on civil and political status.<sup>473</sup> The approach also bodes well with the human rights definition of “persecution.”<sup>474</sup> Finally, the approach is “sufficiently open-ended to allow for evolution in much the same way as has occurred with the other four grounds, but not so vague as to admit persons without a serious basis for claim to international protection.”<sup>475</sup> Examples of groups falling within his definition of ‘social group’ are claims based on gender, sexual orientation, family, class or caste, and voluntary associations of which membership is fundamental to individual identity.<sup>476</sup>

### 7.5.3 International Jurisprudence

In 1985, the BIA of the United States decided a case that has proven to be one of the most influential decisions to date in common law jurisdictions. In *Matter of Acosta*<sup>477</sup> the claimant was a taxi driver from El Salvador. He, along with several other taxi drivers, formed a cooperative organization called COTAXI. The purpose of COTAXI was to enable its members to save money and eventually purchase their own taxis. Over the course of several years, anti-government guerrillas threatened COTAXI for not participating in work stoppages.<sup>478</sup> After receiving numerous death threats, Acosta fled El Salvador and made his way to the United States. While in the United States, Acosta sought refugee protection based on his fear of persecution by the guerrillas and the government. Acosta argued that he was a member of a

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<sup>472</sup> Hathaway, *supra*, note 97 at 161.

<sup>473</sup> *Ibid.*

<sup>474</sup> *Ibid.*

<sup>475</sup> *Ibid.*

<sup>476</sup> *Ibid.* at 162-169. Of particular interest is Hathaway's suggestion that the ‘poor’ may constitute a particular social group “since membership cannot always voluntarily be given up” at 167.

<sup>477</sup> *Matter of Acosta*, *supra* note 471.

<sup>478</sup> Work stoppages were a means by which the guerrillas hoped to damage the national economy.

particular social group, namely, COTAXI drivers. In the course of its analysis, the BIA relied upon the *ejusdem generis* doctrine in its interpretation of the 'particular social group' category. That is, the 'particular social group' category should be interpreted as being of the same kind as the other four protection grounds.<sup>479</sup> On the basis of this doctrine, the BIA sought to identify the key characteristics of the other grounds. The BIA came to the following conclusion:

We find the well established doctrine of *ejusdem generis*, meaning literally, 'of the same kind,' to be the most helpful in construing the phrase 'membership in a particular social group.' That doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words ... The other grounds of persecution ... listed in association with 'membership in a particular social group' are persecution on account of 'race,' 'religion,' 'nationality,' and 'political opinion.' Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed ... Thus, the other four grounds of persecution enumerated ... restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

Applying the doctrine of *ejusdem generis*, we interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that is either beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed. By construing 'persecution on account of membership in a particular social group' in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required to avoid persecution.<sup>480</sup>

<sup>479</sup> *Black's Law Dictionary*, 8<sup>th</sup> Edition, 2004, gives the following definition of *ejusdem generis*: [Latin "of the same kind or class"] A canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed. \* For example, in the phrase *horses, cattle, sheep, pigs, goats, or any other farm animal*, - despite its seeming breadth - would probably be held to include only four-legged, hooved mammals typically found on farms, and thus would exclude chickens.

<sup>480</sup> *Matter of Acosta*, *supra* note 471 at 18.

After reviewing the evidence, the BIA concluded that Acosta did not fall within the refugee definition because he did not belong to a 'particular social group' based on the following:

The characteristics defining the group of which the respondent was a member and subjecting that group to punishment were being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages. Neither of these characteristics is immutable because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages. It may be unfortunate that the respondent either have had to change his means of or earning a living or cooperate with the guerrillas in order to avoid their threats. However, the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice. ... Therefore, because the respondent's membership in the group of taxi drivers was something he had the power to change, so that he was able by his own actions to avoid the persecution of the guerrillas, he has not shown that the conduct he feared was 'persecution on account of membership in a particular social group' within our construction of the Act.<sup>481</sup>

The *Acosta* standard has been expressly adopted by the First, Third and Seventh U.S. Circuit Court of Appeals.<sup>482</sup> As will be discussed below, his approach has also been adopted in Canada, and the United Kingdom.

A year after the *Acosta* decision, the Ninth Circuit Court of Appeals addressed the 'particular social group' category in *Sanchez-Trujillo v. INS*.<sup>483</sup> In that case, the claimant argued that he was a member of a social group comprised of young, working-class Salvadorian males of military age who had never served in the military or otherwise expressed support for the government. In the course of its decision, the Court developed a more restrictive interpretation of the social group category moving well beyond the limitation recognized in *Acosta*.<sup>484</sup> The Court held that the social group category "implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest."<sup>485</sup> In addition, of central importance is the "existence of a *voluntary associational relationship* among the purported members, which imparts some common characteristic that is fundamental to their identity as a

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<sup>481</sup> *Ibid.*

<sup>482</sup> See *Ananeh-Firempong v. INS*, 766 F. 2d 621, (1<sup>st</sup> Cir. 1985) at 626; *Fatin v. INS*, 12 F. 3d 1233 (3<sup>rd</sup> Cir. 1993) at 1239; *Lwin v. INS*, 144 F. 3d 505 (7<sup>th</sup> Cir. 1998) at 511-512.

<sup>483</sup> *Sanchez-Trujillo*, *supra* note 451.

<sup>484</sup> In fact, the Court never referred to *Acosta* in its decision.

<sup>485</sup> *Sanchez-Trujillo*, *supra* note 451 at 1576.

member of that discrete social group.”<sup>486</sup> Based on this interpretation, the Court held that the claimant did not come within the refugee definition because he was not a member of a “cohesive, homogeneous group.”<sup>487</sup> The overly restrictive analysis by the Ninth Circuit drew much criticism in both scholarly circles and in other international decisions.<sup>488</sup>

In a more recent case, however, the Ninth Circuit alluded to the weakness of the *Sanchez-Trujillo* standard. In *Hernandez-Montiel v. INS*<sup>489</sup> the claimant, a homosexual youth from Mexico, fled to the United States in order to escape continuous persecution at the hands of the general public and the police for his sexual orientation. After reviewing the conflicting interpretations regarding the social group category, the Court held that the claimant was a refugee based on the fact that he was a “member of the ‘particular social group’ of gay men in Mexico with female sexual identities.”<sup>490</sup> The case is important not only for the fact that it expressly noted that sexual orientation is a protected ground within the scope of the Refugee Convention but also because the Court clarified its earlier decision in *Sanchez-Trujillo*. The Court made reference to the fact that it was the only court to suggest that a “voluntary associational relationship” was a required element. Recognizing the need to harmonize its decision in *Sanchez-Trujillo* with that of *Acosta* and other foreign decisions, the Court held that the social group category is “one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.”<sup>491</sup> With this decision, the Ninth Circuit appears to have dropped ‘cohesiveness’ as a central

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<sup>486</sup> *Ibid.* emphasis added.

<sup>487</sup> *Ibid.* at 1577.

<sup>488</sup> See for example, Compton, *supra* note 448. As will be discussed, the *Sanchez-Trujillo* “cohesiveness” element was rejected by the UK House of Lords in *Shah and Islam*, *supra* note 89 and by the Australian High Court in *Applicant A*, *infra*.

<sup>489</sup> *Hernandez-Montiel*, *supra* note 381.

<sup>490</sup> *Ibid.* at 1095.

