# Innocent Victims of Civil War as Refugees

*David Matas**

## I. INTRODUCTION

IT IS OFTEN SUGGESTED that the refugee definition in the *Refugee Convention*[1] is too limited, that innocent victims fleeing civil war are denied protection because of technical restrictions in the refugee definition. A more expanded definition, of the sort found in the *Cartagena Declaration*[2] or the *Organization of African Unity Convention,*[3] is held up as an example of what the refugee definition should be.

The *Refugee Convention* defines a refugee as a person with a well-founded fear of persecution by reason of race, religion, membership in a social group, or political opinion and who is outside the country of his nationality.[4] The *O.A.U. Convention* defines a refugee to be a person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order is compelled to leave his place of habitual residence in order to seek refuge outside his country.[5] *The Cartagena Declaration*, adopted by ten Latin American states in 1984, includes in its refugee definition persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal

* David Matas is a lawyer in private practice in Winnipeg. He is the author, with Ilana Simon, of *Closing the Doors: The Failure of Refugee Protection* (Toronto: Summerhill Press, 1989). Revision of a paper prepared for an International Symposium on Refugees, York University, Toronto, 26 May 1991.

[1] *Convention Relating to the Status of Refugees,* 28 July 1951, 189 U.N.T.S. 137 (entered into force 22 April 1954) [hereinafter *Refugee Convention*].

[2] *Declaration of Cartagena*, Colloquium on International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, 19–22 November 1984 reprinted in Annual report of the Inter-American Commission on Human Rights, 1984–85 at 179–82 [hereinafter *Cartagena Declaration*].

[3] *Organization for African Unity Convention on Refugee Problems in Africa,* Sept. 10, 1969, (1969) 8 I.L.M. 1288 [hereinafter *O.A.U. Convention*].

[4] *Supra* note 1 art. 1 A.(2).

[5] *Supra* note 3 art. 1(2).

conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.[6]

It has been suggested, in particular, that the definitions in the *Cartagena Declaration* and the *O.A.U. Convention* allow for protection of innocent victims fleeing civil war and the *Refugee Convention* does not.

This paper argues that the refugee definition in the *Refugee Convention*, in conjunction with other international law principles, provides protection that is broad enough to cover innocent victims fleeing civil war. It is not necessary legally to change the refugee definition to broaden the scope of protection.

In order to establish that assertion, I propose to examine in turn different components of the refugee definition in the *Refugee Convention* definition and show how they can be expansively interpreted to cover innocent victims of civil war. I then propose to examine other international law principles outside the *Refugee Convention* to show how they too provide protection for innocent victims of civil war.

## II. STATE COMPLICITY

A KEY CONCEPT IN the *Refugee Convention* definition is a well-founded fear of persecution. Two issues that arise in attempting to establish a well-founded fear of persecution are whether there is a requirement of state complicity in the persecution, and whether the person fearing persecution has to be singled out or targeted before that fear can be considered to be well-founded.

The refugee definition in the *Refugee Convention*, narrowly construed, requires state complicity before there can be a well-founded fear of persecution. The definition, broadly construed, does not require it. A state's inability to protect is sufficient. A state inflicted persecution or state willingness to protect is not required.

The issue arises in the case of armed insurrection. Can a person claim refugee status because the person fears persecution from opposition elements? The refugee definition broadly construed says yes. The refugee definition narrowly construed says no.

In Canada this issue was decided by the Supreme Court of Canada in June 1993.[7] Patrick Francis Ward claimed refugee status from both the United Kingdom and Ireland (of which he was a dual national)

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[6] *Supra* note 2 conclusion 3.

[7] *Ward* v. *Canada (Minister of Employment and Immigration) (sub. nom. Canada (Attorney General* v. *Ward)* (30 June 1993) [unreported].

because he feared persecution at the hands of the Irish National Liberation Army (I.N.L.A.). The Army is dedicated to uniting Northern Ireland to the Republic of Ireland by violent means.

The Immigration Appeal Board found Ward to be a refugee on the ground that the Republic of Ireland was unable to offer Ward protection from the I.N.L.A. The Federal Court of Appeal overturned the decision.[8] The Court held that in a case where the person is unwilling to seek protection from his home government, the government must actually be complicit in the feared persecution for the person to be a refugee. Only where the person is unable to seek protection from his home government is it unnecessary for the government to be complicit in the feared persecution of the refugee.

The United Nations High Commission for Refugees (U.N.H.C.R.) avoids this distinction between willing and unable. Whether the person is unwilling or unable to seek protection from the home government, government complicity is not an essential requirement of persecution. In the section on agents of persecution, the U.N.H.C.R. *Handbook on Procedures and Criteria for Determining Refugee Status* says that serious discriminatory or other offensive acts committed by the local populace can be construed as persecution if the authorities prove unable to offer effective protection.[9]

Mr. Justice MacGuigan, in a separate judgment in *Ward*, noted that this construction would no doubt make eligible for admission to Canada claimants from strife-torn countries where problems arise, not from their nominal governments, but from various warring factions. He held that this construction was not contrary to the *Immigration Act* or the refugee definition, and was preferable to the construction of the majority in the case.[10]

Even before the Supreme Court of Canada decision in *Ward*, the case of *Ahmad Ali Zalzali*[11] threw into doubt the authority of the *Ward* decision in the Federal Court of Appeal, or at least limited it severely. Zalzali claimed refugee status from Lebanon. He feared persecution from the Amal and Hezbollah militia. The Immigration

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[8] *Ward* v. *Canada (Minister of Employment and Immigration)* (*sub nom. Canada (Attorney General)* v. *Ward*) (1990), 67 D.L.R. (4th) 1; rev'g (1988), 9 Imm. L.R. (2d) 48 (I.A.B.).

[9] (Geneva: Office of the United Nations High Commission For Refugees, 1988) at para. 65.

[10] *Supra* note 8 at 25.

[11] *Zalzali* c. *Canada* (1992), 14 Imm. L.R. (2d) 81.

and Refugee Board refused his claim on the grounds that Zalzali did not try to obtain protection from the Lebanese army. On appeal to the Federal Court of Appeal, counsel for the Minister argued that there could be no persecution in the sense of the *Refugee Convention* since the Lebanese government was not complicit in the persecution Zalzali feared.

