THE LIMITS ON A STATE’S RIGHT TO EXCLUDE AND EXPEL NON-CITIZENS UNDER CUSTOMARY INTERNATIONAL AND HUMAN RIGHTS TREATY LAW

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DECEMBER, 1999
THESIS IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS OF
THE LL.M DEGREE
FACULTY OF LAW,
UNIVERSITY OF TORONTO
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0-612-54071-5
SUMMARY OF THESIS

The thesis is entitled "Limits on the State's Right to Exclude and Expel non-citizens under Customary International and Human Rights Law". Its premise is that customary international and human rights treaty law have developed during the course of the last 50 years to a point where they now impose important limitations on state sovereignty with respect to the admission and exclusion of non-citizens. I argue that under customary international law the prohibition against *refoulement* or the forcible return of a refugee to a country to where he/she faces persecution is a principle of customary international law, as is the provision against the return of any person to a country where he/she faces a risk of torture.

I also examine the *International Covenant on Civil and Political Rights*, the *European Convention on Human Rights* and the *Convention Against Torture*. Pursuant to these international human rights treaty laws, several principles which bind all signatories have emerged. These are:

1. Removal of any person back to a country where there is a risk of torture

2. The prohibition also extends to the deportation of a person to a country where he or she is at risk of other forms of cruel and inhuman treatment.

3. By the same token, the deportation of a parent whose children are citizens of the country from which he/she is being deported is prohibited until the best interests of the children are taken into account. The best interests of the children must be given considerable weight.

4. Long term permanent residents who have grown up in the country in which they are residents have a right to remain in that country and cannot be deported notwithstanding the interests of the state in removing them.

I conclude by arguing that the most effective way of enforcing these rights is through the national courts. In Canada it is possible to use international human rights treaties as a tool for interpreting the *Charter of Rights and Freedoms*. 
Acknowledgements

I should like to thank Professor Craig Scott. Without his patience, support and insight the thesis would have never been completed. I dedicate this thesis to my wife Diana, who encouraged me to begin it, who supported me throughout it and who inspires me every day.

Lorne Waldman
May, 2000
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CHAPTER ONE: INTRODUCTION

Although it is still common for commentators and learned justices in many jurisdictions to assert that the right of a state to exclude aliens is virtually absolute,¹ such a position is no longer tenable today. In the world of the global economy, there are strong economic and social interests that mitigate in favour of the free movement of goods, services, and people. Moreover, as members of the international community, nations are subject to the rules of law that arise either from bilateral or multilateral treaties, or pursuant to the rules of customary international law. These rules impose important limitations on a state's right to exclude or expel non-citizens.²

This was in fact the position under international law until the end of the 19th century. Until that time, there was a general expectation that a state should admit persons seeking to enter its territory unless it had valid reasons for refusing to do so, although there was also recognition that a state could exclude undesirable aliens. However, as a result of the large movements of people to Canada, the United States, and Australia in the latter half of the 19th century, in the 1880s and 1890s the legislatures in these countries passed laws to limit the access of certain categories of immigrants. When these legislative enactments were challenged in the Supreme Courts of the United States and Canada, and in the House of Lords in England, the respective courts held that the sovereign state had complete and unfettered discretion over the admission and exclusion of aliens, and affirmed — without any justification — that this right had long been an accepted rule of

¹ See, for example, Chiarelli v. Canada (Minister of Employment & Immigration), [1992] 1 S.C.R. 711; or T. v. Immigration Officer, [1996] H.L.J. No. 17, House of Lords, May 22, 1996 (QL), where this position is affirmed.

² See, generally, J.A. Nafziger, “The General Admission of Aliens Under International Law” (1983) 77 AJIL 804, for a cogent argument in favour of this proposition.
international law. In fact, no such rule existed at the time. But with the emergence of these new laws and their ratification by the courts, there was a profound shift in thinking so that, by the end of the First World War, most experts accepted that a state's right to exclude and expel non-citizens was subject to few restrictions.

International law did recognize that aliens had certain rights encompassed in the so-called "minimum international standard". Once admitted, aliens had limited rights to due process prior to being expelled, so that a decision to expel could not be made arbitrarily and without reasons. In practice, however, this provided little, if any, protection, and the "minimum international standard" had no effect on the sovereign state's prerogative to deny admission to non-citizens.

But, as a result of international law's increasing preoccupation with human rights since the end of the Second World War, a renewed challenge to this categorical position has emerged, so that leading commentators today accept that there are, under international

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3 Many commentators suggest that the profound shift in thinking around a state's right to exclude and expel aliens can be linked to the decision of the Supreme Court of the United States in the case of Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889).

4 The term "exclude" refers to a decision by a state to deny admission to a person at the time he or she is seeking entry. In some instances a person may be allowed to physically enter the country while a decision is made as to whether he or she will be legally admitted. The term "expel" refers to the decision to order a non-citizen who has been admitted to leave the national territory.

5 As we shall see below, the "rights" of the "minimum international standard" did not accrue to the individual per se but rather to his or her state.

6 See L.B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather Than States" (1982) 32 Am. U. L. Rev. 1 at 9, where he notes:

At the termination of the Second World War, two events completely changed the status of individuals under international law. Both were closely connected with Nazi actions and with other atrocities committed before and during the war. The first event was the punishment of war criminals at Nuremberg and Tokyo; the second was the desire to prevent the recurrence of such crimes against humanity through development of new standards for the protection of human rights . . . The General Assembly of the United Nations later affirmed these Nuremberg principles.
law, significant restrictions on a state's dealings with non-citizens:7

A State has the competence to control and to regulate the movement of persons across its borders. This competence is not absolute. It is limited by the right of individuals to move across borders and by the obligations of the State that arise from generally accepted principles of international law and applicable international agreements.8

What, then, is the extent to which customary international law today extends rights to individuals who find themselves on the territory of a state of which they are not citizens? It is clear that, in most circumstances, custom will not prevent either exclusion or expulsion of an individual. Custom has developed, however, to protect non-citizens against arbitrary actions of states, and it is now recognized that they do have certain rights, such as the right to some form of due process prior to exclusion or expulsion; the right to not be subjected to arbitrary detention during the process leading up to exclusion or expulsion; and the right to a limited protection against refoulement.9 More recent developments have expanded these protections, so that today customary international law imposes an absolute prohibition against removal to a country where the person concerned

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7 As we shall see in Chapter Two, the view that a state had an unfettered discretion with respect to admission and expulsion of aliens only emerged at the end of the 19th century. Yet within thirty years it was universally accepted as a fundamental principle of international law that stemmed from the concept of state sovereignty.


Questions of immigration, of entry and expulsion of aliens, fall easily within traditional conceptions of domestic jurisdiction. It is still common to find expressed the view that such matters are for the local State alone to decide 'in the plenitude of its sovereignty'. (Footnote to Ben Tillett's case, 6 B.D.I.L. 124-150 at 147.) It is well known that in the Tunis and Morocco Nationality Decrees Case (footnote (1923) Ser B. No 4 at 24), the Permanent Court of Justice described the delimitation of domestic jurisdiction as an essentially relative question, which was dependent upon the development of international relations.

9 The term non-refoulement refers to the prohibition in Article 33 of the Convention Relating to the Status of Refugees (1951), 189 U.N.T.S. 150 [hereinafter "Refugee Convention"] against deportation of a refugee back to a country where he or she faces persecution.
would face torture. The scope of the protection of non-citizens under customary international law will be discussed in Chapter Two.

Developments in international human rights law have expanded the protections that have evolved under custom. The ratification of the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child, together with the regional conventions — the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Inter-American Declaration on the Rights and Duties of Man, have increased the protection available to non-citizens. The European Court of Human Rights and the Committees created under the Optional Protocols to the ICCPR and CAT have been given jurisdiction to consider individual petitions, some of which have resulted in decisions that recognize that the prohibition against the return of a non-citizen to torture is absolute; that accept that this protection extends to other forms of cruel, inhuman, and degrading treatment irrespective of its source; that acknowledge that the right of a child to be close to her parents is an essential

10 Under general customary international law, the protection against refoulement is not absolute. According to the rule prohibiting refoulement, states are entitled to deport a refugee back to the country where he or she faces persecution if the refugee poses a serious danger to public order or national security. However, it will be argued that, under customary international human rights law, the prohibition against expulsion back to a country where a person faces torture is absolute, and that developments in general human rights law have superceded customary international law as it developed to protect refugees.


14 ETS No. 005 Rome, as amended by Protocol No. 11 (ETS No. 155) of 11 May 1994 [hereinafter the European Convention].

15 Charter of the Organization of American States, CTS 1990/23; Inter-American Declaration on the Rights and Duties of Man, Arts. XVIII, XXV.
consideration when a state contemplates the parent(s)' expulsion; and that recognize that certain categories of long-term permanent residents should be immune from deportation irrespective of the state interest. These developments will be reviewed in Chapter Three.

The challenge for human rights advocates in Canada is to put to use these advances in international human rights law at the domestic level. As a signatory to the Optional Protocols, Canada has accepted the jurisdiction of the Committees created under the ICCPR and CAT. However, the complex and time-consuming procedures employed by these Committees militate against their being an effective remedy for most non-citizens resisting deportation, who are thus compelled to utilize the national courts to assert their rights. It is now beyond dispute that the relevant principles of customary international law are part of our domestic law, at least to the extent that they do not conflict with national legislation, so that those principles can be pleaded in applications to resist deportation. In addition, as a result of the decision of the Supreme Court of Canada in *Baker,* the courts must consider international human rights treaties when interpreting laws that affect the rights of individuals.

The Supreme Court of Canada has held that "the content of Canada's international human rights obligations is ... an important indicia of the meaning of the 'full benefit of the Charter's protection'. [T]he Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified". As such, when interpreting the *Charter,* Canadian courts must use, consider, and apply the content of the human rights

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conventions. In Chapter Four, I shall examine these different mechanisms for bringing international treaties into domestic law in order to benefit non-citizens.

The rising tide of migrants who have been forced to leave their homelands as a result of political or economic difficulties has created a strong xenophobic reaction in many developed countries. It is essential that all those who are concerned with and active in the protection of the rights of the underprivileged be aware of the relevant developments in international human rights law and use them to advance the cause of immigrant rights in Canada. In this thesis, I hope to make a small contribution to that process.
CHAPTER TWO: LIMITS ON EXPULSION UNDER CUSTOMARY INTERNATIONAL LAW

In this chapter, I will review the developments in customary international law concerning the rights of aliens, the *sui generis* customary law concerning refugees and the right to asylum, and the recent evolution of customary international human rights law. I will analyze the extent to which each of these sources of law have limited the discretion of states to expel and exclude non-citizens. These rights must, of course, be differentiated from those that arise under treaty or convention, which are reviewed in chapter three. The applicability of treaty rights is comparatively more limited insofar as they can only arise after a state has voluntarily acceded to the relevant international instrument.

Furthermore, in many countries, international treaties, as opposed to custom, do not automatically become part of domestic law.

As a preliminary matter, it is important to note that the distinction now drawn in international law between citizens and aliens is of relatively recent vintage. The concept of nationality as a principle of international or municipal law emerged in lockstep with the acceptance of territorial sovereignty and immigration controls, and was not fully developed until the middle of the 19th century. Once laws were enacted to distinguish

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1 The impact of the human rights treaties will be discussed in Chapter Three.

2 A state can only be bound by the terms of a treaty if it accedes to it, and treaty rights therefore only emerge as a result of the voluntary accession of a state to the treaty. The scope of the rights protected under a treaty may well be broader than those that have emerged under customary law. A treaty may also reflect the emergence of a rule of customary international law if it is widely ratified. See the *North Sea Continental Shelf Cases* 1969 I.C.J. Rep. 3.

3 In this regard, it is interesting to note that the concept of *nationality* only emerged in international law in the second half of the 19th century during the struggle by the Italian states to obtain independence; see C. Fenwick, *International Law*, 4th ed. (New York: Appleton-Century-Crofts, 1965) at 161. See also A. D'Amato, *International Law: Process and Prospect* (New York: Transnational Publishers, 1995) at 210 and 227-28, where he notes that “in 1789 the concept of nation had not yet become fully crystallized” and that “vast areas of Europe were not ‘nations’ in today’s sense: the Ottoman Empire was a loose federation of principalities, Germany and Italy were not unified, Africa was a ‘dark continent’ and the term nation connoted ‘foreign lands’ as well as ‘states’ in the modern sense.”
between nationals who were considered to be an integral part of a given society and those who were aliens or outsiders, the imposition of immigration controls became inevitable. The distinction that is today accepted as a matter of course between us (the citizens) and them (the aliens) is thus, in fact, of very recent origin. Those who seek to argue in favour of broader rights for non-citizens in the areas of exclusion and expulsion can therefore rely on historical precedent to bolster their argument that non-citizens should have protection against arbitrary conduct in these areas.  

2.1 **THE CONCEPTS OF “NATIONALITY” AND “CITIZENSHIP”**

Central to the emergence of immigration controls was the acceptance of the notion of “nationality” or “citizenship”, which has been defined as

> the bond which unites a person to a given state, which constitutes his membership in the particular state, which gives him a claim to protection of that state; and which subjects him to the obligations created by the laws of that state.  

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4 D’Amato, *ibid.* at 228.

5 It is important to note that there is a difference between the concepts of citizenship and nationality. For the purposes of this thesis, the term “citizenship” is narrower than “nationality” and connotes only the status defined in relevant legislative enactments. (It is beyond the scope of this thesis to provide anything more than a cursory analysis of nationality. For a comprehensive treatment of this topic, see P. Weis, *Nationality and Statelessness in International Law*, 2d ed. (London: Stevens & Sons, 1978).) R.M. Kalvaitis, in “Citizenship and National Identity in the Baltic States” (16 Boston U. Int’l L.J. 231 at 245) quotes Black’s *Law Dictionary* and the International Law Commission:

> A citizen is one who “is a member of the political community [of a state], owing allegiance and being entitled to the enjoyment of full civil rights . . . [They] are members of a political community who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as collective rights”. The term nationality, on the other hand, refers to “that quality or character which arises from the fact of a person’s belonging to a nation”. The term “national” . . . is broader than the term “citizen”. Thus, citizenship reflects a person’s civil status, while nationality seems to reflect his or her national identity.

This distinction will be of significant import in Chapter Three where I discuss the deportation of long-term residents. There I argue that long-term permanent residents, although not formally citizens, have acquired rights akin to citizenship and therefore, pursuant to international human rights treaties, should be protected against deportation.

In the Nottebœhm Case, the International Court of Justice defined nationality as follows:

According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.⁷

It is now an accepted principle of customary international law that a state cannot expel its own citizens⁸ and is under an obligation to admit them onto its territory.⁹ Thus Weis notes that, although there may not be a positive duty under international law requiring states to allow their citizens to be admitted, the obligation arises from the fact that no other state can be obligated to accept another's citizens:

[The duty] is generally accepted as an inherent duty of States resulting from the conception of nationality. It is based on the territorial supremacy of states. If states were to expel their nationals to the territory of other states without the consent of those states, or were to refuse readmission, thus forcing states to retain on their soil aliens whom they have a right to expel under international law, such action would constitute a violation of the territorial supremacy of these States. It would cast a burden on them which, according to international law, they are not bound to undertake, and which if persistently exercised, would necessarily lead to a disruption of the orderly, peaceful relations between States within the community of nations.¹⁰

Since a state must allow its citizens to remain on its territory, an understanding of who has a right to claim to be a citizen is central to any analysis of a state's rights and

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⁸Pursuant to a treaty obligation a state can, of course, extradite its own national to face prosecution for a crime committed in another state. This is not, however, considered expulsion and is in keeping with a state's international commitments.

⁹See R. Plender, International Migration Law, 2d ed. (Leiden: Sijthoff, 1988) at 94. In support of this proposition Plender cites Oppenheim, Weis, and other international law experts. This principle is formally enacted in Canadian law in section 4(2) of the Immigration Act, which expressly provides that all Canadian citizens have a right to enter Canada. Judicial decisions have also affirmed that citizens enjoy a constitutional right of admission to their country of nationality. In Canada, this was stated in R. v. Soon Gin An, (1941) 3 D.L.R. 125. In the U.S., the principle was affirmed in Gonzales v. Williams, 192 U.S. 1 (1903).

¹⁰Weis, supra note 5 at 51.
duties surrounding exclusion or expulsion. As a general rule, international law leaves it to the discretion of the state to determine who will be entitled to claim citizenship. Most states have enacted legislation that determines entitlement to citizenship. It will usually be afforded based upon either the principle of \textit{jus solis}, whereby all persons born on a state's territory can claim citizenship, or according to \textit{jus sanguinis}, which allows all persons who are children of a citizen to claim citizenship. In some states, modified forms of both will apply. There are, however, some restrictions on the right of states to determine citizenship. States cannot impose citizenship without consent on persons who enter or who are in their territory. Moreover, although states can enact measures that denaturalize citizens, arbitrary denaturalization may result in a violation of customary international law. In some circumstances, international law will not recognize a

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11 Section 6(1) of the \textit{Canadian Charter of Rights and Freedoms}, (Part I of the \textit{Constitution Act, 1982}, being Schedule B to the \textit{Canada Act 1982} (U.K.); hereinafter \textit{Charter}) and s. 4(2) of the \textit{Immigration Act} expressly provide that all Canadian citizens have a right to enter and remain in Canada.


13 Pursuant to the provisions of the \textit{Citizenship Act}, Canadian citizenship is automatically granted to all persons born in Canada, regardless of the legal status of their parents (with the exception of children of diplomats). Citizenship can also be claimed by all persons who are children of Canadian citizens regardless of whether or not they are born in Canada, provided that they comply with certain registration requirements. In recent times, entitlement to citizenship has become increasingly controversial, and there is some indication that the Government of Canada may introduce changes which would have the effect of denying citizenship to some persons who are born in Canada if at the time of their birth their parents do not have legal status in Canada. As noted \textit{supra} at note 5, here I am dealing with the concept of citizenship which under international law is a distinct and more narrow concept than that of nationality.

14 G.S. Goodwin-Gill, \textit{International Law and the Movement of Persons between States} (Oxford: Clarendon Press, 1978) at 6; see also Weis, \textit{supra} note 5 at 115, where he quotes M. Jones, \textit{British Nationality Law and Practice}: "The general principle underlying nationality is the voluntary choice by an individual of a particular nationality. There is evidence from the practice of States that to impose nationality upon individuals against their will either collectively or individually is a departure from the accepted practice of international law".

15 Goodwin-Gill, ibid. at 8; Weis, \textit{supra} note 5 at 129-30. Weis argues that a state can deprive a person of nationality without limits under international law. However, this cannot remove the duty which that state might have to another to grant admission to the former national if he or she had no other country to go to.
country's claim to provide national protection to a person if it can be established that he or she had a second nationality and did not have a substantial connection to the first country. Despite these restrictions, however, it is generally accepted that it is the municipal laws that will determine a person's claim to citizenship.

Decisions of the United States Supreme Court illustrate how these principles have been applied in domestic law. In the case of Perkins v. Elg, the Supreme Court affirmed the principle that a child born in the United States of alien parents was an American citizen. The Court further held that the child could only lose citizenship as a result of a voluntary act of renunciation after reaching the age of majority. The issue before the Court was whether a person born in the United States but subsequently taken by her parents to their home country at an early age had lost her claim to American citizenship.

The Court concluded that she had not:

On her birth in New York, the plaintiff became a citizen of the United States. United States v. Wong Kim Ark, 169 U.S. page 668, 18 S.Ct. page 164. In a comprehensive review of the principles and authorities governing the decision in that case that a child born here of alien parentage becomes a citizen of the United States, the Court adverted to the 'inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship'. As municipal law determines how citizenship may be acquired, it follows that persons may have a dual nationality. And the mere fact that the plaintiff may have acquired Swedish citizenship by virtue of the operation of Swedish law, on the resumption of that citizenship by her parents, does not compel the conclusion that she has lost her own citizenship acquired under our law. As at birth she became a citizen of the United States, her citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles. . . . It has long been a recognized principle in this country that if a child born here is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, he does not thereby lose his

16 See, for example, the Notteböh Case, supra note 7, where the Court held that Liechtenstein did not have standing to raise a case before the Court because Notteböh, who had dual citizenship, did not have a substantial connection to that country. The Court, however, relied on the lack of genuineness on the part of Liechtenstein in reaching its decision.

citizenship in the United States provided that on attaining majority he elects to retain that citizenship and to return to the United States to assume its duties.  

As the U.S. Supreme Court noted, once a person has citizenship in a given country, then he or she will obtain all of the rights that accrue from this, including the right to enter and live in the state, and to seek and obtain diplomatic protection from it. Citizenship, therefore, is the demarcation between those who form an integral part of society and who are fixed with all the attendant rights and obligations, and those who are not. It is of critical importance to international law as it provides the nexus between the individual and the international legal regime.

Some commentators have argued that in today’s world of mass migrations there is a need to retain the distinction between citizenship and nationality. Citizenship is the term used to denote the existence of a legal relationship that creates rights between the individual and the state. Nationality refers to the country with which the individual maintains emotional ties:

When a sovereign grants full functional citizenship to an individual with a horizontal relationship to a different community, however, the individual’s national identity is not necessarily the same as the passport she holds. In a world of increased migration, the emotional elements of membership need not be coextensive with the functional.

Under customary international law, the determinative relationship is that of citizenship because it is that relationship which impose obligations on the state vis-à-vis the individual. In the area of exclusion and expulsion, the fact (or absence) of

18 Ibid.

19 In H. Lauterpacht, ed., Oppenheim’s International Law, 7th ed. (London: Longmans, Green, 1948) at 582, the following is noted: “If, as stated, individuals are as a rule not subjects but objects of the Law of Nations, then nationality is the link between them and the Law of Nations. It is through the medium of their nationality that individuals can normally enjoy benefits from the existence of the Law of Nations”.


21 As indicated by Weis, supra note 5, public international law uses the term “nationality” to describe the legal relationship between the individual and the state. Indeed, “nationality” in the less formal
citizenship provides the essential starting point for any analysis of a state’s rights and obligations.\textsuperscript{22} If states are required to admit their citizens on to their territory, then the determination of citizenship is the \textit{sine qua non} of any decision to exclude or expel.\textsuperscript{23} Moreover, until the end of the Second World War it was universally accepted that states were the principal subjects of international law and were able to protect their citizens pursuant to the doctrine of “diplomatic protection”. Thus when an individual sought to object to a decision made by a state to exclude or expel him, international law required that the individual seek recourse through the country of his or her citizenship pursuant to the doctrine of diplomatic protection. The country of citizenship, however, retained unfettered discretion in deciding whether to espouse the claim.\textsuperscript{24}

\textsuperscript{22} As we shall see in the next chapter, however, there are developments in human rights law today which suggest that this distinction is losing some of its importance, as non-citizens who are long-term residents in a country seek recognition of their right to remain there notwithstanding the fact that they did not obtain citizenship. This position has found favour in some of the decisions of the European Court of Human Rights and was raised before the United Nations Human Rights Committee in the case of \textit{Stewart v. Canada}, CCPR/C/56/D/538/93.

\textsuperscript{23} This arises in two ways. First, a person may claim to be a national of the country into which he is seeking admission. In such circumstances, the country must make a determination as to the validity of the claim prior to determining whether or not to exclude the individual. Second, if a state determines to expel a person, then determination of nationality is essential. This is so because, as noted above, a country is normally required to admit its own nationals. Thus if an expelling state can determine a person’s nationality, it will have a right to expel that person to the country of nationality. In the Canadian \textit{Immigration Act}, section 52 provides that a person may be deported to, \textit{inter alia}, the country of his or her nationality or birth.

The \textit{Immigration Act} and the \textit{Charter} expressly provide for the right of a Canadian citizen to come into and remain in Canada. In addition, a provision in the \textit{Immigration Act} allows a person to make a claim to citizenship during the course of an immigration inquiry (deportation hearing), and no final decision can be made at the inquiry until a determination into the validity of the citizenship claim is made.

2.2 THE EMERGENCE OF IMMIGRATION CONTROLS

As already noted, it is generally accepted today that there are few restrictions over the states’ power to control the entry of non-citizens onto their territory. All states have immigration legislation specifying who can be admitted and what conditions may be imposed on admission.25 However, the now-familiar immigration controls and the theoretical assertions that underpinned them only emerged in a systematic way at the end of the 19th century. In fact, scholars from Plato to Blackstone argued in favour of freedom of movement between states, so that those late-19th-century jurists who asserted that a state’s right to control entry onto its territory was a maxim of international law could not point to any scholarly tradition supporting such a position. Indeed, a review of the literature concerning the right of states to exclude aliens from Plato to Blackstone reveals that the principle of freedom of movement was unanimously accepted.26

Thus, although in state practice as it had developed in the 17th and 18th centuries there had been explicit recognition of the power of the sovereign to deny admission to or to expel non-citizens who entered the territory of his or her domain, this power had been used sparingly and only against those persons who were perceived to be a threat to the kingdom. It was also limited by the acknowledged right of persons to be admitted if the

25 Malanczuk, supra note 12 at 261-62.

26 J.A. Nafziger, “The General Admission of Aliens Under International Law” (1983) 77 AJIL 804 at 810. This article presents an excellent, comprehensive review of the historical development under international law of the power of states to deny admission to and to exclude aliens. The author demonstrates that the assertion by the Courts and commentators at the end of the 19th century that there had developed a maxim or rule which recognized state power in this area was incorrect, and was in fact contradicted by much of the previous thinking and practice.
purpose of their sojourn was lawful. In mid-18th century, Blackstone had stated the principle in these terms:

   [By] the law of nations no member of one society has the right to intrude into another. [Nevertheless] great tenderness is shown by our laws... with regard to the admission of strangers who come spontaneously. For so long as a nation continues at peace with ours, and they themselves behave peaceably, they are under the King's protection.

Blackstone thus acknowledged the distinction between subjects and foreigners but did not overstate its importance, and stressed that foreigners who were allowed into the territory were entitled to the same protection as subjects. However, this freedom of movement was curtailed to some extent at the end of the 18th century. The first immigration controls in England were brought about as a result of a political conflict between France and England in the late 1700s. In 1789, the Government of England introduced the Alien Bill that required non-citizens to report to a customs officer at the border for inspection, and provided for registration requirements and, under certain circumstances, for deportation. A similar statute was enacted in France, whose Passport Law has been described as the "starting point for modern aliens legislation". The United

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27 See Plender, supra note 9 at 41-42. Plender quotes Pufendorf: "Every state may reach a decision according to its own usage on admission of foreigners who come to it for reasons other than are necessary and deserving of sympathy; only no-one can question the barbarity of showing indiscriminate hostility to those who come on peaceful missions".


29 See R. Cholewinski, Migrant Workers in International Human Rights Law (Oxford: Clarendon Press, 1977) at 42. See also Goodwin-Gill, supra note 14 at 94, where he cites Grotius who argued that all persons had a right of admission to the territory of a state for purposes of commerce. This "right", however, was used by European colonists as a justification for their usurping of the lands of indigenous societies.

30 Nafziger, supra note 26 at 815-16.

States and the British colony of Nova Scotia followed suit. However, most of these early enactments were allowed to expire and during the first half of the 19th century there was in Canada, the United States, and Australia a period of liberal immigration policy. Indeed, in England, from the end of the Napoleonic wars until 1905, no foreigners were excluded or expelled. In Latin America, many leading jurists argued in favour of freedom of movement and rejected exclusionary policies except in cases of "ordre public". In Europe, the concept of freedom of movement was also endorsed.

The liberal, tolerant immigration policies, however, did not endure. The immediate cause for the new restrictive legislation enacted in the United States and Canada towards the end of the 19th century was the influx of large numbers of Chinese immigrants who were prepared to work for lower wages than their European counterparts:

[By the end of the 19th century, many geographical frontiers in the Western world had been reached. Mounting economic and political tensions contributed to municipal regulations and restrictions characterized by nationalism and protectionism. For the first time, governments began systematically to deny admission to certain classes of aliens. The First World War and the Great Depression intensified nation-state cleavages and precipitated the enactment of more comprehensive restrictions. Nevertheless, it is important to keep in mind that these restrictions applied to specific classes of aliens. The new laws did not support the proposition of comprehensive exclusion. Of the specific classes, the most significant was Oriental labor. Toward the end of the 19th century, Oriental migration into the United States, Australia, New Zealand, and Canada led to the enactment of discriminatory exclusion laws in all four countries. Nativism in the common law countries was particularly instrumental, if not definitive, in conditioning the landmark judicial decisions that upheld exclusionary laws.]

32 Ibid. at 48.
33 Goodwin-Gill, supra note 14 at 97.
34 Nafziger, supra note 26 at 808.
35 Ibid. at 832-33.
36 Ibid. at 816. See also Goodwin-Gill, supra note 14 at 48.
The U.S. Congress passed the *Chinese Exclusion Act* in 1882, and similar legislation followed in Canada in 1885 and in Australia in 1901. In England, the *Alien Act* was enacted in 1905. It was designed to restrict Jewish immigration from Eastern Europe. Xenophobia against a clearly identifiable ethnic minority whose presence was perceived to pose an economic threat to the majority was the main impetus for restrictive immigration legislation. These early statutes were subsequently replaced by other, more encompassing ones, so that by the end of the first decade of the 20th century the U.S. Congress, and the parliaments of Canada, England, and Australia all had in place legislation designed to both control and limit immigration to some extent. The enactment of the new legislation coincided with the ascendance of the concept of the nation-state at the end of the 19th century, and was justified as an essential aspect of territorial sovereignty:

The claimed right of exclusion is usually considered an attribute of sovereignty and territoriality and is defended as an inherent power necessary for the self-preservation of the state. In other words, if a sovereign “could not exclude aliens it would be to that extent subject to the control of another power.” (*Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889)).

The new immigration laws were endorsed by judicial decisions that affirmed the right of the governments to deny admission to non-citizens. All these decisions relied and

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39 In *Critical Years in Immigration: Canada and Australia Compared* (Montreal: McGill University Press, 1989), Freda Hawkins notes, at 16-18, that the first immigration law was in fact enacted in 1869, but the first restrictive laws designed to exclude the Chinese were not enacted until 1885. See also G. Dirks, *Canada's Refugee Policy* (Montreal: McGill-Queen's University Press, 1977) at 24-25.


41 See Nafziger, *supra* note 26 at 805 and 816-17.
were based on the notion of territorial sovereignty. Although these judicial decisions asserted as a maxim that the state had an unfettered power of admission and expulsion of aliens, there was, as already noted, a large body of opinion contradicting this position:

Ironically, the formative period of restrictionist policy at the end of the 19th century occurred just as the Institute of International Law was formulating a liberal proposal for a state’s duty to admit aliens. The Institute’s adoption in 1892 of the proposed International Regulations on the Admission and Expulsion of Aliens, although less significant today, nevertheless refutes later claims that the international legal community acquiesced in the exclusionary proposition when it was formulated. The regulations distinguished clearly between the legal right of a state to admit or not to admit aliens as “a logical and necessary consequence” of its sovereignty and independence, and the obligations of “humanity and justice.” Thus, the Institute called upon a state, in exercising that legal right, to have due regard, as a matter of humanity and justice, to the right and liberty of foreigners wishing to enter that state’s territory, to the extent compatible with its security.

At the beginning of the 20th century, however, leading jurists and international law commentators quickly adopted the emerging jurisprudence from the U.S., Canadian, Australian, and English courts, and agreed that a state’s right to expel or exclude non-citizens was absolute and was inexorably linked with the concept of sovereignty:

The reception of aliens is a matter of discretion and every State is, by reason of its territorial supremacy, competent to exclude aliens from the whole, or any part, of its territory. . . Just as a state is competent to refuse admission to an alien, it is competent to expel at any moment an alien who has been admitted into its territory . . . Although a State may exercise its right of expulsion according to discretion it must not abuse its right by proceeding in an arbitrary fashion.

This is a succinct statement of the position that was accepted in international law by the end of the Second World War. By that time, virtually all states had enacted legislation that gave them the power to exclude and expel aliens, and this power was

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43 As noted above, these opinions relied on the concept of territorial sovereignty and argued that control over borders was an essential attribute of territorial sovereignty. See Nafziger, supra note 26 at 816-17.

44 Ibid. at 832-33.

45 Lauterpacht, supra note 19 at 616 and 631-32. The restriction against arbitrary conduct by a state imposed procedural requirements but did not give substantive rights to non-citizens.
invoked frequently.46 The early-18th-century understanding that all human beings were entitled to move freely between states had thus been gradually replaced by restrictive rules, which differentiated between the national and the foreigner and acknowledged that states had an almost unfettered discretion over admission and expulsion of non-citizens.

2.3 DEVELOPMENTS IN CUSTOMARY INTERNATIONAL LAW CONCERNING ALIEN'S RIGHTS TO THE END OF THE SECOND WORLD WAR: DIPLOMATIC PROTECTION AND THE MINIMUM INTERNATIONAL STANDARD

Although states had a great deal of discretion with respect to issues of exclusion and expulsion, this did not mean that a non-citizen was stripped of all protection while outside his or her country of nationality. Under international law, the individual was perceived as the embodiment of the state and, as such, if a state wronged a national of another state, that state had a right to recourse against the offending state. The right, however, was not vested in the victim but rather in his or her government. This distinction was necessary because customary international law, as it developed in the 19th and the first half of the 20th centuries, did not have mechanisms for dealing with individuals qua individuals.47 It fell to the state to take action pursuant to the doctrine of diplomatic protection.

Under this principle, when another country violated the rights of one of its nationals, the country of nationality of the alleged victim of the violation could seek compensation through recourse to international tribunals or through arbitration:

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46 Since 1940, most states have claimed wide powers of deportation; see Malanczuk, supra note 12 at 261-62.

47 It is only with the emergence of the international human rights treaties and the international human rights bodies that an effort has been made to find effective mechanisms for the assertion of individual claims. These mechanisms are still subject to many serious limitations but represent the first attempt by international law to recognize the individual as a subject. This topic will be developed more fully in Chapters Three and Four.
Traditional international law, based upon the nation-State system, developed the doctrine of diplomatic protection to enable States to seek reclamation when their nationals were injured, physically or economically, by other States. Whether a compensable claim arose in a particular case was determined under what became known as the law of State's responsibility for injuries to aliens, which contained an international minimum standard by which a State's treatment of an alien was measured. *Since absent a treaty obligation, States were not required to admit aliens*, this body of law focused primarily upon the rights of the alien and the duties of the State after the alien's admission, with secondary attention paid to the norms governing the expulsion process should the state exercise its acknowledged right (once again absent a treaty obligation) to expel the alien.\(^{48}\)

Relying on this principle, a state could seek compensation for its nationals in circumstances where the so-called international minimum standard was violated. Although this standard did not protect non-citizens against expulsion or exclusion, it did provide for some protection against arbitrary treatment while in a foreign country.

The minimum standard is noteworthy for our purposes as it represents the first attempt by the international community to create the type of universal human rights that are behind current efforts to limit state sovereignty in the areas of exclusion and expulsion. The standard was described by Elihu Root, Secretary of State of the United States:

> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of that country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.\(^{49}\)

Another leading commentator described the international minimum standard in the following terms:

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\(^{49}\) E. Root, "The Basis of Protection of Citizens Residing Abroad" (1910) AJIL 517 at 521-22.
When someone resides or acquires property in a foreign country, he is deemed to accept the laws and customs of that country; his national state cannot base its claim on the fact that he would have been better treated in his home country. But the majority of states accept that the national state can claim if a foreign country's laws or behavior fall below the minimum international standard. During the nineteenth and early twentieth century, the United States and Western Europe upheld the idea of the minimum international standard in opposition to the Latin American countries which argued that the state's only duty was to treat foreigners in the same way as it treated its own nationals (national standards). In arbitrations between the two groups of countries the minimum international standard was usually applied.\(^{50}\)

The international minimum standard was usually invoked by large powers, which sought to impose it on the weaker states in disputes arising over the treatment of the former's nationals. The arbitration cases between the United States and Mexico over the treatment of American citizens in Mexico illustrates the typical application of the minimum international standard. Thus in the *T.H. Youmans Claim (United States v. Mexico)*,\(^{51}\) a claim was made against the Mexican Government for its failure to provide adequate protection to an American citizen who was killed by a mob and Mexican troops after a dispute over unpaid wages. The U.S. Government alleged a violation of the international minimum standard based both on the Mexican troops' failure to protect the American citizens and their participation in the murder, and on the Mexican authorities' subsequent failure to take reasonable steps to apprehend the perpetrators. The claim was upheld by the international arbitration panel, which noted "a lack of diligence in the punishment of the persons implicated in the crime".\(^{52}\)

Another oft-cited case is that of *Harry Roberts (U.S.A.) v. Mexico*.\(^{53}\) Here the U.S. Government presented a claim to an international arbitration panel and demanded...

\(^{50}\) Malanczuk, *supra* note 12 at 260.

\(^{51}\) General Claims Commission (1926), 4 R.I.A.A. 110 at 150-59.

\(^{52}\) *Ibid.* at 157.

\(^{53}\) Mexico/USA Claims Commission, November 2, 1925, at 106-08.
compensation from the state of Mexico as a result of its treatment of an American citizen, Harry Roberts. Roberts was arrested by the Mexican authorities after a robbery attempt. He was held without trial for nineteen months in a room with thirty to forty prisoners, without access to exercise or sanitary accommodation. The Mexican authorities argued that Roberts was treated in the same fashion as other Mexican nationals and, as a result, there was no violation. The issue before the tribunal was whether "the treatment of Roberts violated an international norm with respect to aliens notwithstanding that Mexico acted within its rightful jurisdiction". The International Arbitration Tribunal found that there had been a violation of the minimum international standard, first, because Roberts had been held for more than one year without trial, and second, because he had been subjected to cruel and inhumane treatment:

Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.

What is troubling about this analysis is that an act which was found to be a violation of an international standard and subject to a right of compensation for a national of the United States did not give rise to a right of compensation for the Mexican citizens who suffered the same inhumane conditions:

The connotation here is one of inequality, singling out rights holders on the basis of their representative capacities as members of different nations. The alien claimant in the crowded cell evokes the relationship of Mexico to the United States and thereby claims a right which his domestic cellmates, evoking only the relationship of Mexico to Mexicans, clearly do not enjoy.