<sup>491</sup> *Ibid.* at 1093, emphasis added.

element to the existence of a social group and has placed itself more in line with the *Acosta* standard.<sup>492</sup>

The most influential Canadian case regarding the “particular social group” category is the Supreme Court of Canada’s decision in *Ward*.<sup>493</sup> In that case, the claimant, Patrick Francis Ward, had been a voluntary member of the Irish National Liberation Army (INLA). According to Ward, the INLA was a “ruthless paramilitary organization more violent than the Irish Republican Army.” As a member of the INLA, Ward was assigned to assist in the guarding of two hostages held by the INLA. Ward soon found out that the hostages were to be executed. Wanting no part in the execution, Ward eventually assisted the hostages in escaping. When the INLA members found out about Ward’s role in the escape, he was confined, tortured, and sentenced to death. After managing to escape, Ward sought protection of the Irish police. The police, however, charged him for his role in the hostage taking and he was sentenced to three years imprisonment. After his release from prison, Ward made his way to Canada where he sought refugee protection. The main issue in this case, was whether Ward should be granted refugee status based on his membership of a particular social group.

Recognizing that the “social group” category has the potential to be interpreted in many ways, the Court sought guidance from the Refugee Convention’s object and purpose. After reviewing the preamble to the Refugee Convention, the Court decided to base its analysis on the principles of human rights protection and anti-discrimination.<sup>494</sup> With its anti- discrimination

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<sup>492</sup> T. Alexander Aleinikoff, “Protected characteristics and social perceptions: an analysis of the meaning of ‘membership in a particular social group,’ in Erika Feller, Volker Turk, and Frances Nicholson, eds., *Refugee protection in international law : UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 263 at 286.

<sup>493</sup> *Ward*, *supra* note 7.

<sup>494</sup> As the Court stated:

Underlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination. This is indicated in the preamble to the treaty as follows:

CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

approach in mind, the Court considered scholarly authority, the UNHCR *Handbook*, and case law from the United States and Canada. La Forest J., writing for the Court, noted that the UNHCR's *Handbook* definition is very general and can be interpreted in both a wide and narrow way. He opted for a narrow reading arguing that it was more in line with the object and purpose of the Refugee Convention.

La Forest J. also rejected the liberal approach advocated by Helton. In his view, the liberal interpretation has gone too far – the term cannot be a *catch-all* as it would render the other grounds for refugee protection superfluous.<sup>495</sup> According to La Forest J., the intention behind adopting this term was “initially a Cold War reaction aimed at ensuring a haven for capitalists fleeing ... persecution.”<sup>496</sup> In light of the fact that the framers incorporated limitations in the Refugee Convention, La Forest J. concluded that the international community did not intend to offer protection to all suffering individuals.<sup>497</sup> Echoing the decision in *Matter of Acosta*, La Forest J., identified three possible categories:

- (1) groups defined by an innate or unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.<sup>498</sup>

Examples of groups falling within the first category would be individuals fearing persecution based on gender, sexual orientation and linguistic background, while the second would include human rights activists. The last category is included for historical reasons in that “one’s past is an immutable part of the person.”<sup>499</sup>

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This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates. It sets out, in a general fashion, the intention of the drafters and thereby provides an inherent limit to the cases embraced by the Convention : *Ibid.* at 29.

<sup>495</sup> *Ibid.* at 26-28.

<sup>496</sup> *Ibid.* at 27. La Forest J. does acknowledge, however, that the term was not meant to be limited to that specific historical circumstance.

<sup>497</sup> *Ibid.* at 28.

<sup>498</sup> *Ibid.* at 33-34.

<sup>499</sup> *Ibid.* at 34.

Based on the three-pronged analysis of “particular social group,” the Court held that Ward was not a refugee as defined by the Refugee Convention. First, the INLA members could not be defined as being a group comprised of innate or unalterable characteristics. Second, although the INLA was a voluntary association, achieving its political goals through violent means could not be viewed as fundamental to human dignity as to not be required to give up membership. Finally, the third category of the definition did not apply as the group was a present day association and its membership was not unchangeable due to its status as a historical fact.<sup>500</sup>

On the whole the *Acosta* and *Ward* standards are essentially the same as both focus on the ‘internal’ factors of the refugee claimant. In other words, the analysis centers on the ‘innate’ or ‘immutable’ characteristics shared by the persecuted group, and not on the external perception of the group in society. This standard is now commonly referred to as the “protected characteristics” or “immutability” approach to refugee protection.<sup>501</sup>

In the United Kingdom, the leading case on identifying a ‘particular social group’ is the *Shah and Islam* case.<sup>502</sup> In this case the appellants were both Pakistani women who had suffered domestic violence at the hands of their husbands. If sent back to Pakistan, both women were at risk of being falsely accused of adultery. The women feared criminal proceedings for sexual immorality and possibly exposing themselves to Sharia law which prescribed stoning to death as one form of punishment for adultery. Both applicants sought refugee protection in the United Kingdom on the basis that they had a well founded fear of persecution based on “membership of a particular social group” within the meaning of the Refugee Convention. The Secretary of State denied their applications and the cases were eventually appealed to the House of Lords.

In its judgment, the House of Lords, by a 4-1 majority, decided in favour of the two applicants. The majority of the House of Lords held that in light of the state’s toleration of discrimination against women, Pakistani women constituted a “particular social group” which in turn was the reason for fearing persecution. In his discussion on this issue, Lord Steyn stated: “it is

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<sup>500</sup> *Ibid.* at 37-38.

<sup>501</sup> Aleinikoff, *supra* note 492 at 270.

<sup>502</sup> *Supra* note 89.

unchallenged that women in Pakistan are unprotected by state and public authorities if a suspicion of adultery falls on them ... There are unifying characteristics which justify the conclusion that women such as the appellants are members of a relevant social group.”<sup>503</sup>

Although the majority of the House of Lords concluded that the claimants were “members of a particular social group,” the Lords could not agree on a universal application or interpretation. Lords Hoffman and Steyn, for example, essentially adopted the *Acosta/Ward* rationale as providing the appropriate guidance with respect to the necessary criteria for establishing a particular social group. Lord Steyn agreed with Hathaway that “particular social group” was not adopted as “an all encompassing residual category.”<sup>504</sup> Nevertheless, Lord Hoffman noted that the international interpretation of the refugee is constantly evolving:

[T]he inclusion of ‘particular social group’ recognised that there might be different criteria for discrimination, in *parie materiae* with discrimination on the other grounds, which would be equally offensive to principles of human rights ... the concept of a social group is a general one and its meaning cannot be confined to those social groups which the framers of the convention may have had in mind. In choosing to use the general term ‘particular social group’ rather than an enumeration of specific social groups, the framers of the convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the convention.<sup>505</sup>

In addition, both Lords preferred the non-discrimination conceptualization of international human rights protection when deciding whether a claimant falls within the scope of refugee protection. In Lord Hoffman’s opinion, the preamble’s “concept of discrimination in matters affecting fundamental rights and freedom is central to an understanding of the convention.”<sup>506</sup>

Lords Millet and Hope of Craighead, on the other hand, were more in line with the ‘social perception’ approach, as outlined by the High Court of Australia in *Applicant A v. Minister for Immigration and Ethnic Affairs*.<sup>507</sup> According to Lord Hope of Craighead, a “social group”

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<sup>503</sup> *Ibid.* at 557.

<sup>504</sup> *Ibid.* at 555.

<sup>505</sup> *Ibid.* at 562.