The Federal Court of Appeal, on April 30, 1991 rejected the position of the counsel for the Minister and overturned the judgment of the Immigration and Refugee Board. Mr. Justice Décary for the Court said:

> [C]an there be persecution, within the meaning of the Convention and *Immigration Act*, where there is no form of guilt, complicity or participation by the state? I consider that, in light of the wording of the definition of a refugee, the judgments of this Court and scholarly analysis both in Canada and abroad, this question must be answered in the affirmative.[12]

He went on to say: "The position of the respondent would lead directly to the absurd result that the greater the chaos in a given country, the less acts of persecution would be capable of founding an application for refugee status."[13]

The *Zalzali* court did not reject the distinction between unwilling and unable that the *Ward* court had adopted in the Court of Appeal. The *Zalzali* court just limited its scope. The court suggested that inability to seek protection, where state complicity is not required, is the typical situation. Unwillingness alone, where state complicity is required, is unusual. Where there is no government, where there is civil war, or in any chaotic situation, the claimant would be considered to be unable to invoke state protection, and, in consequence, state complicity would not be required.

Of the *Ward* case in the Court of Appeal, the *Zalzali* court said this: "the circumstances in *Ward* are so exceptional and have so little to do with the much more general question now before the Court that I would apply the rules arrived at by a majority of the Court to the case at bar with the utmost caution."[14]

In the Supreme Court of Canada, in *Ward*, the distinction between unable and unwilling was rejected completely. Mr. Justice La Forest, in giving judgment for the Court said: "Where the claimant is

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[12] *Ibid.* at 86.

[13] *Ibid.* at 90.

[14] *Ibid.* at 86.

'unwilling' or 'unable' to avail him-or herself of protection of a country of nationality, state complicity in the persecution is irrelevant."[15] Ward, nonetheless, was not found to be a refugee. The Court sent the case back to the Immigration and Refugee Board to determine whether Great Britain was able to provide Ward protection from the Irish National Liberation Army.

In the U.S., the law has evolved in the direction of requiring no state complicity. As in Canada, the law was articulated in a case involving an Irish refugee. Peter McMullen claimed refugee status from Ireland in the U.S. because he feared persecution at the hands of the Provisional Irish Republican Army. The U.S. government conceded that persecution within both the *Refugee Convention* and U.S. law includes persecution by non-governmental groups, where it is shown that the government of the proposed country of deportation is unable to control the group.[16]

On the one hand, because the issue was conceded, the acceptance by the U.S. courts that there is no requirement of state complicity does not have the same legal weight as it would have had if the issue were joined and the court actually decided the issue. On the other hand, the fact that the U.S. government, which has traditionally been more restrictive in its application of the refugee definition than Canada has been, and has litigated refugee definition issues the Government of Canada has never thought to contest, shows how far from the internationally understood meaning of the definition the Canadian government has gone.

Since that case, the U.S. courts, almost as a matter of rote, recite the refugee definition to mean a well-founded fear of persecution "by the government or a group the government cannot control."[17] In the cases of *Artiga Turcios,*[18] *Maldonado-Cruz,*[19] and *Bolanos-Hernandez,*[20] the U.S. Court of Appeals recognized fear of persecution

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[15] *Supra* note 7 at 31.

[16] *McMullen* v. *I.N.S.*, 658 F.2d 1312 (1981) at 1315 note 2.

[17] See *Canjura-Flores* v. *I.N.S.*, 784 F.2d 885 at 888 (9th Cir. 1985); *Artiga Turcios* v. *I.N.S.*, 829 F.2d 720 at 723 (9th Cir. 1987).

[18] *Supra* note 17.

[19] *Maldonado-Cruz* v. *Dept. of Immigration and Naturalization,* 883 F.2d 788 (9th Cir. 1989).

[20] *Bolanos-Hernandez* v. *I.N.S.*, 767 F.2d 1277 (9th Cir. 1984).

in El Salvador within the refugee definition could be based on fear of persecution by anti-government guerrilla forces.

In Europe, the requirement of state complicity has been rejected by the European Commission of Human Rights when examining the issue of forced return measured against the standards of the *European Convention on Human Rights*. The issue is discussed further in this paper in the section on human rights.

## III. SINGLING OUT

ONE WAY IN WHICH the reach of the refugee definition is shortened is by a requirement that the claimant be singled out for persecution. A victim of generalized oppression is, according to this requirement, not a refugee. Only a person individually targeted is a refugee. That restriction, though often asserted by governments, has been generally rejected by the courts.

In the United Kingdom, the Home Office developed a practice of requiring claimants to show they would be singled out for persecution. The High Court has, however, disapproved of the practice and held that a person is a refugee if a person had a well-founded fear of injury without any element of personal selection, as long as it was for one of the grounds listed in the definition.[21]

In the U.S. also, the notion of singling out was adopted by the government and the Board of Immigration Appeals, but disallowed by the U.S. court. The U.S. Court of Appeal said, in the case of *Bolanos*:

> The Board's [Board of Immigration Appeals] conclusion that the threat against Bolanos' life was insufficient simply because it was representative of the general level of violence in El Salvador constitutes a clear error of law. We are mystified by the Board's ability to turn logic on its head. While we have frequently held that general evidence of violence is insufficient to trigger section 243(h)'s prohibition against deportation, not once have we considered a specific threat against a petitioner insufficient because it reflected a general level of violence .... It should be obvious that the significance of a specific threat to an individual's life or freedom is not lessened by the fact that the individual resides in a country where the lives and freedom of a large number of persons are threatened. If anything ... that fact may make the threat more serious or credible.[22]

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[21] *Ex parte Jeyakumaran* (28 June 1985), (QBD) [unreported]; *Ex parte Coomaraswamy* (28 June 1985), (QBD) [unreported], referred to in: Ian A. Macdonald, *Immigration Law and Practice in the United Kingdom*, 2nd ed. (London: Butterworths, 1987) at 272.

[22] 767 F.2d 1284 at 1284–1285 (1984).

Since that decision the U.S. has even passed a regulation incorporating the principle. The regulation states "the asylum officer or immigration judge shall not require the applicant to provide evidence that he would be singled out individually for persecution."[23]

Canada has gone through a similar cycle. There are a number of Immigration Appeal Board decisions that have imposed a requirement of singling out. But the requirement has been dismissed by the Federal Court of Appeal.

The Refugee Division of the Immigration and Refugee Board denied refugee status to Salibian, and even found he had no credible basis for his claim because he was not personally a target. Salibian claimed refugee status from Lebanon as an Armenian Christian. His claim was based solely on his membership in the group and in the manner in which Armenian Christians are treated in Lebanon.

The Federal Court of Appeal, in allowing the application of Salibian, quoted with approval the statement of James Hathaway:

> In the context of claims derived from generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status.[24]

The Court concluded that there was no need to show that the persecution was personal.[25]

## IV. Political Opinion

A PERSON, TO FALL within the refugee definition, in addition to having a well-founded fear of persecution, must have that well-founded fear by reason of one of five listed grounds — race, religion, nationality, membership in a social group or political opinion. How widely or narrowly the refugee definition is interpreted depends on how widely or narrowly the five grounds are interpreted.