56 *Ibid.* at 111.
In light of these interpretations of the international minimum standard, it is obviously not possible to affirm that the norm was *universal* in the sense of a right we can call a *human* right. This underscores the fundamental limitation of customary international law as it had developed prior to the emergence of human rights law after the Second World War. Thus, since custom did not provide for a process allowing individuals to enforce these rights on their own behalf, the effectiveness of any universal or minimum standard was eroded.\(^{57}\) The individual had no *locus standi* to raise complaints about abusive treatment, and had to rely on his country to seek compensation, in its discretion, pursuant to the doctrine of diplomatic protection. Moreover, while the minimum international standard sought to affirm the existence of the universal norms of state conduct, these norms did not apply universally to all persons, so that non-citizens whose rights had been violated by a state might in some cases be in a more favoured position than citizens insofar as the application of universal rights.\(^{58}\) Sohn described this situation in these terms:

Returning now to the position of individuals in international law in 1945, it is quite clear that apart from a few anomalous cases, in which individuals were allowed to vindicate their rights directly on the basis of a special international agreement, individuals were not subjects of rights and duties under international law. They merely benefited indirectly from the rule that a state could consider any injury to its citizen as an injury to itself and therefore could attempt to obtain reparation for it. Once a state received compensation from another state for the injury to its citizen, however, it had no duty under international law to transfer that compensation to the citizen; if, for economic or political reasons, the

\(^{57}\) Cholewinski, *supra* note 29, notes a further limitation of the minimum international standard. Given that the state is the subject with the authority to seek compensation for breaches of the standard, and has the discretion to decide whether to seek and distribute the damages obtained for the injured party, if the injured party wields little political power, this may impact on the state's exercise of discretion and its willingness to seek compensation. Moreover, since the minimum standard would be enforced by the individual's country of nationality against another state, the capacity of the aggrieved state to obtain compensation would depend to a large extent on the power relationship that existed between the two countries.

\(^{58}\) It is this contradiction which gave rise to the international human rights movement discussed in Chapters Three and Four.
state relinquished the claim or settled it for some small percentage of its original amount, its citizen was deprived of further recourse against the offending state. Thus, a person’s protection depended on the conduct of his state, and stateless persons were entitled to no protection whatsoever. At the same time, a state’s own citizens were almost completely at its mercy, and international law had little to say about mistreatment of persons by their own government.⁵⁹

When it came to the issue of exclusion and expulsion of aliens, the protection afforded was even more limited. As a result of the statist, territorialist organization of the international legal world, the position of citizens under customary international law was and continues to be far more favourable than that of aliens, since citizens have a right to enter and remain in their country of nationality, while non-citizens enjoy no such positive right. It is this long-standing disparity in the level of protection between citizens and non-citizens, which is ultimately related to the most basic human rights, such as the protection against torture and arbitrary imprisonment, that has been the focus of human rights advocates, who have attempted to broaden the scope of the late-19ᵗʰ-century minimal standards for the protection of aliens so that they encompass citizens of repressive regimes.

It is important to note, however, that the obligation of the state to admit its citizens did not emerge as a result of any recognition of a right on the part of the citizen enforceable under international law, but rather as a necessary corollary of the state system which had emerged at the end of the 19ᵗʰ century. If a state had the right to prohibit non-citizens’ access to its territory, because this was perceived as a necessary attribute of territorial sovereignty, then, by implication, the country of the refused alien’s nationality must be obliged to accept back onto its territory its own citizen. Otherwise, the receiving

state's sovereignty would be violated, as it would be obligated to allow the alien to remain on its territory against its will.

With the emergence of the new human rights movement after the end of the Second World War, the importance of the minimum standard has diminished significantly. The new human rights regime has attempted to raise the universal principles embodied in the minimum international standard to a higher level where they will be available to all persons, nationals and aliens alike. Nonetheless, despite its shortcomings, the minimum international standard is of considerable historical significance as the precursor for the universal standards that have emerged under international human rights law. As we shall see, recent developments in customary international and human rights law have sought to address the shortcomings of the minimum international standard, by affirming that certain fundamental rights belong to all individuals irrespective of citizenship status. It is within these new rules and procedures that we will find the source of any limitations that might exist on a sovereign state's right to expel or exclude non-citizens.

As noted above, however, in the international legal system that had developed to the end of the Second World War, customary international law had not yet evolved to a point where the individual had sufficient legal personality to initiate a complaint against a state. Therefore, before any new rules could be effective as a check on the states' power to expel or exclude non-citizens, individuals had to be granted standing so as to become subjects under international law.
2.4 Individuals as “Subjects” of International Law

According to the principles of international law as they stood prior to the end of the Second World War, individuals enjoyed a limited legal personality as subjects of customary international law. As the only bearer of full international personality, the principal subject is the state. As such, under customary international law the state had the capacity to participate in the creation and enforcement of rights as well as in the redress of any violations of those rights. Individuals, however, had no substantive rights that might accrue as a result of a violation, nor could they initiate a process for redress. The only aggrieved party was the state:

Historically, individuals and groups of individuals, for the most part, were treated as objects of international law without international legal personality. That is, international law did not acknowledge that human beings as such had international law rights. International law rights existed in states (the subjects of international law) in their relations with other states. Humans, individually and collectively, generally had no direct international legal personality in the absence of some cognizable and specific legal capacity accepted by the general practice of states or established by treaty. With certain important and limited exceptions, the international legal personality of humans remained, until after World War II, derivative and merely a vehicle for states to assert claims among themselves. Individual or collective “rights” of human beings under international law only existed indirectly and to the extent that states chose to take up the cause of their own nationals and assert them against another state. The notion here was that any injury to humans to be protectable under international law had to constitute an injury to the state of which the humans were nationals. State sovereignty generally precluded states from taking up the causes or claims of the nationals of other states on the theory that no other state’s legal interest was involved when a state mistreated its own nationals.62

60 As we shall see in Chapter Three, this concept is now being challenged by the development of international human rights law with its recognition that an individual can assert and enforce his or her human rights.

61 D’Amato, supra, note 3 at 228, argues that international law in the late 19th century did not accept the distinction between the state as subject and the individual as object of international law:

A writer in 1789 would have been boggled at the attempt to define the law of nations in terms of its subjects and objects. Instead, classical writers of that time sensibly confined their treatises to the content of the rules of the law of nations. It was simply understood that these rules would apply to whatever entities were appropriate... All of this was severely distorted when Oppenheim came along and attempted to recast this sprawling and subtle law into the narrow mold of “states”.

In the period immediately following the Second World War, this position changed somewhat as a result of the emergence of human rights treaties, which extended to individuals and other non-state actors procedural and substantive rights:

In regard to individuals in general, it should be noted that there is a widely recognized rule of international practice that before an international tribunal, the rights of, or obligations binding individuals at international law, are respectively enforceable at the instance of or against those States only whose nationality such individuals possesses. In other words an individual cannot assert his own rights against a State in the same jurisdiction for failing in his obligations, but only through the State of which he is a national.

[However] under modern practice, (a) the number of exceptional instances of individuals or non-State entities enjoying rights or becoming subject to duties directly under international law has grown; (b) that the rigidity of the procedural convention precluding an individual from prosecuting a claim under international law except through the State of which he is a national has been to some extent tempered; (c) that the interests of individuals, their fundamental rights and freedoms etc. have become a primary concern of international law.63

Starke further notes that, as a result of the growing concern of international law to protect fundamental human rights since the Second World War, the practice which required individuals to seek recourse through the mechanism of diplomatic protection has been modified by the states’ voluntary acceptance of treaty obligations which, in certain circumstances, give individuals the right to initiate complaints against a state on their own behalf.64

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Since the Law of Nations is primarily a law between States, States are normally the only subjects of the Law of Nations . . . But what is the normal position of individuals if they are not subjects thereof? The only answer can be that, generally speaking, they are objects of the Law of Nations . . . If, as stated, individuals are not as a rule subjects but objects of the Law of Nations, then nationality is the link between them and the Law of Nations.


64 It is not yet possible to argue that custom has changed to the extent that a new principle of customary law has emerged extending to individuals a right to initiate complaints under international law. If, however, current treaty practice becomes accepted as binding by the majority of states, then it may become custom in the years to come. The *International Covenant on Civil and Political Rights*, 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171, 6 I.L.M. 368 (hereinafter ICCPR) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1987 Can.
Starke’s position is echoed by Malanczuk who notes that, although there is increasing recognition of limited personality of individuals under international law, this does not confer procedural rights to initiate a complaint except to the extent that the states involved agree to the conferring of those rights:

[T]he international legal personality of individuals and companies is still comparatively rare and limited. Moreover, it is derivative in the sense that it can only be conferred by states: it is states which set up international organizations; it is states which make treaties or adopt customary rules giving international rights to individuals. Consequently when some states say that individuals are subjects of international law and when some states disagree both sides may be right; if states in the first group confer international rights on individuals, then individuals are subjects of international law as far as states are concerned; states in the second group can, for practical purposes, prevent individuals from acquiring international personality, by refraining from giving them any rights which are valid under international law.65

If, however, a state does accede to a treaty that gives individuals procedural rights to initiate a complaint under international law, it may be precluded from denouncing its accession so that the rights become vested in the individuals in perpetuity. In this context, the United Nations Human Rights Committee66 noted that there is no provision in the ICCPR to allow a state party which has voluntarily acceded to the Covenant to withdraw from it:

[It] is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation. Together with the simultaneously prepared and adopted International Covenant on Economic, Social and Cultural Rights, the Covenant codifies in treaty form the universal human rights enshrined in the Universal Declaration of Human Rights, the three instruments together often being referred to as the “International Bill of Human Rights”. As such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect. The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection

T.S., No. 36; (1984) I.L.M. 1027 (hereinafter the Convention Against Torture) both have Protocols which contemplate individual complaints before the Committees created to supervise compliance with the Covenants. This will be discussed in Chapter Three.

65 Malanczuk, supra note 12 at 104-05 [emphasis added].

66 General Comment 26 (61) under Article 40, para. 4 of the ICCPR, adopted by the Committee at its 1631st meeting.
devolves with territory and continues to belong to them, notwithstanding change in Government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant. The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.

This General Comment represents the view of the Committee and, while it may not yet be accepted as a customary rule under international law, the Committee’s views on this point must be given considerable weight.

It is, however, the Optional Protocol to the Covenant that vests the right to complain to the Committee in individuals. The Protocol has a specific provision that allows for denunciation. But the Committee’s view that states which accede to a human rights treaty cannot denounce their obligations under it strongly suggests that, in the future, custom is likely to evolve to the point where states will be precluded from rescinding their obligations under a human rights treaty once they had voluntarily acceded to such a treaty. At the moment, however, it remains the generally accepted view that, unless an individual has a right granted by treaty, he or she only has limited personality under customary international law, and cannot seek redress for violations by a state in international fora. As a result, even if a state violates a universal norm of

67 Article 12 of the Optional Protocol to the Covenant on Civil and Political Rights, 1976 Can. T.S. No. 47; (1966) 999 U.N.T.S. 302 (hereinafter Optional Protocol) provides that: 1. Any State Party may denounced the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General. 2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 before the effective date of denunciation.

68 See Cholewinski, supra note 29 at 45. Indeed, customary international law up to the middle of the 20th century did not recognize that individuals had any personality at all under international law to assert claims before international fora. Individuals did have rights to minimum protection and to freedom of movement, but had no standing to assert them. See also S. Sinha, Asylum and International Law (The Hague: Martinus Nijhoff, 1971): “Individuals find protection under the system of international law only through membership in a state”. This statement, written in 1971, does not take into account the developments in international human rights law over the course of the past thirty years. I am not dealing here with the possibility of using the international complaint mechanisms set up under international human rights treaties; these will be dealt with in Chapter Three.
conduct in its treatment of a non-citizen, in most cases the only subject capable of
initiating the process of obtaining compensation is the wronged individual’s country of
nationality. The connection between the wronged individual and the state is made by
regarding the person as an embodiment of sorts of the country of which he or she is a
national.

Apart from this procedural limitation, it is also important to ascertain the extent to
which substantive standards of protection have in fact become part of customary
international law. In the following section, I examine briefly the process of determining
how a norm becomes part of customary international law.

2.5 Custom as a Source of International Law

Customary international law is one of the sources of international law listed in the Statute
of the International Court of Justice. Custom consists of an objective element of a
general practice, and a subjective requirement that the law be “accepted as law” or opinio
juris:

The main evidence of customary law is to be found in the actual practice of states, and a
rough idea of states practice can be gathered from published material, from newspaper
reports of actions taken by states and from statements made by government spokesmen to
parliament [and] to press at international conferences meetings at international
organization . . . Evidence of customary law may sometimes also be found in the writings
of some international lawyers and in judgments of national and international tribunals . . .

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69 Whether the individual had the substantive right to be compensated once the process was
initiated by the state was less certain. Some early judicial decisions took the view that it was within the
discretion of the state to determine both whether to initiate the process and, once initiated, to determine
whether the individual would receive any compensation from it. As we shall see in Chapter Four, it is also
possible in some states to argue that the international human rights treaties have been incorporated into
national law, so that an individual may in some circumstances have recourse to national courts to enforce
international human rights.

70 Weis, supra note 5 at 35, notes that “[n]ationality is the justification in international law for the
intervention of one government to protect persons and property in another country”. The other option open
to the individual may be to seek recourse within the national court system of the offending state. This
option will be explored in Chapter Four.

71 Art. 38 (1)(b).
Similarly, treaties can be evidence of customary law but great care must be taken when inferring rules of customary law from treaties, especially bilateral ones . . . The case of multilateral treaties is different and may definitely constitute evidence of customary law.72

The same author defines *opinio juris* as “a condition felt by states that a certain form of conduct is required by International Law”.73 Byers expands this definition as follows:

International lawyers usually claim that customary international law results from the co-existence of two elements. First, there must be a consistent and general practice among states. Second, states must believe that this practice is required by law. The second subjective element is frequently referred to as *opinio juris sive necessitatis* or *opinio juris* for short. There are many problems with this general understanding of customary international law . . . First there are problems associated with the subjective element of *opinio juris* such as the cognitive problem of how artificial entities called states can “believe,” the chronological problem of requiring states creating new law to believe that they are behaving in accordance with existing law, and the epistemological problem of determining the content of this second element of *opinio juris* using the only evidence available, the first element of state practice. Second are problems associated with determining the law-creating effect of different kinds and differing degrees of repetition and consistency of state practice. Finally there are problems associated with the concept of state equality and assumptions of procedural objectivity.74

Given the difficulties described by Byers concerning the formation or the determination of custom, it is often difficult to ascertain if and when a rule becomes part of customary international law. Such difficulties and assertions to the contrary notwithstanding, states do accept that it is possible for customs to be created which will bind them and limit their jurisdiction. Byers notes that “*[opinio juris* should therefore be regarded above all as a shared belief in the process of customary international law, and more precisely, as to the shared understandings that constitute that process*”.75 *Opinio juris* is therefore an essential precondition for the creating of custom: without belief in the

72 Malanczuk, supra note 12 at 39-40.

73 Ibid. at 44.


75 Ibid. at 141.
process, custom could not be created. However, even if states believe that there is a norm, this in and of itself does not necessarily create a custom unless there is evidence that states are in fact acting in accordance with the rule.\textsuperscript{76} This inherent ambiguity in the process of ascertaining when a norm can be considered a binding rule of customary international law imposes a serious limitation on an individual who wishes to assert that a state is violating customary international law when it acts to expel or exclude him or her.

Yet ascertaining the extent of customary international law in this area is critical because, once a principle is accepted as part of customary international law, as opposed to being merely the product of a treaty obligation, it is binding on all states, irrespective of whether they are in fact parties to the particular treaty or convention which would otherwise give rise to the duty. This point was explicitly recognized by the International Court of Justice in the \textit{Military Activities In and Against Nicaragua} case:

\begin{quote}
Even if two norms belonging to the two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence.\textsuperscript{77}
\end{quote}

Moreover, in many countries it is certainly arguable that international custom is incorporated automatically into domestic law, whereas treaties may require a specific ratification or incorporation process.\textsuperscript{78} This, then, is the major procedural implication of

\textsuperscript{76} According to the traditional view, custom can only be created if two components exist—\textit{opinio juris} must be accompanied by evidence of state practice (see Byers, \textit{supra} note 74). However, some commentators have argued that these criteria must be relaxed within the context of customary human rights law, given the importance of the rights protected and the difficulty in obtaining evidence of state practice. See Lillich, \textit{infra} note 80.


\textsuperscript{78} See T. Meron, \textit{Human Rights and Humanitarian Norms as Customary Law} (Oxford: Clarendon Press, 1989) at 3-5. As Meron notes, country is usually free to either enter into reservations or to opt out of treaty obligations. The same is not true of obligations that are accepted as part of customary international law.
expanded custom: it opens up the possibility of using domestic courts to enforce a state's obligations.\textsuperscript{79}

Whether certain norms have become rules of customary international law is a matter of considerable dispute in international human rights law. This is because the usual methods of establishing state practice and \textit{opinio juris} are often difficult to demonstrate:

Whether human rights obligations have become customary law cannot readily be answered on the basis of the usual process of customary law formation. States do not usually make claims on other States or protest violations that do not affect their nationals. In that sense, one can find scant State practice accompanied by \textit{opinio juris}. Arbitral awards and international judicial decisions are also rare except in tribunals based on treaties such as the European and Inter-American courts of human rights. The arguments advanced in support of a finding that rights are a part of customary law rely on different kinds of evidence . . . [none of which] confirm to the traditional criteria.\textsuperscript{80}

Given this limitation, some commentators argue that the creation of custom in the area of international human rights can be ascertained by reference to that practice accepted as building customary international human rights law [which] included:

- virtually universal adherence to the United Nations \textit{Charter} and its human rights provisions, and virtually universal and frequently reiterated acceptance of the \textit{Universal Declaration of Human Rights} even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights; the adoption of human rights principles by states in regional organizations in Europe, Latin American, and Africa . . . general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law; action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions, directly or by reference, in national constitutions and law; invocation of human rights principles in national courts to enforce a state's obligations.

\textsuperscript{79} This issue will be dealt with in Chapter Three.

\textsuperscript{80} Schachter, "International Law in Theory and Practice" (1982) 178 Rec. des Cours 9, 334-35, quoted in R.B. Lillich, "The Growing Importance of Customary International Human Rights Law" 25 Ga. J. Int'l & Comp. L. 1 at 10. However, as Meron notes, \textit{supra} note 79 at 79-94, when asserting that a human rights norm is a principle of customary international law, it is extremely important to have a solid basis for making this assertion. The mere fact that there has been virtual consensus in the formation of a declaration concerning a human rights norm does not in and of itself confer on the rule the status of custom. Meron argues that there must be empirical studies of state practice as well.
policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or action by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reactions to violations by other states.\textsuperscript{81}

This view has gained broad support among international lawyers, who maintain that customary human rights law must look at new sources in order to ascertain state practice in this area. It has also been endorsed by the Human Rights Committee, the authoritative and prestigious body of experts from 18 countries established to monitor compliance with the ICCPR. In its General Comment No. 24 on reservations to the Covenant issued in 1994, the Committee reached the conclusion that states parties to the Covenant may not make reservations to provisions therein that represent customary international law:

A State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language.\textsuperscript{82}

I will now examine the extent to which custom has developed under international law to limit the discretion of states in the area of exclusion or expulsion of aliens.


\textsuperscript{82} Human Rights Committee, General Comment No. 24 (52), U.N. Doc. CCPR/C/21/Rev.-1/Add.6 at 3 (1994). It should be noted, however, that this position has not gained universal acceptance amongst international law experts, as there are those who argue for evidence of actual state practice before accepting that a custom has been created. See, for example, B. Simma & P. Alston, \textquote{The Sources of Human Rights Law: Custom, \textit{Jus Cogens}, and General Principles} (1992) 12 Austl. Y.B. Int'l L. 82 at 106.
2.6 **States Have an Obligation Under Customary International Law to Admit Certain Categories of Persons onto Their Territory**

Customary international law has long imposed some limitations on a state's right over admission of non-citizens:

> It must be accepted as a general principle of international law that no state is obligated to admit to its territory anyone other than one of its own nationals. One corollary of this principle is the general rule of international law that each state may attach conditions to any license it may give to a non-national to permit him to enter its territory. Another corollary is the general rule that a state which has admitted a non-national may require him at any time to depart... However, certain categories of persons normally are granted immunities from the immigration laws of foreign states.

The categories of persons who may have special rights of admission include diplomats, representatives of international organizations, crewmembers, and victims of *force majeure*. The basis for the granting of special rights is found in the relationship between the individual and the receiving state. Diplomats' and international organizations representatives' rights of admission are founded essentially on necessity, the practical convenience of maintaining normal contact, and the mutual consent of States. Crewmembers of ships and aircraft also benefit from a special travel regime designed to facilitate international transportation and commerce. Victims of *force majeure* are permitted admission due to the understanding that it is an obligation of all civilized states to respond to the urgent needs of persons in distress.

83 As noted above, it is a principle of international law that states must admit their nationals to their territory.

84 Plender, *supra* note 9 at 94.


87 Plender, *supra* note 9 at 120, notes that "[f]or at least two centuries theorists have tended to accept the proposition that states are obliged by international law to extend certain immunities to the property and personnel of foreign vessels which are shipwrecked or forced by evidence of distress to take refuge on land or in territorial or inland waters". See also *Frederick Gerring Jr. (The) v. Canada* (1897), 27
A question that often arises is whether there is a right of asylum under customary international law. "Asylum" is

the Latin counterpart of the Greek word "asylon," which means freedom from seizure. Historically, asylum has been regarded as a place of refuge where one could be free from the reach of a pursuer. Sacred places first provided such a refuge and scholars are of the view that "the practice of asylum is as old as humanity itself." 88

In modern usage, asylum usually denotes the process whereby an individual obtains protection in a third country from persecution in the country of his or her citizenship. Asylum obligates the receiving state

(i) to admit a person to its territory;
(ii) to allow the person to sojourn there;
(iii) to refrain from expelling the person;
(iv) to refrain from extraditing the person; and
(v) to refrain from prosecuting, punishing, or otherwise restricting the person's liberty. 89

It is generally accepted that a state has a right to grant asylum to a person who seeks admission to or who is within the national territory:

The right of a state to grant asylum is well established in international law. It follows from the principle that every sovereign state is deemed to have exclusive control over its territory and hence over persons present in its territory. One of the implications of this generally recognized rule is that every sovereign state has the right to grant or deny asylum to persons located within its boundaries. Traditionally, thus, in international law, the right of asylum has been viewed as the right of a state, rather than the right of an individual. 90

In the same way that a state is entitled under international law to grant asylum, an individual is permitted to seek it. This principle recognizes the right of a person to leave his or her country to seek protection in a third country:

S.C.R. 271, where the Supreme Court held that international law did admit to a right of a ship and crew to seek asylum in warfare or other emergencies.


89 Ibid. at 3.

90 Ibid. at 3-4ff., where the author reviews the international jurisprudence which affirms the right of a state to grant asylum. The right to grant asylum is, of course, subject to a state's obligations under extradition treaties.
The second aspect of the right of asylum is the right of an individual to seek asylum. This is an individual right that an asylum-seeker has vis-à-vis his state of origin. Essentially, it is the right of an individual to leave his country of residence in pursuit of asylum. The basis for this right is the principle that "a State may not claim to 'own' its nationals or residents." This right is enshrined in several international and regional instruments. Article 13(2) of the Universal Declaration of Human Rights proclaims that, "everyone has the right to leave any country, including his own".91

When one considers the right of an individual to be granted asylum in a third country, however, it is clear that such a right does not exist under international law:

The third component right under the umbrella of the right of asylum is the right of an individual to be granted asylum. While Grotius and Suarez are said to have recognized the right of asylum as the natural right of an individual entailing a corresponding state duty to grant asylum, this view has not yet been generally recognized under international law. Felice Morgenstern's view that, "there can be no doubt that the individual has no general 'right' of asylum against [the] state," is generally accepted to represent the status of an individual's right of asylum vis-à-vis the state of refuge. International and regional instruments dealing with human rights, asylum, and refugees, as well as the failure of the international community to agree on a convention on territorial asylum illustrate the general proposition that, in international law today, an individual has no right to asylum enforceable vis-à-vis the state of refuge.92

The decision to grant asylum is entirely within the discretion of the receiving state:93

91 Ibid. at 6. The right to seek asylum is also limited by the obligation of a receiving state to comply with extradition treaties.


93 Over the past fifty years, the international community has attempted to codify a right to asylum, but without success. The United Nations adopted in 1967 the Declaration on Territorial Asylum. However, it has not been enacted as the Convention on Territorial Asylum is still in draft form.

94 Goodwin-Gill, supra note 14 at 138; see also Lauterpacht, supra note 19 at 618: "The so-called right of asylum is certainly not a right possessed by the alien to demand that the State into whose territory he has entered with the intention of escaping prosecution in some other state should grant protection and asylum. For such State need not grant these things. The so called right of asylum is nothing more than the competence of every State to allow a persecuted alien to enter into and to remain on its territory". See also Grahl-Madsen, supra note 31 at 107, where he too affirms that there is no right to asylum.
This position has been upheld by judicial decisions in various jurisdictions. In 1939, Yankwich J. of the United States District Court of California, in the case of *Ex Parte Kurth et al.*, concluded that there was no right of asylum, either under customary international law or under the U.S. Constitution. The case involved an application for *habeas corpus* presented by non-citizens who had been ordered deported on the ground that they did not have the necessary visas. The applicants asserted that although they did not meet the requirements, they had a right to seek asylum in the United States. The Court rejected this proposition in the following terms:

A judge who is motivated by some generous impulse toward people who claim asylum here, and should find unfairness in proceedings of this character, in which deportation is sought upon one ground only, namely that the petitioners are aliens and have no right to remain in the United States, and no contrary right is established, would be doing violence to the rule of law. Unless of course, as contended, I am bound by the ‘right of asylum’ to allow the Petitioners to remain in the United States. On this subject, the question with which we are confronted is not one of policy but of law. The restrictive immigration law of the United States has been attacked at all times. The attack began when we began to exclude persons who believed in polygamy, and those professing anarchy. The answer of the Supreme Court has been that a sovereign nation has the right to choose whom it shall receive. As already stated, those fleeing from persecution have made valuable contributions to our national life, and perhaps those who will follow us, say in 2039, may look back and say that it was not a good policy to prevent accretion to this country of some of the alien groups who find themselves at war with certain foreign political thinking, and that perhaps it would have been better if we had continued the historical policy of asylum under which we have received so many valuable elements who helped develop the country. But Congress of the United States has chosen a different policy. They have declared the conditions upon which a person shall enter the United States. And they do not make any distinctions between a person who is and the one who is not a political refugee. There is nothing in the laws of the United States which confers any special right upon any alien within the United States. If he comes here legally he is entitled to equal protection of the law. . . There is no principle of national or international law which declares that an alien outside of a nation’s territory has a right to choose the country where he shall go.

In the recent decision of the House of Lords in *T. v. Immigration Officer*, the Court again affirmed that there is no right of asylum under international law:

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[A]lthough it is easy to assume that the appellant invokes a "right of asylum", no such right exists. Neither under international nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge. Subject only to qualifications created by statute this country is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries. Under the law of asylum the United Kingdom can choose to allow the appellant to reside here, rather than return him to Algeria to face the consequences of his admitted crimes. Conversely, it can expel him and cause him to be transported to whatever country is willing to accept him. The Secretary of State has made it plain that if the appellant can find a country other than Algeria which will accept the appellant he will be sent there. No such country has been suggested by the appellant. The Secretary of State does not wish to send the appellant back to Algeria, but as things now stand there is nowhere else for him to go . . . [A]lthough a refugee has no direct right to insist on asylum there are certain statutory restrictions on the Secretary of State's freedom of choice as to the destination to which a person refused permission to remain may be sent, which may in practice achieve the same result. . . . [T]he United Kingdom is under an international and municipal duty derived from Article 33.1 of the Geneva Convention of 1951 Relating to the Status of Refugees . . . not to return a fugitive to a place (like Algeria in the present instance) where he is liable to be persecuted. This duty, to which effect is given in English municipal law by Rule 334(ii) of the Immigration Rules (HC 394), is subject to an exception whereby the protection against "refoulement" (as it is called) is disapplied where the fugitive has, before coming to this country, committed a "serious non-political crime", within the meaning of Article 1F(b) of the Refugee Convention. 97

Notwithstanding the fact that there is no right of asylum under customary international law, international law does impose an obligation to not return asylum-seekers to countries where they are at risk of prosecution under the rule requiring states to refrain from refoulement. In the T. case the Court, although it noted the existence of an international obligation to not refoule the applicant, concluded that the obligation also existed under English law as the treaty had been incorporated into municipal law by statute. As a result, the Court did not find it necessary to determine whether the English authorities were also prevented by international law from refouling T. In the next section, I will examine the extent to which such a rule exists under international law.

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97 Supra note 92. Pursuant to Art. 1F(b) of the Refugee Convention, a person who claims to be a Convention refugee can be denied that status if it is determined that he or she has been convicted of a serious non-political crime committed outside the country of refuge. In this case, the decision centred around the meaning to be given to that section and in particular to the term "non-political" crime. After reviewing the jurisprudence, the Court concluded that the applicant's crime was not political and was serious, and that he was therefore correctly denied refugee status as a result of the operation of Art. 1F(b).
2.7 **Restriction Against Refoulement**\(^98\) or the Forcible Return of Refugees to the Country Where They Face Persecution

Although states are not required to grant asylum to persons fleeing persecution, in certain circumstances they are required to admit or to not expel persons already within their national territory. The obligation arises not out of a positive duty owed by the state to admit the individual, but rather due to the potential consequences that might befall the alien upon return to the country of nationality. This principle, known under international law as the rule against *refoulement*, imposes an obligation to admit, or to refrain from expelling, a non-citizen, when such exclusion or expulsion would result in the violation of a duty owed by the state under customary international law to not remove a person who has a well-founded fear of persecution\(^99\) back to the country where the person is at risk of persecution.

It is important to differentiate between the protection against *refoulement* and a right of asylum. As noted above, under customary international law there is no obligation on a state to grant asylum to a person arriving at its border. Thus in *T. v. Immigration Officer*,\(^100\) although the House of Lords affirmed that there was no right of asylum, it upheld the right of protection against *refoulement* or the forcible return to a country where a person has a well-founded fear of persecution. The difference lies in the fact that a right to asylum would require a state to allow a person fleeing persecution to enter its territory and to remain there. The protection against *refoulement* is more limited and only

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\(^98\) *Refoulement* refers to the forcible return of a refugee to the country where he or she faces persecution, and is expressly prohibited by Art. 33 of the *Refugee Convention*.

\(^99\) Article 1 of the *Refugee Convention* defines a *Convention* refugee as a person who has a well-founded fear of persecution due to his or her race, religion, nationality, membership in a particular social group, or political opinion.

\(^100\) *Supra* note 92.
precludes removal to a country where the person faces persecution. Thus when a person seeks asylum, if the receiving state can exclude him or her to a country other than that in which there is a well-founded fear of persecution, then it is free to do so. The obligation to admit the person would only arise in circumstances where there is no other country that can accept the individual, and where a refusal to admit would be tantamount to forcible return to persecution. Moreover, in cases where a state admits a person in order to avoid violating the rule against refoulement, it would be free to return the person to the country of his or her nationality if there is a sufficient change in circumstances as to eliminate the risk of persecution. In cases where the person fleeing persecution has already been admitted, the situation would be the same. The restriction against expulsion would only arise if the receiving state could not find a country other than the country of nationality willing to accept the individual.

In some jurisdictions, the authorities have attempted to distinguish the rights of persons seeking admission from those already inside the territory of the receiving state. In the case of Sale v. Haitian Centers Council, the U.S. Supreme Court held that the non-refoulement provision of the Refugee Convention/Protocol does not apply extraterritorially. The case involved a decision by the U.S. Government to interdict Haitian refugee claimants on the high seas. During the initial stages of the operation, the refugee claimants interdicted on the high seas were given a hearing and were returned to Haiti only if it was determined that there was no risk of persecution to them in that country. As the number of refugee claimants increased, however, it was decided to return them to Haiti without any hearing, and the petitioners contended that such a procedure

violated the principle against non-*refoulement*. The majority of the Supreme Court concluded that the obligations of the *Refugee Convention* could not apply extraterritorially:

The drafters of the *Convention* and the parties to the *Protocol* — like the drafters of §243(h) — may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.\(^{102}\)

In a strongly worded dissent, Justice Blackmun noted:

If any canon of construction should be applied in this case, it is the well-settled rule that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Charming Betsy*, 2 Cranch 64, 117–118 (1804). The majority's improbable construction of §243(h), which flies in the face of the international obligations imposed by Article 33 of the *Convention*, violates that established principle. The *Convention* that the *Refugee Act* embodies was enacted largely in response to the experience of Jewish refugees in Europe during the period of World War II. The tragic consequences of the world's indifference at that time are well known. The resulting ban on *refoulement*, as broad as the humanitarian purpose that inspired it, is easily applicable here, the Court's protestations of impotence and regret notwithstanding. The refugees attempting to escape from Haiti do not claim a right of admission to this country. They do not even argue that the Government has no right to intercept their boats. They demand only that the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse, and death. That is a modest plea, vindicated by the Treaty and the statute. We should not close our ears to it.\(^{103}\)

Justice Blackmun noted that although there is no right to admission or asylum, there is a right to not be forcibly returned to a country where the person would be at risk of persecution. His position was upheld when the case was taken to the Inter-American Commission for Human Rights:

An important provision of the 1951 *Convention* is Article 33(1) which provides that: "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." The Supreme Court of the United States, in the case of *Sale, Acting Commissioner*.

\(^{102}\) *Ibid.*

\(^{103}\) *Ibid.*
Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al., No. 92-344, decided June 21, 1993, construed this provision as not being applicable in a situation where a person is returned from the high seas to the territory from which he or she fled. Specifically, the Supreme Court held that the principle of non-refoulement in Article 33 did not apply to the Haitians interdicted on the high seas and not in the United States' territory.

The Commission does not agree with this finding. The Commission shares the view advanced by the United Nations High Commissioner for Refugees in its Amicus Curiae brief in its argument before the Supreme Court, that Article 33 had no geographical limitations.

However, the finding by the Commission that the United States Government has breached its treaty obligations in respect of Article 33 does not resolve the issue as to whether the United States Government is in breach of Article XXVII of the American Declaration because the cumulative effect of the dual criteria in that Article is that, for the right to seek and receive asylum in foreign territory to exist, it must not only be in accordance with international agreements, but in accordance with the domestic laws of the country in which refuge is sought.

It is noted that Article XXVII provides for a right to seek and receive asylum in “foreign territory.” A question however arises, whether the action of the United States in interdicting Haitians on the high seas is not in breach of their right under Article XXVII of the American Declaration to seek and receive asylum in some foreign territory other than the United States. This statement from the petitioners has not been contested or contradicted by the United States. The Commission has noted that subsequent to the coup ousting President Aristide from office on September 30, 1991, during the interdiction period, Haitian refugees exercised their right to seek and receive asylum in other foreign territories, such as the Dominican Republic, Jamaica, Bahamas, Cuba (provided asylum to 3,851 Haitians during 1992), Venezuela, Suriname, Honduras, the Turks and Caicos Islands and other Latin American countries.

The Commission finds that the United States summarily interdicted and repatriated Haitian refugees to Haiti without making an adequate determination of their status, and without granting them a hearing to ascertain whether they qualified as “refugees.” The Commission also finds that the dual criteria test of the right to “seek” and “receive” asylum as provided by Articles XXVII in “foreign territory” (in accordance with the laws of each country and with international agreements) of the American Declaration has been satisfied. Therefore, the Commission finds that the United States breached Article XXVII of the American Declaration when it summarily interdicted, and repatriated Jeanette Gedeon, Dukens Luma, Fito Jean, and unnamed Haitians to Haiti, and prevented them from exercising their right to seek and receive asylum in foreign territory as provided by the American Declaration. 104

In light of this opinion, 105 it is submitted that it may no longer be possible to distinguish between those persons who are seeking admission and those who are already


105 The decision of the Commission rendered pursuant to the American Declaration is a non-binding opinion. However, I would argue that it is compelling evidence of the existence of a strong international consensus that the protection against refoulement is a custom.
within the national territory. The right to protection against *refoulement*, to the extent that such a right exists under international law, ought to be, and in this case was, extended to both categories of persons.

The *Haitian Center* case highlights another responsibility that accrues to states as a result of the obligation to not *refoule* a refugee to a country where he or she faces persecution—the obligation to determine whether the fear is well-founded. If states are under an obligation to refrain from *refoulement*, then, in order to determine whether that obligation arises in a particular case, a determination of refugee status must be made. Only when such a determination has been made will the state be under an obligation to comply with the principle of non-*refoulement*. Indeed, the issue in the *Haitian Center* case was whether the State could interdict ships carrying refugee claimants on the high seas and return them to Haiti “without making an adequate determination of their status, and without granting them a hearing to ascertain whether they qualified as ‘refugees’”. The Inter-American Commission concluded that such conduct was a violation of international law.

In Canada, the question of whether a refugee claimant can be deported without a hearing has arisen in several cases, notably in *Nguyen v. Canada (Minister of Employment & Immigration)*,\(^\text{106}\) where the Federal Court of Appeal concluded that to deny a person access to the refugee determination procedure does not constitute a violation of the *Charter*. The applicant made a claim to refugee status but, before the claim could be determined, the Minister certified him as a danger to the public. Pursuant

\(^\text{106}\) 18 Imm. L.R. (2d) 165 (F.C.A.).
to the provisions of the Immigration Act,\textsuperscript{107} once certified the applicant was no longer eligible to make a claim to refugee status. Nguyen challenged the constitutionality of this provision. The Court determined, however, that there was no requirement to allow Nguyen to make a refugee claim and that the pertinent section of the Immigration Act did not violate the Charter. Interestingly enough, the Court observed that the decision to deny Nguyen a right to make a refugee claim did \textit{not} mean that the Minister was free to return him to his country of nationality, and added that if the Minister attempted to remove him to a country where he was at risk of torture, this \textit{would} constitute a violation of the Charter.\textsuperscript{108} As we shall see in the next section, the protection against removal to torture either under customary international law or the Convention Against Torture is broader than the protection against non-refoulement.

The position of the Federal Court of Appeal in Nguyen is consistent with the decision of the House of Lords in the \textit{T.} case,\textsuperscript{109} and with the provisions of the Refugee Convention that provides, in Article 1F, that certain categories of persons are to be excluded from refugee status determination. In addition, Article 33 itself, which deals with the question of non-refoulement, makes an exception for persons who, having been convicted of particularly serious non-political crimes, constitute a danger to the public order. Thus, the general rule against refoulement notwithstanding, a person may still be deported to the country of persecution if the person has committed (a) war crimes or

\textsuperscript{107} See s. 46.01(1)(e).