<sup>506</sup> *Ibid.*

<sup>507</sup> *Applicant A v. Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225 (H.C.A.). [Hereinafter, *Applicant A*]. See discussion, *infra*.



exists when a group encompassing a particular characteristic is “recognized as a distinct group by society.”<sup>508</sup> Since social customs differ from country to country, the context for this enquiry during the refugee determination process must be that of the claimant’s country of nationality.<sup>509</sup>

It is also important to note that the House of Lords also rejected the cohesiveness element adopted by the Ninth U.S. Circuit Court of Appeals in *Sanchez-Trujillo*. In Lord Steyn’s opinion, although cohesiveness may assist in proving the existence of a social group, the phrase should not be so limited. There is simply no contextual basis to read this into the phrase.<sup>510</sup> Echoing the same sentiment, Lord Hoffman could not accept that the term ‘particular social group’ “implies an additional element of cohesiveness, co-operation or interdependence.”<sup>511</sup>

The leading case in Australia is the High Court’s decision in *Applicant A*.<sup>512</sup> The claimants, a married couple from the People’s Republic of China, sought refugee protection because of the fear of persecution for violating China’s ‘one-child’ policy. In particular, the claimants had a fear of forced sterilization if sent back to China. In the course of its decision, the Court outright rejected the “protected characteristics” approach of the United States and Canada because of its potential to be overly restrictive.<sup>513</sup> Instead, the Court adopted what is now commonly referred to as the “social perception” approach. Under this doctrine, a group must share some common, uniting characteristic that sets its members apart from society at large in order to be considered a member of a “particular social group.” Since the purpose of the Refugee Convention is the

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<sup>508</sup> *Shah and Islam*, *supra* note 89 at 568.

<sup>509</sup> *Ibid.*

<sup>510</sup> *Ibid.* at 556.

<sup>511</sup> *Ibid.* at 563.

<sup>512</sup> *Supra* note 507.

<sup>513</sup> Brennan CJ, “for my part, I see no ground for holding that a characteristic must be “innate or unchangeable” before it can distinguish a social group”: *Ibid.* at 236, in reference to the *Ward* decision.

protection of fundamental rights and freedoms of every person, the particular social group category should be given a wide interpretation.<sup>514</sup>

Although the Court opted for a wider interpretation of the term, the majority, however, agreed that the term should not be viewed as a “safety-net.”<sup>515</sup> Brennan CJ, on the other hand, argued that the framers included the term as a safety-net in order to fill in any protection gaps that the framers could not envision during the drafting of the Refugee Convention. According to Brennan CJ, “the insertion of the social group category of discrimination ... was intended to include groups that would not be identified by any of the other categories of discrimination,” thus, “the insertion of the term was intended to be a “safety net” for any who fell within it.”<sup>516</sup>

The major theme in *Applicant A* is that one must ascertain whether or not the group in question is recognized by those who are not members of it and whether it is for this reason that the group is being persecuted. This is for the decision-maker to decide based on the available evidence. As Dawson J, noted:

A “group” is a collection of persons ... [T]he word “social” is of wide import and may be defined to mean “pertaining, relating, or due to ... society as a natural or ordinary condition of human life.” “Social” may also be defined as “capable of being associated or united to others” or “associated, allied, combined.” The adjoining of “social” to “group” suggests that the collection of persons must be of a social character, that is to say, the collection must be cognisable as a group in society such that its members share something which unites them and sets them apart from society at large. The word “particular” in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. *A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That*

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<sup>514</sup> Brennan CJ, “The term should be understood simply to connote a group constituted by those who share a common distinguishing characteristic which is the “reason” for persecution that is feared”: *Ibid.* at 236.

<sup>515</sup> Kirby J. “The phrase “particular social group”, where used in the Convention, does not provide a “general safety-net” to cover *any* form of persecution. But it is clearly a phrase with a wide denotation”: *Ibid.* at p. 308; Gummow J., “the demands of language and context should not be departed from by invoking the humanitarian objectives of the Convention, without an appreciation of the limits placed by the Convention upon achievements of such objectives”: *Ibid.* at 283.

<sup>516</sup> *Ibid.* at 236 per Brennan C.J.

*is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society.*<sup>517</sup>

In *Applicant A*, the claimants were not granted refugee status. The Court held that the asserted group, opponents of China's one-child policy, was simply a "disparate collection of couples" who wanted to have more than one child.<sup>518</sup> Based on the evidence, there was no "social attribute or characteristic linking the couples, nothing external that would allow them to be perceived as a social group."<sup>519</sup> In addition, recognizing a group that was united only by a common abuse of human rights would allow the persecution to define the class. The general norm among international jurisprudence is that a "particular social group" must exist independently of the feared persecution. As McHugh J stated: "the only persecution that is relevant is persecution for reasons of membership of a group which means that the group must exist independently of, and not be defined by the persecution."<sup>520</sup> Nevertheless, the persecutor's perception is still a relevant factor in the refugee determination process.<sup>521</sup>

#### **7.5.4 Reaching a Common Ground**

As the above analysis has shown, there is no clear universal concept of what the term "particular social group" means. There are however, some common elements among the varying views. First, there is general consensus that the term was meant to be flexible, just how flexible is up for debate. Second, the group must be unified or linked by a common attribute or characteristic, but cohesiveness is not a necessary element. Third, although the persecution itself cannot define the group, it is still a relevant factor in determining whether or not a group actually exists.

Based on the above discussion, the "social perception" approach is more in line with the liberal interpretation which was the intention of the framers. This is evident from the fact that the

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<sup>517</sup> *Ibid.* at 241 per Dawson J., emphasis added.

<sup>518</sup> *Ibid.* at 270.

<sup>519</sup> *Ibid.*

<sup>520</sup> *Ibid.* at 263.

<sup>521</sup> As McHugh J. acknowledged, "while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group": *Ibid.* at 264.

framers chose not to give any precise meaning to the term. In light of the Refugee Convention's human rights dimension, it is appropriate to give the phrase a broad scope. Since protection of refugees is central to the Refugee Convention, "a liberal interpretation of the criteria is called for."<sup>522</sup> By focusing on the perception of the society in question, the approach is clearly in line with the term's "ordinary meaning."<sup>523</sup> The same cannot be said of the "protected characteristics" approach. Although the framers did not intend to offer protection to every single person fearing persecution, the "protected characteristics" approach limits the scope too much. As Goodwin-Gill has noted: "clearly, there are social groups other than those that share immutable characteristics, or which combine for reasons fundamental to their human dignity."<sup>524</sup> This is not to say that the *Acosta/Ward* standard must be discarded. On the contrary, it can still play an integral role in determining the existence of a "particular social group." It is likely that any group that is defined as having an innate or immutable characteristic would likely be perceived as forming a distinct group in society. Therefore, in most scenarios, the two approaches would come to the same conclusion. However, the "social perception" approach has the potential to fill in any gaps that may result from a "protected characteristics" analysis.

One of the major criticisms of the "social perception" approach is that the analysis is overbroad, rendering the other grounds superfluous. As the New Zealand Refugee Status Appeals Authority has cautioned, the problem with the "social perception approach" is that it "enlarges the social group category to an almost meaningless degree. That is, by making societal attitudes determinative of the existence of the social group, virtually any group of persons in a society perceived as a group could be said to be a particular social group."<sup>525</sup> Although it is true that this approach would likely include more groups than the *Acosta/Ward* standard, it should not lead to the conclusion that the approach is limitless. Although a group may be perceived as distinct in the society in question, the claimant must still be persecuted "for reasons of" his or her membership in that specific group. Without this link, there can be no

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<sup>522</sup> Goodwin-Gill, *supra* note 68 at 35.

<sup>523</sup> As per Article 31 of the *Vienna Convention*, *supra* note 443.

<sup>524</sup> Goodwin-Gill, *supra* note 68 at 365.