There is a limited and there is an expansive way to approach the concept of political opinion. The limited approach is to insist that the claimant actually has a political opinion opposed to that of his persecutors and that the claimant acts on the opinion. The expansive

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[23] 8 C.F.R. 208.13(b)(2)(i).

[24] James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 97.

[25] *Salibian* v. *Canada (Minister of Employment and Immigration)* (1991), 11 Imm. L.R. (2d) 165 at 174, 175.

approach is to accept a person as a Convention refugee no matter what his or her political opinion or activity and even if a person has no political opinion or activity at all, as long as the agents of persecution believe the person to be politically opposed to them.

The courts have favoured the expansive approach over the limited approach. In Canada, in the case of *Inzunza*, the Federal Court of Appeal said in 1979 that:

> The crucial test in this regard, should not be whether the [Immigration Appeal] Board consider that the applicant engaged in political activities, but whether the ruling government of the country from which he claims to be a refugee considers his conduct to have been styled as political activity.[26]

The Supreme Court of Canada in *Ward*, endorsed and elaborated on this expansive approach. The Court noted that the opinion need not be expressed outright. It is enough if the opinion can be perceived from actions. Secondly, the opinion ascribed need not be the true beliefs of the claimant. It is the persecutor perspective that determines, whether the persecutor is the government or private citizens from whom the government is unable to offer protection.[27]

The U.S. courts have said much the same thing. In the case of *Hernandez-Ortiz*, the U.S. Court of Appeals said it is irrelevant whether a victim's political view is neutrality or disapproval of the acts or opinions of the government. "Moreover it is irrelevant whether a victim actually possesses any of these opinions as long as the government believes that he does."[28] Though the U.S. Court of Appeals has taken an expansive approach, the Board of Immigration Appeals (BIA) historically had not. The Board had taken the position that in order for a claimant to establish refugee status based on political opinion, the claimant must show a history of political activity in opposition to the government.[29] This insistence on political activity in opposition to the government was one of a whole variety of techniques the BIA used to deny refugee status to Guatemalan and Salvadoran claimants. It was a technique, however, that the U.S. Court of Appeals refused to condone.

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[26] *Re Inzunza and Minister of Employment and Immigration* (1980), 103 D.L.R. (3d) 105 at 109.

[27] *Supra* note 7 at 64–65.

[28] *Hernandez-Ortiz* v. *I.N.S.*, 777 F.2d 509 at 517 (9th Cir. 1985).

[29] *Bolanos-Hernandez* v. *I.N.S.*, 767 F.2d 1277 (1984); *Del Valle* v. *I.N.S.*, 776 F.2d 1407 (1985); *Argueta* v. *I.N.S.* 759 F.2d 1395, 1397 (9th Cir. 1985).

## V. Social Group

THE CONCEPT OF SOCIAL group can be approached narrowly by insisting that the group be defined by some internal associational characteristic or an external immutable characteristic. Or, it can be approached broadly by defining social group to include any grouping whatsoever as long as members of the group, solely because of their membership in the group, are the object of persecution.

Until 1993, the issue was not squarely addressed in Canada. In 1986 in the case of *Requena-Cruz*, the Immigration Appeal Board said that the ground "membership in a social group" was intended as a catchall to cover cases of persecution based on background and, therefore, must be given a broad and liberal interpretation. However, in that case, the social group in issue was the family, a group with both clear associational links or immutable characteristics.[30] So the principle set out in *Requena-Cruz* did not have to be applied in the case to a group without any associational links or immutable characteristics. The Refugee Division of the Immigration and Refugee Board, nonetheless, as a matter of practice has recognized refugees as members of social groups though the groups internally have no associational links or immutable characteristics.

The definition of social group was canvassed by the Federal Court of Appeal in November, 1992 in the case of *Mayers*.[31] Marcel Mayers claimed refugee status from Trinidad because she feared abuse from her husband back home. She had been abused in the past. The abuse included rape. When she complained to the Trinidad police, the police took hours to respond, did not interview her apart from her husband, and left after being assured by them that there was no more to it than a domestic spat. Spousal rape was not then an offence in Trinidad. To the knowledge of Ms. Mayers, there were no shelters in Trinidad to which she could have had recourse.

Ms. Mayers was found to have a credible basis for her refugee claim by a screening panel. The adjudicator found her to have a credible basis. The Refugee Board member dissented. Because she was in the backlog, the favourable decision on credible basis entitled her to landing. The case would not go to a full hearing.

The Minister of Immigration sought judicial review of the decision in the Federal Court of Appeal. The adjudicator had found Ms. Mayers

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[30] *Requena-Cruz* v. *M.E.I.* (8 April 1986), No. 83-10559 (I.A.B.); (8 April 1986) C.L.I.C. *Notes* 95.10.

[31] *M.E.I.* v. *Mayers* (5 November 1992), A-544-92 (F.C.A.).

to have a credible basis for her refugee claim because there was credible and trustworthy evidence that she had a well-founded fear of persecution by reason of membership in a social group. The argument of the Minister on appeal was that the adjudicator had implicitly found that Ms. Mayers was a member of the social group "Trinidadian women subject to wife abuse." The Minister further argued that such a group, in law, could not be a social group within the refugee definition, because it was only a statistical group with no innate characteristics.[32]

The Federal Court of Appeal rejected that argument. The Court held that the argument of the Minister "may be right" but it was not within the purview of the credible basis screening panel to decide it. The decision whether "Trinidadian women subject to wife abuse" constitutes a social group within the refugee definition requires the weighing of credible evidence in the form of foreign jurisprudence and learned commentary. That was a task for a full hearing, and not for a screening in panel. The task of the screening panel was only to determine if there is any credible or trustworthy evidence that a person is a refugee. There was some evidence, in this case, that "Trinidadian women subject to wife abuse" are a social group within the refugee definition. That was all that was needed to support the finding of the adjudicator. The application of the Minister to set aside the decision of the adjudicator was dismissed.

That Court decision did not resolve the issue whether a well-founded fear of spousal abuse is or is not within the refugee definition. It was still open to a Refugee Board panel in another case, even after the *Mayers* decision, to conclude that a well-founded fear of spousal abuse did not come within the refugee definition.

The Federal Court of Appeal addressed the meaning of membership in a social group more directly in April 1993 in the *Cheung* decision.[33] Ting Ting Cheung had two children and three abortions in China. Officials, in an attempt to enforce the Chinese one child policy, had taken her from her home to be sterilized. Because of infection, the doctor could not proceed immediately with the operation. Before the infection healed and the doctor was prepared to sterilize her, she fled China. She came to Canada and claimed refugee status. Her claim to refugee status was refused by the Immigration and Refugee Board on the ground that the Chinese had no persecutory intent, and that the

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[32] *Ibid.* at 12.