\textsuperscript{108} The effect of this decision is to create a rather anomalous situation whereby persons can be denied access to the refugee determination procedure, but could still resist deportation if they allege a risk of torture. In such circumstances, it is unclear who would make the determination as to risk. In the case of \textit{Farhadi v. Canada (Minister of Citizenship \\& Immigration)}, IMM-3846-96, March 20, 1998, F.C.T.D., Mr. Justice Gibson concluded that some form of independent risk assessment would be required.

\textsuperscript{109} \textit{Supra} note 92.
crimes against humanity;\textsuperscript{110} (b) acts against the purposes and principles of the United Nations;\textsuperscript{111} (c) serious non-political crimes prior to admission in the country of refuge,\textsuperscript{112} or if the person has been convicted of a particularly serious offense\textsuperscript{113} and is found to be a danger to the public or to the national security of the country of refuge. The state, however, would be required to justify the decision to refoûle the refugee by referring to the specific provision of the Convention that permitted this action. In light of these provisions, if a person is caught within one of these exceptions he or she cannot claim to be protected against refoûlement, and therefore a receiving state would not be in violation of that rule if it returned the person to the country of persecution.\textsuperscript{114}

It is noteworthy that the House of Lords based its reasoning in the T. case not on principles of customary international law, but rather on United Kingdom's treaty obligations and on the fact that the specific provisions of the Refugee Convention concerning refoûlement had been incorporated into English domestic law. The Court thus did not see the need to address the more general question of whether the principle of non-refoulement is in fact a principle of customary international law.

Nonetheless, it is certainly arguable that the principle of non-refoulement is part of customary international law, and the argument was in fact made as early as 1978 by Goodwin-Gill. The basis he provided for his conclusion was that

\textsuperscript{110} These are covered by Article 1F(a) of the Refugee Convention.

\textsuperscript{111} See Art. 1F(c) of the Refugee Convention.

\textsuperscript{112} See Art. 1(F)(b) of the Refugee Convention.

\textsuperscript{113} See Art. 33 of the Refugee Convention.

\textsuperscript{114} As we shall see, the rule against return to torture might well supercede these limitations in the rule against refoûlement.
it is to be noted that no State party to the Convention is entitled to make any reservation to this Article, and this element of non-degradation lends additional weight to the view of non-refoulement as a rule of general international law.\(^{115}\)

In his 1989 work Stenberg, while acknowledging that some commentators took the contrary view, offered the following three reasons for regarding non-refoulement as a customary rule:

(A) the large adherence by states to the 1951 Refugee Convention, the 1967 Protocol and the 1969 OAU Convention;

(B) the statement made by the delegates in the Final Act of the 1954 Convention Relating to the Status of Stateless Persons to the effect that the principle of non-refoulement already in 1954 could be considered as a "generally accepted principle"; and

(C) the fact that a provision regarding non-refoulement was included in the 1967 UN Declaration on Territorial Asylum.\(^{116}\)

In terms of the existence of evidence that non-refoulement is not only the general practice but is also accepted as law, Stenberg noted:

[It] may be maintained that the fact that even non-contracting States to a large extent do not consider that they have a general right to return refugees to a country of persecution, constitutes evidence that they regard themselves as being bound by law, and that any case of actual return may be considered to constitute an exception to the rule. Likewise the virtually uniform abstention from formal opposition to the above mentioned General Assembly resolutions may also be considered to constitute persuasive evidence of a communis opinio iuris as well as of individual opinio iuris. Thirdly the fact that States do not maintain that they have a right to return refugees to a country of persecution when UNHCR calls attention to a violation but seek instead to justify their action either by stating that the person in question is not a refugee, or that the circumstances motivate an exception being made in the instant case constitutes added evidence of opinio iuris. To this may be added the opinions stated by representatives of States in international conferences . . . [At] the United Nations Conference on Territorial Asylum which took place in 1977 . . . states from all parts of the world participated and . . . it was made abundantly clear that States do consider the principle of non-refoulement of persons who are refugees in accordance with Article 33 of the 1951 Refugee Convention, as a binding rule of international law.\(^{117}\)

More recently, Goodwin-Gill has reaffirmed his earlier position and has provided a more detailed basis for the conclusion that non-refoulement is now a part of customary

\(^{115}\) Goodwin-Gill, supra note 14 at 140.

\(^{116}\) G. Stenberg, Non-Expulsion and Non-Refoulement (Uppsala: Iustus Forlag, 1989) at 267.

\(^{117}\) Ibid. at 279.
international law. Goodwin-Gill cites Stenberg and notes that most of the scholars who had originally taken the contrary view have altered their position, so that there is now nearly complete agreement on this principle:

Both Article 33 of the 1951 Convention and Article 3 of the 1984 Convention against Torture are of a 'fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law' as that phrase was used by the International Court of Justice in the North Sea Continental Shelf cases. So far as both Convention provisions are formally addressed to the contracting parties, the universality of the principle of non-refoulement has nevertheless been a constant emphasis of other instruments, including declarations, recommendations and resolutions at both international and regional levels. The proof of international customary law requires consistency and generality of practice, but no particular duration; universality and complete uniformity are not required, but the practice must be accepted as law. In many cases this opinio juris may be inferred from the evidence of a general practice or a consensus in the literature. 18

Not all commentators, however, subscribe to this view. Thus Boed, in his article “The State of the Right of Asylum in International Law”, notes:

While many scholars agree that the principle of non-refoulement has acquired “a high degree of general acceptance,” their opinions differ as to whether non-refoulement has become a part of customary international law. The practice of states attests to the uncertain status of the non-refoulement principle in customary international law. Even though many of the states that are bound by the non-refoulement provision of the Refugee Convention and Declaration observe this provision and refrain from returning home those fleeing persecution, the United Nations High Commissioner for Refugees recently expressed concern that, “[a] number of countries, where the admission or presence of certain groups of refugees have been perceived as incompatible with national interests or domestic concerns, have ignored or undermined the principle of non-refoulement.” In particular, the High Commissioner has identified rejection at frontiers, interceptions, push-offs, and forcible return of asylum-seekers as current threats to non-refoulement. 19

19 Boed, supra note 88 at 21-22 [footnotes omitted]. At 22, note 111, Boed summarizes some of the positions of the commentators on this issue:

Compare Kay Hailbronner, “Non-Refoulement and ‘Humanitarian’ Refugees: Customary International Law or Wishful Thinking?”, in The New Asylum Seekers: Refugee Law in the 1980s . . . (David A. Martin, ed., 1988) (“Commentators have taken the view that the principle of non-refoulement must be considered today as a rule of customary international law. Whether this view finds sufficient support in a virtually uniform and extensive state practice accompanied by the necessary opinio juris is doubtful”) . . . and Sinha, “Anthropocentric View” . . . (“customary international law gives the state complete freedom to expel an alien . . . States are under no duty of non-refoulement under this law”) with Goodwin-Gill . . . (noting that the principle of non-refoulement “forms part of general international law. There is substantial, if not conclusive, authority that the principle is binding in all states, independently of specific assent”), and Sohn & Buergenthal . . . (“The general prohibition against a State's return of a refugee to a
Many leading commentators have urged caution before asserting that a norm has become a part of custom. However, given the very broad acceptance of the limited rule against non-refoulement\textsuperscript{120} by scholars who have examined the problem in depth, it is possible to affirm that it is a rule of customary international law.\textsuperscript{121} This rule affects the right of a state to both exclude and expel a non-citizen, and imposes an obligation on a state to make a determination as to whether the person is in fact at risk of persecution. If a person who has been admitted and determined to be a refugee subsequently becomes subject to expulsion, the state is under an obligation to refrain from executing the expulsion order if the result would be to breach the rule against non-refoulement. If a person seeking admission is determined to be a refugee and cannot be deported to any other country but the country where he or she faces a risk of persecution, then the receiving state has no choice other than to admit the person, albeit temporarily.\textsuperscript{122} To fail to do so would be a violation of the principle of non-refoulement.

The restriction is limited insofar as it does not apply to persons who are excluded because of their own conduct pursuant to Article 1F or Article 33; it only applies as a

\textsuperscript{120} I refer to the rule as being "limited" because it is subject to the exceptions noted above whereby, under certain circumstances set out in Art. 33 of the Refugee Convention, a state can deport a refugee back to a country where there is a risk of persecution.

\textsuperscript{121} I make this assertion despite the fact that, as Boed notes supra in note 119, some states have taken actions that are incompatible with the principle. If it were necessary to demonstrate, in a human rights context, that there was virtually universal state practice in compliance with a principle before it became custom, then it would be impossible for customs to be created in this area of international law.

\textsuperscript{122} This obligation is, of course, subject to the limitation that the receiving state can invoke the exception in Art. 33 and return a refugee to the country of persecution if the person has committed a particularly serious non-political crime and poses a threat to the public order. It should be noted, however, that the validity of this exception is now in doubt as a result of recent developments in international law, which provide for an absolute prohibition against removal to a country where there are serious grounds for believing that the person would be subject to torture.
negative obligation to not deport to the country of persecution, so that there is no positive obligation to grant asylum; and it only applies for as long as the circumstances which create the fear of persecution continue to exist.

2.8 **Prohibition under Customary Human Rights Law against Deportation of Any Person Back to a Country where There is a Risk of Torture**

There is now a strong argument in favour of the proposition that, over the last twenty years, customary international law has evolved to a point where the protection against non-refoulement has expanded to include a protection of all persons, refugees and non-refugees alike, against deportation back to a country where there is a serious risk of torture. As noted above, the protection against non-refoulement has generally been restricted to persons who have been found to be *Convention* refugees and who do not fall within one of the exclusion clauses set out in Article 1F of the *Refugee Convention*.\(^\text{123}\)

Some persons who have been denied refugee status\(^\text{124}\) or who have not even sought protection as *Convention* refugees may be at serious risk if returned to their country of nationality. This can occur either because a person is at risk for a reason other than those enumerated in the *Refugee Convention* definition, or because the person, although possibly at risk for a *Convention* reason, has been excluded from protection as a result of his or her conduct. Moreover, given the limited nature of the protection against refoulement and the exceptions allowed both under the *Convention* and under customary international law, some authors have argued that non-refoulement should apply also to non-refugees. There is, however, no consensus on this point under customary international law, although many states do in practice refrain from deporting persons found to not be *Convention* refugees back to countries involved in serious civil strife. See Goodwin-Gill, *supra* note 118 at 130-38.

\(^{123}\) The refusal to grant refugee status could arise because of the application of Article 1F, or because the person does not meet the criteria since the fear of persecution does not have a nexus to the person's race, religion, nationality, membership in a particular social group, or political opinion.
international law, in some cases states may seek to either exclude or expel persons who have been found to be Convention refugees.

If custom has now developed to a point where it can be asserted that there is an absolute prohibition against exclusion or expulsion of a person back to a country where the person faces torture, then this development provides important additional protection to non-citizens. The starting point for any analysis as to whether such a principle exists under international law must be the recognition that it is now accepted as *jus cogens* that the practice of torture is a violation of international custom.

Given the development of international law over the past fifty years, there can be no doubt that a person committing an act of torture is violating international law. The *Convention against Torture* provides an excellent starting point for any analysis of this issue. The *Convention*, which came into force on 26 June 1987, has now been ratified by over 94 countries.\(^\text{125}\) While this fact in and of itself is not determinative as to whether the prohibition against torture has become accepted as custom, it is at minimum a strong indication of that fact.

In addition to the *Convention*, the jurisprudence that has developed in several jurisdictions makes it clear that torture is considered as a violation of custom. Thus the European Court of Human Rights has reiterated repeatedly that the protection against torture contained in Article 3 of the *Convention* *enshrines one of the fundamental values of democratic society*. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the *Convention* and of Protocols Nos 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible.

\(^{125}\) As of 1 February 1996, the *Convention against Torture* had been ratified or acceded to by 94 states. In addition, 13 states had signed the *Convention*. 
under Article 15 even in the event of a public emergency threatening the life of the nation.\textsuperscript{126}

In Canada, there are strong indicia in the decisions of the Supreme Court and the Federal Court that torture is seen as a violation of the most fundamental human rights. Thus in the case of \textit{Kindler}, La Forest J. (writing for himself, L’Heureux-Dubé, and Gonthier JJ.) stated as follows:

[T]his Court has held that extradition must be refused if surrender would place the fugitive in a position that is so unacceptable as to “shock the conscience”; see \textit{Canada v. Schmidt}, [1987] 1 S.C.R. 500.

There are, of course, situations where the punishment imposed following surrender — torture, for example — would be so outrageous to the values of the Canadian community that the surrender would be unacceptable.\textsuperscript{127}

This position is echoed in the jurisprudence and scholarly literature of other jurisdictions. In the case of \textit{Prinicz v. Federal Republic of Germany}, the Court discusses the concept of the practice of torture and notes that the prohibition against torture has reached the status of \textit{jus cogens}, i.e., a fundamental and generally accepted principle of international law:

\textit{A jus cogens norm is a principle of international law that is “accepted by the international community of States as a whole as a norm from which no derogation is permitted . . . .” Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988), quoting Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679.} Such peremptory norms are “nonderogable and enjoy the highest status within international law,” \textit{Committee of U.S. Citizens in Nicaragua, 859 F.2d at 940; they “prevail over and invalidate international agreements and other rules of international law in conflict with them,”} and they are “subject to modification only by a subsequent norm of international law having the same character.” According to one authority, a state violates \textit{jus cogens}, as currently defined, if it:

\begin{itemize}
  \item practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination,
\end{itemize}


\textsuperscript{127} \textit{Kindler v. Canada (Minister of Justice)}, [1991] 2 S.C.R. 779.
or (g) a consistent pattern of gross violations of internationally recognized human rights.\footnote{128}

A case comment on the \textit{Princez} case discusses the concept of \textit{jus cogens} in the following terms:

\textit{Jus cogens} norms are defined as those fundamental rules of international law "from which no derogation is permitted." They are a small subsection of international customary law norms that are binding on all states, regardless of any objection a state may have. Any international agreement that violates \textit{jus cogens} norms is void, and because these obligations are \textit{erga omnes} (owed to all the world), any nation may seek redress of a violation of one of these norms at the international level. Given that \textit{jus cogens} norms are the most binding form of international law, Judge Wald's proposal that a violation of these norms should operate as a waiver of sovereign immunity under the \textit{FSIA} offers a powerful and logical means of enforcement. Although it is sometimes difficult to identify which specific prohibitions constitute peremptory norms, the prohibitions on genocide and torture are generally regarded as having attained \textit{jus cogens} status. \textit{Jus cogens} norms are vital to world order; violations of these norms must be punished in order to maintain a sense of confidence in the legitimacy of the international legal system.\footnote{129}

Again, in the case of \textit{Re Pinochet Ugarte}, the majority of the House of Lords concluded that the prohibition against torture was \textit{jus cogens} and that, as a result, there was universal jurisdiction to prosecute a person charged with committing torture. Lord Browne-Wilkinson noted:

In the early years state torture was one of the elements of a war crime. In consequence torture, and various other crimes against humanity, were linked to war or at least to hostilities of some kind. But in the course of time this linkage with war fell away and torture, divorced from war or hostilities, became an international crime on its own: see \textit{Oppenheim's International Law} (Jennings and Watts edition) vol. 1, 996; note 6 to Article 18 of the I.L.C. \textit{Draft Code of Crimes Against Peace; Prosecutor v. Furundzija}, Tribunal for Former Yugoslavia, Case No. 17-95-17/1-T. Ever since 1945, torture on a large scale has featured as one of the crimes against humanity; see, for example, U.N. General Assembly Resolutions 3059, 3452 and 3453 passed in 1973 and 1975; \textit{Statutes of the International Criminal Tribunals for former Yugoslavia} (Article 5) and \textit{Rwanda} (Article 3).

Moreover, the Republic of Chile accepted before your Lordships that the international law prohibiting torture has the character of \textit{jus cogens} or a peremptory norm, i.e. one of those rules of international law which have a particular status. In \textit{Furundzija} (supra) at para. 153, the Tribunal said:

\footnote{128} 26 F.3d 1166 (D.C. Cir. 1994).
Because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force... Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.\textsuperscript{130}

Given this virtual unanimity of opinion on the issue, it is submitted that there can be no doubt that the prohibition against torture is part of *jus cogens*. This being so, the question arises as to whether that prohibition will affect the right of a state to expel a person to a country where he or she faces a substantial risk of being tortured. The *Convention Against Torture*, in Article 3, provides as follows:

1. No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The question arises, however, whether the principle enshrined in Article 3, prohibiting deportation back to a country where there is a substantial risk of torture, has reached a point where it can be considered to be a rule of customary international law. In order to ascertain this, we must look at the evidence of *opinio juris* and state practice, bearing in mind that the evidence required to create a human rights norm is of a different nature than that which would be required in other areas of international law.\textsuperscript{131}


\textsuperscript{131} See text accompanying notes 80-82, above.
One important indicator of state practice is the fact that the European Court of Human Rights, in *Chahal v. United Kingdom*, created a precedent that is binding on all of the countries of the European Union, so that they cannot deport a person to a country where there is a substantial risk that he or she would be tortured. Subsequently, in the case of *H.L.R. v. France*, the Court reaffirmed this principle and extended it to include persons who were at risk of torture from non-governmental actors.

The same principle has gained broad acceptance in the jurisprudence of the Human Rights Committee of the United Nations and in the decisions of the Committee Against Torture established pursuant to the First Protocol of the *Convention Against Torture*. The *dicta* of the Supreme Court of Canada in *Kindler* quoted above — that evidence that a person whose extradition is sought by a foreign state might be subjected to torture would require that Canada refuse to surrender the fugitive — is yet another indication that expulsion to torture would be a violation of international law. Those *dicta* are consistent with the earlier statement of Marceau J. of the Federal Court of Appeal in *Nguyen*:

> [T]he Minister would act in direct violation of the *Charter*, if he purported to execute a deportation order by forcing the individual concerned back to a country, where on the evidence, torture and possibly death will be inflicted. It would be, it seems to me, a participation in a cruel and unusual treatment within the meaning of s. 12 of the *Charter*,

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134 In the *H.L.R.* case, the Court concluded that there was no evidence that the applicant could not be protected. However, the Court emphasized the absolute character of the rights guaranteed in Art. 3, which enshrines one of the fundamental values of democratic societies. Therefore, the Court did not rule out the possibility that Art. 3 of the *Convention* may also apply where the danger emanates from persons or groups of persons who are not public officials.

or, at the very least an outrage to public standards of decency, in violation of the principles of fundamental justice under s. 7 of the Charter. There are means to enjoin the Minister not to commit an act in violation of the Charter.¹³⁶

This position has since been reiterated in several other decisions of the Canadian courts.¹³⁷

Given the foregoing, and in particular the unanimous views of the European Human Rights Court, the U.N. Human Rights Committee, and the Committee Against Torture, it can be asserted with some certainty that it is now a generally accepted principle of international law that a state cannot expel a person to a country where there is a substantial risk that person would be subject to torture.

2.9 PROCEDURAL RIGHTS OF PERSONS SUBJECT TO EXPULSION

But what of the right of a state to expel non-citizens who have been admitted onto its territory? Custom recognizes that a person who has been admitted has certain basic rights over and above those available to a person who is seeking admission.¹³⁸ These rights arise because customary international law recognizes that a non-citizen who was allowed to enter the territory was both required to obey the laws of the country and entitled to protection under the law. This principle was enunciated, for example, in an early decision of the U.S. Supreme Court in *Yick Wo et al. v. Hopkins, Sheriff et al.*¹³⁹ This case dealt with the constitutionality of an ordinance limiting the right of persons to operate a laundry

¹³⁶ *Supra* note 106.

¹³⁷ See *Farhadi, supra* note 108; *Suresh v. Canada*, 49 C.R.R. (2d) 131 (Gen. Div.).

¹³⁸ This fact is explicitly acknowledged in Canada’s *Immigration Act*. A person seeking admission must, for example, prove that he or she has a right to be admitted. When a person is being expelled, the onus of proof is on the Minister of Citizenship and Immigration to justify expulsion: see *Immigration Act*, ss. 9 and 27. See also Goodwin-Gill, *supra* note 14 at 146, where he notes that “the fact remains that protection of the law will only generally be available after admission”.

¹³⁹ 118 U.S. 356.
within the San Francisco city limits without the consent of the board of supervisors. The appellants, who were not citizens of the United States but were legally in that country, had been operating a laundry for 22 years without incident prior to the passage of the ordinance. However, when the appellants applied for a new license it was denied. The Supreme Court reviewed the facts and concluded that the ordinance was discriminatory in its application. The Court struck down the legislation and held that the appellants, though not American citizens, were entitled to equal protection under the law:

The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the emperor of China . . . The fourteenth amendment to the constitution is not confined to the protection of citizens . . . these provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws . . . The questions we have to consider and decide in these cases therefore are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.\footnote{Ibid. at 356.}

The requirement for procedural fairness in dealing with non-citizens prior to their expulsion has also been recognized by the Canadian courts. Thus in the case of \textit{Boulis}, the Supreme Court held that a non-citizen had certain procedural rights which included, \textit{inter alia}, the right to appeal, with leave, a decision of the administrative tribunal which rendered the decision at first instance:

Parliament has imposed an onerous as well as sensitive duty on the Board to deal with claims for political asylum and to apply compassionate or humanitarian consideration to claims of lawful entry to Canada. The judicialization of power to grant entry in such cases necessarily involves the Board in difficult questions of assessing evidence, because its judgment on the reasonableness of grounds of belief that a deportee will be punished for political activities or will suffer unusual hardship . . . if the deportation is carried out, involves it in estimating the policies and reactions of foreign governmental authorities in relation to their nationals who claim asylum in Canada when unable to establish a claim to entry under the regular prescriptions. The Parliament of Canada has made it clear, in my opinion, that the granting of asylum should rest not on random or arbitrary discretion under s. 15(1)(b)(i) but rather that a claim to the Board's favourable interference may be realized through evidence upon the relevance and cogency of which the Board is to pronounce as a judicial tribunal. The Board has thus been charged with a responsibility
which has heretofore been an executive one. The right of appeal to this Court is proof
enough that the carrying out of this responsibility was not to be unsupervised.  

Less than two years later the Supreme Court of Canada decided Prata v. Canada
(Minister of Manpower & Immigration). Prata was ordered deported pursuant to the
provisions of the Immigration Act. He did not challenge the validity of the deportation
order but rather sought to appeal to the Immigration Appeal Board, which had equitable
jurisdiction to set aside the deportation order under certain circumstances. However, the
Board’s equitable jurisdiction could be eliminated if the Minister of Immigration and the
Solicitor General signed a certificate pursuant to section 21 of the Act. The Ministers
signed such a certificate in Prata’s case and the Board, having been deprived of its
equitable jurisdiction, dismissed the appeal. Prata then appealed to the Supreme Court
arguing that his procedural rights had been violated. The issue before the Court in Prata
was whether this process violated principles of fairness or the Canadian Bill of Rights.

The Supreme Court concluded that the procedural rights to be afforded to a non-
citizen encompassed nothing more than a right to review the decision to expel. If that
decision was made in accordance with the law, then a reviewing Court could not
intervene. Given that there were no defects in the procedure leading to the issuance of the
deporation order, Prata’s procedural rights had been exhausted and he could not claim a
substantive right to an equitable appeal. Because Prata was an alien, any decision to allow
him to remain in Canada or to expel him was within the absolute prerogative of the
executive, subject only to requirements for procedural fairness. Thus, although the Court

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141 Boulis v. Canada (Minister of Manpower & Immigration), [1974] S.C.R. 875. The Court’s
comment about the judicialization of the discretion to determine asylum claims is an interesting
acknowledgment of the view that the discretion to grant or deny asylum claims generally rests with the
executive.

formally acknowledged that non-citizens have the same procedural rights to review an administrative decision as do Canadians, it concluded that the right of review to be afforded to a non-citizen did not extend beyond ensuring that the basic requirements of procedural fairness had been complied with, and did not encompass a comprehensive equitable review of all the circumstances of the case. Since Prata had no legal basis to challenge the deportation order but could only seek equitable relief, the effect of the Supreme Court’s ruling was to deny him any substantive basis for challenging the decision to expel him:

The *Prata* case might be characterized as an administrative replay of the dual notions of sovereignty seen to traditionally underlie Anglo-Canadian thinking about nationhood and aliens. Thus the upshot of Martland J’s judgment is to subtly bring the appellant into the scope of the national norms while effectively (and literally) excluding him from the nation... While the norms governing domestic legal process are portrayed as having an open-textured embrace of even the alien, those same norms are translated into doctrine which closes off the very access to the domestic system which the appellant seeks.\(^{143}\)

More than fifteen years after *Prata* the Supreme Court of Canada revisited the same issue in *Chiarelli*, this time within the context of the *Charter*. Unsurprisingly, the Court again concluded that fundamental justice did not require that the appellant have a right to appeal to the Immigration Appeal Board on humanitarian grounds. The Court noted that no such appeal was mandated by the principles of fundamental justice, but did suggest that some form of procedural fairness was required:

If any right of appeal from the deportation order in s. 32(2) is necessary in order to comply with principles of fundamental justice, a “true” appeal which enables the decision of the first instance to be questioned on factual and legal grounds clearly satisfies such a requirement. The absence of an appeal on wider grounds than those on which the initial decision was based does not violate s. 7.\(^{144}\)

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\(^{143}\) Morgan, *supra* note 54 at 81-82.

\(^{144}\) *Supra* note 1.
The same principle has been enunciated by leading international commentators. Thus Sohn and Buergenthal note that a decision to expel aliens already admitted to the national territory can only be made “in accordance with its laws and in conformity with generally accepted principles of international law”,¹⁴⁵ which include procedural fairness, due process of law, and a right to judicial review. Thus, although non-citizens nominally do have procedural rights prior to being expelled, those rights under customary international law afford only the most minimal procedural protection and do not include any meaningful substantive rights. Goodwin-Gill summarizes the principles that have emerged from the preceding analysis in the following terms:

1. General International Law imposes as a precondition to the validity of an order of expulsion the requirement that it be made in accordance with law.

2. An order of expulsion will only be in accordance with law if
   
   (a) it is permitted under local law and either  
   (b) the alien is allowed a hearing and appeal on the merits or  
   (c) there exists an effective remedy (judicial review) whereby the legality of the exercise of power can be challenged.

3. Expulsion proceedings generally must be carried out in accordance with general standards which international law has established for the treatment of aliens. There must be no ill treatment or torture and due regard must be paid to the dignity of the individual and to his basic rights as a human being.¹⁴⁶


¹⁴⁶ Goodwin-Gill, supra note 14 at 280-81; see also Sohn, supra note 59 at 89: “Just as a state in the exercise of its sovereignty can admit or deny entry to an alien, the State can also expel or deport the alien. However the right to expel or deport, like the right to refuse admission must be exercised in conformity with generally accepted principles of international law . . . both substantive and procedural. Consequently in exercising the right to expel or deport, a State must observe the requirements of due process of law . . . its officials must not act arbitrarily or abuse the powers granted to them by their national law, and in all instances they must act reasonably and in good faith”.
2.10 **Concluding Remarks on the Limits on State Power to Exclude or Expel Non-Citizens under Customary International Law**

Custom has evolved to the point where it is now possible to affirm that a state's right to expel non-citizens is not unfettered. The rules of international law require that states base their decisions to exclude or expel non-citizens upon clearly defined standards applied in a non-discriminatory manner. Requirements of procedural fairness also mandate that states allow for some form of judicial review of the decision to expel. Procedural fairness, however, does not require anything more than a formal review of the process. Generally speaking, non-citizens do not have a substantive right to remain in a foreign country.

A state may, however, be precluded from excluding or expelling an alien, when to do so would result in the violation of the principle of non-refoulement or would expose the person to risk of torture. This restriction does not arise out of any positive duty to admit the non-citizen, but rather out of a responsibility to not submit a person to a serious risk of torture. Given the *jus cogens* nature of the prohibition against torture and the fact that it has now been recognized that torture is an offense of universal jurisdiction, can there be any doubt but that any state which knowingly sends a person back to a country where he or she will be subject to torture is violating one of the most fundamental principles of international law? As the European Court of Human Rights noted in

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147 The same principle would not apply with respect to decisions to exclude, where such due process requirements do not apply under international law.

148 The provisions of the immigration laws in Canada, the United Kingdom, and other European countries provide that a state can deny admission and expel a non-citizen who seeks refugee status to a third country prior to considering the merits of the claim if the person has a right to a determination in the third country. This provision has been held to be constitutional, with the proviso that there must be a degree of certainty that the person will have a right to have the claim determined in the third country.

149 See *Re Pinochet Ugarte*, supra note 130.
Chahal, the proscription against torture and removal to torture are now fundamental principles accepted in democratic societies. This being so, states can no longer hide behind the fact they are not the actual perpetrators of the torture — their responsibility is fixed once they remove a person to a country where he or she will be tortured.

Custom, however, still has not overcome the major limitation that has prevented it from being an effective mechanism for the protection of the rights of non-citizens. Namely, under customary international law, individuals do not have legal personality and as a result cannot enforce their rights. Rather, they must rely on the diplomatic protection of their states of nationality. Given that in most cases the fear of expulsion arises out of concern of what the authorities of that state will do upon return, it is highly unlikely that such protection would be forthcoming. It is this glaring gap in customary international law that gave rise to the international human rights movement, which I will examine next.

\(^{150}\) Supra note 132.
CHAPTER THREE: LIMITS ON EXPULSION PURSUANT TO INTERNATIONAL TREATIES

In the preceding chapter, I reviewed the limits on a state's right to expel or exclude aliens under customary international law. I shall now examine the limits that exist as a result of international human rights conventions. As distinct from those that are created as a result of custom, obligations under treaties can arise when the treaty in question comes into force and only once the state has signed and ratified it. However, once a state has acceded to a treaty, it is bound under international law to comply with its provisions. Given that most states have ratified at least some of the important human rights treaties, these will have a significant impact on a state's right to exclude or expel non-citizens.

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1 The process whereby a human rights treaty comes into effect involves a lengthy drafting stage followed by a ratification procedure. The treaty usually specifies that it will come into force after a certain number of countries have ratified it.

2 The status of the treaty as part of domestic law will vary depending on the jurisdiction. In some jurisdictions, including the United States, the treaty, once ratified, becomes part of domestic law if interpreted as being "self-executing" in nature and content and will derogate existing legislation but can be overruled by statutes enacted later: see P. Malanczuk, ed., Akerhurst's Modern Introduction to International Law (London: Routledge, 1997) at 67. In Canada, international treaties form part of domestic law only when they are expressly incorporated into it by way of an Act of Parliament: see Baker v. Canada (Minister of Citizenship & Immigration), 174 D.L.R. (4th) 193 (S.C.C.). Instruments such as the International Covenant on Civil and Political Rights, UNGA Res. 2200 A (XXI), Dec. 16, 1966, CTS/76 [hereinafter ICCPR], and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/46, Dec. 1984, CTS/91 [hereinafter Convention against Torture], contain Protocols which, if acceded to by a state party, allow individuals to register complaints against the state for breach of compliance with the treaty obligations. These complaints are reviewed by Committees set up under the treaty to supervise compliance. In addition, as we shall see in the next chapter, obligations under international human rights treaties can also be enforced through the domestic courts. In some states, it can be argued that the treaty obligations are incorporated directly into the national law upon ratification. In other states, the obligations can be given effect either by reference to other constitutional provisions designed to safeguard human rights, or as a means of interpretation of domestic legislation. As noted in the preceding chapter, there is some doubt as to whether a state which has voluntarily acceded to a human rights treaty can withdraw from its obligations under it. The Human Rights Committees charged with supervision with compliance with the ICCPR have indicated that, once a state party has accepted the obligations of a treaty of this nature, it cannot withdraw from it. See General Comment 26 (61) under Article 40, paragraph 4 of the ICCPR.

3 As of December 1, 1999 the Convention against Torture had been acceded to by more than 125 states. The ICCPR has been acceded to by more than 145 states. See United Nations High Commission for Human Rights Website Treaty Ratification Information.
As is the case with customary international law, the international community has limited capacity to enforce treaty obligations, so that non-citizens seeking to resist expulsion or exclusion through reliance on international instruments will often have to rely on domestic courts to protect their rights. Notwithstanding this limitation, rights created pursuant to treaty obligations have had a profound effect on exclusion and expulsion, both because states generally make efforts to comply with treaty obligations which they undertook voluntarily and because they affect the view of domestic courts with respect to state obligations.

Several human rights instruments have a significant impact on exclusion and expulsion of non-citizens. These include the United Nations Convention Relating to the Status of Refugees; the ICCPR; the Convention against Torture; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Inter-American Declaration on the Rights and Duties of Man; and the Convention on the

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4 The question of enforcement of a state's obligations under customary international law and treaties will be reviewed in the next chapter. Although it is true that some of the conventions have set up, through Optional Protocols, committees which review compliance of state parties with their treaty obligations, their findings only have the power of moral persuasion and do not extend to enforcement per se in the offending state. One example of the non-enforceability of a "request" of a committee was the failure of the Government of Canada to agree to stay the deportation of Tejinder Pal Singh after the Committee against Torture (CAT) made a formal request to that effect: see IMM-5294-97, December 22, 1997 (F.C.T.D.), denying a stay of removal, where Mr. Justice Muldoon notes the request of CAT.

5 See, for example, Slait Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038.


7 Supra note 2.

8 Supra note 2.

9 ETS No. 005 Rome, as amended by Protocol No. 11 (ETS No. 155) of 11 May 1994 [hereinafter the European Convention].

10 Charter of the Organization of American States, CTS 1990/23; Inter-American Declaration on the Rights and Duties of Man, Arts. XVIII, XXV.
Rights of the Child. These instruments require states to recognize and respect the most fundamental human rights, some of which directly affect exclusion and expulsion.

The Refugee Convention requires signatories to not expel refugees who are lawfully on their territory, and to not return or refoule refugees to the country where their might suffer persecution. This protection, however, is not absolute, as the Convention does admit of an exception to the rule against refoulement if the refugee poses a danger to national security or to the public of the host state.

The Convention against Torture expressly prohibits states parties from deporting a person back to a country where there are serious reasons to believe that he or she might be subject to torture. As distinct from the Refugee Convention, the prohibition in the Convention against Torture is absolute and will apply irrespective of the interest of the state party in expelling the person.

This protection is echoed in the ICCPR which, in Article 7, prohibits torture or cruel, inhuman, or degrading treatment or punishment. The Human Rights Committee charged with ensuring compliance with the ICCPR has, in a General Comment, interpreted Article 7 as requiring states to refrain from expelling persons back to countries where

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12 The right of a refugee to not be expelled to a country where he or she fears persecution is known as the protection against refoulement.

13 Refugee Convention, supra note 6, Arts. 32 and 33.

14 Convention against Torture, supra note 2, Art. 3.

15 Article 7 of the ICCPR states:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
they would be subjected to treatment in violation of this provision.\textsuperscript{16} As the scope of Article 7 is broader than the equivalent provision in the \textit{Convention against Torture} — because it encompasses not only torture but also other forms of cruel, inhuman, and degrading treatment — it may provide even greater protection to non-citizens against expulsion than does the \textit{Convention against Torture}.\textsuperscript{17}

The right to family unity is guaranteed in the \textit{Convention on the Rights of the Child}.\textsuperscript{18} The relevant provision has been interpreted by courts in some jurisdictions as requiring that the interests of the children be taken into account prior to any decision to expel their parents.\textsuperscript{19} The European Court of Human Rights has taken a similar position, and has placed a high value on the right of a child to live with his or her parents by interpreting Article 8 of the \textit{European Convention} so as to restrict a state’s right to expel non-citizens whose children are nationals of the expelling state.\textsuperscript{20}

The right to remain in one’s own country is perhaps the most contentious right as it has not yet received full acceptance within the agencies charged with interpreting human rights legislation. The jurisprudence of the European Court in this respect is mixed, with the Court finding a violation of Article 8 protecting family unity in some

\textsuperscript{16} United Nations Human Rights Committee, \textit{General Comment}, No. 20, CCPR/C/21/Rev. 1/Add. 3, April 1993, para. 3. Paragraph 9 states that “[i]n the view of the Committee, States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”.

\textsuperscript{17} The \textit{European Convention} contains a similar provision in Article 3 which has been interpreted by the European Court in a manner consistent with the \textit{General Comment} of the Human Rights Committee.

\textsuperscript{18} \textit{Supra} note 11.

\textsuperscript{19} See, for example, \textit{Baker}, \textit{supra} note 2.

\textsuperscript{20} \textit{European Convention}, Art. 8 (see discussion of the caselaw under this provision below).
cases involving long-term permanent residents, but not in others.\textsuperscript{21} At the UN Human Rights Committee, a small majority has maintained that long-term permanent residents do not have a right to remain in a country they consider their own, but there is an important and growing minority of members who are prepared to find a violation.\textsuperscript{22} As such, there is a growing recognition that it is inappropriate to deport long-term permanent residents who have resided virtually all of their lives in the expelling state. In the following sections, I shall examine in greater detail how each of these clusters of human rights impacts on the right of states to expel non-citizens.

3.1 \textbf{PROTECTION AGAINST EXPULSION AND REFOULEMENT PURSUANT TO THE \textit{REFUGEE CONVENTION}}

The protections against expulsion and \textit{refoulement} arise as a result of the 1951 United Nations \textit{Refugee Convention}. This instrument, the first human rights convention signed after the Second World War, was designed to provide protection to persons fleeing persecution.\textsuperscript{23} Pursuant to Article 32 of the \textit{Refugee Convention}, a state is prohibited from expelling a refugee lawfully on its territory except on grounds of public order or national security.

\footnotesize
\begin{itemize}
  \item \footnotemark[21] See below for discussion of the Court’s relevant jurisprudence.
  \item \footnotemark[22] See below for discussion of the Committee’s relevant jurisprudence.
  \item A refugee is defined as a “person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country”: see the \textit{Refugee Convention}, supra note 6, Art. 1. Note that until the \textit{Protocol} of 1967 there was a geographical limitation to the \textit{Convention} so that persons could claim refugee status only as a result of events arising in Europe prior to 1951.
\end{itemize}
Article 33 requires that states refrain from subjecting a refugee to *refoulement*, subject to the same general exception as set out in Article 32.\(^{24}\) *Refoulement* is defined as the removal of a person who has been found to be a *Convention* refugee back to a country where he or she would face persecution. Expulsion, as it is used in Article 32, refers to "any measure by which the removal of an alien from the territory of a State is secured",\(^{25}\) so that Article 32 would apply to any type of procedure whereby the state decided to expel a *Convention* refugee.