<sup>525</sup> *In Re G.J.*, New Zealand Refugee Status Appeals Authority, Refugee Appeal No. 1312/93, online: <<http://www.refugee.org.nz>>.

protection. Therefore, this approach is clearly in line with the framers' intent not to offer protection to every person who suffers harm. The harm must clearly be linked to one of the five grounds. A random attack on a member of a distinct social group would not fall within the parameters of the refugee definition. However, an approach that seeks to cast the broadest protection net is clearly in line with the Refugee Convention's emphasis on anti-discrimination and human rights protection.

Given the lack of consensus regarding the application of the term "particular social group" in the refugee determination process, and the protection gaps that may result, reference should be made to the UNHCR's recent attempt to reconcile the two approaches. In May, 2002, the UNHCR issued Guidelines regarding the 'particular social group' category as a compliment to its *Handbook*.<sup>526</sup> In the UNHCR's opinion, although the term cannot be viewed as a "catch all," it must still be read "in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."<sup>527</sup> With this in mind, the UNHCR offers the following reconciliation and definition of the term:

11. The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches:

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

It is clear from this definition that the UNHCR prefers the "social perception" approach, relegating the "protected characteristics" approach to sub-set status. The advantage of this definition is that it not only provides an easily identifiable framework ("immutable characteristics") for many social groups, but it also provides the necessary open-endedness ("social perception") required to live up to the liberal interpretation envisioned by the framers.

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<sup>526</sup> UNHCR, Guidelines on International Protection No. 2: "Membership of a Particular Social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02). [Hereinafter, UNHCR *Guidelines*].

<sup>527</sup> *Ibid.* at paras. 2 and 3.

### 7.6 People with Mental Disabilities as Members of a “Particular Social Group”

As Helton has argued, the “social group” category is a broad and flexible concept that should be read expansively.<sup>528</sup> Although the Refugee Convention does not specifically make reference to people with mental disabilities, the motive behind the framers’ decision to incorporate the “particular social group” category was to deal with the needs of persons who have suffered the kind of discrimination and maltreatment to which persons with mental disabilities have been subjected to throughout history and which many, as discussed in Chapter Six, continue to endure.<sup>529</sup> Throughout the world, the stigma attached to people with mental disabilities has fuelled the continued prejudice, discrimination and fear against this social group. In turn, this has contributed to the human rights violations of this group as a result of their particular disability. Therefore, people with mental disabilities not only fall within the very group of refugees the framers initially intended to protect, but they also constitute a “particular social group” due to the continual maltreatment, discrimination and prejudice afforded by societies today.<sup>530</sup> Furthermore, recent case law suggests that the door has been opened to recognizing persons with mental disabilities as members of a particular social group.

In *Re Santiago-Carrillo*,<sup>531</sup> the BIA, in an unreported decision, addressed the issue of a mentally disabled refugee claimant fearing persecution if sent back to Mexico. In this case, the claimant was classified as an “abandonado,” a name given to mentally ill people placed in Mexican mental hospitals. At the initial hearing, a California immigration judge granted Santiago-Carrillo a withholding of removal to Mexico based on the fact that he would likely face “persecution” if sent back due to his membership in a particular social group, namely, the “abandonados.”

The immigration judge based his decision on a report by MDRI on the Mexican mental health system and the offensive mistreatment of many institutionalized persons in Mexico.<sup>532</sup> The

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<sup>528</sup> Helton, *supra* note 296 at 45-46.

<sup>529</sup> Kanter and Dadey, *supra* note 296 at 1152.

<sup>530</sup> *Ibid.*

<sup>531</sup> *Re Santiago-Carrillo*, *supra* note 396; Arlene S. Kanter *et al*, *supra* note 396 at 512.

<sup>532</sup> *Ibid.*

judge held that the conditions in Mexico's mental institutions constituted persecution under the INA.<sup>533</sup> On appeal, the BIA agreed that the "abandonados" constituted a particular social group given their close affiliation and *immutable* characteristic of mental disability, and because they shared a common fate of being "readily identified either through misbehaviour or an inability to function in society at large, and are subsequently involuntarily hospitalized, oftentimes for life."<sup>534</sup> However, the BIA reversed the immigration judge's decision that Santiago-Carrillo would be persecuted. The BIA held that without "any evidence of any ill will or animus supplying a *motive* for the government to harm the respondent" the institutionalization of Santiago-Carrillo without treatment did not amount to persecution.<sup>535</sup> Instead, the BIA held that upon his return, the Mexican government would institutionalize the claimant in order to "protect both he and society in general."<sup>536</sup>

In an unreported 2001 decision, the Chicago Immigration Court, granted refugee protection to an autistic boy with obsessive-compulsive disorder based on his well-founded fear of persecution on account of his mental disability. The Letter Opinion, issued by the Director of the Chicago Asylum Office, Robert Esbrook, did not disclose the facts of the case, but news reports were able to shed light on the issue at hand. The claimant, Umair Choudhry, was a boy from Pakistan who developed autism at the age of three.<sup>537</sup> Because Umair's behaviour included violent self-abusive outbursts, he wore a helmet and mittens for protection against self-mutilation.<sup>538</sup> In Pakistan, Umair's relatives and neighbours said that he was cursed by Allah and possessed by demons.<sup>539</sup> In order to help "cure" Umair of his affliction, he was

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<sup>533</sup> *Ibid.*

<sup>534</sup> *Ibid.*, emphasis added.

<sup>535</sup> *Ibid.*

<sup>536</sup> *Ibid.*

<sup>537</sup> Julie Deardroff, "Mom Wins Asylum for Son with Autism: INS Agrees Boy Faced Persecution in Pakistan Because of his Disability" *Chicago Tribune* (February 21, 2001) available on Westlaw at 2001 WLNR 10615171.

<sup>538</sup> Julie Deardroff, "Mom Says Asylum Bid a Plea for Son's Life: Pakistani Woman Hopes U.S. Law will Stretch to Shelter Autistic Boy" *Chicago Tribune* (September 19, 2000) available on Westlaw at 2000 WLNR 8208501.

<sup>539</sup> *Ibid.*

subjected to degrading treatments in Pakistan, such as being forced to drink dirty water meant for cows, in order to expel Allah's curse.<sup>540</sup> Umair's mother feared that if he were sent back to Pakistan, he would be taken to a pagal khana (mad house) where he would be locked away in a cage.<sup>541</sup> Based on the evidence at hand, the Chicago Immigration Court concluded that Umair fit the classic definition of a refugee claimant. According to Robert Esbrook, Umair was granted asylum not on the basis of being disabled or autistic, but rather, because of the persecution his disability itself caused.<sup>542</sup> This case marked the first time that an individual was granted asylum on account of a mental disability in the U.S.<sup>543</sup>

Although the decision to grant Umair refugee status was a major step forward in the human rights protection of persons with mental disabilities, only two years later, the movement was stalled by the Eighth Circuit Court of Appeals. In *Raffington v. INS*,<sup>544</sup> the Court upheld a BIA decision denying the refugee claimant's motion to reopen deportation proceedings to permit her to apply for asylum. Raffington argued that she would be persecuted because of her membership in a particular social group comprised of mentally ill women in Jamaica. The BIA denied the motion on the ground that she failed to establish a *prima facie* case that she would be persecuted if returned to Jamaica.<sup>545</sup>

In support of her motion, Raffington presented evidence that she had a history of depression and suicide attempts and that her mental illness was being effectively treated in the United States. Raffington argued that deportation back to Jamaica would deny her the necessary psychiatric and counselling care she was receiving. According to the BIA, Raffington "failed to provide any evidence which would support her assertion that she ha[d] a well-founded fear of

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<sup>540</sup> Nadya Labi, "Does this Boy Deserve Asylum?" *Time*, (Oct. 16, 2000) (Canadian Edition) at 62.