[33] *Ting Ting Cheung* v. *M.E.I.* (1 April 1993) A-785-91 (F.C.A.).

violation she feared was the implementation of a law of general application not related to one of the five Convention grounds.
The Federal Court of Appeal reversed the finding of the Board and found Ms. Cheung to be a refugee.

In so doing, the Court held that a social group can consist of people who are not in voluntary association and who have no common innate characteristics. It is enough that they share a similar social status; hold a similar interest which is not held by their government; that they have certain basic characteristics in common; and that they are all identified by a purpose which is fundamental to their human dignity. The group to which Ms. Cheung belonged, women in China who have one child and are faced with forced sterilization satisfied enough of these criteria to be considered a particular social group within the refugee definition.

In the case of *Ward*, in the Federal Court of Appeal, the concept of social group was applied differently by different judges, without much discussion. The majority held that the concept of social group excluded groups who by acts of terrorism seek to promote their aims.[34] MacGuigan J.A., in dissent, held that any stable association with common purposes was a social group within the refugee definition.[35]

The Refugee Law Research Unit, Osgoode Hall Law School, York University took what I believe to be a perverse approach to this issue. I call it perverse because the Unit advocated a broad approach to the refugee definition, but then took a restrictive stance. The Unit advocated a definition of social group that rejected a perpetrator perspective. The Unit wrote "what is needed is a concept of social group ... which will exist independently of the nature of persecution directed against it."[36]

The reason the Unit got into this contortion was the *Ward* decision at the Federal Court of Appeal. The *Ward* case, as I mentioned, decided at the Federal Court of Appeal that there must be state complicity for there to be persecution within the refugee definition. Persecution by non-state agents, where the state is unable to offer protection, is not within the refugee definition.

The Unit thought the effect of the *Ward* decision could be avoided by an internally defined social group concept. The Unit appeared to reason that if state complicity in persecution was not part of the

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[34] *Supra* note 8 at 6.

[35] *Ibid.* at 19.

[36] *A.G. of Canada* v. *Ward (Discussion Paper No. 1)* at 13.

definition of social group, if membership in a social group could be defined from an outsider or group perspective, rather than a persecutor perspective, then a refugee claim would not need to meet the state complicity requirement.

It is hard to see how that reasoning helps the position the Unit was trying to advance. For one, the Federal Court of Appeal in *Ward* insisted on the requirement of state complicity whether it was incorporated into the definition of social group or not. Even if social group is defined in the manner the Unit would have wanted, the *Ward* Court of Appeal requirement of state complicity would not have been avoided.

For another, the problem with the *Ward* Court of Appeal approach to social group is not that it incorporates persecution into the concept of social group. By itself, that concept is helpful rather than harmful to the cause of refugee protection. The problem is rather that persecution is wedded to state complicity. If the two concepts are divorced, if persecution is understood to mean inability as well as unwillingness to protect, not only does the problem posed by *Ward* in the Court of Appeal disappear; we, as well, end up with a definition of social group broader than we would have if we accepted the Unit's approach.

At the Supreme Court of Canada, in *Ward*, there was a full discussion of the meaning of the concept "social group." The conclusion to which the Court came was that the concept of social group includes groups defined by innate or unchangeable characteristics; groups whose members voluntarily associate for reasons so fundamental to their dignity that they should be not forced to forsake the association; and groups associated by a former voluntary status, unalterable due to its historical permanence.[37]

If Canada took a while to come off the fence on how the concept of social group is to be interpreted, the United States jumped, on the side of restriction. In the case of *Sanchez-Trujillo*, the U.S. Court of Appeals held a social group was "a collection of people closely affiliated with each other, who are activated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imports some common characteristic that is fundamental to their identity."[38]

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[37] *Supra* note 7 at 61.

[38] *Sanchez-Trujillo* v. *I.N.S.*, 801 F.2d 1571 (9th Cir. 1986).

The Court contrasted social groups with statistical groups. Statistical groups may be subject to persecution, but because they have no internal affiliation, they cannot benefit from the protection of the Convention. Sanchez-Trujillo claimed membership in the social group of young working class urban males who have failed either to serve in the military or actively to support the government. The Court held that was not a social group at all, but just a statistical group. The Court acknowledged the significance of the distinction it was making. It recognized that the opposite position, including statistical groups as social groups would mean the refugee definition would encompass "every alien displaced by general conditions of unrest or violence in his or her home country."[39]

It is hard to see how the U.S. Court of Appeals could have held both that political opinion depends on the persecutor's perspective, and that membership in a social group does not. The Court, itself, sidestepped the issue in an unconvincing footnote. In that footnote the court said "We do not mean to suggest that a persecutor's perception of a segment of a society as a "social group" will invariably be irrelevant to this analysis. But neither would such an outside characterization be conclusive."[40] The obvious questions are: when is it relevant? How is it relevant? How would the Court distinguish between the relevant and the conclusive? None of these questions are answered. And, in reality, the approach the Court takes makes a persecutor characterization irrelevant.

The Board of Immigration Appeals has interpreted "social group" restrictively in yet another way. In the case of *Acosta*,[41] instead of insisting on internal associational links, its focus has been on immutable characteristics. For a person to be a member of a social group within the refugee definition, the membership must be beyond the powers of the individual to change or so fundamental to individual identity or conscience that it ought not to be changed. So, for instance, an asylum seeker who had a well-founded fear of persecution because of membership in a taxi company that refused to participate in guerilla sponsored work stoppages was not considered a refugee, because his membership in the taxi company was not considered an immutable characteristic.

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[39] *Ibid.* at 1576, 1577.

[40] *Ibid.* at 1574.

[41] *Re Acosta*, Interim Dec. No. 2986 (BIA 1985), (1985) Georgetown Imm. L.J. 143.

If the U.S. has jumped one way, Europe has jumped the other. The West German courts in particular have recognized a whole host of social groups as coming within the definition where the members of the group have no associational links. Social groups that have been recognized as coming within the definition are Polish entrepreneurs, Indian women's rights activists who marry out of caste, Iranian homosexuals, Chinese landowners and Romanian landowners with emigré family members.[42]

One commentator has said that the European cases "show that the social group is a flexible concept to be used to fill definitional gaps when persecution is directed at a segment of a society that does not fit into racial, religious, national, or political categories."[43]

## VI. CONSCIENTIOUS OBJECTION

IN A GENERAL BREAKDOWN of law and order, many people flee because they do not wish to join the fighting. All sides in a civil war attempt to get recruits. The effectiveness of the refugee definition depends on whether it includes or excludes those who fled because they are unwilling to join the battle.