### 3.2 PROTECTION PURSUANT TO ARTICLE 32

The protection against expulsion in Article 32 applies only to *Convention* refugees lawfully in a state's territory. There is little doubt that this phrase must, at a minimum, encompass all those *Convention* refugees who are lawfully in the country of refuge as that term is understood in the national immigration laws, irrespective of the period of time for which they had originally been allowed to enter the state.\(^{26}\) However, it is

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\(^{24}\) Article 32 provides that "[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order". Article 33, which prohibits expulsion or return ("*refoulement*") reads as follows:

1. 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.

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

\(^{25}\) G. Stenberg, *Non-Expulsion and Non-Refoulement* (Uppsala: Iustus Forlag, 1989) at 83. Stenberg argues, at 84, that "[t]he purpose of Article 32 . . . must be that it should not be possible to terminate the lawful presence of a refugee by any measure whatsoever except for specific weighty reasons."

\(^{26}\) *Ibid.* at 121.
certainly arguable that the term ought also to include “an alien who has been granted provisional stay pending the determination of his refugee status”.27

In Canada, section 4(2.1) of the *Immigration Act* provides that a *Convention* refugee has “while lawfully in Canada a right to remain in Canada”, unless the refugee is found to be in any of the inadmissible classes involving criminality or threats to national security, or unless he or she is convicted of an offense under any Act of Parliament for which a sentence of more than six months has been, or more than five years may be, imposed.28 The term “lawfully” is not defined in the *Immigration Act*, and the only jurisprudence on point is the case of *Kammy Boun-Leua v. Minister of Employment and Immigration*.29 Boun-Leua had been granted refugee status in France and then came to Canada and made a claim to refugee status here.30 He was found to be a *Convention* refugee but, notwithstanding this finding, the Minister sought to deport him. Boun-Leua argued that, as a *Convention* refugee, he was lawfully in Canada and therefore, pursuant to section 4(2.1), had a right to remain in the country. The Court disagreed, concluding that the term “lawfully” had to be interpreted so as to mean legal status in Canada and that, since Boun-Leua’s status had expired, he was not “lawfully” in the country. The Court noted that, as a *Convention* refugee, he had protection against *refoulement*, but

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28 *Immigration Act*, s. 4.1.


30 This case was decided under the provisions of the *Immigration Act* as they existed prior to 1989. Until 1989, there were no eligibility requirements and therefore Boun-Leua had a right to claim refugee status here even though he had status in France. After 1989, the law was changed so that, at the present time, Boun-Leua would not be eligible to make a claim (see *Immigration Act*, s. 46.01(1)(b)), and could be expelled to France without a determination of his claim for refugee status.
since Canada was returning him to France, where he had refugee status, there was no
violation of Canada's obligations:

A Convention refugee . . . is not given the right to reside permanently in Canada nor, by
being designated such, is he given the right to remain in Canada for a specific period of
time. Presumably his right to remain is dependent upon his continuing to be a refugee
from the country of his nationality. If for any reason, he no longer can fulfill the
requirements to be characterized as a Convention refugee, he is subject to a removal or
deportation order. The duration of his stay, as a Convention refugee, can only be fixed by
a Ministerial permit issued pursuant to section 37 of the Act. If no such permit is issued
then, if he is within an inadmissible class, he may be the subject of a removal or
deportation order. The only rights accorded to a Convention refugee are first, not to be
returned to a country where his life or freedom would be threatened, a right granted by
virtue of section 55 of the Act, and, second, to be able to appeal a removal order or a
deportation order made against him on a question of law or fact or of mixed law and fact
and "on the ground that, having regard to the existence of compassionate or humanitarian
considerations" he should not be removed from Canada (sections 72(2)(a) and (b) and
72(3)). From all of the above, I can only conclude that the determination by the Minister
that a person is a Convention refugee does not, as urged by applicant's counsel, confer on
that person a status of some undefined nature. It gives him only the rights to which I have
previously alluded. In this case the applicant as a refugee admitted to France can return to
France at least so long as his travel permit, issued by that country to him, is valid.31

This reasoning is indeed consistent with international practice as noted above.

Since Boun-Leua had protection in France, Canada was not constrained from expelling
him pursuant to Article 32 of the Refugee Convention, but could not return him to the
country of persecution.

State practice in Europe indicates that a broad interpretation is being given to the
phrase "lawfully on its territory", so that it includes a refugee claimant who will not be
expelled pending a determination of his or her status unless it can be determined that he
or she poses a threat to national security or public order.32 The sole exception to this rule
involves refugee claimants who have already obtained protection in a third country and
have a right to return there,33 or claimants who have a right to a determination of refugee

31 Supra note 29, paras. 10-11.
32 Supra note 25 at 96-119.
33 "[I]f the authorities of the third State have granted the alien in question refugee status, they have
undertaken under international law to give him the benefits enumerated in the 1951 Convention including
status there.\textsuperscript{34} In Europe, many states' laws do not preclude deportation to a third country where the person has obtained protection, but would still prohibit \textit{refoulement}.

Article 32 does admit of an exception to the rule against non-expulsion in cases involving threats to national security or public order. The concept of "national security" is, of course, a highly discretionary one, and it is generally accepted that it will be within the right of the individual state to determine whether an individual constitutes a threat:

\begin{quote}
\[\text{In view of the fact that it (national security) also constitutes a central part — perhaps the central part — of a domain in which States have been the most unwilling to relinquish their freedom, matters pertaining to national security have largely remained within State discretion . . . The concept of national security will therefore remain somewhat unclear and this means that expulsion of refugees from the state of refuge on grounds of national security will also to a certain extent remain within the discretion of that State. Fortunately States generally seem to have taken the restrictive character of the exception \textit{ad notam} . . . In so far as exceptions based on public order are concerned, in Europe the practice has been to restrict the interpretation of the term so that it will only apply to particularly serious crimes involving drugs and/or violence.}\textsuperscript{35}
\end{quote}

Notwithstanding the general tendency of international law to acknowledge the right of a state to define the parameters of its national security interests, there is jurisprudence from the UN Human Rights Committee which clearly indicates that the concept of national security is subject to limitations, and that the Committee is not prepared to accept the exercise of unlimited discretion by the state when there is evidence that the state is violating international human rights norms. In the case of \textit{Buffo Carballal}
v. Uruguay, the Committee indicated that "general reference to 'subversive activities' does not however suffice to show that the measures of penal prosecution . . . were compatible with the provisions of the Covenant". This is an indication that international law reserves the right to judge the necessity of a measure, taking into account the actual circumstances which exist in the state asserting the need to protect national security.

The current provisions of the Canadian Immigration Act comply to some extent with the requirements of Article 32, although the grounds for expulsion of a Convention refugee are far too broad. A refugee claimant who is found eligible to make a claim to refugee status cannot be expelled from Canada until a final determination is made with respect to the claim. If the claimant is found to be a Convention refugee, he or she has a right to apply for permanent residence, and will be accorded that status unless he or she is found to be a member of the inadmissible classes involving national security, or has been convicted in Canada of an offense for which a sentence of more than six months was imposed or more than five years could have been imposed. A Convention refugee whose application for permanent residence is denied due to criminality or to national security

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37 As we shall see below, certain categories of claimants who have protection elsewhere, who have been rejected under the determination procedure in Canada, or who are determined to be threats to public order or national security, are not eligible to make claims in Canada: see Immigration Act, s. 46.01(1).

38 Pursuant to s. 32.1 of the Immigration Act, if a refugee claimant is ordered expelled from Canada, the order only becomes effective once a negative determination is made with respect to the claim for refugee status. A person who is convicted of serious criminal offenses or is considered a danger to national security can be declared ineligible to make a claim and can then be deported without a determination of refugee status.

39 Ibid., s. 46.04.

40 Ibid., s. 46.04(3).
security concerns can be brought before an immigration adjudicator and ordered deported.\textsuperscript{41}

The effect of these provisions is to subject \textit{Convention} refugees to a risk of expulsion from Canada if they are convicted of relatively minor criminal convictions. In light of the manner in which the term "public order" has been defined in other jurisdictions, the scope of crimes for which a \textit{Convention} refugee can be denied permanent residence so that he or she becomes subject to expulsion is far too broad. There would appear to be no basis for subjecting a \textit{Convention} refugee to expulsion on such grounds and, as noted above, this is inconsistent with state practice in Europe.

Moreover, the \textit{Immigration Act} imposes one other requirement before the refugee can be granted landing: he or she must obtain a passport or other satisfactory identity document.\textsuperscript{42} If a refugee does not obtain a satisfactory identity document, then the application for landing can be refused and the refugee could then become subject to expulsion from Canada, although the authorities could not remove the refugee to the country of persecution. In light of the wording of Article 32 and of the state practice in Europe, there is no justification for subjecting a \textit{Convention} refugee to the risk of expulsion from Canada based merely on the refugee's failure to obtain a satisfactory identity document. It is therefore submitted that this ground for expelling a \textit{Convention} refugee in Canada ought to be reconsidered.\textsuperscript{43}

\textsuperscript{41} \textit{Ibid.}, s. 46.07.

\textsuperscript{42} \textit{Ibid.}, s. 46.04(8).

\textsuperscript{43} There is, of course, a distinction between denying a \textit{Convention} refugee permanent residence status as a result of a conviction or the failure to obtain a satisfactory identity document, and of expelling the individual. The problem, however, is that according to the provisions of the \textit{Immigration Act} as it is currently drafted, if a \textit{Convention} refugee is denied landing, then he or she can be ordered deported from Canada. No doubt there is a discretion vested in immigration officials who can determine whether to
Notwithstanding the fact that Article 32 does have these significant limitations, it has given and continues to give Convention refugees an important measure of protection against expulsion to third countries and, because of the very broad acceptance of the Refugee Convention, has had an extremely important effect on the manner in which states exercise their right to exclude and expel non-citizens.

3.3 ARTICLE 33 PROTECTION AGAINST REFOULEMENT

The Convention protection against refoulement, or deportation to the country where the refugee faces persecution, is of even greater importance to refugees. This protection against refoulement is subject to significant restrictions. First, it applies only to those persons who are determined by the receiving state to be Convention refugees. Second, it does not impose on the state a positive duty to allow the refugee to remain in its territory, but merely requires that the state not expel the refugee to the country where he or she faces persecution; removal to a third country is not prohibited. Finally, the Refugee Convention allows for refoulement in circumstances where there is a strong state interest in expelling the individual.

Since the protection against refoulement only applies to persons who are Convention refugees, the person seeking that protection must first satisfy the state that he or she in fact qualifies for that status. As a preliminary matter, the state must first determine whether the refugee claim will be entertained at all. A state would not violate its obligations under the Convention if it were to deny a refugee claimant a hearing into initiate expulsion proceedings. However, there would appear to be no need to subject a Convention refugee to even the threat of expulsion. There is, of course, an intermediate position whereby a Convention refugee who has been convicted of a minor offense or who has failed to obtain a satisfactory identity document might be denied landing for a period of time, but could only be subject to deportation to a third country if he or she were convicted of a more serious offense.
his or her claim, unless it expelled the claimant back to the country where the person had a well-founded fear of persecution.\textsuperscript{44}

Clearly, if the refugee is already within the territory of the state, his or her claim must be evaluated in some manner prior to any decision to expel. But will a state violate the principle of non-refoulement if it excludes a refugee when he or she presents herself at the border before having been admitted to the national territory? It is now generally accepted by experts and confirmed by state practice that the protection against refoulement will extend to persons who have not yet been admitted to the national territory:

Neither does it seem logical to exclude from protection the (admittedly few) refugees who have not yet succeeded in crossing the frontier line but who stand in danger of being rejected. It is submitted that the main stress should be put on the question of what state possesses territorial jurisdiction over the refugee when the question of rejection comes up. It is clear that the only State which in this situation possesses territorial jurisdiction over the refugee is the country which contemplates sending him back . . . Neither does the practice of individual States differentiate between these two measures of removal in so far as forcible return to the country of persecution is concerned.\textsuperscript{45}

\textsuperscript{44} In some circumstances, it might not be a violation of the \textit{Convention} to remove a person back to a country where there is a risk of persecution without a hearing. This arises as a result of the exclusion clauses, which allow for certain categories of persons to be denied protection as refugees even if they have a well-founded fear of persecution, because their previous conduct makes them unworthy of that protection (see Article 1F of the \textit{Refugee Convention}). Thus if a person had been convicted of a serious non-political offense and were deemed to be a danger to the public, then he or she could be denied access to the refugee determination procedure and deported back to the country of persecution. This is the import of s. 46.01(1)(e) of the \textit{Immigration Act}, which provides that a person is not eligible to make a claim if he or she is convicted of a serious criminal offense and is determined by the Minister to be a danger to the public. The constitutionality of this provision was upheld in the case of \textit{Nguyen v. Canada (Minister of Employment \\& Immigration)}, [1993] 1 F.C. 696. See also \textit{Berrahma v. Canada (Minister of Employment \\& Immigration)}, 132 N.R. 202 (F.C.A.) As was noted by the Federal Court of Appeal in \textit{Nguyen}, however, it is arguable that the removal of such a person, although it does not violate the \textit{Refugee Convention}, violates the \textit{Canadian Charter of Rights and Freedoms}. In addition, s. 46.01(1) sets out other categories of persons who are not eligible to make a refugee claim. These include persons who have been found to be \textit{Convention} refugees in another country and who have a right to return there: s. 46.01(1)(a); persons who have come to Canada through a designated third country: s. 46.01(1)(b), although persons denied a right to claim under this section cannot be returned to a country where they fear persecution (see s. 53(2) of the \textit{Immigration Act}); persons who have been found not to be \textit{Convention} refugees pursuant to the determination procedure in Canada: s. 46.01(1)(c); persons who are members of terrorist organizations and with respect to whom the Minister certifies that it would be contrary to the public interest to have their claim determined; and, pursuant to s. 44, a person against whom an unconditional removal order has been made is ineligible to make a refugee claim.

\textsuperscript{45} Stenberg, \textit{supra} note 25 at 201. The \textit{Canadian Immigration Act} makes no distinction between
The Canadian *Immigration Act* grants a right to make a refugee claim to any person who is physically present in Canada and who is not under a removal order.\(^4^6\) When a person makes a claim, prior to referral to the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB) for a hearing, a senior immigration officer will make a determination as to the person's eligibility to make a claim.\(^4^7\) The *Act* is silent as to what procedural protections the claimant is entitled at the eligibility interview. In practice, the determination by the senior immigration officer does not involve a formal hearing with a right to counsel. In some cases, the determination is made right after arrival at a port of entry so that the claimant has no opportunity to seek or obtain legal advice. No legal aid is provided for the eligibility interview. An interpreter is provided if necessary so as to ensure that the person understands the nature of the proceedings.

The apparent rationale justifying such an important determination in such a highly administrative fashion without any procedural protection is that the decision is a simple factual one. In some cases, however, complex legal issues arise so that a more formal hearing process would be more appropriate, but the current scheme does not provide for persons who have been admitted and those who are seeking admission insofar as the protection against *refoulement* is concerned. A related question is whether a state will violate the protection against *refoulement* if it interdicts a person prior to arrival at the frontier. As noted earlier, there is jurisprudence that strongly suggests that such a practice is inconsistent with Article 33 of the *Refugee Convention*. In the United States, a distinction is made between the procedures applied to stowaways on ships and those used to process other refugee claimants. With respect to the former group, American immigration law provides for a preliminary interview to be conducted by an immigration officer, who determines whether there is a *prima facie* case, before the stowaway is allowed access to the refugee determination process; see A.O. Beate, "Comment: International and U.S. Obligations toward Stowaway Asylum Seekers"(1991) 140 U. Pa. L. Rev. 285.

\(^{46}\) *Immigration Act*, s. 44.

\(^{47}\) *Ibid.*, s. 45. In cases where the person's ineligibility to make a claim is based on allegations that he or she has committed criminal offenses or is a threat to national security, the determination as to whether the person falls within these categories is made by an immigration adjudicator.
the person found to be ineligible to make a claim may be deported from Canada seven days after that determination — further militate in favour of a more formal and procedurally fair process.\footnote{A claimant will be found to be ineligible, for example, if he or she has recognition as a \textit{Convention} refugee in another country and can be returned there. Issues of recognition elsewhere or right to return can often be difficult and controversial, and in these circumstances such a highly administrative process without safeguards is inappropriate.}

A person physically present in Canada is eligible to have his or her refugee claim heard unless he or she has been recognized as a \textit{Convention} refugee elsewhere and has a right to return there;\footnote{\textit{Immigration Act}, s. 48(1)(e). A person can seek leave to commence an application for judicial review but this will not have the effect of staying the deportation order. If a person found ineligible wishes to challenge his or her deportation, then a stay of deportation must be sought.} the claimant came to Canada through a country which has been designated as a country which complies with Article 33 of the \textit{Refugee Convention} and the claimant can be returned to that country;\footnote{\textit{Ibid.}, s. 46.01(1)(a). If found ineligible on this ground, the person cannot be deported back to the country where he or she fears persecution: s. 53(1).} or the claimant has been convicted of an indictable offense punishable by more than ten years of incarceration and is designated by the Minister to be a danger to the public, or is found to be a danger to national security.\footnote{\textit{Ibid.}, s. 46.01(1)(b). Section 46.03 provides that if a person has been found ineligible to make a claim due to his or her having come to Canada through a third country, then, if the person cannot be removed to the third country, he or she will be eligible to make a claim.}

Although these provisions formally meet Canada’s obligations under the \textit{Refugee Convention}, the complete lack of any procedural rights in the eligibility process is of
great concern as it can result in grave injustice. Moreover, as I will argue below, the
grounds for permitting refoulement as provided in section 46.01(1)(e) are far too broad
because, as a result of conviction for relatively minor offenses, a person can be sent back
to a country where he or she is at risk of persecution.

Some European states have introduced special expedited procedures at airports
and other ports of entry that allow claimants to be turned away summarily. Thus the
French Government has enacted regulations that provide that only persons who have been
granted leave to enter France can make asylum claims. Persons arriving at an airport who
seek asylum, however, can be denied leave to enter if they have false travel documents.
Decisions to deny to asylum-seekers leave to be admitted to French territory can only be
made by the Minister of the Interior after consultation with the Minister of Foreign
Affairs. 53 Persons denied leave cannot, however, be returned directly to the country where
they allege a fear of persecution. In the decision of the European Court of Human Rights
in Amuur, 54 the petitioners, citizens of Somalia, arrived in France with false passports and
sought asylum. They were denied leave to enter because of the false documents and were
held in detention within the confines of the so-called “international zone” at the airport.
The decision to deny leave to enter was upheld by the Minister of the Interior, who had
received assurances that the asylum-seekers would be able to return to, and receive
protection in, Syria. Some 20 days after arrival the petitioners were deported to Syria,
where they were ultimately accepted as refugees. The petitioners alleged before the

53 This procedure is discussed in the decision of the European Court of Human Rights in the case

54 Ibid.
European Court that their right to liberty had been violated as a result of their being held in the "international zone" for such a lengthy period. The Court agreed, concluding, first, that such a detention was a deprivation of liberty and that, under the circumstances, it was unlawful:

The Court emphasises that from 9 to 29 March 1992 the applicants were in the situation of asylum-seekers whose application had not yet been considered... At the material time none of these texts allowed the ordinary courts to review the conditions under which aliens were held or, if necessary, to impose a limit on the administrative authorities as regards the length of time for which they were held. They did not provide for legal, humanitarian and social assistance, nor did they lay down procedures and time-limits for access to such assistance so that asylum-seekers like the applicants could take the necessary steps. The French legal rules in force at the time, as applied in the present case, did not sufficiently guarantee the applicants' right to liberty.35

In Amuur, the lack of procedural rights in the context of a situation where the refugee claimant was being expelled to a supposedly safe third country was seen as a violation of the European Convention. In light of the proliferation of rules restricting access of asylum-seekers to the refugee determination procedure in Western countries, this ruling is significant because it concludes that states are required to guarantee asylum-seekers minimum protections, including the rights to counsel, social assistance, and judicial review of decisions to detain persons in the so-called international zones while their eligibility to enter the country and make a claim is being assessed.37

Even though a country cannot arbitrarily deny a person a right to make a claim for asylum upon arrival, Western European countries have placed certain obstacles in the way of asylum-seekers in response to the large number of claims that are being

35 Ibid., paras. 53-54.

36 The ruling, of course, is only binding on European countries who are subject to the jurisdiction of the European Court of Human Rights.

37 As noted above, this is in sharp contrast to the situation in Canada where there is no right to counsel or publicly funded legal representation prior to a decision being reached on questions of eligibility. It should be noted that there was no allegation in Amuur that France had breached the Refugee Convention,
submitted. The so-called “safe-third-country rule” has been implemented. The rule provides that a person who comes to a country and claims refugee status after passing through a third country can be returned to the third country, if that country will ensure that the person’s claim for asylum will be heard prior to any decision being taken concerning return to the country where the claimant fears persecution. However, in

because the petitioners were not returned to their country of nationality but rather to a third country, Syria, which had guaranteed to give them protection.

Although s. 46.01(1)(b) of the Canadian Immigration Act allows the Minister to designate so-called safe third countries, no such country has been designated.

As noted in the preceding chapter, there is some dispute as to whether a state can turn a person away prior to the person’s arrival at its borders. In the Haitian Refugee Case (Sale v. Haitian Centers Council, 113 S. Ct. 2549 (1993)), the United States Supreme Court upheld an order which allowed the Coast Guard to intercept ships containing Haitians seeking to reach the United States shore in order to claim refugee status. The Court concluded that such conduct was not a violation of national or international law. However, the Inter-American Commission considered the same issue and concluded that such conduct did violate international law. The basis for the conclusion was that the Haitians were being returned directly to Haiti without any consideration as to whether they were at risk of persecution. See The Haitian Centre for Human Rights et al. v. United States, Case 10.675, Report No. 51/96, Inter-Am. Comm. H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997). In the United Kingdom, the House of Lords has also held that the so-called safe third country provisions are acceptable but only if they provide safeguards to ensure that the person is not returned directly to the country of persecution without a hearing. In Canada, the issue has not yet been tested. Section 46.01(1)(b) of the Immigration Act provides that a person who has come to Canada through certain designated third countries (no countries have yet been designated as such) can be denied a refugee determination hearing in Canada, and can be returned to that country and required to make a claim there. It is certainly arguable that, unless there are strong protections which would ensure a fair determination in the country to which the person is being sent, any provision denying a right to a hearing in Canada would be subject to challenge under the Charter. It is clear, however, that some sections of the Immigration Act which deny eligibility to make a claim do not violate the Charter. The Canadian third-country provision echoes similar enactments in Europe, designed to prevent so-called “asylum shopping”. For example, s. 2 of the British Asylum and Immigration Act 1996 states as follows:

(1) Nothing in section 6 of the 1993 Act ... shall prevent a person who has made a claim for asylum being removed from the United Kingdom if
(a) the Secretary of State has certified that, in his opinion, the conditions mentioned in subsection (2) below are fulfilled;
(b) the certificate has not been set aside on an appeal under section 3 below; and
(c) except in the case of a person who is to be sent to a country or territory to which subsection (3) below applies, the time for giving notice of such an appeal has expired and no such appeal is pending.

(2) The conditions are
(a) that the person is not a national or citizen of the country or territory to which he is to be sent;
(b) that his life and liberty would not be threatened in that country or territory by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and
order for the person to be returned to the third country, there must be a clear indication that the third country will comply with its obligations under the Convention.

In Adan v. Secretary of State for the Home Department, the English Court of Appeal quashed a decision of the Secretary of State to expel a refugee claimant to France without a hearing. The evidence before the Court indicated that France interpreted the Convention refugee definition in such a manner as to exclude claims where the agents of persecution were non-state actors. The Court concluded that such an interpretation was contrary to the Convention and that, as a result, the evidence before the Court did not indicate that France would comply with its obligations under the Convention insofar as it applied to the appellant. In the result, in the particular circumstances of the case, France could not be considered a "safe third country" and the claimant was entitled to a determination of his claim in the United Kingdom.

(c) that the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention.

(3) This subsection applies to any country or territory which is or forms part of a member State [sc. of the European Union], or is designated for the purposes of this subsection in an order made by the Secretary of State by statutory instrument.

[1999] E.W.J. No. 3793, FC3 1999/6323/4, QBCOF 1999/0082/4, QBCOF 1999/6078/4, QBCOF 1999/0040/4, England and Wales Court of Appeal (Civil Division), 23 July 1999. Interestingly enough, in the case of Regina v. Secretary of State for the Home Dept. and another, [1996] H.L.J. No. 1, February 15, 1996, the majority (three-to-two) of the House of Lords concluded that the filing of a certificate signed by the Home Secretary before a special adjudicator that the third country complied with the Convention, was sufficient evidence that the country was safe and that a person could be removed there without violating the Convention. The dissenting Lords argued that the special adjudicator was required to make his or her independent decision based on evidence, and that the certificate in and of itself was not sufficient to warrant such a conclusion.

60 Ada, ibid. at paras. 66-67. See also the decision of the Inter-American Commission for Human Rights in the The Haitian Centre for Human Rights et al. v. United States, supra note 59, where the Commission concluded that the interdiction of ships containing Haitian refugee claimants and their forcible return to Haiti without any examination of the merits of the claim violated international law.
The Court noted, however, that this finding would only apply in situations where the evidence disclosed that the receiving state was not properly interpreting the Convention, but would not apply in cases where the evidence suggested merely that there was a difference in acceptance rates. The Court concluded that the third-country rule per se does not violate the protection against refoulement because there is an undertaking given by the country to which the refugee is expelled that it will properly examine the merits of the claim.

If a claimant overcomes the third-country rule, or is returned to a third country where the claimant is found to be eligible to make a claim, the state must then determine whether the person is in fact a Convention refugee. This requires that the state implement some form of procedure to determine the validity of the claim.\(^2\) Since 1989, the refugee

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\(^2\) The procedures used to determine whether a person is entitled to protection as a Convention refugee vary widely. The United Nations High Commissioner for Refugees (UNHCR) *Handbook on Procedures* sets out the suggested procedure to be employed:

189. It is obvious that, to enable States parties to the Convention and to the 1967 Protocol to implement their provisions, refugees have to be identified. Such identification, i.e., the determination of refugee status, although mentioned in the 1951 Convention (Art. 9), is not specifically regulated. In particular, the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.

190. It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation . . . His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs . . .

192. In view of this situation and of the unlikelihood that all States bound by the 1951 Convention and the 1967 Protocol could establish identical procedures, the Executive Committee of the High Commissioner's Programme, at its twenty-eighth session in October 1977, recommended that procedures should satisfy certain basic requirements. These basic requirements, which reflect the special situation of the applicant for refugee status, to which reference has been made above, and which would ensure that the applicant is provided with certain essential guarantees, are the following:

(i) The competent official (e.g., immigration officer or border police officer) to whom the applicant addresses himself at the border or in the
determination procedure in Canada involves a hearing before a quasi-judicial tribunal, the CRDD of the IRB. The claimant has a right to an oral hearing, to present evidence, to be represented by legal counsel, and to written reasons for the decision rendered by the tribunal.

When assessing the *bona fides* of the claim, the state must consider whether the person fits the definition of a refugee as set out in Article 1A of the *Convention*. In essence, the person must show a "well-founded" fear of persecution for one of the *Convention* reasons. The "well-founded" component of the definition requires that the claimant satisfy the decision maker that there is an objective basis to the claim. There is a broad consensus that the standard to be applied is a very low one, and that a claimant

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territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority.

(ii) The applicant should receive the necessary guidance as to the procedure to be followed.

(iii) There should be a clearly identified authority — wherever possible a single central authority — with responsibility for examining requests for refugee status and taking a decision in the first instance.

(iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.

(v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.

(vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.

(vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.

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63 *Immigration Act*, s. 69.1.
ought to be granted *Convention* refugee status if the claimant could demonstrate anything more than a mere possibility that he or she would suffer protection. In Canada this formulation was accepted by the Federal Court of Appeal in the case of *Adjei*.

If a person is found to be a *Convention* refugee, the state is not obligated under the *Convention* to grant asylum, but is only required to protect the refugee against *refoulement*. Thus, the state can expel the alien to a third country without violating the *Convention*. However, if the evidence suggests that there is a significant possibility that the third country will not protect the refugee against *refoulement*, then the decision to expel the refugee there will violate the *Convention*. As Canada has not yet implemented the third-country rule, the question of the rule’s legality has yet to be tested. However, in the United Kingdom, the Courts have accepted this rule, subject to the proviso that there be sufficient evidence that the person will be afforded protection in the third country. This was the conclusion of the House of Lords in the case *Bugdacay*, where the Court concluded that the United Kingdom was violating the protection against

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65 A person fleeing persecution is granted asylum if she is permitted to remain indefinitely in the receiving country. The *Refugee Convention* does not obligate a state to grant asylum, but merely to not *refoule* a refugee. As noted above, removal to a third country is not a violation of the *Convention*.

66 Given that in many circumstances the only country to which a person can be expelled is the country of nationality, when a state determines that a person is a *Convention* refugee, it may well have to provide asylum at least for a temporary period in order to avoid violating the principle of non-*refoulement*.

67 The third-country provisions would come under section 7 *Charter* scrutiny. It is certainly arguable that a person could not be denied a hearing pursuant to the third-country provisions unless there was clear evidence that the person would be entitled to a fair hearing of the refugee claim in the third country. Otherwise, the person would be put at risk of *refoulement* in violation of Article 33 of the *Refugee Convention* and of section 7 of the *Charter*. 
refoulement when it purported to remove a Convention refugee to a third country, without having satisfactory evidence that the refugee would be given protection there:

The troublesome question is how far the provisions of the Convention, to the extent that they are incorporated in the relevant immigration rules, should be regarded as prohibiting the removal of a person who is a refugee from the country of his nationality to a third country in the face of an alleged danger that the authorities in that third country will send him home to face the persecution he fears.

My Lords, I can well see that if a person arrives in the United Kingdom from country A claiming to be a refugee from country B, where country A is itself a party to the Convention, there can in the ordinary case be no obligation on the immigration authorities here to investigate the matter. If the person is refused leave to enter the United Kingdom, he will be returned to country A, whose responsibility it will be to investigate his claim to refugee status and, if it is established, to respect it... It is not, however, difficult to imagine a case where reliance on the international practice would produce the very consequence which the Convention is designed to avoid, i.e. the return of refugees to the country where they will face the persecution they fear. Suppose it is well known that country A, although a signatory to the Convention, regularly sends back to its totalitarian and oppressive neighbour, country B, those opponents of the regime in country B who are apprehended in country A following their escape across the border. Against that background, if a person arriving in the United Kingdom from country A sought asylum as a refugee from country B, assuming he could establish his well-founded fear of persecution there, it would, it seems to me, be as much a breach of Article 33 of the Convention to return him to country A as to country B. The one course would effect indirectly, the other directly, the prohibited result, i.e. his return “to the frontiers of territories where his life or freedom would be threatened”.

The protection against refoulement is not unqualified and the Convention does allow for the refugee to be refouled if the person has been convicted of a particularly serious non-political crime, and constitutes a danger to the public order or to the security of the country of refuge. The Convention leaves it to each contracting party to determine whether the exception set out in Article 33(2) applies. However, state practice and the wording of the exception itself provide important indications as to how these exceptions ought to be interpreted. It is thus clear that the phrase “danger to the security of the country” must be interpreted in a more restrictive manner than that of “national security” used in Article 32. Although matters of national security, as noted above, are generally

within the discretion of the state, the express wording of the exception in Article 33 must mean “that solely refugees who seriously threaten the foundations of the State or even its existence can be forcibly returned to a country of persecution”.\(^6^9\)

With respect to the exception for persons who have been convicted of a particularly serious crime, the interpretation of the UNHCR is instructive:

Repatriation must only be applied as last resort where no other measures appear to be possible to prevent the person from endangering the community . . . The offense must normally be a capital crime (murder, arson, rape, armed robbery, etc.), but it is not possible to establish a list of such crimes because according to general principles of criminal law not the crime but the criminal must be punished. Only where one or several convictions are symptomatic of the basically criminal incorrigible nature of the person and where any other measure (detention, assigned residence, resettlement in another country) are not practical to prevent him from endangering the community may repatriation be resorted to.\(^7^0\)

In contrast to this position, the threshold for refoulement in Canada is very low and a refugee can be subjected to it if he or she is convicted of a crime punishable by ten or more years of imprisonment, and the Minister certifies the person as a danger to the public.\(^7^1\) A large number of non-violent property crimes are punishable by ten or more years of imprisonment.

\(^6^9\) Stenberg, supra note 25 at 220. At 221, Stenberg notes that in Europe this exception to refoulement is rarely invoked.

\(^7^0\) As quoted in Stenberg, ibid. at 227. At 243, Stenberg notes that practice in Europe conforms to this statement.

\(^7^1\) See Immigration Act, s. 53(1) which states that

[n]o person who has been determined under this Act or the regulations to be a Convention refugee . . . shall be removed from Canada to a country where the person’s life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless the person is a member of the inadmissible class described in paragraph 19(1)(c) or 19(1)(c.1) [these paragraphs deal with persons who have been convicted of indictable offenses punishable by ten or more years of imprisonment] and the Minister is of the opinion that the person constitutes a danger to the public in Canada; or unless the person is a member of the inadmissible class described in paragraph 19(1)(e) or 19(1)(f), (g), (j), (k), (l) [these paragraphs deal with persons who have been found to be members of “terrorist” organizations] and the Minister is of the opinion that the person constitutes a danger to the security of Canada.

In the United States the threshold for withholding of asylum is also very low: see K.B. Rosati, “The United Nations Convention against Torture: A Self-Executing Treaty That Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal", 26 Denver J. Int’l L. & Pol’y 533, where the
years of imprisonment, so that the net cast is very broad. Moreover, the provision merely requires the Minister to form an opinion as to whether the Convention refugee constitutes a danger to the public or security of Canada. Since the Act does not prescribe a procedure to be followed in determining whether the person shall be subject to refoulement, that procedure and the ultimate decision are left entirely to the discretion of the Minister.\(^{72}\)

According to the administrative procedure devised by the Minister of Citizenship and Immigration, a notice is sent to the refugee advising that the Minister will be requested to make an adverse determination that can potentially subject the refugee to refoulement. The notice invites submissions to be made within fifteen days. Once the submissions have been received and considered, officials in the Minister's office make a recommendation to the Minister or Minister's delegate, who then renders a decision. The refugee is not apprised of the recommendation nor provided with the underlying reasons for it.\(^{73}\) Once the determination is made, however, the refugee can be removed to the

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\(^{72}\) The Immigration Act itself does not provide for any procedure whereby the Minister determines whether to subject a refugee to refoulement. The Act merely provides that a Convention refugee can be subject to refoulement if certain conditions are met — one being a finding that the person is inadmissible to Canada due to criminality or national security concerns, and the second being a certification by the Minister. The Government has created an administrative procedure whereby the refugee is served with a notification in writing by immigration officials that they will be seeking certification from the Minister to allow for refoulement. The refugee is given 15 days to make submissions to the Minister. The matter is then put before the Minister or a Ministerial delegate for a decision. Senior officials of the Immigration Department in Ottawa make a recommendation to the Minister's delegate, which is not shared with the refugee prior to the rendering of a decision. Moreover, the Minister's delegate is not required to give reasons for the decision. The question as to whether this procedure is constitutionally valid remains unresolved. In Williams v. Canada (Minister of Citizenship & Immigration), [1997] 2 F.C. 646 (C.A.), the Federal Court of Appeal upheld this procedure as it was applied to permanent residents. Subsequently, however, the Supreme Court of Canada in Baker, supra note 2, concluded with respect to a similar type of decision-making process that reasons are required and that there is a high duty of fairness that attaches to the decision-making procedure. In light of Baker, it is certainly doubtful that the current procedure will withstand future judicial scrutiny. See also Farhadi v. Canada (Minister of Citizenship & Immigration), IMM-3846-96, March 20, 1998, F.C.T.D.

\(^{73}\) It is certainly arguable that this procedure does not comply with the requirements of fairness or fundamental justice, especially in light of the decision in Baker, supra note 2. In Baker, the Supreme Court
country where he or she faces persecution. In light of the very broad legislative criteria that can form the basis for a decision to refoule, and the highly discretionary procedure that provides the refugee facing removal to a country of persecution with very limited substantive or procedural safeguards, there is a significant risk that persons can be subject to refoulement in circumstances where this is not warranted.

Clearly, then, the protection against refoulement is subject to serious limitations. Yet there is no doubt that the Refugee Convention and its Protocol have had a profound impact on the attitude and practice of states vis-à-vis exclusion and expulsion of non-citizens. Given the almost universal adherence to the Refugee Convention, most states have implemented some form of determination procedure to determine the bona fides of refugee claims. Claimants are usually allowed to remain inside the territory of the receiving state until a determination is made. If a positive decision is rendered, the refugee will be given some form of temporary or permanent status, which usually includes a right to work, a right of access to social programs, and a right to a travel

held that immigration officers rendering decisions with respect to applications on humanitarian grounds are required to give reasons and are subject to the requirement that they act with a high degree of fairness. As noted above, it is unlikely in view of Baker that the current procedure will withstand future judicial scrutiny. The procedure is also suspect because it requires that the Minister form a subjective opinion concerning danger to the public, as opposed to making an objective determination. In light of the potential consequences to the refugee, it is certainly arguable that he or she should have far greater procedural rights before a decision to refoule him or her is made.

74 The question of whether a person can be returned to a country where there is a risk of torture is, of course, a separate one. There is currently conflicting jurisprudence on this point in the Federal Court of Canada. In Farhadi, supra note 72, Mr. Justice Gibson concluded that removal back to torture violated section 7 of the Charter. In the Ontario Court-General Division in the case of Suresh v. Canada, 49 C.R.R. (2d) 131, Mr. Justice Lane took a similar approach. However, in Suresh v. Canada (Minister of Citizenship & Immigration), IMM-117-98, June 11, 1999, F.C.T.D., Mr. Justice McKeown reached the opposite conclusion. For a discussion of the Federal Court of Appeal decision in Suresh see note 94, infra.