<sup>541</sup> *Ibid.*

<sup>542</sup> "INS Grants Asylum to Autistic Child Persecuted Due to Disability" 78 No. 13 Interpreter Releases 604, available on Westlaw at 78 No. 13 INTERREL 604.

<sup>543</sup> *Ibid.*

<sup>544</sup> *Raffington v. INS*, 340 F. 3d 720 (8<sup>th</sup> Cir. 2003).

<sup>545</sup> *Ibid.* at 721.



persecution upon her return to Jamaica based upon her mental disability.”<sup>546</sup> Based on this finding, the BIA concluded that there was no evidence in the record that she would be singled out for persecution based upon one of the grounds enumerated for refugee protection.<sup>547</sup>

The Eighth Circuit Court of Appeals affirmed this decision stating that Raffington failed to establish a *prima facie* case that the mentally ill or mentally ill women have been persecuted in Jamaica due to their mental disability.<sup>548</sup> The fact that the Jamaican government devoted limited resources to treating the mentally disabled did not establish a pattern of discrimination or harassment amounting to persecution on account of mental disability.<sup>549</sup> The importance of this case, however, is in relation to the Court’s discussion regarding Raffington’s argument that she was a member of a particular social group. According to the Court, there was not enough evidence to conclude that mentally ill Jamaicans, or mentally ill female Jamaicans, meet the requirements of the “particular social group” category. In the court’s opinion, mentally ill women in Jamaica are not a “collection of people closely affiliated with each other, who are actuated by some common impulse or interest ... the mentally ill are too large and diverse a group to qualify.”<sup>550</sup> Although this case is definitely a strike against the adoption of the mentally disabled as a “particular social group,” the Court’s holding should be read in light of a recent case handed down by the Ninth Circuit Court of Appeals.

In *Tchoukhrova v. Gonzales*,<sup>551</sup> the Ninth Circuit Court of Appeals addressed the issue of whether a child with cerebral palsy fell within the parameters of the “particular social group” category.<sup>552</sup> The Court noted that persons with disabilities are precisely the kind of individuals that the Refugee Convention contemplates with its reference to the “social group” category.<sup>553</sup>

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<sup>546</sup> *Ibid.* at 723.

<sup>547</sup> *Ibid.*

<sup>548</sup> *Ibid.*

<sup>549</sup> *Ibid.*

<sup>550</sup> *Ibid.*

<sup>551</sup> *Tchoukhrova*, *supra* note 410.

<sup>552</sup> For a detailed discussion regarding this case see Chapter Six.

<sup>553</sup> *Tchoukhrova*, *supra* note 124 at 1189.

In addition, although not all mental or physical disabilities are “inherent” or “innate,” due to the fact that some are acquired, in the Court’s opinion, they are usually “immutable.”<sup>554</sup> Since mental and physical disabilities constitute precisely the sort of “immutable characteristic” that a refugee claimant cannot change, as contemplated under the Refugee Convention, the Court had no trouble concluding that persons with disabilities can “constitute a ‘particular social group’ for purposes of asylum and withholding of removal.”<sup>555</sup> Although this is a very important holding regarding the protection of persons with mental disabilities throughout the world, the Court was quick to limit the scope of this particular group. The group considered by the Ninth Circuit does not include all “disabilities” as it is restricted to individuals whose disabilities are “serious and long lasting or permanent in nature.”<sup>556</sup>

This is a clear example of how the “immutable characteristics” test can be overly restrictive in excluding groups that are worthy of international protection. The fact that not all disabilities are “innate” or “unchangeable” should not be the basis for denying refugee protection to individuals who will face persecution if sent back to their country of origin. Again, this relates back to the fact that in many instances societies perceive certain individuals to be different and that this difference poses a threat. For example, the fact that a mentally disabled person may eventually procreate and bring forth another mentally disabled human being makes many able-bodied people uneasy. This uneasy feeling, as history has shown, has led to the forced sterilization of millions of people and other forms of discrimination and mistreatment.<sup>557</sup>

In Canada there are signs that persons with mental disabilities would fall within the “social group” category, however, there is a lack of reported decisions that address the issue in any detail. In *Re F. (G.E.)*<sup>558</sup> the Canadian Immigration and Refugee Board (Convention Refugee Determination Division) stated that it would accept that persons with the “*inherent and substantially immutable*” characteristic of mental disability may collectively be seen to form a

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<sup>554</sup> *Ibid.*

<sup>555</sup> *Ibid.*

<sup>556</sup> *Ibid.*

<sup>557</sup> See discussion in Chapter Six.

<sup>558</sup> *Re F. (G.E.)*, [1991] C.R.D.D. No. 869 (QL).

social group, of which the claimant is a member.”<sup>559</sup> However, the claimant was not granted refugee protection as the evidence did not establish that the Somali police had a habit of persecuting the mentally disabled.<sup>560</sup> Like the American decisions above, the tribunal sought fit to restrict the scope of this group to matters of “immutability.”

Most recently, the Federal Court of Canada was given the opportunity to discuss the issue of mental disabilities and social group in *Liaqat v. Canada (Minister of Citizenship and Immigration)*.<sup>561</sup> In that case, a Pakistani claimant was diagnosed as having schizophrenia while in Canada. During the refugee hearing, the claimant argued that his mental illness was an innate and unchangeable characteristic and that he feared being persecuted on account of his mental illness if sent back to Pakistan. According to the applicant, the mentally ill in Pakistan are severely mistreated in public areas and in state institutions where treatment plans include electroshock therapy.<sup>562</sup> In addition, the applicant argued that he would receive very little, if any, medical treatment for his schizophrenia if sent back due to the limited resources Pakistan devotes to its mental health system.<sup>563</sup> This lack of treatment, the applicant argued, would also amount to persecution. In reaching its decision, the Court noted that the respondent Minister conceded that the applicant was a member of a particular social group. In light of this fact, the Court also agreed with this submission. Unfortunately, the Court failed to provide a detailed analysis as to why the applicant was a member of a “particular social group.” Given the fact that the applicant had initially argued that his mental illness was an “innate and unchangeable characteristic” the assumption can be made that the Court had this in mind when reaching its decision. Overall, the case turned on the lack of evidence that Liaqat would face persecution in Pakistan. According to the available evidence, the Court concluded that Liaqat would receive conventional psychiatric treatment. Even though the level of care would not be the same as in

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<sup>559</sup> *Ibid.* at 5, emphasis added. As part of his claim, the applicant argued that he would be persecuted by the Somali police on account of his mental disability if sent back.

<sup>560</sup> *Ibid.*

<sup>561</sup> *Liaqat v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1119 (F.C.) (QL).

<sup>562</sup> *Ibid.* at para. 17.

<sup>563</sup> *Ibid.*

Canada, in the Court's opinion, State protection is not expected to be perfect. Thus, it could not be held that Liaqat would face a real chance of persecution if sent back to Pakistan.<sup>564</sup>

Although the above cases are a significant step forward in fully recognizing persons with mental disabilities who are persecuted on account of their disability as deserving of refugee protection, there is a concern that the adoption of the "immutable characteristics" test by administrative tribunals and courts will overly restrict the potential scope of this "particular social group". The "social group" category was intended to include individuals who share common social characteristics that are the target of persecution but who do not necessarily fall within the categories of race, religion or political opinion. Limiting refugee protection to persons with an innate or immutable mental disability will likely limit the group of mentally disabled who may qualify for refugee status. To reiterate, the central concern of the Refugee Convention is to protect persons from being persecuted. Persecution is the key and not what constitutes a protected ground such as "particular social group." As noted above, this term was purposely left undefined in order to allow for a flexible and open-ended approach. Limiting the discussion to whether an individual has an "innate" characteristic cuts short the Refugee Convention's objective of protecting human rights. The more favourable approach would be to adopt the progressively developed "social perception" test in the refugee determination process. In many cases, it is the perception of a particular group as posing some threat to those in power or society at large that essentially leads to persecution. People with mental disabilities clearly fall within a group that shares a common uniting characteristic that sets them apart as a cognizable group within society.