A person who avoids military service, either from the government or opposition, may have a well-founded fear of persecution because the avoidance of service may lead those conscripting him to think that the evader is opposed to them. In that sense draft evasion is akin to any other act which triggers persecution. The issue becomes simply one of fact whether there is a well-founded fear of persecution or not.

The issue becomes more complicated when what the evader fears is not a serious violation of human rights, but rather a penalty prescribed by law for anyone who avoids military service. It is arguable even in that context that the person is a refugee.

Even the most generous application of the refugee definition would not apply to every draft evader. But a generous interpretation of the definition would allow a draft evader to claim refugee status, if the reason for the evasion is conscientiously held political or religious belief. The belief could be a belief opposed to the use of force in all circumstances. Or it could be a belief opposed to the use of force in violation of international standards.

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[42] Maryellen Fullerton, "Social Group Defined" (1990) 4 Georgetown Imm. L.J. 381.

[43] Daniel Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar — *Sanchez-Trujillo* v. *I.N.S.*, 801 F.2d 1571 (9th Cir.1986)" (1986) 62 Wash. L.R. 913 at 928.

People who are opposed to the use of force under any circumstances are a relatively small group. A much larger group are those opposed to the use of the type of force they expect they will have to commit in the service of those who draft them. What those evaders object to is either being forced to participate in atrocities, or being forced to participate in combat against their friends or relatives who have taken up arms on the other side.

In Canada, the Federal Court of Appeal, in 1981, appeared to have rejected conscientious objection as a basis for refugee status, but it is a decision that was not followed subsequently by the Immigration Appeal Board, and is not being followed now by the Refugee Division of the Immigration and Refugee Board. In the case of *Musial,* a draft evader from Poland who fled because he did not want to support the subjugation of the Afghan people to Communist domination was found not to be a refugee. Mr. Justice Pratte said, of the penalty Musial would suffer from draft evasion: "A person who is punished for having violated an ordinary law of general application, is punished for the offence he has committed, not for the political opinions that may have induced him to commit it."[44]

Since the Federal Court decision in *Musial* in 1981 there has been a substantial evolution in the international arena about conscientious objection. The U.N. Commission on Human Rights in 1987 resolved that states refrain from subjecting conscientious objectors to prison.[45] The Commission reaffirmed the right to conscientious objection in 1989.[46]

A Committee of Ministers of the Council of Europe in 1987 recommended alternative service for conscientious objectors. The European Parliament, in October 1989, passed a resolution calling for the right of all conscripts to refuse to serve on grounds of conscience.[47] At the Conference on Security and Cooperation in Europe, meeting June, 1990 in Copenhagen on the Human Dimension, participating states agreed to consider introducing, where not already in existence, alternative service for conscientious objection.

The U.N.H.C.R. *Handbook* states that where "the type of military action with which an individual does not wish to be associated is condemned by the international community as contrary to basic rules

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[44] *Musial* v. *M.E.I.* (1981), 38 N.R. 55 at 60.

[45] Resolution 1987/46.

[46] Resolution 1989/59.

[47] Recommendation R.87(8), (9 April 1987).

of human conduct, punishment for desertion or draft evasion could, in light of all other requirements of the definition, in itself, be regarded as persecution."[48]

The Immigration Appeal Board, in 1987, in the case of *Ramirez* went in the opposite direction to the *Musial* case, without referring to it. Ramirez was a Jehovah's Witness who did not want to serve in the El Salvador army. The Board wrote in its reasons:

> It matters little that he [Ramirez] is subjected to the same conscription laws or practices as other young men of military age who are without such scruples, the issue is not equal treatment, but fear of persecution. In the Board's opinion such a situation exists in the case under consideration here. Were Mr. Ramirez required to enter the military and undertake military duties which would deeply offend his sensibilities, he would, in the Board's opinion, be suffering persecution.[49]

The I.A.B. has recognized conscientious objection as a basis for a refugee claim in the cause of a person who did not want to take up arms to kill members of his family or tribe.[50] In the case of *Arbaca*, the Board recognized conscientious objection in the case of a person not willing to serve "if it means having to become part of a government force that is systematically killing innocent people just to instill fear and terror into the general public. He [Arbaca] strongly objects to serving in his country's military force because he would most probably be forced to participate in violent acts of persecution against non-combatant civilians, which is contrary to recognized basic international principles of human rights."[51] In this case, there was a dissent, based on the *Musial* case.

The Federal Court of Appeal, in June 1993, in the case of *Zolfagharkhani*, explained that reading of the *Musial* case to say that it rejected conscientious objection as a basis for refugee status was wrong.[52] Mr. Justice MacGuigan for the Court said, in *Zolfagharkhani*, that the proposition which the *Musial* case is taken to establish, that, where a government is merely enforcing an ordinary law of general application, it cannot be guilty of persecution, is only

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[48] *Supra* note 9 para. 71.

[49] (5 May 1987), V 86-6161 (I.A.B.). See also (12 December 1989), T 89-03347 (I.R.B.).

[50] *Hassan* v. *M.E.I.* (1 May 1987), No. M86-1561 X (I.A.B.). See also *Egal* v. *M.E.I.* (27 April 1987), No. M87-1075 X (I.A.B.).

[51] (21 March 1986), No. W86-4030-W (I.A.B.) at 4. See also (8 June 1990), Decision No. T89-01690 (I.R.B.).

[52] (15 June 1993), A 520-91 (F.C.A.).

a half proposition. What the Court in *Musial* was saying was that, where the government is enforcing an ordinary law of general application, it cannot be guilty of persecution, simply because the claimant disagrees with that law for political reasons. The relevant political opinion is that of the persecutor, not of the victim. If the intent or any principal effect of an ordinary law of general application is persecution within one of the five grounds listed in the refugee definition, then punishment for violation of the law is also persecution within the refugee definition.

The Court in *Zolfagharkhani* went on to hold that a person who conscientiously objects to military actions condemned by the international community as contrary to the basic rules of human conduct falls within the refugee definition. Zolfagharkhani objected to participation as a paramedic in chemical warfare being planned by Iran. The Court found that chemical warfare is contrary to the basic rules of human conduct. The objection of Zolfagharkhani to participation in chemical warfare was a valid basis for a refugee claim. The Court was silent on the larger issue, although it was argued, whether conscientious objection, as such, could support a refugee claim. The Court held that the issue was not raised by the record.[53] They therefore chose not to deal with it.