75 In Canada, the practice has been to allow persons who are accepted as Convention refugees to apply for permanent residence: see Immigration Act, s. 46.04. In Europe, the practice has been to grant refugees temporary status with a right to work.
document.\footnote{The \textit{Refugee Convention} provides that states must afford certain rights to refugees who are allowed to remain on their territory.} Even though the \textit{Convention} does allow for \textit{refoulement} in certain circumstances, and despite the lack of safeguards found in the procedure invoked by some states in determining whether to \textit{refoule} a \textit{Convention} refugee, the instances of \textit{refoulement} are still relatively few. There is therefore little doubt that the \textit{Refugee Convention} has had a profound, dramatic impact on states' rights over exclusion and expulsion of non-citizens.\footnote{Ironically enough, the success of the \textit{Refugee Convention} as a means of providing protection against expulsion and \textit{refoulement} has resulted in states taking measures to limit its impact on their power to control their borders. Efforts to ensure that refugees make claims in the first country of refuge, and efforts at controlling irregular movements have become the hallmark of international refugee policy in recent years as states attempt to cope with the large number of refugee claimants seeking asylum in Western countries.}

3.4 \textbf{Prohibition against Removal Back to Torture and Cruel, Inhuman or Degrading Treatment}

While the obligation to refrain from returning a person to a country where he or she would face torture or cruel or inhuman treatment is now a part of customary international law, the duty also arises as a result of treaty obligations. Indeed, its status as the law in widely ratified treaties assists in establishing its customary pedigree. Given that the status of customary international law as part of domestic law will vary from state to state, it is also important to analyze this obligation within the scope of the discussion on convention law. The ICCPR,\footnote{\textit{Supra} note 2, para. 7.} the \textit{Convention against Torture},\footnote{\textit{Supra} note 2, Art. 3.} and the \textit{European Convention}\footnote{\textit{Supra} note 9.} all contain provisions which prohibit torture and cruel or inhuman treatment and which,
either implicitly or explicitly, prohibit removal of a person back to a country where he or she faces a serious risk of such treatment.81

In Canada, an assessment of whether a person is at risk of torture or other forms of cruel, inhuman, or degrading treatment is usually done within the context of a claim to refugee status. A person who asserts a claim must demonstrate a well-founded fear of persecution for one of the reasons set out in the Refugee Convention. As persecution has been interpreted to encompass threats to life, liberty, and other serious human rights violations,82 the concept is similar, if not identical, to a fear of torture or other forms of cruel, inhuman, or degrading treatment prohibited under the international human rights treaties.

There are, however, many situations where persons in Canada who assert such a fear will not have their claims evaluated under the refugee determination procedure. Such situations can arise if the person is found ineligible to make a claim to refugee status; if the person asserts such fear after being ordered to leave the country;83 if the person is excluded from the Convention Refugee definition pursuant to Article 1F;84 if the reason

81 As we shall see in this section, the prohibition is stated explicitly in the Convention against Torture but has been inferred by the European Court of Human Rights and the UN Human Rights Committee.

82 In the leading case of Rajudeen v. Canada (Minister of Employment & Immigration), 55 N.R. 129 at 133 (F.C.A.), the Court relied on the dictionary definition of persecution to conclude that it encompassed "a particular course or period of systematic infliction of punishment . . . persistent injury or annoyance". The concept of persecution as interpreted by the jurisprudence in Canada includes physical abuse, even if connected to national security measures (see Thirunavukkarasu v. Canada (Minister of Employment & Immigration), 109 D.L.R. (4th) 682 (F.C.A.)) and can include cumulative harassment: see Madelat v. Canada (Minister of Employment & Immigration), A-537-89, January 28, 1991 (F.C.A.). The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, at paras. 51-54, states that threats to life or freedom or other serious violations of human rights would constitute persecution.

83 If a person has been ordered deported from Canada pursuant to s. 44 of the Immigration Act, he or she will not be eligible to make a claim to refugee status.

84 Article 1F of the Refugee Convention provides that persons who have committed serious non-political crimes outside the country of refugee (1F(b)); war crimes or crimes against humanity (1F(a)); or
for the fear of cruel or inhuman treatment falls outside the parameters of the grounds set out in the *Convention Refugee* definition;\(^5\) or if there is a change in circumstances in the country of the person’s nationality after the CRDD has rendered its decision.\(^6\)

The Government of Canada has yet to create a formal procedure for persons who assert a fear of torture or other forms of cruel or inhuman treatment outside the refugee determination process so that they could seek protection under the *Convention against Torture*. After it acceded to the *Convention against Torture*, the Canadian Government introduced the Post-Determination Refugee Claimants in Canada (PDRCC) class, indicating that this program was intended to ensure Canada’s compliance with the *Convention against Torture*.\(^7\) These regulations allow rejected refugee claimants to apply for a review of the consequences that might accrue if they were deported to their country of nationality. The process is initiated by submitting a formal application to an immigration officer within fifteen days of being notified that the applicant’s claim to refugee status has been refused.

The applicant has a right to make submissions within thirty days of submitting the

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\(^5\) The *Convention* refugee definition requires that a claimant demonstrate a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion. The person must demonstrate a link between the persecution and these reasons and, if no link is established, the claim will be rejected. Thus, for example, in *Riskallan v. Canada (Minister of Employment & Immigration)*, A-606-90, May 6, 1992, the Federal Court of Appeal upheld a decision of the CRDD rejecting a claim to refugee status based on its conclusion that the risk to the claimant was a result of the general civil war situation.

\(^6\) The Federal Court has held that the CRDD does not have jurisdiction to reopen a refugee hearing in order to receive evidence of changed country conditions after the decision has been rendered. See, for example, *Longia v. Canada (Minister of Employment & Immigration)*, A-1058-90, September 23, 1991 (F.C.A.).

\(^7\) See *Immigration Act*, s. 114(2). In addition, as we shall see below, section 7 of the *Charter* will come into play and may impact on Canada’s right to deport persons back to torture.
PDRCC application. The application and submissions are reviewed by an immigration officer, who also considers the CRDD’s decision on the refugee claim as well as country documentation concerning the human rights situation in the applicant’s country of nationality. No oral hearing is held, and the applicant does not have the benefit of a quasi-judicial process. Moreover, the officer is entitled to draw negative inferences from adverse credibility findings made by the refugee tribunal. Although the immigration officer’s decision on a PDRCC application is subject to judicial review, the Federal Court takes the standard of review to be that of “patent unreasonableness”, implying a high degree of deference to the immigration officer.88

A significant and serious limitation of the PDRCC procedure is the fact that it is only open to some rejected refugee claimants. Persons who were excluded from protection under the Refugee Convention due to a finding that they committed war crimes, crimes against humanity, or serious non-political crimes;89 those who were made subject to removal orders before they asserted a fear of torture; and those deemed ineligible to make a claim due to criminal convictions or due to the fact that they are considered a danger to national security, have no access to the PDRCC procedure. This suggests that the Government of Canada subscribes to the view that it can remove such persons back to a country where there is a substantial risk of torture, despite the express prohibition of such an act under the Convention against Torture.90 Moreover, once a

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88 However, in light of the recent decision of the Supreme Court in Baker, supra note 2, it is now arguable that the standard of review is more exacting so that the Courts will have wider scope to review decisions made under the PDRCC regulations.

89 Under Article 1F of the Refugee Convention.

90 This is the necessary implication of the procedures which exclude from the ambit of the PDRCC regulations persons who are certified as a danger to the public pursuant to section 46.01(1) and who are
decision is rendered, it is final, so that if there is a change in country conditions after the
decision this cannot be considered by the PDRCC officer.

In addition to the PDRCC procedure, a person can also make an application for
consideration on humanitarian and compassionate (H&C) grounds. This procedure is
available to all persons physically present in Canada and involves a submission of a
written application to an immigration officer. The officer need not hold an interview, but
must provide reasons for his or her decision and must comply with the duty of fairness.\textsuperscript{91}
The effectiveness of this procedure as a remedy to persons asserting a risk of torture or
cruel or inhuman treatment is very limited, because the application does not defer
removal and the decision is left to the \textit{discretion} of the immigration officer. It is
submitted that, if there is a right to be protected against torture or cruel or inhuman
treatment, this cannot be a matter of discretion but rather constitutes an obligation on the
part of the state.

There is one other remedy available to persons in Canada who assert a risk of
torture or other forms of cruel and inhuman treatment upon removal to their country of
nationality, and this is an application for judicial review challenging the decision to
execute the deportation order based on section 7 of the \textit{Charter}.\textsuperscript{92} The applicant could
argue that the execution of the removal order would result in her being put at risk of
torture in violation of section 7.

\textsuperscript{91} \textit{Baker, supra} note 2.

\textsuperscript{92} The possibility of such a challenge has been acknowledged by the Federal Court of Appeal; see
\textit{Barrera v. Canada (Minister of Employment & Immigration)}, [1993] 2 F.C. 3, and \textit{Nguyen, supra} note 44.
The principle that the Charter precludes removal of a person to torture has been accepted by the Canadian courts to some extent, although the jurisprudence remains mixed. Thus in the case of Farhadi, the Federal Court-Trial Division concluded that removal back to torture would be a violation of section 7 of the Charter. This was reiterated by Mr. Justice Lane of the Ontario Court-General Division in the case of Suresh. However, when Suresh was heard in the Federal Court-Trial Division, Mr. Justice McKeown dismissed an application for judicial review of the decision to refoule the applicant, a Convention refugee, back to his country of nationality. His Lordship

93 Supra note 72.

94 Suresh (Ontario Court-General Division), supra note 74. His Lordship, however, was only dealing with an application for an interlocutory injunction. The matter had been brought in the Ontario Court after Madam Justice Tremblay-Lamer of the Federal Court-Trial Division had dismissed a stay of deportation: see Suresh v. Canada (Minister of Citizenship & Immigration), IMM-117-98. After Mr. Justice Lane granted the interim injunction, he directed that the matter be dealt with in the Federal Court. As a result, all subsequent proceedings have been heard in the Federal Court.

95 Suresh (Federal Court-Trial Division), supra note 74. After the submission of this thesis to satisfy the requirements for the L.L.M. degree, but prior to its publication, the Federal Court of Appeal rendered its decision in Suresh v. Canada (Minister of Citizenship & Immigration), [2000] F.C.J. No. 5 (QL), Court File No. A-415-99, January 18, 2000. The Court concluded that Article 3 of the Convention against Torture did not preclude the deportation of a person back to a country where there was a substantial risk of torture in all circumstances. This rather remarkable conclusion stands alone in the jurisprudence and is inconsistent with all of the decisions of the Committee Against Torture, the European Court of Human Rights, and the UN Human Rights Committee. The Court concluded that the Convention against Torture had to be considered in the light of other conventions and especially in the light of the Refugee Convention of 1951, and attempted to reconcile the two instruments by interpreting the Convention against Torture as being subject to the provisions of the Refugee Convention. As Article 33 of the Refugee Convention allowed refoulement, Article 3 of the Convention against Torture should be similarly interpreted. Such an interpretation ignores the fact that human rights treaties and protection are constantly evolving in favour of providing greater protection for human rights, so that the Convention against Torture, which was enacted some 35 years after the Refugee Convention, should not be given a restrictive interpretation by reference back to that Convention. Moreover, such an interpretation also fails to give sufficient weight to the purpose of the Convention against Torture, which is to protect human rights and eliminate torture. A plain reading of the Convention against Torture indicates that the drafters placed such a high priority on the elimination of torture as to conclude that the right to be protected against torture must take precedence over issues of extradition and expulsion. The Court also referred to Article 16 of the Convention against Torture to support its contention that the Convention does not preclude expulsion to torture. Article 16, however, is a residual clause, and it is inconsistent with the basic principles of interpretation of human rights treaties to use a residual clause to limit human rights protection. This is particularly true given that the purpose behind Article 16 is to ensure that the Convention against Torture does not limit the rights afforded under other treaties that provide greater protection. Given this, the reading by the Federal Court of Appeal that Article 16(2), which provides that the Convention against Torture will apply without prejudice to national or
concluded that Suresh had not met the burden of proof required to demonstrate that there were substantial grounds to believe that he would face torture.\(^6\) He also held that the state had a right to balance the risk of torture against the risk to state security, and that section 7 would not automatically be violated if a person were to be sent back to a country where there was a substantial risk of torture.\(^7\)

In both *Furhadi* and *Suresh*, the procedure used to challenge the decision to deport was an application for judicial review. Neither Farhadi nor Suresh had a hearing where any evidence of risk they might have presented could have been evaluated in a quasi-judicial setting.\(^8\) This absence of a fair hearing to determine issues of risk involving non-refugees is of great concern, but there are strong indications that this lack

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\(^6\) As noted above, this high onus is not consistent with international jurisprudence.

\(^7\) Of particular note on this point is the decision of Madam Justice Sharlow in the case of *Fabian v. Canada (Minister of Citizenship & Immigration)*, IMM-2394-99, November 12, 1999. In this case, the Court noted that the immigration officials had concluded that the applicant, a *Convention* refugee, would likely face torture if returned to Sri Lanka. Sharlow J. further noted that there was a serious issue with respect to whether it would be a violation of the *Charter* to send the applicant back to a country where he faced torture. Notwithstanding this finding, Her Ladyship dismissed the stay of deportation and ordered that the applicant be returned to Sri Lanka, because she concluded that the public interest in deporting him outweighed any private interest. This is clearly inconsistent with the *Convention against Torture*.

\(^8\) Suresh had been accepted as a *Convention* refugee and therefore had a well-founded fear of persecution in his country of nationality. The only risk assessment performed prior to removal was done in the context of the procedures leading to the issuance of a danger-to-the-public opinion (see text accompanying notes 71-74, above). Farhadi had been found to have a "credible basis" to his claim (this procedure, whereby a determination of a *prima facie* case was made, was abolished in 1993), but was determined to be ineligible to make a claim as a result of criminal convictions. As such, the only assessment of risk in his case was the danger opinion.
of procedural fairness will be found to be a violation of the Charter. The dicta of Mr. Justice Cory of the Supreme Court of Canada, although obiter in the case of Pushpanathan, is directly on point:

In the context of the present appeal, it is neither necessary nor desirable to examine in detail the remedies that are presently available to an individual facing deportation nor to suggest the particular form that such a remedy should take. However, it would be unthinkable if there were not a fair hearing before an impartial arbiter to determine whether there are "substantial grounds for believing" that the individual to be deported would face a risk of torture, arbitrary execution, disappearance or other such serious violation of human rights. In light of the grave consequences of deportation in such a case, there must be an opportunity for a hearing before the individual is deported, and the hearing must comply with all of the principles of natural justice. As well, the individual in question ought to be entitled to have the decision reviewed to ensure that it did indeed comply with those principles. These protections should be available whether or not the individual is excluded from claiming status as a refugee, to avoid unacceptably harsh consequences arising from the exclusion.99

In contrast to the situation in Canada, the Government of the United States has recently incorporated the Convention against Torture into its domestic legislation, and created an independent procedure whereby persons can assert a right to be protected from removal back to torture.100 Two forms of relief are contemplated. The first is the "withholding of removal" under section 241(b)(3) of the Immigration and Nationality Act. This remedy is similar to asylum but has certain bars including, inter alia, criminal convictions. For those who are ineligible to apply for "withholding of removal", a second procedure known as "deferral of removal" is available. In order to receive this form of protection, the person must demonstrate a substantial likelihood of torture. Deferral of removal is a less permanent form of relief than withholding of removal, and can be

99 This paragraph was written by Cory J. in his dissenting opinion, in which His Lordship had concluded that the appellant ought to have been excluded from refugee protection. Having reached this conclusion, His Lordship noted in the quoted paragraph that some other process which includes procedural protections would be required; see Pushpanathan v. Canada (Minister of Citizenship & Immigration), [1998] 1 S.C.R. 982, para. 157.

100 The legislation implementing the Convention against Torture was signed into law on October 21, 1998; the Immigration and Naturalization Service implementing regulations became effective on March 22, 1999.
terminated once the Government determines that the conditions are such that the person can be safely returned to the country of nationality. Irrespective of which procedure is invoked, persons who assert that they are at risk of torture can make a formal application before the immigration courts, where they can avail themselves of an oral hearing with all the protections of a quasi-judicial process.101

The threshold question to be addressed in any procedure designed to protect persons against removal back to torture is the meaning of the term “torture”. Pursuant to Canada’s PDRCC regulations, the person must demonstrate to an immigration officer that he or she would be subject to an “objectively identifiable risk to life, extreme sanctions, or inhumane treatment, which risk would apply in every part of the country and would not be faced generally by other individuals in or from that country”.102 The H&C Guidelines use similar terminology and require that a person demonstrate “an objectively identifiable personalized risk” to the person’s life or of “severe sanctions or inhumane treatment”.103 Both provisions fail to provide a clear definition of the scope of the

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(a) Policy. — It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

(b) Regulations. — Not later than 120 days after the date of enactment of this Act [Oct. 21, 1998], the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

102 See the definition of a member of the PDRCC class in Immigration Regulations, s. 2.

protection and there is no jurisprudence that provides any clear delimitation of the scope of the terms.

Although the Supreme Court of Canada has yet to deal directly with the question of removal back to torture, the majority decision in *Kindler* provides strong indications that it will view attempts to expel a person to a country where there is a substantial risk of torture as being a violation of section 7 of the *Charter*. In *Kindler*, Mr. Justice La Forest distinguished extradition to face the death penalty following a fair procedure from removal to face torture, indicating that "[t]here are . . . situations where the punishment imposed following surrender — torture, for example — would be so outrageous to the values of the Canadian community that the surrender would be unacceptable". La Forest J. went on to note the universal condemnation of torture, citing the ICCPR.

Article 1 of the *Convention against Torture* defines torture as

any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind, when such pain or suffering is inflicted by acquiescence of a public official or other person acting in an official capacity.

This can be contrasted with the *European Convention* and the ICCPR, where the scope of protection against removal is broader as it covers "torture or inhuman or degrading treatment or punishment" (Article 3 of the *European Convention* and Article 7 of the ICCPR). The meaning of the phrase "torture or cruel or inhuman treatment or punishment" has been the subject of considerable commentary in the European Court of

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105 Ibid. at 835.

106 Article 1(2) of the *Convention against Torture* states that "This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application".
Human Rights, and the Court's view as to what constitutes torture has evolved over the years. In one of its earlier decisions, Ireland v. United Kingdom, the Court dealt with a complaint by the Government of Ireland against the Government of the United Kingdom arising out of allegations of mistreatment of detainees held by the British in Northern Ireland. One of the issues before the Court was whether the treatment of the detainees during interrogation amounted to a violation of Article 3 of the European Convention and thus to torture. The Court concluded that only behaviour of a certain severity was prohibited under Article 3, and that only the most severe forms of behaviour sanctionable under this provision could be considered to be torture. The Court concluded that, although the treatment in the case before it was inhuman and degrading and therefore in violation of Article 3, it was not severe enough to be considered torture:

The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 (art. 3) of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. Moreover, this seems to be the thinking lying behind Article 1 in fine of Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975, which declares: "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment". Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood. The Court concludes that recourse to the five techniques amounted to a

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European Court of Human Rights, January 18, 1978. The treatment complained of consisted of: (a) wall-standing: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers"; (b) hooding: putting a black or navy coloured bag over the detainees’ heads and, at least initially, keeping it there all the time except during interrogation; (c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise; (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep; (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.
practice of inhuman and degrading treatment, which practice was in breach of Article 3.\textsuperscript{108}

In the recent case of Smith & Grady v. U.K.,\textsuperscript{109} the petitioners claimed that they had been subjected to cruel and inhuman treatment as a result of investigations carried out by the British authorities into their sexual orientation. While the investigations did unfairly intrude into the private lives of the complainants, their conduct had none of the qualities that were found to be objectionable in the Ireland case. Although the Court concluded that there had been a violation of Article 8 of the Convention dealing with protection of family life, it held that there was no violation of Article 3 because the treatment was not severe enough to be considered cruel or inhuman:

The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of that minimum is relative and depends on all of the circumstances of the case, such as the duration of the treatment and its physical or mental effects (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, § 162). It is also recalled that treatment may be considered degrading if it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see the Ireland v. the United Kingdom judgment cited above, pp. 66-67, § 167). Moreover, it is sufficient if the victim is humiliated in his or her own eyes (see the Tyrer v. the United Kingdom judgment of 25 April 1978, Series A no. 26, p. 16, § 32).

The Court has outlined above why it considers that the investigation and discharge together with the blanket nature of the policy of the Ministry of Defence were of a particularly grave nature... Moreover, the Court would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3 (see, mutatis mutandis, the Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985, Series A no. 94, p. 42, §§ 90-91).

However, while accepting that the policy, together with the investigation and discharge which ensued, were undoubtedly distressing and humiliating for each of the applicants, the Court does not consider, having regard to all the circumstances of the case, that the treatment reached the minimum level of severity which would bring it within the scope of Article 3 of the Convention.\textsuperscript{110}

\textsuperscript{108} Ibid., paras. 96-97.

\textsuperscript{109} Applications no. 33985/96 and 33986/96, September 27, 1999.

\textsuperscript{110} Ibid., paras. 120-22.
In the case of *Soering v. United Kingdom*, the Court considered whether the extradition of the petitioner back to Virginia to face trial for a capital crime, where there was a significant possibility that he would face the death penalty, would be a violation of Article 3 of the *Convention*. The Court concluded that the *Convention* prohibited extradition in circumstances where there was a significant likelihood that the petitioner would be subject to treatment in violation of Article 3 in the receiving state. The Court also held that, in the particular circumstances of the case, the treatment to which the petitioner was likely to be subjected was severe enough to come within the ambit of Article 3, although it could not be characterized as torture but rather as inhuman and degrading treatment:

In interpreting the *Convention* regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms ... Thus, the object and purpose of the *Convention* as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective ... 

Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the *Convention* shows that Article 3 (art. 3) enshrines one of the fundamental values of the democratic societies making up the Council of Europe.

It would hardly be compatible with the underlying values of the *Convention*, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intention of the Article, and in the Court’s view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3).

... As is established in the Court’s case-law, ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in

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some instances, the sex, age and state of health of the victim... Treatment has been held by the Court to be both "inhuman" because it was premeditated, was applied for hours at a stretch and "caused, if not actual bodily injury, at least intense physical and mental suffering", and also "degrading" because it was "such as to arouse in [its] victims' feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance"... In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment... In this connection, account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him.\textsuperscript{112}

In \textit{Selmouni v. France},\textsuperscript{113} the Court also discussed the distinction between torture and other forms of cruel, inhuman, or degrading treatment. Of particular significance in this decision is the express acknowledgement by the Court that all human rights treaties are living instruments that must be interpreted in the light of contemporary values. The level of tolerance for arbitrary behaviour by the state has significantly diminished, so that the Court was no longer bound by the criteria it had applied in the \textit{Ireland} decision some twenty years earlier. In \textit{Selmouni}, then, the Court concluded that the behaviour of the police in subjecting the petitioner to beatings, threats, and humiliation did constitute torture:

In order to determine whether a particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As the European Court has previously found, it appears that it was the intention that the \textit{Convention} should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

... The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading... In any event, the Court reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3.

In other words, it remains to establish in the instant case whether the "pain or suffering"

\textsuperscript{112} \textit{Ibid.}, paras. 88-111.

\textsuperscript{113} Application no. 25803/94, 28 July 1999.
inflicted on Mr. Selmouni can be defined as "severe" within the meaning of Article 1 of the United Nations Convention. The Court considers that this "severity" is, like the "minimum severity" required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.

... [H]aving regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions", the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.114

The European Court of Human Rights has therefore made a clear distinction between conduct that is severe enough to constitute torture and that which, although not torture per se, will still be considered a violation of Article 3. Physical as well as mental suffering can be considered a violation, as can punishment resulting from penal proceedings.115 Moreover, given the current "high standard" required for the protection of the most fundamental values, the term "torture" will be given a broader meaning today than was the case in the past, and still broader in the future. Finally, despite the distinction that the European Court makes between torture and other forms of cruel, inhuman, or degrading treatment or punishment, the Court's jurisprudence makes it clear that expulsion of any person to a country where he or she would receive such treatment is a violation of Article 3 of the Convention and is prohibited.116

114 Ibid., paras. 95-96; 98-105.

115 See A.G. Sancho, Chueca La Expulsión de Extranjeros en la Convencion Europea de Derechos Humanos (Aragoza, Spain, 1998) at 48-49; see also Ng v. Canada, infra note 121. In Canada, the Supreme Court has discussed the scope of the phrase "cruel and unusual punishment or treatment" in several decisions. In R. v. Smith, [1987] 1 S.C.R. 1045, the Court concluded that any form of corporal punishment would be cruel or unusual. In Kinder, supra note 103, the Court noted that all forms of torture are unacceptable, and suggested that the test to be applied is whether the treatment is outrageous to the values of the Canadian community. Another test that has been proposed is whether the treatment shocks the conscience of Canadians.

116 Soering, supra note 111.
In addition to being an "act by which severe pain or suffering, whether physical or mental, is inflicted on a person", to fall within the definition of "torture" under the Convention against Torture the act must be intentional. As we shall see in the next section, the interpretation of Article 3 of the European Convention is broader so as to also encompass the unintentional but foreseeable consequences of a state party's actions.\textsuperscript{117} Moreover, under Convention against Torture, the torture must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". This last requirement is particularly significant because here again the Convention against Torture is more limiting than the Refugee Convention, the European Convention, or the ICCPR.\textsuperscript{118} Under the interpretation of the Refugee Convention that has developed in most jurisdictions, a person can seek refugee status even if the agents of persecution are non-state actors, if the state is unwilling or unable to provide protection.\textsuperscript{119} Likewise, this restriction is not found in Article 3 of the European Convention\textsuperscript{120} or in the interpretations of the ICCPR\textsuperscript{121} where, as already noted, the

\textsuperscript{117} In the case of D. v. United Kingdom (146/1996/767/964, 2 May 1997), which is reviewed in detail below, the European Court of Human Rights found a violation of Art. 3 resulting from the expulsion of the petitioner to a country where he could not obtain life-preserving medical treatment, even though there was no express intent on the part of the expelling state to inflict cruel treatment.

\textsuperscript{118} In the case of Elmi v. Australia, heard in the May 1999 session, the United Nations Committee against Torture (CAT) concluded that Australia would be in violation of its obligations under the Convention against Torture if it were to deport the petitioner to Somalia. This conclusion was reached notwithstanding the fact that there was no effective government in Somalia, and was based on the reasoning that the warlords in that country were the quasi-government and therefore came within the ambit of Art. 1.

\textsuperscript{119} See, for example, Ward v. Canada (Minister of Employment & Immigration), 67 D.L.R. (4th) 1 (S.C.C.).


prohibition against the imposition of cruel and inhuman treatment has been given a broader meaning.

A key factor common to all three instruments is that the right to be free from torture is absolute. Thus Article 2.2 of the Convention against Torture recognizes the right as non-derogable:

No exceptional circumstances whatsoever, whether war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Under the ICCPR, protected rights are divided into two categories. The first class encompasses those rights that are capable of limitation or derogation, such as expression and liberty, which can be restricted in clearly defined, narrow situations. The second class consists of rights which are absolute or non-derogable. The right not to be subjected to torture or cruel or inhuman treatment, contained in Article 7, is one of the latter. Article 4 of the ICCPR, which is the derogation article, specifically provides that there can be no derogation from Article 7.122 The UN Human Rights Committee, which monitors compliance with the ICCPR and hears individual complaints, has published General Comments, which are directives to states concerning substantive compliance with their ICCPR obligations. In General Comment No. 20, the Committee states:

[Even] in situations of public emergency, . . . no derogation from the provisions of Article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 for any reasons, including those based on an order from a superior officer or public authority.123

122 Article 7 of the ICCPR, supra note 2, states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

123 United Nations Human Rights Committee, General Comment, No. 20, CCPR/C/21/Rev. 1/Add. 3, April 1993, para. 3.
The views of the Human Rights Committee are the same as those of the European Commission and the European Court of Human Rights. The European Court in the Soering decision made it clear that a state's responsibilities under Article 3 take precedence over any bilateral obligations under extradition treaties.\textsuperscript{124} Soering has had a profound influence on the practice of states in extradition proceedings.\textsuperscript{125} Although it is still accepted under the principle of "non-inquiry" that the extraditing state will not look at the overall fairness of the procedures in the receiving state,\textsuperscript{126} there is a growing recognition that this principle is not absolute and that, in circumstances where the treatment is such that it will "shock the conscience",\textsuperscript{127} extradition will be denied.

Interestingly, there is a growing consensus that a state's obligations under multilateral human rights instruments must take precedence over its bilateral obligations under extradition treaties:

When a municipal court refuses extradition on the ground that the basic rights of the fugitive will be violated by the requesting state if he is extradited, or when an international court or other institution finds a state to be in breach of its obligations under a human rights treaty for having extradited a fugitive, primacy is in effect accorded to a human rights norm over the extradition treaty. Courts have paid little attention to the reason for this primacy. The principle of \textit{lex posterior derogat legi priori} clearly does not explain the present trend in favor of human rights norms, for in Soering the U.S.-U.K. Extradition Agreement of 1972 was held to have been "trumped" by the European \textit{Convention on Human Rights} to which the United Kingdom had become a party in 1951. The explanation may instead be found in some sort of two-tier system of legal obligation that recognizes the higher status of human rights norms arising from notions of \textit{jus cogens}, and the superiority of multilateral human rights conventions that form part of the \textit{ordre public} of the international community or of a particular region.\textsuperscript{128}

\textsuperscript{124} \textit{Supra} note 111.


\textsuperscript{126} \textit{Ibid.} at 190-92, where the authors discuss the principle of non-inquiry as it has developed in domestic law in Canada, the United States, and England.


\textsuperscript{128} \textit{Ibid.} at 194-95.
This view is consistent with the position of the European Court of Human Rights in *Chahal*, where the Court affirmed the absolute nature of the prohibition against placing a person at risk of torture. Article 3 of the *European Convention* is similar in scope and purpose to Article 7 of the *ICCPR* in prohibiting torture or other inhuman or degrading treatment or punishment. In *Chahal*, the British Government argued that Article 3 had implied limitations entitling the state to expel a person for reasons of national security, notwithstanding the existence of a real risk that the person concerned would be subjected to torture or to inhuman or degrading treatment in the receiving state. The Commission and the Court disagreed:

Article 3 enshrines one of the most fundamental values of democratic society... The Court is well aware of the immense difficulties faced by states in modern times in protecting their communities from terrorist violence. However, even in these modern circumstances, the *Convention* prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct... no derogation from it is permissible under Article 15, even in a state of public emergency threatening the life of a nation...

The prohibition provided by Article 3 against ill treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another state, the responsibility of the contracting state to safeguard him or her against such treatment is engaged in the event of expulsion... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 *Convention on the Status of Refugees*.

...It should not be inferred from the Court's remarks [in *Soering*] concerning the risk of undermining the foundations of extradition... that there is any room for balancing the risk of ill-treatment against reasons for expulsion in determining whether a state's responsibility under Article 3 is engaged.129

In the case of *Ahmed v. Austria*,130 the European Court of Human Rights extended the principle that a state could not expel an individual, even if he or she posed a danger to society, to persons who had been convicted of serious criminal offences. In *Ahmed*, the

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petitioner was a citizen of Somalia who had been granted refugee status in Austria. He was subsequently convicted of several criminal offences including attempted robbery. Austria ordered his expulsion to Somalia, concluding that his case fell within the exception set out in Article 33(2) of the Refugee Convention. The Court held that Article 3 of the European Convention took precedence over the Refugee Convention and precluded his deportation to Somalia:

The Court further reiterates that Article 3, which enshrines one of the fundamental values of democratic societies (see the above-mentioned Soering judgment, p. 34, § 88), prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation (see the Ireland v. the United Kingdom judgment...; the Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, p. 42, § 115; and the above-mentioned Chahal judgment...).

The above principle is equally valid when issues under Article 3 arise in expulsion cases. Accordingly, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Article 33 of the United Nations 1951 Convention on the Status of Refugees...

Under the ICCPR, the prohibition against removal to a place where there is a likelihood of torture or other forms of cruel or degrading treatment is considered to be inherent in the Covenant. In its General Comment on Article 7 of the Covenant, the UN Human Rights Committee notes that

States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.

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131 Ibid. para. 40. See also Sancho, supra note 115, who notes that, although the regulation of entry and expulsion of non-citizens is generally within the discretion of the state, in certain "exceptional cases" where there is a risk that the person concerned will suffer cruel or inhuman treatment, the Court will find a violation of Article 3.

132 Supra note 123.
Under the *European Convention*, the European Court has also indicated that the protection against torture or cruel or degrading treatment is an essential aspect of the protection granted under Article 3 of the *Convention*.\(^{133}\)

The *Convention against Torture*\(^{134}\) explicitly extends this protection to instances where the person could face torture if removed from a signatory state to another state.\(^{135}\)

Article 3 states:

1. No state shall expel, return ("refouler"), or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Thus the prohibition against expulsion back to torture applies even in cases where the expelling state is acting pursuant to an extradition treaty obligation, so that the obligations under the *Convention against Torture* and its prohibition against extradition to torture are so fundamental as to supercede other international obligations.\(^{136}\)

The United Nations Committee Against Torture (CAT) has, in a series of decisions, made it clear that the prohibition against removal to a country where there is a

\(^{133}\) See *Chahal*, *supra* note 129, and *Ahmed*, *supra* note 130.

\(^{134}\) *Supra* note 2.

\(^{135}\) Significantly, the protection in the *Convention against Torture* applies only in cases where there is a risk of torture upon expulsion. Article 3 speaks only of expulsion; Article 15 incorporates some of the protections against torture so that they also encompass inhuman or degrading treatment. These protections, however, do not extend to situations where there is a risk of treatment which, although degrading or inhuman, is not severe enough to be considered torture. No such restriction exists in either the ICCPR or the *European Convention*, in which the prohibition against expulsion is absolute.

\(^{136}\) See W.M. Cohen, "Implementing the U.N. Torture Convention in U.S. Extradition Cases", 26 Denver J. Int'l L. & Pol'y 517, where the author discusses the impact of the *Convention against Torture* on the extradition process in the United States. See also the decision of the UN Human Rights Committee in *Ng*, *supra* note 120, where the Committee found that Canada was in violation of its obligations under the ICCPR by extraditing Ng to California, where the death penalty was to be carried out by asphyxiation in a gas chamber, which the Committee concluded was inhuman.
risk of torture is absolute. In the case of Khan, the Committee indicated that a determination of whether Article 3.1 should apply necessarily rests on two factors, interrelated but not necessarily dependent on each other. The first is whether there is a consistent pattern of gross, flagrant, or mass violations of human rights, and the second is whether the individual would be personally at risk if returned to the country in question. The determination concerning personal risk may flow from the class or character of the person: where a person falls within the class by virtue of his or her personal characteristics or activities, if the evidence indicates that there is a consistent pattern of gross, flagrant, or mass violations of human rights to which those within the class are subjected, removal cannot be sanctioned.

In the case of Mutombo v. Switzerland, the UNCAT examined, pursuant to the Optional Protocol, the complaint of a national of Zaire who was being expelled by Switzerland back to Zaire after his claim for refugee status had been rejected. In upholding the complaint, the Committee did not consider the fact that the Swiss government had rejected his refugee claim as determinative. Rather, it considered the human rights situation in Zaire, the fact that Zaire had not signed the Convention, and the personal characteristics of the complainant. The Committee noted that, while the lack of respect for human rights in the receiving state was an important factor to be considered, it was not in and of itself determinative, as the complainant had to demonstrate a personalized risk. The Committee also noted that it had a responsibility to ensure that the

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complainant's security was not at risk even if there are doubts about the facts as adduced:

The Committee considers that in the present case substantial grounds exist for believing that the author would be in danger of being subjected to torture. The Committee has noted the author's ethnic background, alleged political affiliation and detention history as well as the fact, which has not been disputed by the State party, that he appears to have deserted from the army and to have left Zaire in a clandestine manner and, when formulating an application for asylum, to have adduced arguments which may be considered defamatory towards Zaire. The Committee considers that, in the present circumstances, his return to Zaire would have the foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured. Moreover, the belief that "substantial grounds" exist within the meaning of article 3, paragraph 1, is strengthened by "the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights", within the meaning of article 3, paragraph 2.

Moreover, the Committee considers that, in view of the fact that Zaire is not a party to the Convention, the author would be in danger, in the event of expulsion to Zaire, not only of being subjected to torture but of no longer having the legal possibility of applying to the Committee for protection.

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

In the light of the above, the Committee is of the view that, in the prevailing circumstances, the State party has an obligation to refrain from expelling Balabou Mutombo to Zaire, or to any other country where he runs a real risk of being expelled or returned to Zaire or of being subjected to torture.139

It is important to note that the Committee was prepared to give the benefit of the doubt to the complainant notwithstanding the fact that the Swiss Federal Refugee Office had rejected his claim as not being credible. The same position was taken by the Committee in the case of Tala,140 where a complaint was upheld notwithstanding the adverse credibility findings made by the refugee tribunal.141 Indeed, the Committee has taken the position that the standard to be applied when determining whether an individual

139 Ibid. paras. 9-10.


faces a "substantial risk of torture" is a low one. In its "General Comment on the Implementation of Article 3 of the Convention against Torture", the Committee noted:

With respect to the application of Article 3 of the Convention to the merits of the case, the burden is upon the author to present an arguable case. This means that there must be a factual basis for the author's position sufficient to require a response from the State party. Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere suspicion. However, the risk does not have to meet the test of being highly probable.\textsuperscript{142}

This position is certainly consistent with the jurisprudence that has developed under the Refugee Convention. There would appear to be no reason to depart from this standard when assessing claims for protection under the Convention against Torture, especially in light of the fact that the Convention has as its purpose the protection of the most fundamental human rights.\textsuperscript{143}

In Canada, there is nothing in the jurisprudence to date to suggest what test will be applied when assessing "risk of torture". Both the PDRCC definition and the H&C Guidelines do not provide any indication as to the standard of proof. This leaves open two possibilities: the Courts could either adopt the low threshold of the Convention against Torture, or could conclude that the usual standard of balance of probabilities ought to apply. Given that the purpose of the provisions of the Convention against Torture is to protect human rights, it is submitted that the lower standard is the more appropriate as it will ensure more effective protection of human rights.\textsuperscript{144}

\textsuperscript{142} U.N. Doc. CAT/C/IX/Misc. 1 (1997), paras. 5-6.

\textsuperscript{143} In Pushpanathan, supra note 99, the Supreme Court of Canada noted that the purpose of a human rights treaty should be the driving force behind any interpretation of its terms, which should be given the meaning most in keeping with the protection of human rights.