People diagnosed as having a mental disability, such as schizophrenia for example, form a cognisable group in terms of their particular social and medical status. They are generally treated as a cognisable group in that members of the public generally respond to people with mental disabilities on the basis of their particular disability, developing and acting upon stereotyped notions of what a mental disability, such as schizophrenia, signifies. Reactions and attitudes based on fear, ignorance, and prejudice are generally applied to individuals due to their perceived membership of that particular social group. It is the stigma of being labelled as "schizophrenic," "psychotic," or "mentally ill" that sets the mentally disabled apart from the general public and not the fact that they may or may not have an "innate" or "immutable" characteristic. In most scenarios, the two approaches may very well reach the same conclusion

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<sup>564</sup> *Ibid.* at paras. 36-39.

regarding the status of the mentally disabled as members of a particular social group. In many respects, their distinguishing characteristics are “immutable” in so far as they are readily identifiable to persecutors based on the never-ending ignorant, prejudicial and stereotypical attitudes towards the mentally disabled. However, the “social perception” approach has the potential to fill in any gaps that may result from a “protected characteristics” analysis. In this case, the gap relates to the fact that there is no clear consensus regarding the cause of mental disabilities.

Essentially, there are two general models regarding the cause of mental disabilities that mental health professionals subscribe to: the medical and psychosocial models.<sup>565</sup> In its strictest form, the medical model suggests that mental disabilities are illnesses in the same manner that physical disabilities are illnesses. This model conceptualizes an individual’s maladaptive behaviour and mental malfunction as stemming from a biological, genetic or organic cause, primarily in the brain.<sup>566</sup> As such, this model is in line with the “immutable characteristics” approach to refugee determination. The psychosocial model, on the other hand, conceptualizes an individual’s mental disturbances as psychological, resulting from social, environmental, cultural, and ethical factors. The essential element here is the cumulative effect of environmental stressors on the individual in question and not a particular “innate” biological quality. To varying degrees, the everyday stresses of life have proven to be important in the causation of many forms of mental illness.<sup>567</sup>

The debate between these two dominant models of causation has existed for many years and will continue to do so for many years to come.<sup>568</sup> In light of the continued debate among mental health practitioners, there is little to be gained by adopting the more restrictive “immutable” standard. Although this approach may define certain individuals with mental disabilities as members of a particular social group, there is a higher chance that it would deny individuals

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<sup>565</sup> Randall C. Wyatt and Norman Livson, “The Not So Great Divide? Psychologists and Psychiatrists Take Stands on the Medical and Psychosocial Models of Mental Illness” (1994) 25 *Professional Psychology: Research and Practice* 120.

<sup>566</sup> Peter Tyrer and Derek Steinberg, *Models for Mental Disorders*, 4<sup>th</sup> ed. (Chichester, West Sussex, England: John Wiley & Sons, 2005) at 7-8.

<sup>567</sup> *Ibid.* at 102.

<sup>568</sup> Wyatt and Livson, *supra* note 565 at 130.

whose disability is linked to social factors. The simplicity and beauty of the “social perception” approach is that the refugee decision-maker does not have to probe the question of what has caused the mental disability at issue. All that matters is that the society in question perceives that the individual belongs to a “particular social group,” namely, the mentally disabled.

The other danger associated with adopting the “immutable” standard is that it reinforces the stereotypes associated with mental disabilities. Prejudice against persons with mental disabilities has been extensively documented with dangerousness and unpredictability the most often reported perceptions among members of the general public.<sup>569</sup> Studies have revealed that the “medical model” approach to mental disabilities, which generally focuses on “innate” and “immutable” characteristics, significantly increases this perception of unpredictability and dangerousness.<sup>570</sup> A recent New Zealand study has shown that the more the public believes in “biogenetic causes” the more negative their attitude towards persons with mental disabilities.<sup>571</sup> In particular, those who hold biogenetic causal beliefs view “mental patients” as more dangerous and unpredictable.<sup>572</sup> The same study also revealed that when members of the public are presented with psychosocial causes of mental disabilities, attitudes regarding dangerousness and unpredictability significantly improve.<sup>573</sup> This is the added danger of adhering to the “immutable characteristics” test in determining refugee status for persons with mental disabilities. In many respects, some mental disabilities may have a genetic or biological cause which makes the disability in question “immutable.” However, the public does not generally perceive the mentally disabled to be different due to “innate” characteristics. In fact, many studies have shown that the public prefers the psychosocial causation approach to mental disabilities. Studies in the United States, Germany and Austria have revealed that the public

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<sup>569</sup> John Read and Niki Harré, “The Role of Biological and Genetic Causal Beliefs in the Stigmatisation of ‘Mental Patients’ (2001) 10 *Journal of Mental Health* 223 at 223.

<sup>570</sup> Ian Walker and John Read, “The Differential Effectiveness of Psychosocial and Biogenetic Causal Explanations in Reducing Negative Attitudes toward “Mental Illness” (2002) 65 *Psychiatry* 313; see also Read and Harré, *supra* note 569 at 223.

<sup>571</sup> *Ibid.* at 315; “propagation of the medical model ... perpetuate[s] stigma: information on genes and ‘chemical imbalances’ implies that those with mental illness have no control over or responsibility for their actions”: Peter Byrne, “Psychiatric Stigma” (2001) 178 *British Journal of Psychiatry* 281 at 284.

<sup>572</sup> *Ibid.*

<sup>573</sup> *Ibid.* at 315.

tends to reject the biological and genetic (innate/immutable) theory of causation, preferring instead, environmental stressors as explanations for mental disabilities.<sup>574</sup>

In light of the dangers associated with limiting the definition of the “social group” category to “immutable characteristics,” adoption of the UNHCR’s reconciliatory approach to the “social group” category emerges as the most reasonable option. The mentally disabled, as a community, share a common characteristic and are perceived as a distinct group by society. In some cases, but not all, the distinction may have its basis on an immutable characteristic. This distinctive characteristic often leads to exclusion from society and the deprivation of such fundamental human rights as life, liberty, security of person, education and privacy. The exclusions, in many respects, stem from the social perception of this group, which is largely based on ignorance, prejudice, stereotypes and fear. In light of these factors, people with mental disabilities should qualify as a “particular social group” under the Refugee Convention. Therefore, to the extent that people with mental disabilities can prove that the mistreatment they face constitutes “persecution,” that they are being “persecuted” on account of their mental disability and that their country of origin is either the agent of persecution or is unwilling or unable to offer protection, States party to the Refugee Convention should recognize that the mentally disabled qualify for refugee protection. The granting of refugee status to individuals with mental disabilities, especially in Canada and the United States, will send a message to governments around the world that discrimination against the mentally disabled is a violation of human rights and will not be tolerated at the international level.

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<sup>574</sup> *Ibid.* at 314; see also Read and Harré, *supra* note 142 at 224.