The U.S. Court of Appeals has taken a highly restrictive approach to the notion of conscientious objection. The Fourth Circuit, where the issue was litigated, accepted that a refugee claim may be based on conscientiously objecting to committing atrocities. But it has said that the atrocities must be the articulated policy of the government, rather than something the government just does. As well, it ruled that the atrocities must be provided by condemnation by recognized intergovernmental bodies. Eye witness testimony of the atrocities or reports by non-governmental organizations such as Amnesty International are not sufficient proof for the purpose of conscientious objection claims.[54]

Harrison Winter, Senior Circuit Judge, in dissent wrote that the requirement that the government actually have an announced policy of committing atrocities can never be satisfied. The judgment said "no government wishing to remain even remotely connected with the international community would openly advocate such a policy."[55]

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[53] *Ibid.* at 11.

[54] *M.A.* v. *U.S. I.N.S.* 899 F.2d 304 (4th Cir. 1990).

[55] *Ibid.* at 322.

Judge Winter said much the same thing about requiring intergovernmental condemnation and ignoring non-governmental reports. He wrote,"if one ignored such evidence, providing evidence of international condemnation would often be virtually impossible as governments understandably shy away from making such statements about their allies in a public forum."[56]

The United Kingdom, on the other hand, has accepted the notion of conscientious objection. The Immigration Appeal Tribunal has held that refusal to serve in the South African army because of conscientious objection to apartheid constitutes a well-founded fear of persecution within the Convention refugee definition contained in the U.K. immigration rules. All that has to be established is that the conscientious objection is genuine and sincere.[57]

## VII. TEMPORARY REFUGE

THE REFUGEE DEFINITION IN the *Refugee Convention* is not the only legal avenue open for protection of refugees. There are, in addition, three extra-Convention resources. One is the customary international norm of temporary refuge. The second is the *Geneva Convention for the Protection of Civilians in Times of War*.[58] The third is international human rights law.

There is a customary international norm of temporary refuge that prohibits a state from forcibly repatriating foreign nationals who find themselves in its territory after having fled generalized violence and other threats to their lives and security caused by international armed conflict within their own state. Temporary protection is to last until the violence ceases in the refugee's own state and that state can assure the security and protection of its nationals.[59]

The refugee definition in the *Cartagena Declaration* and the *O.A.U. Convention* form part of international law, because of this customary norm, without any change required in the *Refugee Convention*. A

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[56] *Ibid.* at 323 quoting Stephen H. Legomsky, "Political Asylum and the Theory of Judicial Review" (1989) 73 Minn. L.R. 1205 at 1209.

[57] *Church* case, described in Macdonald, *supra* note 15 at 273.

[58] *Convention Relative to the Protection of Civilians in Time of War* (Geneva IV) 12 August 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 reprinted in Richard B. Lillich, *International Human Rights Instruments*, 2nd ed. (Buffalo, New York: William S. Hein Co., 1990) at 100.1.

[59] Deborah Perluss and Joan F. Hartman, "Temporary Refuge: Emergence of a Customary Norm" (1986) 26 Virginia J.I.L. 551.

customary international law norm is formed by state practice and considered to be binding. The *Cartagena Declaration* and the *O.A.U. Convention* are key elements in the overall international practice that has developed and has been viewed as binding.

In the U.S. case of *American Baptist Church* v. *Meese*, District Judge Peckham held that even if there was a customary international law norm of temporary refuge, it could not be applied in the U.S. because Congress had specifically rejected it. Judge Peckham found that specific rejection in the *Refugee Act* of 1980. Temporary refuge was not included in the 1980 Act and Congress intended to provide, through the Act, the exclusive means for obtaining refugee status in the U.S.[60]

The American Baptist Church (A.B.C.) appealed the judgment of District Judge Peckham to the U.S. Court of Appeals. But the case was settled out of court before it was heard.[61] The U.S. Congress passed legislation in 1990 to allow for temporary refuge for designated countries, and specifically designated El Salvador. The U.S. government subsequently designated Guatemala, Lebanon, Liberia and Kuwait. As part of the A.B.C. settlement, the government of the U.S. agreed to re-adjudicate all claims of Salvadorans in the U.S. before September 19, 1990 and all Guatemalans in the U.S. before October 1, 1990 who had made claims and been refused. The settlement and legislation do not overturn the judgment of District Judge Peckham, but they do weaken its authority.

Subsequent to the judgment of Judge Peckham, the norm of temporary refuge was accepted and applied in the U.S. in the case of *Maria Elena Santos-Gomez*. In that case Immigration Judge Paul Mejelski found that Ms. Santos-Gomez, her mother and daughter, were not refugees, but nonetheless could not be deported to El Salvador because of a right to non-return to a country engaged in civil war, which is recognized in international state practice and legal obligation, and was thus binding on that court.[62]

Customary international law is part of Canadian common law. There is no requirement that it be legislated in order to form part of Canadian law. Canadian legislation, if in contradiction to customary international law, takes precedence. However, legislation should be construed so that, if possible, it could be read in a way consistent with

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[60] 712 F. Supp.756 (N.D. Cal. 1989) at 771.

[61] *Monday*, v.10 no.1, (14 Jan. 1991); v.10 no.9 (15 April 1991).

[62] (24 August 1990), No. A 29 564 781, 785, 821.

customary international law. The norm of temporary refuge has been recognized in Canada in the form of a list of countries to which Canada does not remove. Currently on the list are China, Iraq, Haiti and Lebanon.

The problem that arises in asserting the norm of temporary refuge, in addition to establishing the existence of the norm, is finding the appropriate forum in which to assert it. In Canada, the Refugee Division of the Immigration and Refugee Board determines whether the Convention refugee definition applies. An immigration adjudicator determines whether or not a removal order should be issued.

However, whether or not a removal order, once made, should be executed, is left to administrative discretion alone. The *Immigration Act* says that a removal order should be executed as soon as reasonably practicable.[63] The Federal Court of Appeal has held that the execution of a removal order could be stayed where there is an application pending in the court for leave to review or appeal the removal order and the applicant demonstrates a serious issue to be tried, irreparable harm from removal, and a balance of convenience favouring non-removal.[64]

The Federal Court has also said that it has no jurisdiction to issue a stay if the validity of the removal order has not been challenged.[65] However, what is at issue for temporary refuge is the execution of the order alone, rather than its issuance.

In the U.S., Immigration Judge Mejelski found he had jurisdiction to consider the norm of temporary refuge because U.S. law gives a U.S. immigration judge a general power to dispose of the case "as may be appropriate," and to take any other action "consistent with applicable law and regulations as may be appropriate." Judge Mejelski used these powers to order that the Santos Gomez family was deportable, but could not be deported to El Salvador during the civil war. He further ordered they could be deported to a third country which was not at war and which would accept them.