\textsuperscript{144} Ibid.
This lack of clarity again highlights the difficulty in ensuring state compliance with treaty obligations, because decisions as to who is entitled to protection are left to the discretion of the receiving state.\footnote{This difficulty is exemplified by the fact that in the decisions in Khan, supra note 136, and Tala, supra note 139, the UNCAT concluded that there would be a violation of the Convention if the complainants were expelled to their country of nationality, notwithstanding the fact that in both cases the receiving states had found their claims of persecution to be lacking in credibility. Khan, who was to be expelled from Canada, had had his refugee claim rejected and had also received a negative determination by a PDRCC officer. The review of Khan's case was not a formal PDRCC review because he was not eligible for one, but was undertaken by the Government and followed the same procedure as a regular PDRCC review. The problem of enforcing international human rights obligations will be reviewed in the next chapter.} However, as in the case of the Refugee Convention, the ratification of the Convention against Torture has provided an important layer of protection to persons who are at risk of torture if returned to their home country. By placing the right of the individual to be protected against torture ahead of state interests and other international obligations, including that of extradition, the Convention against Torture provides greater protection than that available under the Refugee Convention, and signals that the international community places an extremely high value on ensuring that torture is not committed. As the acceptance of the Convention against Torture becomes more universal, more states will feel obliged to introduce procedures whereby claims for protection under that Convention can be evaluated. Moreover, as will become apparent in the next Chapter, where I discuss methods of enforcing treaty obligations, the Optional Protocol has provided aggrieved individuals with a mechanism for resisting deportation by giving them a formal right to complain to the UNCAT against a state's decision to expel.
3.5 Protection Against Cruel, Inhuman and Degrading Treatment: Limits on the Right to Expel Persons Who Are Receiving Life-Saving Medical Treatment in the Receiving State

The protection against cruel, inhuman, and degrading treatment can also impact upon the state's right to expel non-citizens in another manner. There is now jurisprudence which suggests that a state will be violating its international obligations under article 7 of the ICCPR and Article 3 of the European Convention by acting in a manner which violates the prohibition against the imposition of cruel, inhuman, and degrading treatment when it expels a non-citizen to a country where there is a reasonable possibility that the person will be subjected to cruel and inhuman treatment as the result of lack of medical facilities in the receiving state, even though the treatment is not the result of an act by representatives of the state. This arises as a result of the acceptance by international human rights tribunals of three distinct principles: that the expelling state can be responsible for the actions of non-state actors in the receiving state;\textsuperscript{146} that this principle can be extended to hold the state accountable for consequences that arise not as a result of any act but rather as the result of an omission due to a lack of adequate resources in the state;\textsuperscript{147} and that the test to be applied when considering whether there is a violation is not whether the cruel, inhuman, or degrading treatment will occur but whether it is a reasonably foreseeable consequence of the expulsion.\textsuperscript{148}

In Canada, the only mechanism whereby a person can assert that his or her human right to be protected against cruel, inhuman, and degrading treatment would be violated by expulsion to a country where life-saving medical treatment is not available is within

\textsuperscript{146} H.L.R., supra note 120.

\textsuperscript{147} D., supra note 117.
the context of an application for consideration on H&C grounds.  As already noted, the immigration officer reviewing such an application has the delegated discretionary power to allow a person to be landed within Canada by granting an exemption from the normal requirement to apply for and obtain an immigrant visa prior to arriving in Canada. The relevant Guidelines indicate that it is appropriate to exercise positive discretion when there is "an objectively identifiable personalized risk" to the person's life, or of "severe sanctions such as unwarranted imprisonment or inhumane treatment such as torture". Pursuant to the Guidelines, officers reviewing H&C applications are encouraged to seek a risk assessment from the Post-Claim Determination Officers (PCDO) who make decisions under the more restrictive PDRCC regulations. The Guidelines note, however,

148 Ng, supra note 121.

149 A permanent resident who has been ordered deported has a right to appeal to the Appeal Division of the IRB, which can exercise equitable jurisdiction to stay the deportation if "all the circumstances of the case" warrant it. However, pursuant to the decision of the Federal Court of Appeal in Chieu v. Canada (Minister of Citizenship & Immigration), A-1038-96, December 3, 1998, the Appeal Division is precluded from considering the consequences that might arise in the person's country of nationality upon execution of the deportation order. Such circumstances can only be considered in the context of a H&C application.

150 The power to grant the exemption is delegated to the immigration officer pursuant to s. 2.1 of the Immigration Regulations. If the person is granted the exemption from the normal requirement, this does not mean that he or she will automatically be granted permanent residence status in Canada. Rather the person is allowed to apply for landing and must meet the other requirements of the Immigration Act, i.e., must demonstrate that she is not medically or criminally inadmissible. In the case of a person who requires life-saving medical treatment, such a person would in all likelihood be medically inadmissible so that, even if granted an exemption, the application for landing would be refused. In such circumstances, the person would either be deported from Canada or issued a Minister's Permit pursuant to s. 37 of the Immigration Act.

151 H&C Guidelines, supra note 103, section 8.8. The wording of the section does not appear to preclude the exercise of positive discretion in cases where the threat is based on medical grounds. The PDRCC regulations, however, expressly exclude risks to a person's life that arise as a result of "the inability of that country [the person's country of nationality] to provide adequate health or medical care".

152 PCDO renders decisions on applications made under the PDRCC regulations. The H&C Guidelines instruct H&C officers to consult with PCDOs about risk issues. PCDOs render decisions based on PDRCC regulations, which expressly exclude medical risk.

“that the risk opinion and factors relevant to an H&C decision are not necessarily the same. A negative risk assessment does not automatically mean a negative H&C decision”.\textsuperscript{154} This suggests that the scope of the H&C review is necessarily broader, so that it can contemplate issues related to a lack of medical treatment.

There are no decisions from the Federal Court on applications for judicial review where the issues were fully canvassed that would provide guidance as to how these provisions should be interpreted. There are, however, decisions on applications for stays of deportation which the Court granted based on the likely consequences of deportation in cases where persons were receiving medical treatment in Canada. Thus in \textit{Samokhvalov v. Canada (Minister of Citizenship & Immigration)}, Mr. Justice MacKay considered whether there was a serious issue to be tried in the application for judicial review and whether the applicant had made out irreparable harm so that a stay could be granted:

In regard to the question whether a serious issue is raised for consideration by the applicants' Application for Leave and for Judicial Review, for the respondent it is conceded that a serious issue is here raised. That issue concerns the validity of the conclusion of the Immigration Officer based on the findings set out in his reported decision in light of the evidence before him. The applicants urge that those findings are capricious or without regard to the evidence, in particular concerning the availability of medical and other assistance for appropriate management of the child Andrey's condition of Tourette Syndrome if he is returned to Russia ... With respect to irreparable harm in my view it is clear from the evidence, and implicitly acknowledged by the respondent that the current management of the child Andrey's condition is beneficial for him, for his condition and for the family. It is also clear that disruption of those conditions would be harmful, in particular to the child Andrey, and there is no assurance that current conditions can be restored if they are interrupted. That harm, in those circumstances, in my view, qualifies as irreparable harm, which could not appropriately be redressed by damages, even if such an award were possible, if the applicants' applications now before this Court be allowed, and upon review of the circumstances by an Immigration Officer, a favourable decision for the applicants is reached.\textsuperscript{155}

\textsuperscript{154} H&C Guidelines, \textit{supra} note 103, s. 8.8.

Moreover, the *dicta* of the Supreme Court of Canada in *Kindler* suggest that the appropriate test for determining whether deportation would be a violation of section 7 of the *Charter* is whether it would be "so outrageous to the values of the Canadian community that the surrender would be unacceptable".156 The Court in *Kindler* also acknowledged that there would be circumstances when it would be prepared to review the reasonably foreseeable consequences of expulsion or extradition and determine whether these rendered the extradition a violation of the *Charter*. Moreover, the test formulated in *Kindler*, focused as it is on the response of Canadians to the reasonably foreseeable consequences of expulsion, is certainly broad enough to contemplate situations where the treatment feared is not the result of conduct of any state actors in the receiving state, but rather is due to a lack of proper facilities in that state.157 Although the Supreme Court in *Kindler* was considering the question of extradition as opposed to expulsion, its reasoning would apply to a fact situation involving the deportation of a person who was receiving life-saving medical treatment in Canada to a country where no such treatment is available.

This view is consistent with the finding of the European Court of Human Rights in the case of *H.L.R. v. France*.158 The petitioner was a citizen of Colombia. He was arrested in France for possession of narcotics. He then supplied information that led to the arrest and conviction of another drug trafficker who, after serving his sentence, was expelled to Colombia. *H.L.R.* argued that the Government of France had a duty to protect

156 *Kindler*, supra note 104 at 835.

157 As noted above, the test formulated in *Kindler* was whether the consequences were such as to "outrage the values of Canadians".

158 *Supra* note 120.
him and that, if he were to be deported to Colombia, there was a substantial risk that he would be subjected to inhuman treatment by the traffickers in circumstances where the state authorities could not provide him with protection. For its part, the French Government maintained that, as the risk did not arise from state actors, it was outside the scope of Article 3.

Although the Court dismissed the application, because it concluded that there was insufficient evidence that the Government of Colombia would not be able to protect H.L.R., it found that the fact that non-state actors were involved was irrelevant. The Court built on its previous jurisprudence in Soering and Chahal and indicated that, in an appropriate case, a violation could result as a result of expulsion to a situation where cruel and inhuman treatment was committed by non-state actors:

It is . . . necessary to examine whether the foreseeable consequences of H.L.R.'s deportation to Colombia are such as to bring Article 3 (art. 3) into play. In the present case the source of the risk on which the applicant relies is not the public authorities. According to the applicant, it consists in the threat of reprisals by drug traffickers, who may seek revenge because of certain statements that he made to the French police, coupled with the fact that the Colombian State is, he claims, incapable of protecting him from attacks by such persons. Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention (art. 3) may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.  

159 Supra note 111, para. 88.

160 Supra note 129, para. 79.

161 Supra note 120, paras. 40-42.
The reasoning in *H.L.R.* makes it clear that accountability of the expelling state under Article 3 will extend to the foreseeable consequences arising as a result of the conduct of non-state actors.¹⁶²

In the case *D. v. United Kingdom,*¹⁶³ the Court carried this principle one step further by holding a state accountable for the foreseeable consequences that arise from expulsion of a non-citizen, even if these do not result from any positive action by state or non-state actors in the receiving country. The Court observed that it would be a violation to expel a person who has serious medical problems and is receiving treatment in the receiving country, if no similar treatment is available in the country to which he or she is being expelled. In the *D.* case, the Court dealt with the complaint made by a citizen of St. Kitts, who had been apprehended upon arrival in the United Kingdom carrying a large amount of narcotics. He was charged and convicted of importing a narcotic and was sentenced to a period of incarceration. While in detention, he developed AIDS and was given treatment for his condition by the penal authorities. When he became eligible for parole, the Government of the United Kingdom sought to deport him back to St. Kitts, even though it was established that there was no treatment of any kind available for him there and that, as a result, he would suffer greatly. The European Court of Human Rights concluded that the conduct of the British Government was tantamount to the imposition of cruel and inhuman treatment so that the expulsion of *D.* would result in a violation of Article 3 of the *European Convention.*

¹⁶² In its earlier jurisprudence, as reflected by the decision in *Chahal,* the Court had concluded that the expelling state could be held accountable for cruel treatment suffered at the hands of persons in authority in the receiving state.

¹⁶³ *Supra* note 117.
The Court first noted that the duty of the parties to the Convention to not violate the provisions of Article 3 superceded the rights of the states to control entry, residence, and expulsion of aliens, and that these duties arose regardless of the nature of the individual and of whether the person was ever lawfully admitted to the territory:

The Court recalls at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. It also notes the gravity of the offence which was committed by the applicant and is acutely aware of the problems confronting Contracting States in their efforts to combat the harm caused to their societies through the supply of drugs from abroad. The administration of severe sanctions to persons involved in drug trafficking, including expulsion of alien drug couriers like the applicant, is a justified response to this scourge. However, in exercising their right to expel such aliens Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies. It is precisely for this reason that the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question (see, most recently, the Ahmed v. Austria judgment... and the Chakal v. the United Kingdom judgment...). The Court observes that the above principle is applicable to the applicant’s removal under the Immigration Act, 1971. Regardless of whether or not he ever entered the United Kingdom in the technical sense... it is to be noted that he has been physically present there and thus within the jurisdiction of the respondent State within the meaning of Article 1 of the Convention since 21 January 1993. It is for the respondent State therefore to secure to the applicant the rights guaranteed under Article 3 irrespective of the gravity of the offence which he committed.164

The Court went on to analyze whether the forced expulsion of D. would violate Article 3, and concluded:

The Court notes that the applicant is in the advanced stages of a terminal and incurable illness... The limited quality of life he now enjoys results from the availability of sophisticated treatment and medication in the United Kingdom and the care and kindness administered by a charitable organisation... The abrupt withdrawal of these facilities will entail the most dramatic consequences for him. It is not disputed that his removal will hasten his death. There is a serious danger that the conditions of adversity which await him in St. Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering. Any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St. Kitts... There is no evidence of any other form of moral or social support. Nor has it been shown whether the applicant would be guaranteed a bed in either of the hospitals on the island which, according to the Government, care for AIDS patients... In view of these exceptional circumstances and

164 Ibid., paras. 46-48.
bearing in mind the critical stage now reached in the applicant’s fatal illness, the
implementation of the decision to remove him to St. Kitts would amount to inhuman
treatment by the respondent State in violation of Article 3. The Court also notes in this
respect that the respondent State has assumed responsibility for treating the applicant’s
condition since August 1994. He has become reliant on the medical and palliative care
which he is at present receiving and is no doubt psychologically prepared for death in an
environment which is both familiar and compassionate. Although it cannot be said that
the conditions which would confront him in the receiving country are themselves a
breach of the standards of Article 3, his removal would expose him to a real risk of dying
under most distressing circumstances and would thus amount to inhuman treatment.\textsuperscript{165}

In\textit{ D.}, the European Court of Human Rights extended the scope of Article 3 to
encompass foreseeable consequences that would arise as a result of the expulsion of\textit{ D.},
even if those consequences did not arise from actions by either state or non-state actors,
but was a foreseeable result of a lack of resources in the receiving state.\textsuperscript{166} This reasoning
is consistent with that of the UN Human Rights Committee, charged with monitoring
compliance with the ICCPR. In the case of\textit{ Chitat Ng v. Canada},\textsuperscript{167} the Committee dealt
with a complaint by a resident of the United States who fled to Canada after being
implicated in a large number of particularly brutal murders in California. The State of
California, which had the death penalty for premeditated murder, sought his extradition.
A person executed in California was put to death by means of the gas chamber. Ng
argued that his extradition to the United States by Canada would violate article 7 of the
\textit{Covenant},\textsuperscript{168} because execution in the gas chamber constitutes cruel and inhuman
treatment. The Committee rejected the Government of Canada’s argument that issues of
extradition were outside the scope of the Committee’s jurisdiction, and determined that

\textsuperscript{165} \textit{Ibid.}, paras. 51-53.

\textsuperscript{166} See J. Kokott & H. Berger-Kerkhoff “Case Comment” on the \textit{D. & H.L.R}. case, 92 A.J.L.L.
524. See also \textit{Ng, supra} note 121, where the UN Human Rights Committee followed \textit{Soering} and
concluded that Canada had violated Article 7 of the ICCPR by deporting Ng back to California where there
was a reasonable possibility that he would be subject to cruel and inhuman treatment.


\textsuperscript{168} \textit{Supra} note 15.
the infliction of the death penalty in the case of Ng was a violation of Article 7, as it did not comply with the requirement that it be carried out in a manner which ensured that the individual suffered the least possible mental and physical suffering. Most significantly, the Committee found a violation even though Ng had not yet been convicted, let alone sentenced to death, applying the "reasonably foreseeable test" which was later used by the European Court of Human Rights in D.

The Committee made it clear that a state's decision to expel an individual to a third country will engage the Covenant if, as a reasonably foreseeable result of its decision, the individual suffers cruel and inhuman treatment. The Committee further noted that it was irrelevant that the suffering that might arise did not occur as a result of any direct conduct of the expelling state: "The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on". In light of these comments, there can be little doubt that the Human Rights Committee would find that there had been a violation of article 7 of the Covenant if a state sought to expel a critically ill person who had been receiving treatment, in circumstances where there was no suitable treatment available in the receiving state.

This jurisprudence suggests that a strong case can be made that a person who is critically ill and who has been receiving medical treatment cannot be expelled to the country of nationality in circumstances where that country does not have facilities for

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169 Article 3 of the Convention against Torture makes it clear that the prohibition against return to torture applies even in cases where the expelling state is acting in accordance with an extradition treaty.

170 Supra note 121, para. 6.2.
medical treatment. Such conduct would be a violation of Article 7 of the ICCPR. There is, of course, a range of fact situations that might come within the ambit of such a rule. Clearly, the $D.$ case represents the extreme end of the spectrum — that of a terminally ill person who had been receiving treatment in the United Kingdom for a long time prior to the decision to expel, and who would suffer greatly if denied the treatment. Arguing that a violation would result in a scenario at the other end of the spectrum — involving a recently arrived visitor in need of treatment that had not yet been initiated — might be far more difficult. As noted by the European Court of Human Rights in $D.$, each case will have to be examined on its merits, bearing in mind that a state cannot expel a critically ill person without considering whether it will be in breach of the prohibition against cruel and inhuman treatment.\textsuperscript{171}

3.6 Deportation in cases where the non-citizen has children who are citizens of the expelling state

There is now a growing body of jurisprudence that indicates that the interests of children who are citizens of the state must be taken into account before a decision is made to expel their non-citizen parents. The most important international instrument relevant in such cases is the \textit{Convention on the Rights of the Child}\textsuperscript{172} which, in Articles 3 and 9, provides as follows:

\begin{quote}
3. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
\end{quote}

\textsuperscript{171} This issue has not yet been dealt with by the Federal Court of Canada on an application for judicial review decided after full argument. The Court has, however, granted applications for a stay of deportation based on the risk to the health of one of the persons being subjected to deportation; see, for example, \textit{Lewis and Samokhvalov, supra} note 155.

\textsuperscript{172} \textit{Supra} note 11.
9.1 States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence. [emphasis added]

In light of these provisions, it can be argued that a state must consider the impact of the deportation of a non-citizen on his or her children, and must assess the extent to which the deportation will result in the children being separated from the parents and whether this is in the best interests of the child.

A person who is the parent of Canadian children can assert a right to remain in Canada with the children within the context of an application for consideration on H&C grounds. As noted above, such an application is considered by an immigration officer who has been delegated, pursuant to the Immigration Regulations, the authority to decide whether the person will be granted an exemption from the requirement to obtain an immigrant visa prior to entering Canada. The Immigration Department Guidelines instruct officers to consider the impact of removal on the Canadian children, but do not indicate that the interests of the children will generally dictate a specific outcome:

The removal of a status-less individual from Canada may have an impact in relation to family members who do have the legal right to remain... The geographic separation of family members could create a hardship that may warrant a positive H&C decision... the status-less individual’s family members with legal status may include children, parents and siblings, among others. In evaluating such cases, you should balance the different and important interests at stake: - Canada’s interest (in light of the legislative objective to maintain and protect the health, safety and good order of Canadian society); - family interests (in light of the legislative objective to facilitate family reunification); - the circumstances of all the family members, with particular attention given to the interests and situation of the status-less individual’s children. The applicant’s submissions may be considered in light of international human rights standards such as the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, and the Convention on the Rights of the Child. International case law suggests that the State’s interests in protecting society and regulating immigration are to

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173 See s. 2.1.
be weighed or balanced in relation to the interests of the individual facing removal and the impact of this removal on his/her family members.\textsuperscript{174}

These Guidelines were drafted prior to the decision of the Supreme Court of Canada in \textit{Baker} and, given that the Court concluded that the best interests of the children are an important concern, it is certainly arguable that the Guidelines do not place sufficient weight on the children’s interests.\textsuperscript{175}

As already noted, there are serious limitations to the H&C process that militate against its being an appropriate vehicle for considering the best interests of the children. First, the procedure is initiated by the parent who applies for landing and pays the requisite fee.\textsuperscript{176} As a result, there is no obligation on the Government of Canada to consider the best interests of the child independently of a request by the parent, something that is clearly inconsistent with the state’s obligation under the \textit{Convention on}

\textsuperscript{174} H&C Guidelines, \textit{supra} note 103. The Guidelines were written after leave to appeal had been granted in \textit{Baker} but prior to the decision being rendered by the Supreme Court. They have not (yet?) been amended in the light of \textit{Baker}.

\textsuperscript{175} The Federal Court has relied on \textit{Baker} in a judicial review of a decision on a H&C application. In the case of \textit{Sovalbarro v. Canada (Minister of Citizenship & Immigration),} [1999] F.C.J. No. 1394, (T.D.), August 26, 1999 (QL), the Court quashed a negative H&C decision noting that the officer had failed to properly weigh the interests of the Canadian children:

\begin{quote}
In the case at bar, it is clear that the Immigration Officer gave little or no weight to the interests of the applicants’ children. Indeed, there is only very limited mention of the children in the immigration officer’s notes. The notes reveal that the applicants claim that they “have a Canadian born child and conditions here are better for their children.” . . . There is also a reference to the applicants’ Canadian-born son in parentheses in the “Officer’s Recommendation” section to the fact that the applicants have a Canadian-born son. Furthermore, there is no indication that the children’s interests were canvassed although they were present in the waiting room during the interview. This is clearly insufficient to demonstrate that the interests of the children were given any sort of significant consideration by the immigration officer. In the language of the Court in \textit{Baker} . . . this lack of attention to the interests of the applicants’ children is “inconsistent with Canada’s humanitarian and compassionate tradition” and the guidelines provided by the Minister. Accordingly, I find that the decision of the immigration officer was unreasonable. [paras. 12-13]
\end{quote}

\textsuperscript{176} Currently the fee for consideration of the application is CAD$500, which in some cases makes it impossible for the person to apply.
the Rights of the Child to always act in the best interests of the child. Moreover, the application itself does not stay removal, so that a parent could be deported prior to the determination by the officer as to whether the best interests of the child require that the parent be permitted to remain in Canada.\footnote{177} Finally, the entire procedure is not based on any acknowledgement of the right of the children to have their best interests considered, but is rather based on the premise that the officer deciding the case is exercising a discretion.

The extent to which the Convention on the Rights of the Child imposes an obligation on Canada to consider the best interests of the child when assessing an application for consideration on H&C grounds was considered by the Supreme Court of Canada in the case of Baker.\footnote{178} In Baker, the Court dealt with the effect of the Convention on the Rights of the Child on the right of a non-citizen, who had Canadian children, to remain in Canada. The appellant was a citizen of Jamaica who entered Canada as a visitor in August 1981. She never received permanent resident status, but supported herself illegally as a live-in domestic worker for 11 years. She had four children (all Canadian citizens) while living in Canada. The appellant was ordered deported in December 1992, after it was determined that she had worked illegally in Canada and had overstayed her visitor's visa. In 1993, the appellant applied, pursuant to section 114(2) of the Immigration Act, for an exemption from the requirement to apply for permanent residence outside Canada based upon H&C considerations. She had the assistance of

\footnote{177} The parent can apply for a stay of removal. However, the jurisprudence of the Court to date for the most part has determined that the mere existence of an application for consideration on H&C grounds is not a sufficient basis for the granting of a stay. See, for example, Schelkanov v. Canada (Minister of Employment & Immigration), IMM-1515-94, April 12, 1994 (F.C.T.D.).

\footnote{178} Supra note 2.
counsel in filing this application and included, along with other documentation, submissions from her lawyer, a letter from her doctor, and a letter from a Children's Aid Society social worker. This documentation indicated that, although she was still experiencing psychiatric problems, she was making progress. It also stated that she might become ill again if she were forced to return to Jamaica, since treatment might not be available for her there. The appellant's submissions also clearly indicated that she was the sole caregiver for two of her Canadian-born children, and that the other two depended on her for emotional support and were in regular contact with her.

The application for consideration under section 114(2) was rejected, as was a subsequent application for judicial review and an appeal to the Federal Court of Appeal. The Supreme Court allowed the appeal, however, and concluded that the decision of the immigration officer denying the application for permanent residence on H&C grounds was unreasonable, because it failed to properly take into consideration the interests of the Canadian children. The Court held that the Convention on the Rights of the Child, although not part of Canadian law, should be used to inform the exercise of

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179 Interestingly enough, there was some evidence before the Court in Baker which suggested that Ms. Baker's health would be at risk if she were deported back to Jamaica. This aspect of the case, similar although not as serious as that considered by the European Court in D., was not a central issue as the case progressed through the Courts and hence did not figure in the decision of the Supreme Court.

180 The summary of facts is taken from the judgment of the Supreme Court, supra note 2, paras. 2-4. See also the decision of the Supreme Court of Ireland in the case of Fajijonu v. Minister for Justice, [1989] I.R. 151. The case was brought in the name of a six-year-old child born in Ireland to African parents who were residing in Ireland without a permit. At the time the proceedings were brought, a deportation proceeding had not been initiated. The Court concluded, at 162, that where an alien has in fact resided for an appreciable time in the State and has become a member of a family unit within the state containing children who are citizens, there can be no question but that those children, as citizens, have got a constitutional right to the company, care and parentage of their parents within a family unit ... and that prima facie and subject to the exigencies of the common good that is a right which these citizens would be entitled to exercise within the State.
discretion by immigration officers acting under section 114(2), and that the interests of the children must therefore be an important consideration. Although the Court did not go as far as holding that the interests of the children would be determinative, the decision makes it clear that the best interests of the children are an important, substantial, and indeed central consideration which must be given considerable weight by the decision maker:

The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the Universal Declaration of Human Rights, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations Declaration of the Rights of the Child (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H&C power...

The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H&C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.181

Since the Court was able to decide the case based on administrative law principles, it did not find it necessary to deal with the question of whether the children's interests under section 7 of the Charter would be violated by a decision to deport their mother. However, there is considerable jurisprudence that suggests that the children's

181 Baker, supra note 2, paras. 69-75. As I will argue in the next Chapter, the major limitation of the Supreme Court's decision in Baker is that it did not provide a remedy that would enable the children to assert that they should be allowed to have their mother with them in Canada. In order to obtain such a remedy, the children must rely on sections 7 and 15 of the Charter.
rights under section 7 of the Charter are engaged by the decision to deport their mother and that such a decision is not consistent with principles of fundamental justice.

Thus in the case of B. (R.) v. Children's Aid Society of Metropolitan Toronto,\(^{182}\) La Forest J. concluded that section 7 liberty interests were engaged when the state interfered in the right of a parent to make decisions regarding the health of his or her child. In that case, the Supreme Court was called upon to review a lower court decision that authorized a blood transfusion over the objections of a child's parents, who were opposed to the transfusion on religious grounds. Four of the nine justices of the Court found that the parents' right to liberty was engaged by the actions of the state in interfering in decisions concerning a child's medical care, but concluded that the procedures invoked did not violate the principles of fundamental justice and that state interference was justified as it was in the best interests of the children. The significance of B. (R.) lies in the explicit recognition by the Court that decisions affecting a child's welfare will engage section 7 of the Charter and that, as a result, these decisions must be made in accordance with the principles of fundamental justice and with due consideration given to the best interests of the children. According to the Supreme Court, the fundamental obligation of the state was to ensure the best interests of the children and, in the circumstances of the case, this permitted the state to intervene even if such intervention interfered with the constitutionally protected rights of the parents.

The Supreme Court has indicated in other contexts that the overriding concern of the state when dealing with children must be the best interests of the children, and that the courts must always act so as to ensure that the interests of the children are given

paramount importance. Thus in *Gordon v. Goertz*, the Supreme Court concluded that the interests of the parents were irrelevant and that the only issue to be determined by the courts in considering custody and access matters was the best interests of the children. Again, in *New Brunswick (Minister of Health & Community Services) v. G. (J.) [J.G.]*, the Court held that a parent's section 7 interests are engaged when the state seeks an order suspending a parent's custody rights over her children, and that the principles of fundamental justice require that the state provide legal counsel to an indigent person:

I have little doubt that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.)*, . . . "an individual interest of fundamental importance in our society". Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.

In view of these decisions of the Supreme Court, there is little doubt that the section 7 rights of both the child and the parents are engaged when the state determines to forcibly separate a child from one or both of its parents through an expulsion order, so that the state must carefully consider the best interests of the children prior to doing so. Given that there is no rational basis for making a distinction between separation as a result of expulsion of the parent and separation on account of other forms of state intervention, it is very likely that the Court will conclude that the *Charter* should apply in expulsion cases. Although there might be circumstances where the best interests of the child may not dictate that the parent be allowed to remain in Canada, the principles of

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fundamental justice will certainly require a careful assessment of the interests of the child prior to any decision to deport a parent.

This view is consistent with the jurisprudence from the European Court of Human Rights, where that Court has also emphasized the interests of children when assessing petitions by non-citizens subject to expulsion. The European Court has interpreted Article 8 of the European Convention\textsuperscript{185} so as to provide protection against expulsion in cases where the person subject to deportation has young children. Article 8 reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.\textsuperscript{186}

In the case of \textit{Ahmut v. The Netherlands}, the European Court of Human Rights dealt with an alleged violation of Article 8. The petitioner was the minor son of a citizen of the Netherlands. His father was originally from Morocco and had emigrated to the Netherlands. The son had stayed behind in the custody of his mother. After the mother’s death, and while still a minor, the petitioner sought residency in the Netherlands but it was denied. He applied to the Court alleging that his right to family life had been infringed, and that this infringement was not necessary in a democratic society. Since the

\textsuperscript{185} Supra note 9.

\textsuperscript{186} The \textit{Inter-American Declaration on the Rights and Duties of Man}, supra note 10, contains the following provisions which are similar to those found in the European Convention:

Article I: Every human being has the right to life, liberty and the security of the person.

Article VI: Every person has the right to establish a family, the basic element of society, and to receive protection therefor.

Article IX: Every person has the right to the inviolability of his home.
concept of "family life" is not defined in the European Convention, the Court first had to determine whether the petitioner's right to family life was engaged by the denial of his right to immigrate to the Netherlands. Although the Court concluded, by a vote of five to four, that the interference was not a violation of Article 8 because a state was not under a positive obligation to allow an immigrant's family to enter its territory, the Court did accept that the petitioner's family life was affected:

As the Court has frequently held, it follows from the concept of family on which Article 8 is based that a child born of a marital union is ipso iure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life" (see, as a recent authority, the Gül v. Switzerland judgment . . .), which subsequent events cannot break save in exceptional circumstances. It was not suggested that any such exceptional circumstances were present in this case. The existence of "family life" between the applicants is therefore established.\(^\text{187}\)

The European Court of Human Rights has thus given a broad meaning to the term "family life" so as to extend it to all forms of heterosexual relationships, including common-law ones, and to the relationship between a father or mother and his or her children.\(^\text{188}\) In the case of Berrehab v. The Netherlands, the Court dealt with the opposite situation to that posed in Ahmut. Here the issue was whether the expulsion of a non-citizen, whose child was a citizen of the country, constituted a violation of Article 8 of the European Convention. The petitioner was a citizen of Morocco. He married a Dutch citizen and was granted a residency permit. The couple had a child and subsequently divorced. The father was given, and exercised, regular and frequent access with his child.


\(^{188}\) Sancho, supra note 115 at 67-70, states that the concept of family life does not include homosexual relationship, citing the case of X & Y v. United Kingdom, 32 Decisions and Reports of the European Human Rights Commission 221. However, in light of Smith and Grady, supra note 109, and of the acknowledgement that the Convention is a "living document", this proposition is now subject to question. (Note that the Smith and Grady question was decided under Art. 8, but on the "private life" rather than the "family life" ground.)
The Dutch authorities expelled him, however, holding that he had no legal right to remain in the Netherlands after his marriage had been dissolved. He applied to the Court arguing that his deportation had resulted in a violation of his right to family life. The Court agreed, finding that the right to family life included the right of a child to have access to her father when he was separated from her mother:

The Court likewise does not see cohabitation as a *sine qua non* of family life between parents and minor children. It has held that the relationship created between the spouses by a lawful and genuine marriage — such as that contracted by Mr. and Mrs. Berrehab — has to be regarded as "family life" (see the *Abdulaziz, Cabales and Balkandali* judgment ...). It follows from the concept of family on which Article 8 (art. 8) is based that a child born of such a union is *ipso jure* part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life", even if the parents are not then living together. Subsequent events, of course, may break that tie, but this was not so in the instant case. Certainly Mr. Berrehab and Mrs. Koster, who had divorced, were no longer living together at the time of Rebecca's birth and did not resume cohabitation afterwards. That does not alter the fact that, until his expulsion from the Netherlands, Mr. Berrehab saw his daughter four times a week for several hours at a time; the frequency and regularity of his meetings with her ... prove that he valued them very greatly. It cannot therefore be maintained that the ties of "family life" between them had been broken.189

Having concluded that the right to family life was affected, in order to find a violation under Article 8 the Court next had to find that there was an interference in the petitioner's family life. The Government of the Netherlands argued that there was no such interference as there was nothing to prevent visits between the petitioner and his child. The Court, however, concluded that occasional visits were insufficient and that there was an interference:

In the applicants' submission, the refusal to grant Mr. Berrehab a new residence permit after the divorce and his resulting expulsion amounted to interferences with the right to respect for their family life, given the distance between the Netherlands and Morocco and the financial problems entailed by Mr. Berrehab's enforced return to his home country. The Government replied that nothing prevented Mr. Berrehab from exercising his right of access by travelling from Morocco to the Netherlands on a temporary visa.

Like the Commission, the Court recognises that this possibility was a somewhat theoretical one in the circumstances of the case; moreover, Mr. Berrehab was given such a visa only after an initial refusal ... The two disputed measures thus in practice

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prevented the applicants from maintaining regular contacts with each other, although such contacts were essential as the child was very young. The measures accordingly amounted to interferences with the exercise of a right secured in paragraph 1 of Article 8 (art. 8-1) and fail to be considered under paragraph 2 (art. 8-2).\footnote{190}{Ibid.}

This finding is consistent with other jurisprudence of the European Court of Human Rights, which has given a broad meaning to the term “interference” so as to encompass situations where a parent is separated from a child, or where a child is separated from a parent and/or siblings. Thus in \textit{Boujilfa v. France}, the Court noted:

\begin{center}
\begin{quote}
The Commission expressed the opinion that the deportation order constituted interference with the applicant’s right to respect for his private and family life.
\end{quote}
\end{center}

The question whether the applicant had a private and family life within the meaning of Article 8 must be determined by the Court in the light of the position at the time when the impugned measure was adopted (see, \textit{mutatis mutandis}, the \textit{Bouchekria v. France} . . .). That means on 8 April 1991, but the applicant had been informed on 21 November 1990 that deportation proceedings had been commenced against him . . . Mr Boujilfa was not therefore entitled to claim at that time to be involved in a relationship with Miss V. However, the Court observes that he arrived in France in 1967 at the age of five and has lived there since then, except while he was imprisoned in Switzerland. He received his schooling there (partly in prison), and his parents and his eight brothers and sisters — with whom he seems to have remained in touch — live there . . . Consequently, the Court is in no doubt that the measure complained of amounts to interference with the applicant’s right to respect for his private and family life.\footnote{191}{122/1996/741/940, 21 October 1997, paras. 35-36.}

In \textit{Berrehab}, the Court was also prepared to conclude that the expulsion of the non-citizen petitioner interfered in his family life, notwithstanding the fact that there was the possibility of ongoing contact between the petitioner and his child by means of visitation.\footnote{192}{The Federal Court of Canada has held that the Charter is not violated by the expulsion of a parent because the child has the option of going to live with the parent. See, for example, \textit{Langner v. Canada (Minister of Employment & Immigration), A-386-94}, March 21, 1995 (F.C.A.). However, in light of the Supreme Court of Canada decision in \textit{Baker}, which overruled the Federal Court of Appeal, \textit{Langner} is almost certainly bad law.}

Once the Court determines that there has been an interference with the petitioner’s family life, it will be incumbent on the state to justify the interference. In order to do so,
the state must establish that the interference "is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". The Court must therefore assess whether the requirements of Article 8(2) have been met. The first requirement is that the interference must be "in accordance with the law", meaning that the rule authorizing interference be clear and precise so that any person will be able to understand that the consequences of his or her actions may well lead to expulsion; and the rule must not be applied arbitrarily but with fairness.

The second requirement is that the interference is necessary in order to protect some state interest, such as national security, public order, or possibly an economic interest. This requirement is usually subdivided by the Court into two separate issues: first, the Court will examine the nature of the state interest being protected and determine whether that interest is one that is included in Article 8(2). If that precondition is met, then the Court will assess whether there is proportionality between the state's aim and the interference. When the Court concludes that the interference is disproportionate to the state's objective, then it will conclude that a violation has occurred. In cases involving criminality, the Court will accept as a matter of course that the state's objective is legitimate. By the same token, in cases where the issue is related to immigration policy,

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193 European Convention, supra note 9, Art. 8(2).

194 Sancho, supra note 115 at 73-74.

195 Boujila, supra note 191, para. 39.
the Court will also be prepared to infer that the purpose is legitimate. Thus in Berrehab, the Court noted:

The Government considered that Mr. Berrehab's expulsion was necessary in the interests of public order, and they claimed that a balance had been very substantially achieved between the various interests involved. The Commission noted that the disputed decisions were consistent with Dutch immigration-control policy and could therefore be regarded as having been taken for legitimate purposes such as the prevention of disorder and the protection of the rights and freedoms of others.

The Court has reached the same conclusion. It points out, however, that the legitimate aim pursued was the preservation of the country's economic well-being within the meaning of paragraph 2 of Article 8 (art. 8-2) rather than the prevention of disorder: the Government were in fact concerned, because of the population density, to regulate the labour market.\(^{196}\)

If the expulsion is undertaken in order to achieve a legitimate state objective, the Court will determine whether the effect is proportionate to the state's aim. In Berrehab, the Court concluded that the expulsion was illegal because it had a serious detrimental effect on the petitioner's relationship with his child. The Court affirmed the right of a parent to be close to his or her child in circumstances where the evidence indicated that there was a close relationship, and where the parent's expulsion would make continued access difficult. Thus, while acknowledging that the aim of the state was a legitimate one, the Court found that it was not sufficient to justify the expulsion in the particular circumstances of the case:

Like the Commission, the Court recognises that this possibility was a somewhat theoretical one in the circumstances of the case; moreover, Mr. Berrehab was given such a visa only after an initial refusal . . . The two disputed measures thus in practice prevented the applicants from maintaining regular contacts with each other, although such contacts were essential as the child was very young. The measures accordingly amounted to interferences with the exercise of a right secured in paragraph 1 of Article 8 (art. 8-1) and fall to be considered under paragraph 2 (art. 8-2).\(^{197}\)

\(^{196}\) Berrehab, supra note 189, para. 26-27. See also Sancho, supra note 115 at 75-78, who notes that the Court gives a wide margin to states to regulate immigration, but that this discretion is subject to intervention by the Court when the discretion is exercised in a manner which is disproportionate to the objective.