## CHAPTER EIGHT    Conclusions

The general spirit behind the adoption of the Refugee Convention was an humanitarian desire to develop a better international system whereby the horrors of World War II would not be repeated. In light of the fact that a perfect world is an utopian dream, "it should at least be ensured that victims of oppression and persecution ... be decently treated by the international community."<sup>575</sup> It was for this reason that the UDHR included the right to seek asylum as a fundamental human right. As this thesis has argued, the Refugee Convention is marked by an ambition to further develop the fundamental human rights expressed in the United Nations Charter and the UDHR. As the opening two paragraphs of the preamble to the Refugee Convention state:

Considering 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,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms[.]

With its preamble grounded in the concept of non-discrimination, the Refugee Convention encompasses an ever-evolving definition of refugeehood and offers the greatest protection for asylum seekers within the international community. Based on this premise, this thesis has argued that the mentally disabled form a "particular social group" in society and that those individuals who are persecuted on account of their mental disability should be granted refugee protection. The following section is a brief summary of the arguments and conclusions of this thesis.

In Chapter Two, I presented an historical overview of international refugee protection from ancient times to the present. I explored the movement of refugee protection from areas of religious inviolability to that of the sovereign right of nations to control entry to and exit from their territory. The evolving concept of refugeehood was examined, specifically, the shift from defining refugees in relation to specific ethnic or national origins to a more comprehensive individualized definition.

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<sup>575</sup> Ivor C. Jackson, "The 1951 Convention relating to the Status of Refugees: A Universal Basis for Persecution" (1991) 3 Int'l J. Refugee L. 403 at 403.



In Chapter Three, I argued that the human rights approach constitutes a consistent and principled basis for granting refugee status and best explains the willingness among states to grant protection notwithstanding their right to control their borders. I concluded that this approach offers an appropriate means for reconciling the sovereign right of states to implement restrictive immigration policies with the reality that those seeking protection will find a way to enter the territory of a refuge state. Furthermore, it legitimizes a state's claim to being democratic and liberal by upholding values such as freedom and equality.<sup>576</sup>

In Chapter Four, I explored the recent international movement toward securing the human rights of people with mental disabilities. Reference was made to the international community's adoption of a human rights model regarding mental disabilities which recognizes the equality of all people regardless of any difference or disability. In particular, I referred to the United Nations' initiative to adopt a binding convention on the rights for people with mental disabilities. Taken as a whole, I argued that the principles of non-discrimination and human rights for people with mental disabilities have reached center stage in the international community. In light of this reconceptualization of international human rights law as inclusive of issues regarding the mentally disabled, I proposed that the granting of refugee protection to persons with mental disabilities would further advance an enforceable human rights regime for the promotion and protection of the rights of the mentally disabled.

With this proposal in mind, Chapter Five analysed the central element of the Refugee Convention - "persecution." As was argued, the essential question that must be answered in any refugee claim is whether the harm feared amounts to persecution. Without persecution, there is no need for international protection. Although there is no universally accepted definition of "a well-founded fear of persecution," in this chapter I concluded that there is substantial consensus on a few important matters. First, threats to an individual's life or freedom will always constitute persecution. Second, depending on the facts at hand, serious violations of fundamental human rights may form the basis of a valid refugee claim. Third, the concept of "well-founded" primarily involves an objective analysis of the particular facts at hand. In other words, there must be an air of reality to the harm feared. Fourth, the level of state protection is a relevant component of the "persecution" analysis. When the state concerned is the source of the persecution, then the lack of protection is self-evident. Persecution may also be established

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<sup>576</sup> Schuster, *supra* note 158 at 56-57.

even though the state concerned is not the source. The bridge between persecution by the state and persecution by non-state actors will likely be met if the objective analysis reveals that the state concerned either condones or is indifferent to the harm feared. Fifth, there must be a “reasonable chance” or “reasonable possibility” that the claimant will suffer persecution if sent back to his or her country of origin. This final element consists of evaluating an asylum applicant’s circumstances in relation to the overall human rights record in his or her country of origin.<sup>577</sup>

With this framework in mind, Chapter Six analysed the extent to which international incidents of mistreatment of people with mental disabilities amounts to persecution under the Refugee Convention. I made reference to historical and recent incidents of mistreatment, discrimination, prejudice and abuse of the mentally disabled. In light of the detailed country reports and recent case law, it was argued that the mistreatment of the mentally disabled through such acts as, involuntary institutionalization in inhumane living conditions, involuntary sterilization, electroconvulsive therapy, and physical and mental abuse, should satisfy the “persecution” arm of the Refugee Convention.<sup>578</sup>

Chapter Six further argued that if the State is the primary figure behind involuntarily confining individuals in inhumane conditions, then the “well-founded” requirement of the refugee definition will easily be met. When the State is not the active agent of persecution, the case will always be harder to prove. However, as *Tchoukhrova*<sup>579</sup> illustrates, a mentally disabled refugee applicant should qualify for asylum to the extent that the State is unable or unwilling to control the responsible groups and offer protection. If a State is not able to protect individuals who face physical or mental abuse in the public or private realm, and if those individuals are incapable of seeking redress in the courts, this should qualify as a “well-founded fear of

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<sup>577</sup> In many respects, international human rights norms assist in determining what constitutes persecution. As Hathaway notes, “the appropriate starting point for an analysis of objective conditions within the refugee claimant’s state of origin is an examination of that country’s general human rights record”: Hathaway, *supra* note 97 at 80.

<sup>578</sup> Murphy, *supra* note 426 at 863.

<sup>579</sup> *Tchoukhrova*, *supra* note 410.

persecution,” as the State’s failure to provide these individuals with protection or redress would amount to an inability or unwillingness to prevent that persecution.<sup>580</sup>

Although the Refugee Convention does not specifically make reference to people with mental disabilities, in Chapter Seven I concluded that the mentally disabled fall within the scope of the “particular social group” category. This chapter noted that the stigma attached to people with mental disabilities has fuelled the continued prejudice, discrimination and fear against this social group. I argued that the mentally disabled share a common social identity and are perceived as a distinct group by society. This common identity is often associated with an inferior social status by those who persecute them. In addition, the mentally disabled form a readily identifiable group based on the premise that they are different. The social identity, label or stigma attached to this social group cannot be avoided due to the persecutor’s faulty assumption that the particular group is inferior, weak, or dangerous. In many cases, people with mental disabilities are unable to distance themselves from their given social status and are readily recognizable to persecutors. In turn, this social stigma precipitates discrimination and harassment and eventually persecution. Thus, I concluded that the mentally disabled not only fall within the very group of refugees the framers initially intended to protect, but they also constitute a “particular social group” due to the continual maltreatment, discrimination and prejudice afforded by societies today.<sup>581</sup> The mentally disabled, therefore, deserve international protection on account of the inferior social status that is ascribed to them by members of the public and the state.<sup>582</sup>

Therefore, to the extent that people with mental disabilities can prove that the mistreatment they face constitutes “persecution,” that they are being “persecuted” on account of their mental disability and that their country of origin is either the agent of persecution or is unwilling or unable to offer protection, States party to the Refugee Convention should recognize that the mentally disabled qualify for refugee protection. The granting of refugee status to individuals with mental disabilities, especially in Canada and the United States, will send a message to

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<sup>580</sup> Murphy, *supra* note 426 at 863.

<sup>581</sup> *Ibid.*

<sup>582</sup> Nicole LaViolette, “The Immutable Refugees: Sexual Orientation in *Canada (A.G.) v. Ward*” (1997) 55 U.T. Fac. L. Rev. 1 at 41.

governments around the world that discrimination against the mentally disabled is a violation of human rights and will not be tolerated at the international level.