There is no comparable jurisdiction in Canadian immigration adjudicators. Immigration adjudicators have no general jurisdiction. They cannot indicate the country to which a person is to be removed, or not removed. The country of removal is set out in the *Immigration*

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[63] *Immigration Act*, R.S.C. 1985, c. I-2, s. 23(4)(a).

[64] *Toth* v. *M.E.I.* (1988), 6 Imm. L.R. (2d) 123.

[65] *Donkor* v. *M.E.I.* (30 May 1988), A–647–88 (F.C.A.); *Lodge* v. *M.E.I.* (1979), 1 F.C.775 (F.C.A.).

*Act*. First choice is the country from which the person came to Canada. Next is the country of permanent residence. Third is a country of nationality. Fourth is a country of birth.[66]

The Canadian Act does say a person is not to be removed to a country where his/her life or freedom would be threatened for listed reasons. But that protection is limited to persons found to be refugees. A person who fits within the norm of temporary refuge, but outside the Convention refugee definition cannot take advantage of this provision. In any case the listed reasons for non-removal are identical to the listed reasons in the refugee definition. It is unlikely anyone who managed to fit within this part of the non-removal section would not also meet the Convention refugee definition.

There are two different ways the norm of temporary refuge may be invoked in Canada. One is to fit the law of temporary refugee within the Canadian refugee definition itself. There is, however, no authority for that possibility.

The other is to assert the right of temporary refuge in a free standing court action. In Canada, the Federal Court, Trial Division would have jurisdiction to consider such an action. The motion would take the form of a request for prohibition, asking the Court to prohibit the Government of Canada from deporting the applicant to a country torn by civil war, and for a stay pending the hearing of the prohibition motion. There is no reported decision on such an action. However, Mr. Justice Mahoney, for the Federal Court of Appeal, has said that it "would be a grave and I hope justiciable matter indeed if Canada were to execute deportation orders in circumstances which breached obligations under international law and put the life, liberty or security of persons in peril."[67]

## VIII. Geneva Conventions

*The Geneva Convention Relative to the Treatment of Civilian Persons in Time of War* provides that protected persons may be transferred by the detaining power only to a power which is a party to the Convention and after the detaining power has satisfied itself to the willingness and ability of the transferee power to apply the Convention.[68]

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[66] *Supra* note 58 s. 52(2).

[67] *Orelien* v. *M.E.I.* (22 November 1991), A-993-90 (F.C.A.) at 12–13.

[68] *Supra* note 53 art. 45.

The Convention provides that in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply certain minimum provisions. Torture, hostage-taking and extrajudicial executions are amongst the minimum prohibited activities.[69] Each of the Parties to the Convention undertakes to ensure respect for the Convention.[70] A protected person is defined as a person who finds himself, in the case of a conflict, in the hands of a party to the conflict.[71]

In deportation proceedings against Jesus Del Carmen Medina in 1985, the U.S. Immigration Judge, Michael Horn, was prepared to apply these provisions. Medina was from El Salvador. Judge Horn found Medina to be a protected person though he did not hold the United States to be a party to the conflict in El Salvador, because Medina was a protected person under the minimum provisions. The upshot was that the whole notion of persecution was sidestepped. It did not matter whether the torture, hostage-taking and extrajudicial execution were the responsibility of government or not. The fact that they were occurring was enough.

The case ended in a typical judicial evasion. Judge Horn refused a request for asylum for withholding of deportation from El Salvador.[72] He decided that counsel for Medina had not established that grave breaches of the Convention were occurring in El Salvador. Grave breaches of the Convention are, generally, similar to crimes against humanity: wilful killing, unlawful and wanton destruction, torture or inhuman treatment.[73] The decision of the judge in *Medina* was a decision on the evidence before him, not a decision on the situation in El Salvador. The judge noted that the testimony simply addressed the fact that there was an armed conflict in El Salvador, and not whether there were grave breaches of the Convention. As well, the evidence was all secondary, or derived. It was conclusions, rather than facts.

Given the consistent pattern of human rights violations in El Salvador, establishing grave breaches of the Fourth Geneva Convention should not be all that difficult. If a forum is provided, and the

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[69] Art. 3.

[70] Art. 1.

[71] Art. 4.

[72] *Matter of del Carmen Medina*, No. A26 949 415 (U.S. Dept. of Justice, Exec. Office for Immigration 25 July 1985).

[73] *Supra* note 53 art. 147.

evidence is marshalled, a conclusion of violation would be straightforward.

The Convention can be used not only for El Salvador, but also for virtually every trouble spot on the globe. The Geneva Conventions, unlike the *Refugee Convention*, have received almost universal recognition by states.

The Board of Immigration Appeals in the *Medina* case rejected the reasoning of Immigration Judge Horn. The Board ruled that the obligation to ensure respect for the minimum provisions of the Geneva Conventions was at most an obligation of those not engaged in armed conflict to refrain from encouraging others to violate the minimum provisions. It was not an affirmative duty to exert efforts to ensure that parties not under their control refrain from committing violations.[74]

This argument was also rejected by the U.S. District Court of Northern California in the case of *American Baptist Church* v. *Meese*. In that case more than a dozen sanctuary churches and several refugee organizations sued to enjoin the I.N.S. from deporting Salvadorans and Guatemalans who feared persecution if returned. The District Court, in rejecting an argument based on the Geneva Conventions held only that the obligation to ensure respect for the Conventions found in common Article One was non-self executing. According to the U.S. constitution, treaties are the supreme law of the land. U.S. courts have interpreted that provision to apply only to self executing treaties. Treaties that are executory require legislation before they become the law of the land.[75]

In determining whether a treaty is self-executing or not, U.S. courts have to look to whether the treaty itself provides specific obligations and intelligible guidelines for judicial enforcement. The Court held that common Article One was phrased in broad generalities. It contained no rules by which private rights might be determined. It therefore did not grant rights cognizable in U.S. courts without legislation.

In Canada, there is no comparable provision to the U.S. constitution provision that treaties are the law of the land. Treaties become law in Canada only if they are legislated. The Geneva Conventions have been legislated in Canada, in *The Geneva Conventions Act*;[76] so a Cana-

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[74] (7 Oct. 1988), Interim Decision No. 3078 (B.I.A.).

[75] *Supra* note 55.

[76] R.S.C.1985, c. G-3.

dian invocation of the Geneva Conventions is not open to the same objection the U.S. invocation was.