\(^{197}\) Berrehab, supra note 189, para. 23.
Interestingly, as we shall see in the next section, the Court’s jurisprudence in cases involving the deportation of long-term residents who do not have children is mixed. But when the interests of the children come into play, the Court has been prepared to find a violation of the right to family life as protected by Article 8. It is thus apparent that the European Court of Human Rights has placed a very high value on maintaining the relationship between a parent and a child, and will find a violation where it can be established that the expulsion will have a significant adverse impact on that relationship.\textsuperscript{198}

The Court reached a similar conclusion in the case of \textit{Mehemi v. France}. In \textit{Mehemi}, the Court concluded that the deportation of a long-term permanent resident with a criminal record back to his country of nationality constituted a violation of the petitioner’s rights to family life protected by Article 8 of the \textit{European Convention}. The petitioner had lived in France for more than thirty years prior to his being expelled. His wife and three children, parents, and four of his siblings also resided in France. The Court concluded that, notwithstanding the petitioner’s conviction for conspiracy to import hashish, his expulsion was a violation of Article 8 of the \textit{Convention}:

\begin{quote}
The Court reiterates that it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens and notably to order the expulsion of aliens convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued . . .
\end{quote}

The Court’s task therefore consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant’s right to respect for his

\textsuperscript{198} As we shall see in the next section, the jurisprudence of the Court on the deportation of long-term residents is far more ambiguous. There are cases where the Court has been prepared to authorize the deportation of long-term residents with criminal records. Significantly, in the recent decisions where the Court has found no violation, the petitioner has not had children who were citizens of the expelling country; see, for example, \textit{El Boujaidi v. France}, 123/1996/742/941, 26 September 1997.
private and family life, on the one hand, and the prevention of disorder or crime, on the other.

The Court notes that the applicant was born in France, received all his schooling there and lived there until the age of 33, before the permanent exclusion order was enforced. His parents and his four brothers and sisters live there, as do his wife and his three minor children, who were born in France and have French nationality. Moreover, it has not been established that the applicant had links with Algeria other than his nationality.

On the other hand, in view of the destructive effect of drugs on people's lives, the Court understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge. The fact that in 1989 the applicant participated in a conspiracy to import a large quantity of hashish counts heavily against him. Nevertheless, in view of the applicant's lack of links with Algeria, the strength of his links with France and above all the fact that the order for his permanent exclusion from French territory separated him from his minor children and his wife, the Court considers that the measure in question was disproportionate to the aims pursued. There has accordingly been a breach of Article 8.

The fact that the petitioner had three minor children who were separated from him as a result of the expulsion order was critical to the Court's conclusion that the measure of expulsion was disproportionate to the aim of maintaining public order.

The determination by the Court as to whether an expulsion will be a legitimate and proportionate response will depend on a series of factors, the most important being family ties and especially ties between children and parents. These family ties will be considered together with the gravity of the offenses that form the basis for the decision to expel; the other ties to the expelling state; and finally the ties to the country of nationality.

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200 See the decisions of the European Court of Human Rights in the following cases: Beldjoudi, infra note 222; Berrehab, supra note 189; Djeroud, 34/1990/246, January 23, 1991; and Moustaquim, infra note 229.

201 The Court will not give the same weight to the existence of children if they are born after the person has been ordered expelled: see Sancho, supra note 115 at 82.

202 Ibid. at 82-83. This analysis is similar to the exercise of equitable jurisdiction by the Appeal Division of the IRB: see Chieu, supra note 149. However, in the case of an appeal to the Appeal Division, that tribunal is exercising its discretionary power when it grants equitable relief. This is entirely different from the practice of the European Court, which bases its decision on the right to family unity under the provision of the European Convention. The Court is thus recognizing the existence of a right on the part of
In the case of *Stewart v. Canada*, the UN Human Rights Committee also considered whether international obligations (under the ICCPR) were violated as a result of the deportation of a long-term permanent resident with children. While the Committee upheld the Government of Canada’s right to deport the petitioner, it noted the necessity of giving due consideration to the rights of the children:

The deportation of Mr. Stewart will undoubtedly interfere with his family relations in Canada. The question is, however, is whether the said interference can be considered either unlawful or arbitrary. Canada’s immigration law expressly provides that the permanent residency status of a non-national may be revoked and that person may then be expelled from Canada if he or she is convicted of serious offences. In the appeal process the Immigration Appeal Division is empowered to revoke the deportation order “having regard to all the circumstances of the case”. In the deportation proceedings in the present case Mr. Stewart was given ample opportunity to present evidence of his family connections to the Immigration Appeal Division. In its reasoned decision the Immigration Appeal Division considered the evidence presented but it came to the conclusion that Mr. Stewart’s family connections in Canada did not justify revoking the deportation order. The Committee is of the opinion that the interference with Mr. Stewart’s family relations that will be the inevitable outcome of his deportation cannot be regarded as either unlawful or arbitrary when the deportation order was made under law in furtherance of a legitimate state interest and due consideration was given in the deportation proceedings to the deportee’s family connections.

The dissenting members of the Committee did, however, find that there was a violation.Absent from *Stewart* was any significant analysis of the impact of the deportation on his children, although this can to some extent be explained by the fact that little emphasis was placed on that aspect of the case by the petitioner and the fact that he appeared to have limited contact with them.

*Stewart* is not consistent with the more recent jurisprudence of the Supreme Court of Canada in *Baker* and that of domestic courts in other jurisdictions, according to which significant weight must be accorded to the interests of the children. In addition to *Baker*,

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204 Seven members of the Committee dissented from the majority decision.
the decision of the Australian High Court in the case of *Minister of State & Ethnic Affairs v. Teoh*\(^{205}\) is another example of a decision where the majority of the Court concluded that Australia's ratification of the *Convention on the Rights of the Child* created a legitimate expectation that the Government would act in accordance with the *Convention*. As a result, when considering the issue of deporting a non-citizen resident, the decision maker was bound *to make the best interests of the children its primary consideration*. Although the Court stopped short of recognizing an unqualified right for all non-residents of Australia with Australian children to remain within the territory, it clearly indicated that the interests of the children had to be of primary concern when determining whether to deport the parents and that, by signing the *Convention*, the Government of Australia created a legitimate expectation that the rights of the children would be carefully considered prior to any decision to expel the parents:

It follows that while Australia's ratification of the *Convention* does not go so far as to incorporate it into domestic law, it does have consequences for agencies of the executive government of the Commonwealth. It results in an expectation that those making administrative decisions in actions concerning children will take into account as a primary consideration the best interests of the children and that, if they intend not to do so, they will give the persons affected an opportunity to argue against such a course. It may be said that such a view of ratification will have undue consequences for decision-makers. But it is important to bear in mind that we are not concerned with enforceable obligations, but with legitimate expectations, and that there can be no legitimate expectation if the actions of the legislature or the executive are inconsistent with such an expectation.\(^{206}\)

In light of these developments in the jurisprudence, both domestically and internationally, it is clear that the *Convention on the Rights of the Child*, the ICCPR, and the *European Convention* all require that the interests of children be considered prior to the deportation of parent(s). The European Court of Human Rights has explicitly

\(^{205}\) (1995) 128 A.L.R.

\(^{206}\) *Ibid.*, judgment of Toohey J., para. 32. See also the decision of the New Zealand Court of Appeal in *Tavita v. Minister of Immigration* (1993), 2 NZLR 257.
recognized that the interests of the children are such that they will in most cases preclude deportation of a non-citizen parent. In Australia, New Zealand, and Canada, the courts have ruled that the best interests of the child are an important factor that must be considered prior to any decision to expel the parent(s). This requirement will undoubtedly impose important restrictions on a state's right to expel non-citizens.

3.7 DEPORTATION OF LONG-TERM RESIDENTS

The final area in which the international human rights instruments impact upon the discretion to expel non-citizens arises in cases of expulsion of long-term legal residents who have a claim to be considered "de facto" nationals of the expelling state. The jurisprudence of the European Court of Human Rights and the UN Human Rights Committee contains dicta which tend to support the view that long-term residents have an absolute right to live in the country to which they have immigrated, despite the legitimate interest of the state in wishing to expel them due to criminal activity. This position is justified in a number of different ways.

At the Human Rights Committee, some members have relied on Article 12(4) of the ICCPR, which states that "[n]o one shall be arbitrarily deprived of the right to enter his

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207 As we shall see later in this section, the jurisprudence of the Court is mixed. Some justices support a case-by-case approach, while others maintain that the right of long-term residents is absolute.

208 At the UN Human Rights Committee, those who hold the view that the right of a long-term resident to remain in his own country is absolute are still a minority, although the Committee is almost evenly split on this issue.

209 In this section, we are dealing with the situation of long-term residents who have been admitted to the country as permanent residents. Although there may be some exceptional cases of individuals who never obtain legal status, the vast majority of persons who fit into this category will have legal status. A long-term permanent resident can be defined as an immigrant who came to Canada as a young child and who has remained there all of his or her life without having obtained citizenship. The person will have become fully integrated in Canada and will have few, if any, ties to the country of nationality.
own country". Those who argue in favour of the rights of long-term permanent residents have interpreted this section expansively so as to support their views. At the European Court of Human Rights, the Court has relied on Article 8 and its protection of the right to family life as the basis for its conclusion that, in certain circumstances, expulsion of long-term residents will violate the European Convention. Moreover, although no majority decision has yet relied on it, some judges in dissenting or concurring opinions have also relied on Article 3 of the European Convention, which prohibits inhuman and degrading treatment.

Canada’s Immigration Act currently provides that a permanent resident who has been convicted of an indictable criminal offense, for which a term of more than six months is imposed or more than five years may be imposed, is subject to deportation. The person concerned has a right to appeal to the Appeal Division of the IRB, and that Division has a discretion to allow the appeal if it determines that, in all the circumstances

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210 See discussion of the decision of the Human Rights Committee in Stewart, accompanying notes 203-04, above.

211 Article 8 states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Although they represent a minority, some members of the UN Human Rights Committee charged with supervising compliance with the ICCPR have also taken this position.

212 Immigration Act, s. 27(1). There are other grounds for deportation, including that of a person who obtained status as a result of a misrepresentation or who failed to comply with a condition of his or her admission to Canada.
of the case, the deportation order ought not to be executed.\textsuperscript{213} The Division is required to consider a series of factors including, \textit{inter alia}, the seriousness of the offense, whether the person has been rehabilitated, and the person’s ties to Canada.\textsuperscript{214} However, the Appeal Division’s consideration of such cases is carried out without reference to the human rights of the appellant, but merely as an exercise of its discretion to provide equitable relief. In the result, there is no recognition whatsoever that the person concerned may have an absolute claim to remain in Canada because the person’s expulsion might violate his or her human rights to family life or the right to be protected from inhuman or degrading treatment.\textsuperscript{215} This legal position has its roots in the decision of the Supreme Court of Canada in \textit{Chiarelli}.

\textbf{Chiarelli} was a citizen of Italy who immigrated to Canada at the age of fifteen. He was convicted of several criminal offenses, including uttering threats and possession of narcotics for the purpose of trafficking. As a result, he was ordered deported and he appealed to the Immigration Appeal Board (\textsc{iab}). Prior to the hearing of his appeal, he was notified that the Minister had applied to the Security Intelligence Review Committee (\textsc{sirc}) for a certificate which, if issued, would deprive him of his right to appeal on equitable grounds to the \textsc{iab} (the Government alleged that \textsc{chiarelli} was involved in organized crime). \textsc{chiarelli} was invited to a hearing before the \textsc{sirc}, but he declined to

\begin{footnotesize}
\begin{enumerate}
\item[213] Pursuant to s. 70(5) of the \textit{Immigration Act}, the Minister can deprive the Appeal Division of its jurisdiction by certifying that the person is a danger to the public. In such circumstances, the deportation order is carried out without any equitable review of the circumstances of the case by a quasi-judicial tribunal.
\item[214] \textit{Chieu, supra} note 149.
\item[215] The Minister’s ability to pre-empt the exercise of discretion of the Appeal Division by certifying the person as a danger to the public (see \textit{supra} note 213) is a clear illustration of the absence of such recognition.
\end{enumerate}
\end{footnotesize}
participate on the grounds that the process was unfair. Before the IAB, Chiarelli argued that his rights under section 7 of the *Charter* had been violated as a result of the procedure invoked by the Government, which denied him a right to appeal on equitable grounds. The first appeal was heard by the Federal Court of Appeal, which decided in Chiarelli's favour. On appeal to the Supreme Court, however, the Court concluded that there was no violation of the principles of fundamental justice in denying a non-citizen an equitable appeal. The Court based its reasoning on the ground that, under international law, states had unfettered discretion over the admission of non-citizens and this implied that the only obligation a state had prior to expelling a non-citizen was to ensure that the person had a fair hearing so that the deportation was not arbitrary:

Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. It has done so in the *Immigration Act*. Section 5 of the *Act* provides that no person other than a citizen, permanent resident, Convention refugee or Indian registered under the *Indian Act* has a right to come to or remain in Canada . . . One of the conditions Parliament has imposed on a permanent resident's right to remain in Canada is that he or she not be convicted of an offence for which a term of imprisonment of five years or more may be imposed. This condition represents a legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country . . . It is true that the personal circumstances of individuals who breach this condition may vary widely. The offences which are referred to in s. 27(1)(d)(ii) also vary in gravity, as may the factual circumstances surrounding the commission of a particular offence. However, there is one element common to all persons who fall within the class of permanent residents described in s. 27(1)(d)(ii). They have all deliberately violated an essential condition under which they were permitted to remain in Canada. In such a situation, there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. In the case of a permanent resident, deportation is the only way in which to accomplish this. There is nothing inherently unjust about a mandatory order . . . The deportation of a permanent resident who has deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a criminal offence punishable by imprisonment of five years or more, cannot be said to outrage standards of decency. On the contrary, it would tend to outrage such standards if individuals granted conditional entry into Canada were permitted, without consequence, to violate those conditions deliberately.\(^{216}\)

The Supreme Court in *Chiarelli* bases its approach on the "unfettered" right of sovereign states to control access to their borders by non-citizens. As I have argued in

this and the preceding chapter, however, such an approach is based on a fundamentally erroneous premise, one that fails to consider the plethora of obligations that states have to each other and to individuals under international law. As we saw in the last chapter, under international law states are bound to respect the principle of non-refoulement and to not deport a person back to a country where the person would be at risk of torture. In light of the fact that these rules have and will continue to impose serious limitations on a state’s right to expel or exclude persons, it is incorrect to assert that the power of a state is this domain is unfettered.

The Chiarelli judgment also relies on the notion of a contract between the immigrant and the state: the state allows the person the privilege to enter, work, and have access to services in Canada and, in exchange, the non-citizen agrees to abide by certain conditions such as, inter alia, not to commit criminal offenses. The Supreme Court thus concluded that deportation was not unreasonable in circumstances where an immigrant who had been admitted conditionally to Canada breached one of the conditions of admission. The Court further limited a non-citizen’s rights to minimal procedural fairness in the expulsion proceedings, and denied the non-citizen any substantive right to remain in Canada. Such a view might be reasonable if the person immigrated to Canada as an adult. However, in the case of residents who immigrated as young children in the company of their parents, it cannot be said that they chose to come to Canada and accepted the terms of a social contract. Having been brought here as young children, such individuals cannot be said to be parties to a social contract whereby their admission is contingent upon the fulfillment of certain conditions. Rather, they are products of Canadian society and their right to live in “their own country” ought to be recognized. It
is therefore untenable to maintain that "in such a situation, there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada".

All states, including Canada, are obliged to comply with their obligations under international human rights instruments. In certain cases, these instruments give rights to individuals to resist expulsion. Thus under the ICCPR, the protection against torture is extended so that, pursuant to Article 7, a person cannot be expelled to a country where he or she faces cruel, inhuman, or degrading treatment. As noted above, this protection has been interpreted by some of the justices of the European Court of Human Rights to encompass situations where a person without legal status in the expelling state and with serious criminal convictions is to be deported to a country where he would suffer unduly.217 Even in Canada, the Supreme Court has recognized in Kindler that, in certain circumstances, the consequences of extradition would be "so outrageous to the values of the Canadian community that the surrender would be unacceptable".218 There is no reason why this principle cannot be extended to deportation cases. Indeed in Canepa v. Canada (Minister of Employment & Immigration), the Federal Court of Appeal acknowledged that such a possibility existed:

I am prepared to assume, for the sake of argument, that the issue as to whether deportation under s. 32(2) of the Immigration Act constitutes cruel and unusual treatment under s. 12 of the Charter, is still open to us, and that the question should first be looked at from the perspective of the person subjected to it, as specified by Gonthier J. in Golz. If in that perspective this deportation order under s. 32(2) of the Act were found to contravene s. 12, and the statutory provisions were not saved by s. 1 of the Charter, presumably the deportation order would receive a "constitutional exemption" or "reading out", leaving s. 32(2) in force, as proposed by this court in Grewal v. Canada (Minister of Employment and Immigration) (1991), 85 D.L.R. (4th) 166, 135 N.R. 310, 29 A.C.W.S. (3d) 255, and Kaur v. Canada (Minister of Employment and Immigration) (1989), 64

217 See D., supra note 117.

218 Kindler, supra note 104 at 835.
Based on the *dicta* in *Kindler*, one could contemplate scenarios involving, for example, a person who had criminal convictions but who, at the time of the deportation, was suffering from a serious mental illness which made him completely dependent on others, or from a serious medical problem which required treatment not available in his or her country of nationality. If one applied the standard of the Supreme Court in *Kindler* in cases involving such individuals, their deportation would be unacceptable.

Indeed, this position has been adopted by the European Court of Human Rights in a number of cases. When assessing whether there has been a violation of Article 8 of the *European Convention*, the Court engages in a five-step analysis. First, the Court asks whether there has been any interference with family life. In deportation cases involving long-term permanent residents, who invariably have close family ties to the expelling state, the Court has been prepared to infer that the person's right to family life is affected by the decision to expel.\(^{220}\) In the case of *Beldjoudi v. France*,\(^ {221}\) the fact situation concerned the deportation of a long-term permanent resident, who had in fact been born in France of Algerian parents, but did not have French nationality. He committed many serious criminal offences beginning in his teenage years and spent a total of more than seven years in prison. As a result of these convictions, the Government of France ordered his expulsion. Beldjoudi, who had no children but was married to a French citizen, applied to the European Court of Human Rights arguing that his right to family life was being improperly interfered with as a result of the decision to expel him.

\(^{219}\) 93 D.L.R. (4th) 589 at 597.

\(^{220}\) See, for example, *Berrehab*, supra note 189.

As a preliminary objection, the Government of France maintained that the expulsion of the petitioner did not affect his family life, and sought to distinguish the case from that of Berrehab because the petitioner did not have children. The Court rejected this argument, noting that the "enforcement of the deportation order would constitute an interference by a public authority with the exercise of the applicants’ right to respect for their family life, as guaranteed by paragraph 1 of Article 8".222

Having reached this conclusion, the next step in the Court’s analysis was to consider whether the deportation would be an actual interference with "family life". As can be seen from the section quoted above, the Court concluded that deportation would invariably involve such an interference. Given this finding, the Court was then required to assess whether the interference is in accordance with the law, i.e., whether it is conducted in a non-arbitrary fashion. In deportation cases, the Court has invariably found that the expulsion provisions are not arbitrary. In Beldjoudi, the Court noted that the decision to expel was taken in accordance with the provisions of the French law and that there was no dispute that due process had been complied with.223

The next step in the process of determining whether the conduct of the French Government had violated Beldjoudi’s right to family life was to determine whether the expulsion was being carried out for a legitimate aim. Here, given the petitioner’s lengthy criminal record, the Court had no difficulty in finding that "interference in issue was directed at aims which were entirely in accordance with the Convention, the ‘prevention

222 Ibid., para. 67.
223 Ibid., para. 69.
of disorder' and the 'prevention of crime'. The applicants did not dispute this. Having made this finding, the final requirement was for the Court to decide whether the decision to expel was necessary in a democratic society. As we saw earlier, this requires an analysis of competing interests— that of the state to protect itself against dangerous criminals as opposed to the interest of the individual to maintain his family relations. The Court engages in what can be described as a "proportionality" test, and considers a series of factors including, inter alia, the length of time the person has resided in the expelling state; the person's family connections to that state and how they will be affected by the expulsion; and the person's connections to the country of nationality including family, length of residence, and whether the person speaks the language and understands the culture in that country. These factors are balanced against the seriousness of the criminal record. However, the Court is prepared to conclude in some cases that the nature of the connections to the expelling state are such that the person cannot be expelled regardless of the seriousness of the record:

The Court acknowledges that it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens ... However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8 (art. 8-1), be necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.

In the present case, as was rightly emphasised by the Government, Mr Beldjoudi's criminal record appears much worse than that of Mr. Moustaquim ... It should therefore be examined whether the other circumstances of the case, relating to both applicants or to one of them only, are enough to compensate for this important fact.

The applicants lodged a single application and raised the same complaints. Having regard to their age and the fact that they have no children, the interference in question primarily affects their family life as spouses, as the Government rightly pointed out. They were

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224 Ibid., para. 70.

225 As we saw in the last section, the existence of children is a critical factor and if the petitioner has children who are nationals of the expelling state, then the Court will invariably find in his or her favour.
married in France over twenty years ago and have always had their matrimonial home there . . .

Mr. Beldjoudi, the person immediately affected by the deportation, was born in France of parents who were then French. He had French nationality until 1 January 1963. He was deemed to have lost it on that date, as his parents had not made a declaration of recognition before 27 March 1967 . . . Finally, he has spent his whole life — over forty years — in France, was educated in French and appears not to know Arabic. He does not seem to have any links with Algeria apart from that of nationality.

. . .

Having regard to these various circumstances, it appears, from the point of view of respect for the applicants' family life, that the decision to deport Mr. Beldjoudi, if put into effect, would not be proportionate to the legitimate aim pursued and would therefore violate Article 8. 226

Judge Martens agreed with the result but suggested that the Court should adopt a clear policy regarding long-term residents, grounded in the acknowledgement that there was no rational basis to distinguish between them and nationals when it comes to questions of expulsion:

Paragraph 1 of Article 3 of Protocol No. 4 (P4-3) to the Convention forbids the expulsion of nationals. In a Europe where a second generation of immigrants is already raising children (and where violent xenophobia is increasing to an alarming extent) it is high time to ask ourselves whether this ban should not apply equally to aliens who were born and bred in a member State or who have otherwise, by virtue of long residence, become fully integrated there (and, conversely, become completely segregated from their country of origin).

In my opinion, mere nationality does not constitute an objective and reasonable justification for the existence of a difference as regards the admissibility of expelling someone from what, in both cases, may be called his "own country". I therefore have no hesitation in answering the above question in the affirmative. I believe that an increasing number of member States of the Council of Europe accept the principle that such "integrated aliens" should be no more liable to expulsion than nationals, an exception being justified, if at all, only in very exceptional circumstances . . . I would have preferred the Court's decision in the present case to have been based on the aforesaid principle, coupled with a finding that there were no very exceptional circumstances justifying a departure therefrom. A judgment along those lines would have achieved what the Moustaquim v. Belgium and the present judgment have failed to do, namely introduce a measure of legal certainty; this seems highly desirable, especially in this field. 227

In the case of Moustaquim v. Belgium, the Court engaged in a similar analysis and concluded again that there was a violation of Article 8. The petitioner was a citizen of

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226 Beldjoudi, supra note 222, paras. 74-78.

227 Ibid.
Morocco who had arrived in Belgium in 1965 when he was two years of age. Over the next sixteen years, he accumulated some 147 charges for theft, aggravated theft, and robbery, although only 22 convictions were registered against him. The Court concluded that, in view of the length of time the petitioner had spent in Belgium, his close family ties in that country, and his lack of ties to Morocco, the expulsion could not be justified: Mr. Moustaquim's alleged offences in Belgium have a number of special features. They all go back to when the applicant was an adolescent... Furthermore, proceedings were brought in the criminal courts in respect of only 26 of them, which were spread over a fairly short period—about eleven months—and on appeal the Liège Court of Appeal acquitted Mr. Moustaquim on 4 charges and convicted him on the other 22. The latest offence of which he was convicted dated from 21 December 1980. There was thus a relatively long interval between then and the deportation order of 28 February 1984. During that period the applicant was in detention for some sixteen months but at liberty for nearly twenty-three months.

Moreover, at the time the deportation order was made, all the applicant's close relatives—his parents and his brothers and sisters—had been living in Liège for a long while; one of the older children had acquired Belgian nationality and the three youngest had been born in Belgium. Mr. Moustaquim himself was less than two years old when he arrived in Belgium. From that time on he had lived there for about twenty years with his family or not far away from them. He had returned to Morocco only twice, for holidays. He had received all his schooling in French. His family life was thus seriously disrupted by the measure taken against him, which the Advisory Board of Aliens had judged to be "inappropriate".

Having regard to these various circumstances, it appears that, as far as respect for the applicant's family life is concerned, a proper balance was not achieved between the interests involved, and that the means employed was therefore disproportionate to the legitimate aim pursued. Accordingly, there was a violation of Article 8.

However, in the case of El Boujaidi, the Court concluded that there was no violation of Article 8 in the case of a long-term permanent resident who had immigrated to France when he was seven and had lived there for more than seventeen years prior to the issuance of the final expulsion order. He was convicted of serious offenses including trafficking in drugs and robbery. Although he married and had a child in France, the child was born after the issuance of the expulsion order so that the Court concluded that it was


229 Supra note 198.
not relevant to the determination of the case.\textsuperscript{230} Despite this fact, the Court accepted that the expulsion affected and interfered with his family life; it found, however, that the interference was in accordance with the law and that the aim of the expulsion was for a legitimate state purpose:

The Court’s task therefore consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant’s right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other. The Court notes that Mr. El Boujaidi arrived in France at the age of seven and lived there lawfully from 1974 until 19 June 1991 (the date of his release . . .). He received most of his education there, he worked there and his parents, his three sisters and his brother live there . . . However, while he asserted that he had no close family in Morocco, he did not claim that he knew no Arabic or that he had never returned to Morocco before the exclusion order was enforced. It also seems that he has never shown any desire to acquire French nationality. Accordingly, even though most of his family and social ties are in France, it has not been established that he has lost all links with his country of origin other than his nationality . . . The seriousness of the offence on account of which the measure in issue was imposed on the applicant and his subsequent conduct count heavily against him.

Having regard to the foregoing, the Court does not find that enforcement of the order for the applicant’s permanent exclusion from French territory was disproportionate to the legitimate aims pursued. There has accordingly been no breach of Article 8.\textsuperscript{231}

In a very cogent dissent, Judge Foighel argued that, as a long-term permanent resident, the petitioner ought to have been immune from deportation:

El Boujaidi belongs to the category of “integrated aliens” or “second-generation immigrants”. As such he did not choose his country of residence of his own free will and he went through his entire upbringing, schooling etc. under the same conditions as French nationals.

I share the opinion expressed by Judge Martens in the case of Boughanemi v. France that integrated aliens — i.e. aliens who have spent all or practically all their lives in a State — should in principle be treated in the same way as nationals as regards the question of their expulsion. As mentioned by Judge Martens, the expulsion of nationals is forbidden by Article 3 § 1 of Protocol No. 4. An effective consequence of this principle would be that — with the possible exception of absolutely extraordinary cases — integrated aliens would not be subject to expulsion. This view, which has also been advocated by Judges de Meyer, Morenilla, Baka and Palm, is also consistent with the fact that nationality is not a condition for the exercise of the rights guaranteed by the Convention, unless the Convention expressly states as much in relation to a specific right.

\textsuperscript{230} Ibid., para 32.

\textsuperscript{231} Ibid., paras. 40-41.
The criminal law of the country of residence should normally be sufficient to punish criminal acts committed by an integrated alien, in the same way as it is deemed sufficient to punish criminal acts committed by a national.232

The Court split again along similar lines in the case of *Boujlifa v. France*. The petitioner in this case was a citizen of Morocco who emigrated to France when he was five years of age. He was convicted of armed robbery and received a six-year sentence. Ordered expelled from France, he applied to the European Court arguing a violation of Article 8. The majority found no violation:

With regard to Mr. Boujlifa’s ties, the Court observes that he arrived in France at the age of five and has lived there since 1967, except for the period from 5 May 1987 to 5 August 1988, when he was serving a prison sentence in Switzerland. He received his education in France, he worked there for a short period and his parents and his eight brothers and sisters live there . . . On the other hand, it seems that he did not show any desire to acquire French nationality at the time when he was entitled to do so. The Court notes that the offences committed (armed robbery and robbery), by their seriousness and the severity of the penalties they attracted, constituted a particularly serious violation of the security of persons and property and of public order. It considers that in the instant case the requirements of public order outweighed the personal considerations which prompted the application.233

There were two dissenting opinions. Judge Morenilla relied on the earlier reasoning of the Court and argued that the deportation of long-term residents was a violation of article 3, which prohibits inhuman treatment, and also a violation of the right of a national to reside in his country. He argued that there was no reasonable basis to distinguish between long-term residents and nationals and that the criminal justice system was an effective way of dealing with this problem:

To my regret, I cannot agree with the majority in this case. The considerations I set out in my partially dissenting opinion in the *Nasri* case (judgment of 13 July 1995, Series A no. 320-B, pp. 30-33) remain valid in the present case, although the extreme situation of Mr. Nasri, a deaf-mute from birth, raised in even more dramatic terms the same question of the compatibility with Articles 3 and 8 of the *Convention* of the deportation from France to his country of origin of a “second-generation” immigrant who had been convicted of serious crimes committed in his youth, a measure adopted by the French authorities after he had served the sentences imposed on him. Mr. Boujlifa — like Mr. Nasri — is the son


233 *Supra* note 191, para. 44.
of an immigrant and came to France from Morocco in 1967 at the age of five under a family reunion procedure. His whole family lives in France and three of his brothers have French nationality on account of their birth in French territory. He has never returned to Morocco, whose language he says he does not know . . . , and he has been living since 1991 with a French national who will not follow him to Morocco. In these circumstances, since the deportation of Mr. Boujlifa to his country of origin, where he now has no social ties, tears him away from his French environment, it constitutes an interference on the part of the French authorities with his right to respect for his private and family life, as set forth in Article 8 of the Convention, and has no ethical or legal justification under paragraph 2 of that Article. The pressing social need to preserve public order cannot be invoked, since the measure concerned amounted to an aggravation of the criminal penalty imposed on Mr. Boujlifa in relation to those imposed on French nationals, so that it is discriminatory. It is also incompatible with the objective of promoting the social rehabilitation of offenders. Lastly, it is unjust for the country which has to take in the deported alien, which is not responsible for its national’s antisocial behaviour.  

Judges Baka and Van Duk also dissented, arguing that the Court had failed to provide any rational distinction between the facts in Boujlifa and the earlier decisions in Mostaquim and Nasri, where violations had been found. They argued that deportation of those immigrants who had grown up in a member state of the European Union should be prohibited, or at least permissible only in exceptional cases of public order.

In the case of Nasri v. France, the Court again found a violation of Article 8. This case was compelling on the facts in that the petitioner was a deaf mute who had lived almost all of his life in France, arriving there when he was five years of age. He accumulated a very lengthy criminal record, which included crimes of violence, and was ordered deported as a danger to public order. He petitioned the European Court, alleging a violation of Article 8. The Court found a violation, concluding that the circumstances of the case were such that the deportation of the petitioner would violate his right to family life.

Of special interest in Nasri is the concurring opinion of Judge Morenilla, who argued that the proper approach was to find that the deportation of the petitioner would

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234 Ibid.

violate Article 3 as it would constitute an imposition of inhuman and degrading treatment:

The deportation of such dangerous “non-nationals” may be expedient for a State which in this way rids itself of persons regarded as “undesirable”, but it is cruel and inhuman and clearly discriminatory in relation to “nationals” who find themselves in such circumstances. A State which, for reasons of convenience, accepts immigrant workers and authorises their residence becomes responsible for the education and social integration of the children of such immigrants as it is of the children of its “citizens”. Where such social integration fails, and the result is antisocial or criminal behaviour, the State is also under a duty to make provision for their social rehabilitation instead of sending them back to their country of origin, which has no responsibility for the behaviour in question and where the possibilities of rehabilitation in a foreign social environment are virtually non-existent. The treatment of offenders whether on the administrative or criminal level should not therefore differ according to the national origin of the parents in a way which — through deportation — makes the sanction more severe in a clearly discriminatory manner.

Attention has rightly been drawn (see Andrew Drzemczewski, “The position of aliens in relation to the European Convention on Human Rights”, Council of Europe, Strasbourg, 1985, pp. 7-9) to the way in which international law has changed over the last few years, under the influence of recent developments in the human rights field, towards according equal treatment between aliens and nationals. This equality becomes more and more evident where the aliens are “immigrants integrated” in the community where they work. In the words of Article 12 para. 4 of the International Covenant on Civil and Political Rights, their “own country” is that in which they were born or in which they grew up and which is theirs despite the difficulties of integration inherent in being of foreign origin or belonging to a different family culture. In any event, legal considerations or reliance on the traditional notion of State sovereignty cannot today serve as the basis for such treatment.\(^\text{236}\)

The jurisprudence reviewed above reveals a serious split of opinion in the European Court of Human Rights. While all of the justices appear prepared to accept that, in cases where the long-term resident has children who were born prior to the issuance of the expulsion order,\(^\text{237}\) separation from the children would constitute a violation of Article 8 of the Convention, their views in cases where there are no children are mixed. All of the justices are prepared to concede that, in some cases where the circumstances are compelling, expulsion is too disproportionate a penalty. Among the factors that are

\(^{236}\text{Ibid., paras. 3-4.}\)

\(^{237}\text{El Boujaldi, supra note 198.}\)
considered are the severity of the criminal record, the ties to the expelling state, and the lack of connections to the country of nationality.

Some of the justices are prepared to go further and hold that the deportation of long-term residents should be prohibited in all except the most extreme cases. They rely either on the prohibition against inhuman treatment (Article 3) or on an expanded understanding of the term "national", arguing that it should encompass not only citizens but also long-term residents.

A similar division of opinion is apparent in the jurisprudence of the UN Human Rights Committee. As noted above, in the case of Stewart the majority of the Committee upheld the deportation of a long-term permanent resident convicted of criminal offenses, and rejected the notion that the notion of "own country" should be expanded so as to encompass second-generation immigrants. The minority, however, argued for such an interpretation, on the basis that the provision in Article 12(4) that "[n]o one shall be arbitrarily deprived of the right to enter his own country" must include not only nationals but also long-term residents, and that the denial of the right of admission to the petitioner was unreasonable because it was arbitrary:

The circumstances relied on by the author to establish that Canada is his own country are that he had lived in Canada for over thirty years, was brought up in Canada from the age of seven, had married and divorced there. His children, mother, handicapped brother continue to reside there. He had no ties with any other country, other than that he was a citizen of the UK; his elder brother had been deported to the UK some years before . . . Underlying the connections mentioned is the fact that the author and his family were accepted by Canada as immigrants when he was a child and that he became in practical terms a member of the Canadian community. He knows no other country. In all the circumstances, our view is that the author has established that Canada is his own country.

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238 The Justices do not specify what would qualify as an extreme case, other than to state that it would only entail cases where there is evidence of such serious criminality that the person would constitute a grave threat to public safety.

239 Supra note 203.
Was the deprivation of the author's right to enter Canada arbitrary? In another context, the Committee has taken the view that "arbitrary" means unreasonable in the particular circumstances, or contrary to the aims and objectives of the Covenant (General Comment on article 17). That approach also appears to be appropriate in the context of article 12, paragraph 4. In the case of citizens, there are likely to be few if any situations when deportation would not be considered arbitrary in the sense outlined. In the case of an alien such as the author, deportation could be considered arbitrary if the grounds relied on to deprive him of his right to enter and remain in the country were, in the circumstances, unreasonable, when weighed against the circumstances which make that country his "own country".

The grounds relied on by the State party to justify the expulsion of the author are his criminal activities. It must be doubted whether the commission of criminal offences alone could justify the expulsion of a person from his own country, unless the State could show that there are compelling reasons of national security or public order which require such a course. The nature of the offences committed by the author do not lead readily to that conclusion... In these circumstances, we conclude that the decision to deport the author was arbitrary, and thus a violation of his rights under article 12, paragraph 10. We agree with the Committee that the deportation of the author will undoubtedly interfere with his family relations in Canada (paragraph 12.10), but we cannot agree that this interference is not arbitrary, since we have come to the conclusion that the decision to deport the author — which is the cause of the interference with the family — was arbitrary. We have to conclude, therefore, that Canada has also violated the author's rights under articles 17 and 23.480

This strong and cogent dissent expresses the rationale behind accepting that long-term permanent residents have a human right to be exempt from expulsion. One commentator on the European Court's jurisprudence in this area notes that

"If this interpretation [of the non-expulsion of second-generation immigrants] is accepted it will be necessary to conclude that second generation immigrants can only be expelled in truly exceptional cases. This thesis is of great interest because it would impose a positive obligation on the receiving state to allow foreigners residing on its territory the possibility to effectively integrate into society."481

Acknowledgement of the right of second-generation immigrants to be exempt from expulsion is indeed reasonable, in light of the concept of domicile, which existed under previous immigration legislation in Canada.482 Domicile, acquired after five years of permanent residence, provided protection from expulsion except in cases of treason or

480 Ibid., dissenting opinion by Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Francisco José Aguilar Urbina, paras. 7-10.

481 Sancho, supra note 115 at 85 (translated from the original Spanish text).

482 According to s. 2 of the Immigration Act, 1952, a person acquired domicile after residing in Canada for a period of five years as a permanent resident.
sedition. What is being proposed here is a lesser degree of protection, one that would only apply to persons whose expulsion would violate their human rights in circumstances discussed above.

As noted by the European Court of Human Rights in *Selmouni*, the interpretation of human rights treaties is subject to constant change as the underlying values of society evolve. Over the course of the past fifteen years, there have been significant changes as a result of the implementation of new human rights treaties and the emergence of a new trend in the jurisprudence on the international level. The significance of these developments on expulsion and exclusion has yet to be fully appreciated. However, the decisions of the European Court of Human Rights which have extended the protection of family life to include exemption from expulsion in cases where young children would be affected, and the decisions of the Supreme Courts of Canada and Australia in *Baker* and *Teoh*, respectively, are certainly harbingers of new, positive directions in the jurisprudence. Surely, it is only a matter of time before the rights of second-generation immigrants are fully accepted.