Some critics, however, are opposed to granting refugee protection to individuals with mental or physical disabilities based on the fear that it would "lead to a flood of disabled refugees seeking advanced medical treatments ... under the guise of escaping persecution."<sup>583</sup> Dan Stein, executive director of the Federation for American Immigration Reform, has been a staunch supporter of restrictive immigration policies. In his opinion, "asylum laws cannot account for all the vagaries of human vexation and misfortune."<sup>584</sup> This concern, however, is not warranted. Including the mentally disabled within the scope of the social group category will not automatically increase the number of refugee applicants in North America or other jurisdictions.<sup>585</sup>

In wake of the INS's decision to grant refugee protection to Umair Choudhry,<sup>586</sup> Mr. Stein expressed his displeasure by arguing that asylum is being stretched "beyond recognition and creating another immigration problem." With respect to classifying Choudhry as a "member of a particular social group" he stated the following: "I have bunions on my foot. That's a group I'm in. Could that be considered a social group? ... Officials are making open-ended kinds of definitions that have nothing to do with political asylum. We can't use these open-ended definitions to help people avoid all forms of misfortune in the world."<sup>587</sup>

Mr. Stein's statement is a clear example of the lack of knowledge many people have regarding the Refugee Convention. Although refugee protection was initially focused on protecting

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<sup>583</sup> Labi, *supra* note 540 at 62.

<sup>584</sup> *Ibid.*

<sup>585</sup> A similar argument was made in relation to granting refugee protection on the basis of sexual orientation or gender. These arguments have proven to be without merit. See Peter C. Godfrey, "Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees" (1994) 3 J.L. & Pol'y 257 at 282-83, and Layli Miller Bashir, "Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law" (1996) 4 Am. U. J. Gender & Law 415 at 453-454.

<sup>586</sup> See Chapter Seven.

<sup>587</sup> August Gribbin, "Asylum grant to autistic boy criticized as expanding law" *Washington Times* (February 23, 2001) at A3.

individuals from political and religious persecution, especially during the Cold War period, this is no longer the case. Since the collapse of the Soviet Union, many of the world's refugee claims have little to do with politics. As already noted, the social group category was adopted by the framers to account for man's endless creativity in the realm of persecution. The fact that an individual may be a member of a social group comprised of persons who have bunions should not automatically disqualify her from receiving refugee protection. Though this social group may sound unusual to some, what matters is that the individual in question is being persecuted. If Mr. Stein, for example, were being persecuted based on the fact that he has bunions, should he not be protected? According to this author, he should. I will also assume that Mr. Stein would gladly accept refugee protection from the international community if his home state were to actively persecute him and his fellow social group members for having bunions. The other enumerated refugee grounds listed in the Refugee Convention, namely, race, religion, nationality and political opinion all refer to very broad groups. If the Refugee Convention is to be interpreted in a consistent manner with the other grounds, then the term "particular social group" should be given a wide scope. Extending the scope to include the mentally disabled is a logical and correct interpretation of the term.<sup>588</sup> The key issue is not about the misfortunes that many people in the world must deal with, important though this may be, it is about protecting people who cannot turn to their home state for protection. This is the case for many people around the world with mental disabilities.

Others may argue that the mentally disabled are too large and diverse a group to qualify as a particular social group. This was the case in *Raffington*<sup>589</sup> where the Eight Circuit Court of Appeals held that the mentally disabled are too large and diverse a group to qualify for refugee protection. Yet the mentally disabled as a group are no larger than those who have been granted refugee protection on account of their race, religion or nationality. The fact that an individual shares a common distinguishing characteristic with many others does not result in the feared persecution being any less real. He or she will still face the same chance of being persecuted regardless of the numbers involved. As Grahl-Madsen has stated: "[o]nce a person is subjected to a measure of such gravity that we consider it 'persecution', that person is

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<sup>588</sup> Godfrey, *supra* note 584 at 281.

<sup>589</sup> *Raffington*, *supra* note 544, see Chapter Seven.

'persecuted' in the sense of the Convention, irrespective of how many others are subjected to the same or similar measures."<sup>590</sup>

As noted above, there are other elements of the refugee definition that each individual claimant must establish before any form of surrogate protection will be granted. The claimant must still provide evidence that he or she has a well-founded fear of persecution. This element has both a subjective and objective element. Even if the decision-maker believes that the claimant has a genuine subjective fear, the fear itself must still be objectively reasonable based on the evidence at hand. The objective foundation is usually established if there is a genuine lack of state protection. Accordingly, if an individual's country of origin has an adequate enforcement system for addressing the alleged mistreatment in question, then protection will not be granted.<sup>591</sup> Even if a claimant establishes a "well-founded fear," the fear must still be linked to one of the enumerated grounds, in this case, membership in a particular social group. If this nexus does not exist, once again, there can be no surrogate protection. Thus, mere membership in an enumerated group is not sufficient to recognize a well-founded fear of persecution. Since refugee claims are processed on a case-by-case basis, extending protection to one member of a particular social group, in this case, the mentally disabled, will not amount to the granting of asylum to all members of that group. Each individual applicant must prove his or her case that there is a reasonable chance of being persecuted if sent back to his or her country of origin. Overall, the Refugee Convention contains many safeguards to restrict those who are simply looking for a better life, important as this may be, while ensuring that those who genuinely face persecution on account of their mental disability are granted surrogate protection.<sup>592</sup>

Overall, the Refugee Convention has established an international standard for refugee protection and it remains the most comprehensive international treaty for the protection of vulnerable groups facing persecution. According to the World Health Organization, an

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<sup>590</sup> Grahl-Madsen, *supra* note 91 at 213.

<sup>591</sup> "...those claimants who come from states which have generally laudable human rights records face a tougher objective threshold: whether through their own testimony or whatever other evidence can be marshalled, they must counter the established perception that their country is one that can be relied upon to afford them meaningful protection": Hathaway, *supra* note 97 at 81.

<sup>592</sup> Murphy, *supra* note 426 at 864.

estimated 450 million people worldwide are affected by mental disabilities at any time.<sup>593</sup> As this thesis has argued, there is a “sustained and systemic failure of state protection”<sup>594</sup> with respect to the mentally disabled in many parts of the world. The mentally disabled are innocent of any wrongdoing. They are continually threatened with harm that amounts to persecution in many parts of the world based on socially constructed stigmas attached to their identity. They are a classic group for whom refugee protection was designed.<sup>595</sup> Until such time as individuals with mental disabilities can freely live in safety without fearing for their lives, states party to the Refugee Convention, such as Canada and the United States, must recognize their predicament and extend surrogate protection. The risk of not granting protection to the mentally disabled who are persecuted on account of their disability is rather large. In light of the many well documented reports regarding the abhorrent living conditions and treatment that many of the world’s mentally disabled face, the refusal to grant asylum will likely lead to criticism by activists and the international community for refusing to protect individuals who may very well have valid claims of persecution in their country of origin. A restrictive interpretation of the refugee definition that excludes the mentally disabled as a particular social group is inconsistent with the Refugee Convention’s object and purpose of anti-discrimination and protection of human rights. By upholding the rights of people with mental disabilities to seek and obtain surrogate protection from persecution on account of being a member of a particular social group of people with mental disabilities, both Canada and the United States can lead the way in fulfilling the Refugee Convention’s human rights guarantee of non-discrimination and fully recognize the dignity and human rights of the mentally disabled.

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<sup>593</sup> World Health Organization, *Mental Health*, online: <  
[http://www.who.int/mental\\_health/en/](http://www.who.int/mental_health/en/)> (last accessed July 27, 2006).

<sup>594</sup> Hathaway, *supra* note 97 at 112.

<sup>595</sup> Daniel J. Steinbock, “Interpreting the Refugee Definition” (1998) 45 UCLA L. Rev. 733 at 805.

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