## IX. HUMAN RIGHTS LAW

*THE CANADIAN CHARTER OF Rights and Freedoms* provides that everyone has the right not to be subjected to any cruel and unusual treatment or punishment.[77] The U.S. Constitution provides that cruel and unusual punishments shall not be inflicted.[78] The *European Convention on Human Rights* provides "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[79] So does the *International Covenant on Civil and Political Rights.*[80]

These provisions can be used to prevent the forced return of a person fleeing torture, or cruel inhuman or degrading treatment in his home country, whether the person fits within the confines of the refugee definition or not. The *U.N. Torture Convention*, which Canada has signed and ratified, specifically provides that no state party shall expel, return or extradite a person to another state where there are substantial grounds for believing he would be in danger of being tortured. In deciding whether there are such grounds, the authorities must take into account, where they exist, a consistent pattern of gross flagrant or mass violation of human rights in the state of intended return.[81]

While the human rights instruments are available for protection of innocent victims fleeing civil war, these instruments are subject to the same variations in interpretation as the *Refugee Convention* itself. For instance, the requirement of singling out which has been both accepted and rejected in the application of the refugee definition, has also arisen in the context of the application of human rights instruments.

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[77] *Canadian Charter of Rights and Freedoms*, s. 12, Part I of the *Constitution Act, 1982*, being schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.

[78] Bill of Rights, art. VIII.

[79] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur. T.S. No.5, 213 U.N.T.S. 221, art. 3.

[80] 16 December 1966, Can. T.S. 1976 No., 47, 999 U.N.T.S. 171, 6 I.L.M. 368, art. 7.

[81] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted 10 December 1984, G.A.Res. 39/46, 39 U.N. GAOR Supp. (No.51) at 197, 23 I.L.M. 1027, art. 3.

In the case of *Vilvarajah*, five Sri Lankan Tamils complained to the European Commission of Human Rights that their rights had been violated by the United Kingdom. The United Kingdom forcibly returned the five Tamils to Sri Lanka. Three of the five were detained and maltreated after their return. The Commission, nonetheless, found, on a tie vote of seven to seven, with the President casting a tie breaking vote, that there was no violation of the Convention. Because the five Tamils forcibly returned did not face any greater personal risk than other non-combatants in the area, the European Convention was not violated.[82] The decision has been appealed to the European Court of Human Rights.

In the case of *Cemal Kemal Altun*,[83] the European Commission on Human Rights held that a person's removal from a European Convention signatory state to another, non-signatory state, may be in violation of the prohibition against cruel, inhuman or degrading treatment where there are serious reasons to believe that the individual will be subjected, in the receiving state, to the prescribed treatment. In that case, the F.R.G. wished to extradite Altun to Turkey. Altun claimed he would be tortured on arrival for political reasons. The F.R.G. replied that the Government of Turkey was opposed to torture as a matter of principle and had commenced an anti-torture campaign.

The Commission held it did not matter whether the Turkish government was responsible for the torture that took place in Turkey or not. What was at issue was whether Altun was in danger, even if the danger did not come from the public authorities. The Commission ruled that the complaint of Altun was admissible.[84]

In the *Soering* case, before the European Court of Human Rights, the Court wrote that it would hardly be compatible with the underlying values of the Convention were a contracting state knowingly to return a person to another state where there were substantial grounds for believing he would be subjected to torture. In the Court's view the inherent obligation not to return also extended to cases in which the person would be faced in his state of nationality with a real risk of exposure to inhuman or degrading treatment of punishment.[85]

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[82] (8 May 1990), Application No. 13163/87.

[83] *Cemal Kemal Altun* v. *Federal Republic of Germany* (1984), 36 Decision and Reports 209.

[84] *Ibid.*

[85] *Soering* v. *United Kingdom*, 161 Eur. Ct. H.R. (Ser.A) 1989 at 34 para. 88.

The Supreme Court of Canada has endorsed this principle in the context of extradition. It can be assumed the principle would apply equally to deportation. According to the Supreme Court, situations falling far short of torture may well arise where the nature of what will happen to the person in the foreign country sufficiently shocks the conscience as to make return of the person there one that breaches the principles of fundamental justice enshrined in the *Canadian Charter of Rights and Freedoms.*[86]

Although these principles have been articulated in relation to torture and inhuman treatment in particular, the reasoning would apply, with equal vigour, to the whole range of human rights. Removing a person to a country where there is a serious risk that the person will be arbitrarily detained, denied freedom of expression and so on, in itself constitutes a violation of these rights. The violation lies in the exposure of a person to the violation of these rights in another country.

## X. CONCLUSIONS

THE REFUGEE DEFINITION IS a flexible instrument. It can be used, if interpreted restrictively, to deny protection to almost everyone needing protection. And, indeed, many states have interpreted it in a highly restrictive fashion. It can, as well, be applied generously, in conjunction with other international law principles to offer protection to virtually everyone who needs it.

The malleable nature of the refugee definition, and the restrictiveness with which states have applied the definition has led some commentators to suggest the definition should be changed, made more specific, more specifically broader, as in the *O.A.U. Convention* and the *Cartagena Declaration.*[87]

The trouble with that suggestion is that the politics that leads states to apply the definition restrictively will also lead them to articulate a narrow definition. We cannot assume that once states start discussing a new refugee definition, the result will be a broader one than the current one in the *Refugee Convention.* The dynamics of recent refugee developments suggests quite the contrary — that the push will be to narrow the scope of protection rather than broaden it.

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[86] *Schmidt* v. *The Queen,* [1987] 1 S.C.R. 500 at 522; *U.S.A.* v. *Allard and Charette,* [1987] 1 S.C.R. 564 at 572.

[87] See for instance James Hathaway, "A Reconsideration of the Underlying Premises of Refugee Law" (1990) 31 Harvard I.L.J. 129.

One suggestion I have heard is that an optional protocol be added to the U.N. *Refugee Convention* which would incorporate a refugee definition akin to the O.A.U. or Cartagena definition. While, in itself, there is no objection to such an optional protocol, the danger is that it will be used to read down the Convention definition. The argument will invariably be made that the protocol definition is broader than the Convention definition. Otherwise there would be no point in having the protocol.

In order to overcome that sort of argument, if there is to be a protocol, the protocol must include amongst its terms a clause that states the protocol is without prejudice to the Convention, which does or may contain provisions of as equally wide application as the protocol. The *U.N. Torture Convention* contains such a clause in reference to other international instruments against torture.[88] So it should not be that difficult, in principle, for the international community to accept such a clause in a *Refugee Convention* protocol.

In any case, for those concerned with protection for the innocent victims of civil war, it would appear far easier, far more realistic to invoke the current international legal definitions and instruments rather than attempt to have them changed. It is at least arguable that the law now allows for all innocent victims fleeing civil war to be protected. It would be both unnecessary and unwise to abandon that argument now and instead chase after the chimera of new instruments with broader definitions.

[88] *Supra* note 65 art. 1(2).