3.8 CONCLUSION

Once we accept that in certain situations a person’s human rights must take precedence over the right of the state to expel, then the question becomes one of determining the parameters of such rights and the extent to which they will limit a state’s discretion in this area. We must look to the international human rights treaties for guidance. Given the clear statements in the ICCPR and CAT and the jurisprudence that has evolved in the

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243 As was noted by the Supreme Court of Canada in *Baker, supra* note 2, and in *Slaight Communications Inc., supra* note 5, human rights treaties inform the interpretation of the *Charter*. 
various international fora, there can be no doubt that the right to be protected against
torture and other forms of cruel, inhuman, and degrading treatment is now considered a
human right. There are strong indications that this protection will extend to the indirect
consequences of expulsion arising out of a lack of resources in the receiving state.

These same instruments and the Convention on the Rights of the Child requires
governments to act in a manner that takes into account the best interests of the child. In
Europe, in cases involving the expulsion of long-term residents, the existence of children
is all but determinative. This is consistent with the positions adopted by the Supreme
Courts of Canada and Australia, which too have held that the children’s interests are of
paramount importance. Given the fact that the Supreme Court of Canada has, over the
last several years, accepted that section 7 of the Charter encompasses a person’s right to
parent and a child’s right to parental guidance, there can be no doubt that the rights of
Canadian children will impose limitations on state’s discretion in this area. As noted
above, there is a growing body of jurisprudence from the European Court of Human
Rights according to which the human rights of children and their interest in not being
separated from their parents take precedence over the state’s interest to expel.

Beyond the question of the interests of children, it is certainly arguable that a
long-term resident can now assert that citizenship is not a proper gauge of his or her right
to reside in his or her “own country”. Although this argument is not yet unanimously
accepted by the European Court of Human Rights and the UN Human Rights Committee,

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244 Supra note 11.

245 In my review of the jurisprudence of the European Court, I was unable to find a single case
since 1990 where the Court upheld the expulsion order in circumstances involving a long-term resident
with criminal convictions who had minor children prior to the issue of the expulsion order.
there is an increasingly vocal minority in both fora which is prepared to support the position that the concept of “own country” must be given a broader interpretation, so that so-called “second generation” immigrants are acknowledged to have a right to remain in the country even if they commit offenses that would otherwise make them subject to expulsion.
CHAPTER FOUR: THE PRESENT AND FUTURE OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS RELATING TO DEPORTATION IN CANADIAN LAW

In light of the developments in customary international law and the emergence of the human rights conventions noted in the previous chapters, it is clear that the power of a state to expel non-citizens is subject to important limitations, so that the position expressed by the Supreme Court of Canada in Chiarelli\(^1\) — that the power of a state to admit or expel non-citizens is unfettered — is no longer tenable. As we have seen, the human right to be protected against persecution and torture; the right to not be subjected to cruel, inhuman, or degrading treatment or punishment; the right of a child to be close to his or her parents; the right of a person to maintain family life; and the right to remain in one’s “own country”, can all constitute grounds to resist deportation.

However, when confronted with national legislation, which permits expulsion, the individual concerned will often find it difficult to access a forum where the claim that the expulsion decision violates his or her human rights can be asserted. In Europe, all of the European Union member states have now accepted the jurisdiction of the European Court of Human Rights, so that the individuals concerned can appeal expulsion decisions against them to that higher authority which, as we have seen, has acknowledged that the human rights of the individual will often restrict the state’s power to expel non-citizens it has deemed undesirable.\(^2\)

In countries that are not part of the Council of Europe, however, a person facing expulsion will not usually have recourse to a judicial authority outside the national court

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\(^1\) Chiarelli v. Canada (Minister of Employment & Immigration), [1992] 1 S.C.R. 711.

\(^2\) Maastricht Treaty.
In countries that are not part of the Council of Europe, however, a person facing expulsion will not usually have recourse to a judicial authority outside the national court system. In terms of recourse to international fora, as noted in chapter two, the individual is not ordinarily regarded as a subject of international law and does not generally have standing before international tribunals. In cases where the country has accepted the individual communications procedures under the *Optional Protocol to the Convention against Torture* or the ICCPR, however, it will be possible for the individual to make a complaint to the Committees established to ensure compliance with these instruments. These petitions however are not the equivalent of binding judicial rulings even within each treaty's order, and further more have no direct affect in the Canadian legal system in view of Canada's dualistic approach to the reception of treaty law.

4.1 AVENUES IN CANADIAN LAW

In Canada, in terms of domestic remedies, the procedural and substantive rights that non-citizens have to resist deportation are quite limited. As a result of the decision of the Supreme Court of Canada in *Chiarelli*, the only procedural protection available to a person is an immigration inquiry before an adjudicator, where the onus is on the Government to demonstrate that the person is subject to removal under the provisions of section 27(1) or 27 (2) of the *Immigration Act*. Given that the immigration adjudicator

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3 Some Commonwealth countries still provide for an appeal to the Privy Council. In addition, the Inter-American Court for Human Rights has jurisdiction to hear petitions filed against countries that are members of the OAS by persons who allege that country's conduct is in violation of the *Inter-American Declaration on the Rights and Duties of Man*. The Commission has only had a few complaints against Canada to date.

4 *Supra* note 1.

5 Section 27(1) of the *Immigration Act* provides the grounds for deportation of an immigrant. These include conviction under any act of Parliament of an offence punishable by five or more years or for
does not have equitable jurisdiction and that the issue before him will not usually be in dispute,\(^6\) the hearing in most cases is *pro forma* and fails to address the substantive issue—whether the person should be subject to deportation in view of his or her connections to Canada or given the consequences of the deportation. As a result of the *Chiarelli* decision, a non-citizen in Canada does not have a right to an equitable review on the merits prior to removal.

Despite the holding in *Chiarelli*, the current legislation does provide most immigrants with an appeal before the Appeal Division of the Immigration and Refugee Board (IRB).\(^7\) This jurisdiction can be removed, however, if the Minister certifies the person as a danger to the public pursuant to section 70(5) of the *Immigration Act*.\(^8\)

Even when the Appeal Division does hear the appeal and exercise its power to review equitable issues,\(^9\) its jurisdiction is quite limited. As a result of *Chiarelli*, and of the development of the jurisprudence of the Appeal Division and the Federal Court of Canada in cases involving criminality,\(^10\) the Appeal Division must balance the

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\(^{6}\) The adjudicator must only determine whether the person is in fact described in the relevant paragraph of s. 27(1) of the *Act*.

\(^{7}\) See s. 70 of the *Immigration Act* that gives the Appeal Division the jurisdiction to hear equitable appeals made by permanent residents who have been ordered deported.

\(^{8}\) *Ibid*. s. 70(5).

\(^{9}\) As noted above as a result of the Supreme Court decision in *Chiarelli* there is no obligation on the part of the government of Canada to give a permanent resident an equitable appeal. However, the legislation still grants such an appeal unless the person is certified as a danger to the public. If the Minister certifies the person as a danger then the Board loses its jurisdiction to hear the Appeal.

\(^{10}\) See especially *Chieu v. Canada (Minister of Citizenship & Immigration)*, A-1038-96, December 3, 1998 (F.C.A.), where the Court listed the criteria to be considered by the Appeal Division
seriousness of the offence, the likelihood of rehabilitation, and the danger the person poses to the public against the impact of deportation on the person and his or her family in Canada.\(^{11}\) There is no requirement that the Appeal Division consider the human rights of the individual, or that it place a high value on the rights of children to have the continued presence of their parent.\(^{12}\) Indeed, Draft Guidelines issued by the Chair of the \(^{13}\) in October 1998 directed members of that tribunal to not exercise their equitable jurisdiction in favour of the Appellant if, on a balance of probabilities, they are not satisfied that the person was rehabilitated.\(^{13}\) Moreover, the jurisprudence of the Federal Court expressly denies the Appeal Division the jurisdiction to consider the impact on the person concerned of the return to the country of nationality, a factor that is highly relevant in the analysis of the European Court of Human Rights.\(^{14}\)

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\(^{11}\) Ibid. This holding is based on the erroneous conclusion of the Federal Court of Appeal that the country of deportation is not known at the time of the appeal, because the Minister has not yet determined the country to which the person will be deported. In fact, in virtually every case the only country to which the person can be deported is his or her country of nationality, and this fact is known at the time the Appeal Division hears the appeal.

\(^{12}\) There have been no decisions by the Federal Courts on this point since the decision of the Supreme Court of Canada in \(Baker v. Canada (Minister of Citizenship & Immigration), (1999) 174 D.L.R. (4th) 193 (S.C.C.)\) July 9, 1999, was released. It remains to be seen whether the \(Baker\) decision will result in greater weight being placed on the interests of children in such circumstances.

\(^{13}\) Pursuant to section 65(3) of the \(Immigration Act\), the Chair of the Immigration and Refugee Board may issue guidelines to “assist the members . . . carrying out their duties under this \(Act\)”. The draft guidelines make no mention of the human rights of the person being deported or of placing any special importance on the rights of children. These guidelines, if implemented, while not binding on Members, will have an important persuasive effect. They have not yet been approved by the Chairperson.

\(^{14}\) \(Chieu, supra\) note 10. The \(Chieu\) decision suggests that there are other mechanisms whereby these issues can be decided including, \(inter alia\), humanitarian and compassionate reviews. However, as noted below, although a person can seek such a remedy, an application for permanent residence on humanitarian and compassionate grounds does not stay removal, so that the person could be deported before an assessment of the impact of deportation has been made. Moreover, the humanitarian review is a discretionary one, so that the effect of the decision of the Federal Court of Appeal in \(Chieu\) is that consideration of issues related to consequences of return to a person’s country of nationality are no longer
Non-immigrants facing deportation have even fewer procedural or substantive rights. Most individuals who assert a fear of persecution will have a hearing before the quasi-judicial Convention Refugee Determination Division (CRDD) of the IRB. The matter is initially referred to a senior immigration officer who makes a determination with respect to eligibility to make a claim and removability from Canada at the same time.\(^{15}\) However, if a refugee claimant is either excluded from the Convention refugee definition by the CRDD at the hearing into the claim pursuant to Article 1F, or found ineligible to make a claim by a senior immigration officer pursuant to section 46.01 of the Immigration Act,\(^ {16}\) he or she will not have a determination concerning risk of removal to the country of nationality by the CRDD. Moreover, the CRDD only has jurisdiction to consider the claim to refugee status and cannot consider other issues that might arise upon removal, such as a risk of torture for reasons outside the scope of the Refugee Convention, or other humanitarian concerns.

In cases where the individual does not make a claim to be a Convention refugee, the only procedural requirement is a hearing before an immigration adjudicator or an interview before a senior immigration officer before the removal order is issued.\(^ {17}\) Although there is a right to seek judicial review of that decision, the Court can only

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\(^{15}\) See the Immigration Act, ss. 44-46.01; 20-23.

\(^{16}\) Section 46.01 provides the criteria for determining who is eligible to make a refugee claim. Inter alia, a person is not eligible to make a claim if he or she has already had a claim determined and has not left Canada; if he or she has protection in another country; and if he or she has committed, or been convicted of, a serious criminal offence and is certified by the Minister to be a danger to the public or a threat to national security.

\(^{17}\) Certain types of removal orders can be made by a senior immigration officer at an informal interview; see, for example, ss. 23(4); 27(4) of the Immigration Act.
consider whether errors of law were committed in the determination to issue a removal order, and cannot look beyond that to determine whether there are any other equitable factors.\textsuperscript{18}

Finally, a non-citizen who is not a permanent resident has a right to apply for landing on humanitarian and compassionate grounds (H\&C application), pursuant to section 14(2) of the \textit{Immigration Act}. However, the procedure involved is extremely time consuming so that it will usually take more than six months before a decision is rendered. Since there is no statutory obligation on the Minister to consider such an application prior to the execution of the deportation order,\textsuperscript{19} the submission of an H\&C application will not, in most cases, be an effective remedy, as the removal order may well be executed before the decision on that application is rendered. Although it is possible for a person in this situation to seek a stay of deportation, a stay will only be granted if the person satisfies a justice of the Federal Court that he or she meets the tripartite test, namely that there is a serious issue to be tried with respect to the application for judicial review, that the person will suffer irreparable harm if the application is denied, and that the balance of convenience is with the applicant. There is jurisprudence in the Federal Court that clearly indicates that the mere submission of an H\&C application does not constitute sufficient justification for granting a stay of removal,\textsuperscript{20} although in some cases

\textsuperscript{18} \textit{Ibid.} s. 83.1.

\textsuperscript{19} See, for example, \textit{Shchelkanov v. Canada (Minister of Employment \& Immigration)}, IMM-1515-94, April 12, 1994. The process currently in place for consideration of H\&C applications is an extremely lengthy and cumbersome one, whereby the applicant sends the application to a centralized processing centre in Vegreville, Alberta. Once received at the Central Processing Centre, the application is then referred to one of the local immigration offices. In Toronto, the current processing time from submission of the application to a decision is over nine months.

\textsuperscript{20} \textit{Shchelkanov, ibid.}
the Court has been prepared to issue a stay until such time as the H&C application is dealt with. However, these are rare exceptions to the general rule.

In addition, the review of an H&C application involves the exercise of discretion by an immigration officer. Although as a result of the decision of the Supreme Court of Canada in *Baker* the process now requires that the officer provide reasons and comply with the principles of fairness, there is no requirement that the officer conduct an oral interview. Most of the officers exercising the discretion have little, if any, training in international human rights issues. There is no appeal from a negative decision. The person concerned can seek leave to commence an application for judicial review in the Federal Court, but the scope of the Court’s power on review is very limited — the Court will give a great deal of deference to the decision maker and will only intervene if the decision is unreasonable.

The effect of all of these provisions is that, in most cases, persons who seek to resist deportation on the grounds that their human rights will be violated will find it extremely difficult to obtain an effective remedy under current immigration procedures.

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22 Supra note 12

23 Section 82.1 of the *Immigration Act*. In terms of the scope of review, as a result of the decision of the Supreme Court in *Baker* the degree of deference that the Court will now afford to immigration officers remains uncertain. The pre-*Baker* jurisprudence afforded a very high degree of deference so that decisions were only overturned if they were ‘patently unreasonable’. *Baker* held that the degree of deference was not as high holding that the standard was reasonableness. There is some indication in the cases decided since *Baker* that the Court will be prepared to intervene more frequently. See, for example, *Sovalharro v. Canada (Minister of Citizenship & Immigration)*, [1999] IMM-5049-98, August 26, 1999. However, since judicial review involves an application for leave and leave is denied in the vast majority of cases, this process does not provide an effective remedy for reviewing the discretion of immigration officers.
Immigrants do have a right in most cases to appeal to the Appeal Division but, as noted above, the jurisdiction of that tribunal is limited. Non-immigrants practically have no effective remedies. Children seeking to assert that they should not be separated from their parents, for example, do not have any meaningful mechanism through which to present their case before the decision-makers. In this context, it is extremely important for persons to look beyond the existing statutes for effective remedies for the protection of their human rights.

4.2 INTERNATIONAL AVENUES

The first forum where a non-citizen can assert his or her human rights is before the Human Rights Committees established pursuant to the *Optional Protocols*. As noted in the previous chapter, under the *Optional Protocol* to the ICCPR, a person can submit a “communication” to the Human Rights Committee alleging that one or more of his or her rights under the *Covenant* has been violated.\(^{24}\) As Canada is a signatory to the *Optional Protocol*, the Committee has jurisdiction to hear a complaint against it. Once a “communication” has been filed, the Committee will first determine whether it is admissible. In order for the Committee to make that finding, the country which is alleged to have committed the violation must be a party to the *Optional Protocol*; the person

\(^{24}\) *Optional Protocol* to the *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entered into force 23 March 1976. Article I states:

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.
submitting the “communication” must have exhausted all domestic remedies;\textsuperscript{25} the matter must not be the subject of a complaint before any other international human rights body; and the matter must not be frivolous.\textsuperscript{26}

If the complaint is found to be admissible, the Committee will proceed to examine the matter on the merits. This process involves a formal submission by the petitioner that is then forwarded for comments to the country, which is the subject of the complaint. A six-month time limit for the state party’s comments is usually imposed, following which the petitioner is given a further opportunity to reply. Once the Committee has received all the submissions, the matter is considered at a closed session and the decision is rendered.

The Committee is empowered to make a request for interim measures pursuant to Rule 86 of its Rules of Procedure. In a deportation case, such a request would either require the state to refrain from deporting the individual if there were a risk of serious harm associated with such deportation, or might require the state to give an undertaking to allow the person to return if the Committee rules in favour of the petitioner. In \textit{Stewart v. Canada},\textsuperscript{27} the Committee granted a request for interim measures and requested that Canada refrain from removing Stewart pending the examination of the merits of his complaint. The Government of Canada complied with this request. In its decision on the merits, however, the Committee noted that once it had received an assurance that the

\begin{verbatim}
\textsuperscript{25} Ibid. Art. 2. Pursuant to this requirement, the petitioner must have made all reasonable efforts to obtain recourse through the judicial system in the country against which the complaint is being made, although this requirement does not imply that the person must seek remedies that are obviously ineffective.

\textsuperscript{26} Article 3 states:

The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.
\end{verbatim}
petitioner would be allowed to return if successful, this would usually be sufficient unless the petitioner could demonstrate that irreparable harm would result from his deportation. 28

In addition to the Human Rights Committee established under the ICCPR, the Committee against Torture (CAT) also has powers pursuant to the Optional Protocol to the Convention against Torture to receive complaints by individual petitioners. 29 The requirements and procedures are very similar to those used by the Human Rights Committee, and the process suffers from the same limitations. Persons in Canada have had recourse to CAT. In Khan, 30 the CAT found in favour of the petitioner and determined that his deportation from Canada to Bangladesh would be a violation of Article 3 of the Convention against Torture. Khan was eventually allowed to remain in Canada.

However, the effectiveness of recourse to the CAT to protect the human rights of non-citizens has been cast in doubt as a result of the failure of the Government of Canada to respect the Committee’s directives. In the case of Tejinder Pal Singh, the CAT had made a request to the Canadian Government to refrain from deporting the petitioner


28 Ibid. para. 7.7:

The Committee noted the State party’s request for clarifications of the criteria that formed the basis of the Special Rapporteur’s request for interim protection under rule 86 of the Committee’s rules of procedure, as well as the State party’s request that the Committee withdraw its request under rule 86. The Committee observed that what might constitute “irreparable damage” to the victim within the meaning of rule 86 cannot be determined generally. The essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure his rights, should there later be a finding of a violation of the Covenant on the merits. The Committee may decide, in any given case, not to issue a request under rule 86 where it believes that compensation would be an adequate remedy. Applying these criteria to deportation cases, the Committee would require to know that an author would be able to return, should there be a finding in his favour on the merits.

29 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/46, Dec. 1984, CTS/91 [hereinafter Convention against Torture]. Article 22

pending a review of his case on the merits. The Government of Canada declined to heed this request and Singh was deported. This raises serious concerns about the effectiveness of recourse to the Human Rights Committees in future cases. Moreover, the very cumbersome nature of the process, the length of time it usually takes for the Committee to render a decision on the merits, and the risk that the issue will become effectively moot before the Committee acts also mitigate against these procedures being an effective mechanism for the majority of persons who wish to resist expulsion.

There is one final international body which has jurisdiction over petitions filed by persons who allege that the government of Canada has violated their human rights—the Inter-American Commission on Human Rights. Although Canada has yet to sign the American Convention on Human Rights, as a result of its membership in the OAS it is bound to comply with the American Declaration of the Rights and Duties of Man so that the Inter-American Commission has jurisdiction to hear individual petitions against

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31 See the decision of Mr. Justice Muldoon of the Federal Court-Trial Division denying a stay of removal, where he notes the request of the CAT, [1997] IMM-5294-97, December 22, 1997. In this case Singh made a complaint to the CAT, which accepted jurisdiction and made a request to the Government of Canada to refrain from deporting Singh pending a review of his complaint. Singh applied for a stay in the Federal Court and, after it was denied, Singh was deported notwithstanding the request for interim measures from the CAT.

32 In Stewart, supra note 27, the Communication was submitted in February 1993, and the decision on the merits was issued in November 1996.

33 In the Ng communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994), referred to in the preceding chapter, Ng was deported from Canada prior to the Committee acting on the communication, so that the Committee’s decision failed to provide any effective relief to Ng despite the fact that it ultimately ruled in his favour.

34 Canada signed the Charter of the Organization of American States on November 13, 1989,
Canada. The procedure involved is similar to that used by the Human Rights Committee and is subject to the same limitations.

4.3 LINKING CANADIAN LAW AND INTERNATIONAL LAW

As a result of the limitations of the international complaint mechanisms, the only effective remedy for the vast majority of non-citizens seeking to resist deportation will be a domestic one. A person facing expulsion from Canada has the option of seeking judicial review of the expulsion decision. In the course of such an application, the person can argue that his or her human rights would be violated as a result of the execution of the expulsion order, and can seek a declaration that the expulsion would be a violation of the international human rights norms and of the Charter of Rights and Freedoms.36

In Canada, it is clear that, unless the human rights treaties and conventions are incorporated into domestic law through an Act of Parliament, they are not part of the law of Canada.37 However, even though such instruments are not automatically part of our domestic law, it is still possible to rely on customary international law to argue that those norms represent the most basic principles of human conduct and are therefore, by their very nature, part of domestic law.

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36 Pursuant to s. 82.1 of the Immigration Act, a person must apply for leave to commence an application for judicial review. The decision to issue the deportation order, or to dismiss an appeal to the Appeal Division of the IRB (if the person has a right to appeal to the Division) can be made the subject of an application for judicial review, as can the actual decision to execute the removal order: see Saini v. Canada (Minister of Citizenship & Immigration). [1998] F.C.J. No. 982 Court File No. IMM-1712-97 Federal Court of Canada-Trial Division June 29, 1998. In Barrera v. Canada (Minister of Employment & Immigration), 18 Imm. L.R. (2d) 81, the Federal Court of Appeal concluded that Charter arguments related to the legality of the execution of the deportation order can only be raised at the time the decision to execute the removal order is made. See also Nguyen v. Canada (Minister of Employment & Immigration), [1993] 1 F.C. 696, and Chieu, supra note 10. In Gwala v MCI [1999] F.C.J. No. 792 Court File No. A-375-98 Federal Court of Appeal May 21, 1999, the Court concluded that it did have jurisdiction to consider issues related to the Charter even though the decision maker did not have that jurisdiction.

37 The Supreme Court of Canada in Baker has now definitively decided this issue.
It is no longer disputed in Canada that customary international law forms part of the domestic law, at least to the extent that it is not in conflict with domestic legislation. This principle has been accepted in Canadian law at least since the case of Reference as to the Powers to Levy Rates on Foreign Legations, where the Supreme Court applied customary international law in a case concerning the rights of foreign diplomats.

In more recent decisions, Canadian Courts have not been reluctant to rely on custom. In the case of Re Regina and Palacios, the Ontario Court of Appeal again had recourse to custom when it concluded that a diplomat facing criminal charges was entitled to immunity. In the case of Jose Pereira E Hijos, S.A. v. Canada (Attorney General), the plaintiffs sought damages against the Federal Government related to the seizure of their vessel during the so-called “Turbo Wars”. In their defence, the defendants relied in part on principles of customary international law. The Court commented on the applicable rules to be applied in such cases in the following terms:

The principles concerning the application of international law in our courts are well settled, and they are not here disputed by plaintiffs. One may sum those up in the following terms: accepted principles of customary international law are recognized and are applied in Canadian courts, as part of the domestic law unless, of course, they are in conflict with domestic law. In construing domestic law, whether statutory or common law, the courts will seek to avoid construction or application that would conflict with the accepted principles of international law. In so far as those principles are reflected in or

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38 In oral argument before the Federal Court of Appeal in the case of Suresh, the Court indicated that it accepted the principle that customary international law is part of domestic law to the extent that it does not conflict with that law. In Baker supra note 12 the Supreme Court of Canada noted the importance of using international treaties to interpret domestic law see para. 70.

39 [1943] S.C.R. 208. See also Reference re: seabed and subsoil of the continental shelf offshore Newfoundland, [1984] 1 S.C.R. 86, where the Court considered international law and applied it as if it were part of the law of Canada.

40 45 O.R. (2d) 269. (O.C.A.)

41 The Court relied on rules of customary international law to conclude that the accused's diplomatic immunity continued until he had left the country permanently.

arise from international conventions, which may conflict with domestic law, these conventions become a part of the law of Canada only by legislative enactment, of Parliament or of a provincial legislature, acting under the Constitution.\(^{43}\)

In the case of \(R. \text{ v. Rumbaut,}^{44}\) the Court again applied custom when dealing with the issue of the legality of the seizure of a ship in the context of a criminal proceeding. The Crown alleged that the seizure was legal and permissible under customary international law. After a review of the authorities, the Court concluded that the doctrine of "hot pursuit" relied on by the Crown was part of custom and therefore incorporated into Canadian law. As a result, the Court upheld the legality of the seizure of the ship.\(^{45}\)

In light of this jurisprudence, custom must be accepted as part of domestic law in Canada to the extent that it does not directly conflict with domestic law. Moreover, the Courts, when interpreting domestic law to determine whether a conflict exists, are

\(^{43}\) \textit{Ibid.} para. 21.


\(^{45}\) \textit{Ibid.} paras. 28-32. The Court noted:

The significance of this issue is that neither the 1958 \textit{Geneva Convention} nor the 1982 UNCLOS have been ratified by the Canadian Parliament and are not, as such, part of our domestic law. Consequently, if Article 23 of the \textit{Geneva Convention} or Article 111 of the 1982 \textit{Convention} do not reflect customary international law, then Canada’s hot pursuit of the \textit{Pacifco} on the basis of the doctrine of extended constructive presence as expressed in Article 23 and Article 111 may not have been justified and may have been unlawful, considering the absence of evidence before the Court as to state practice at any time before February 1994 . . . . It is also obvious that it would have been preferable for the Crown, during this \textit{voir dire}, to have supplied evidence and/or materials to remove doubts that the "extensive or extended constructive presence" principle was in fact State practice prior to 1958 or that it had been sufficiently implemented in subsequent (i.e. since 1958) practice to have become customary law after 1958 up to 1994 when the \textit{Pacifco} was arrested in international waters. Nevertheless, I agree with McIntyre, J., in \textit{Kirchhoff}, with Devonshire, J., in \textit{Mills}, and with Hart, J.A., in \textit{Sunila}, that Article 23 of the \textit{Geneva Convention} and Article 111 of the \textit{Montego Bay Convention} (UNCLOS) as they relate to the issue of extensive constructive presence are declaratory of existing customary international law and that such a law is part of the Canadian domestic law.

obliged to attempt to find an interpretation which gives effect to international law. As a result, a person can rely on customary international law when seeking to restrain the Government of Canada from executing an expulsion order.

In this regard, the most important principle of customary international law that may be invoked is the prohibition against removal back to a country where there is a risk of torture. As custom prohibits expulsion in such situations, absent a provision in the *Immigration Act* which expressly requires that the Government expel a person back to a country where there is a risk of torture, the Government of Canada would be acting in violation of its own domestic law if it purported to expel a person in such circumstances. A person resisting deportation in such a case could assert the existence of custom barring his or her expulsion in the context of an application for judicial review of the decision to execute the removal order, by seeking a declaration that the expulsion is illegal under the laws of Canada as a violation of customary international law.

In addition to reliance on customary international law, a person can also use the human rights instruments and the principles contained therein as a vehicle for interpreting domestic law. In the case of *Baker*, although the Supreme Court of Canada made it

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46 See chapter 2.

47 Section 53(1) of the *Immigration Act* allows the Minister to expel a *Convention* refugee to a country where there is a risk of persecution if he or she is certified as a danger to the public or to national security. This section, however, only *authorizes* deportation, but it does not obligate the Minister to carry it out. Given that custom absolutely prohibits expulsion to torture under any circumstances, it is submitted that the provision would have to expressly override the prohibition in order to authorize it. As s. 53(1) does not meet that requirement but is merely permissive, the custom will prevail.

48 The procedure whereby a non-citizen can resist expulsion will vary depending on the particular circumstances of the case. In the case of a person who asserts a fear of torture upon return to the country of nationality, the jurisprudence suggests that the appropriate moment to challenge the legality of the expulsion would be when the decision to execute the deportation is made. See *Barrera*, supra note 36.

49 Supra note 12.
clear that the *Convention on the Rights of the Child* was not part of Canadian law until expressly incorporated into it by means of an *Act* of Parliament,\(^5^0\) the Court indicated that Canada’s obligations under international human rights treaties are an important factor which informs the interpretation of domestic legislation.\(^5^1\) By using the *Convention on the Rights of the Child*, the Court was able to infuse into the humanitarian and compassionate review a requirement that the officer consider the “best interests of the children” as an important factor in the assessment. If the interests of children must be taken into account so as to ensure compliance with Canada’s international obligations under the *Convention on the Rights of the Child*, then, by the same token, Canada’s obligations to not be responsible for the imposition of cruel, inhuman, or degrading treatment or punishment must also be considered in the same process. By reading in a clear requirement that the humanitarian and compassionate process considers these factors, international human rights concerns can, to some extent, be accommodated within the ambit of current procedures.\(^5^2\)

\(^{50}\) *Ibid.* para. 69.

\(^{51}\) *Ibid.* para. 71. The Court noted that

the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330: “[T]he legislature is presumed to respect the values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.” The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India), at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*; *Slaight Communications* . . .

\(^{52}\) Even if there were an attempt to infuse the H & C procedures with human rights norms, this would not be sufficient to make it an effective remedy given the discretionary nature of the process, the characteristics of the decision maker, the lack of procedural safeguards and the fact that removal is not deferred during the proceedings.
The same approach would warrant reading into the equitable review by the Appeal Division of the IRB of the deportation of a permanent resident pursuant to section 70 of the *Immigration Act*. a requirement that it carefully consider the human rights issues that might arise in cases involving a long-term permanent resident, a permanent resident with children in Canada, or a seriously ill person receiving medical treatment in Canada who is facing removal to a country where such treatment was not available.

This approach would only be available to permanent residents who have a right to appeal to the Appeal Division, so that those who are certified as a danger to the public would have to seek another forum for asserting their human rights.

As non-immigrants do not have an appeal to the Appeal Division of the IRB, they would have to rely on the humanitarian and compassionate review as their remedy. As noted above, non-immigrants who seek to use these procedures to assert their human rights will face serious obstacles. First, the humanitarian and compassionate review does not have the effect of staying the execution of the deportation order. The remedy is thus ineffective if the expulsion occurs prior to the determination of the application. This situation arose in the recent case of *Holder v. Canada (Minister of Citizenship &

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53 See the *Immigration Act*, s. 70, which gives the Appeal Division the jurisdiction to hear an appeal by a permanent resident of a deportation order and to consider, in addition to the legality of the order, all of the circumstances of the case prior to rendering a decision.

54 An appeal before the Appeal Division does comply with the requirements of fundamental justice. The person is entitled to an oral hearing, can be represented by counsel, present evidence and examine the evidence presented by the Minister. The Division is required to give reasons that are subject to judicial review. Unfortunately, the decision of the Federal Court of Appeal in *Chieu supra note 10* prevents the Board from considering human rights issues related to the impact on the Appellant of deportation back to the country of nationality.

55 The jurisprudence of the Federal Court suggests that the procedure contemplated here is the humanitarian and compassionate review pursuant to section 114(2) of the *Immigration Act* with all of its inherent limitations.
Ms. Holder, a citizen of Barbados, had come to Canada in 1990, and had lost her legal status here shortly thereafter. In 1997, she applied for consideration on humanitarian and compassionate grounds. The basis for her application was that she had two Canadian-born children who were dependent on her for care and support. Her application was denied prior to the Supreme Court of Canada’s decision in Baker. She submitted a new application, the decision on which was still pending when the Baker decision was released. Despite the fact that the decision on her application was still pending, a Federal Court justice declined to issue a stay of deportation, so that she was deported even though the best interests of her children had not been considered by an immigration officer prior to the execution of the deportation order. This situation could be remedied if the justices of the Federal Court properly exercised their jurisdiction to grant stays in cases where fundamental human rights issues arise.

A more serious problem in relying on the humanitarian and compassionate review to protect human rights results from the fundamental limitations inherent in the procedure itself. As noted above, the review is conducted by an immigration officer who usually does not have special training in human rights. Although, as a result of Baker, the process has been infused with a requirement that the officer comply with the principles of fairness and provide reasons, and that, in order to be considered reasonable on judicial review, the decision must have taken into account the human rights issues at stake, there is no requirement for an interview and, in the final analysis, the decision as to whether to grant

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56 IMM-2874-99.

57 In the case of appeals to the Appeal Division by permanent residents, the provisions of s. 49 of the Immigration Act provide for an automatic stay of deportation pending the consideration of the appeal by the Division.
the requested relief remains within the discretion of the reviewing officer. I would argue that a discretionary procedure of this kind is completely inadequate as a mechanism to ensure protection of fundamental human rights, so that in many cases persons concerned will have to seek other mechanisms to protect their interests.

There is one final option in Canada available to a person resisting deportation and that is through the *Canadian Charter of Rights and Freedoms*.⁵⁸ In *Slaight Communications v. Davidson*,⁵⁹ the Supreme Court held that Canada’s international human rights obligations must be used to inform the interpretation of the *Charter*. Moreover, in *Pushpanathan*,⁶⁰ the Court concluded that the purpose of a human rights treaty — the protection of human rights — is central to a proper interpretation and understanding of such a treaty. In the context of this jurisprudence, then, the *Charter* can be a mechanism for asserting that expulsion may violate a person’s human rights.

The provision of the *Charter* most relevant in expulsion cases is section 7, which provides that the right to life, liberty, and the security of the person is protected and that any procedure, which affects any of these rights, must be conducted in accordance with the principles of fundamental justice. The threshold question to be determined in expulsion cases is whether the expulsion engages section 7, i.e., whether it affects a person’s right to life, liberty, or the security of the person. Given the diversity of circumstances in which expulsion can occur, it is not possible to assert that section 7 rights are engaged without an examination of the particular fact situation.

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There is no doubt that section-7 rights are engaged in the Convention refugee determination procedure in which claimants assert a fear of persecution. This was settled by the Supreme Court of Canada in the case of Singh v. Canada (Minister of Employment & Immigration),\(^6\) where Madam Justice Wilson held that “even if one adopts the narrow approach advocated by counsel for the Minister, ‘security of the person’ must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself”.

Further, it is also settled that section 7 is engaged in the expulsion of a person who has asserted a fear of persecution but who has been declared ineligible, pursuant to section 46.01 of the Immigration Act, to have his or her refugee claim determined by the CRDD. This situation arose in the case of Nguyen,\(^6\) where the applicant had asserted a claim to refugee status but was found to be ineligible to have his claim determined as a result of criminal convictions, which led to his being certified as a danger to the public. Nguyen challenged the constitutionality of the procedure. The Federal Court of Appeal concluded that Nguyen’s section-7 rights were engaged by the procedure, but also held that the procedures were constitutional as they were in accordance with the principles of fundamental justice.

Interestingly, while the Court concluded that there was no violation of fundamental justice in denying Nguyen access to the refugee determination procedure, it did state, in obiter, that section 7 would be violated if the Minister purported to execute the removal order and send Nguyen back to a country where there was a risk that he

\(^6\) 58 N.R. 1.

\(^6\) Supra note 36
would be subject to torture. This is consistent with the subsequent dicta of Cory J. in Pushpanathan. In his dissenting opinion in that case, Mr. Justice Cory held that large-scale drug trafficking would be a basis for exclusion under the Refugee Convention. He also noted, however, that denial of refugee status does not dispose of the necessity to assess, in the context of a fair hearing, whether the person's expulsion from Canada to the country of alleged persecution would expose him or her to unacceptable risk upon return. In light of this jurisprudence, there is no doubt that section 7 of the Charter is engaged in circumstances where a person asserts a risk of torture or other forms of cruel, unusual, or degrading treatment or punishment as a result of his or her deportation.

To date, however, there is no jurisprudence with respect to the situation of those persons who assert that they would be at risk not due to a fear of torture, but rather because they are being expelled to a country where they would not be able to obtain medical treatment they need. In some cases where a person receiving life-saving medical treatment has been subject to an expulsion order, stays of removal have been granted. Thus in Vasquez v. Canada (Minister of Citizenship & Immigration), the applicant was a citizen of Ecuador who came to Canada and made a claim to refugee status. During the processing of his application, which took several years, he suffered kidney failure and was put on dialysis. Eventually, he was ordered deported and, when the immigration department sought to execute the order, he sought a stay of deportation, arguing that his life would be put in jeopardy if he were deported because the treatment he needed was available in Ecuador. Vasquez applied for leave to commence an application for judicial

63 Supra note 60

64 Ibid. para. 157
review to challenge under the Charter the decision to execute the removal order. He also sought a stay of deportation but the immigration officials voluntarily agreed to defer removal pending a decision on the application for judicial review. Leave was granted but no final decision was rendered in the case as the matter became moot. Notwithstanding the lack of any clear precedent, however, given the obvious risk to the person's that would result of deportation in these circumstances, it is very likely that a court would conclude arguable that section 7 of the Charter is engaged.

The applicability of section 7 of the Charter to the cases of children whose parents are being expelled was argued before the Supreme Court in Baker, but the Court left the issue unresolved because it based its decision on administrative law principles. Notwithstanding the lack of an explicit finding on this point, the fact that the Court was prepared to import into an administrative procedure a requirement that Canada's obligations under the Convention on the Status of the Child must be taken into account is,

65 IMM-1246-96

66 Tragically, Mr. Vasquez died of his medical problems. In addition to the Vasquez case, there have been other cases where stays were granted due to risks to health as a result of medical problems: see for example Samokhvalov v. Canada (Minister of Citizenship and Immigration) (1994) 76 F.T.R. 56 [1994] F.C.J. No. 345 Action No. IMM-1174-94 Federal Court of Canada - Trial Division March 17, 1994.

67 Perhaps the case most analogous to this is that of Rodriguez v B.C.[1993] 3 S.C.R. 519 a woman who asserted that she had a right to euthanasia. Although the Supreme Court did not uphold her contention, it did agree that her section-7 rights were at stake. In concluding that section 7 was engaged Sopinka J noted: "In my view, then, the judgments of this Court in Morgentaler can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress. In Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), supra, Lamer J. also expressed this view, stating at p. 1177 that "[s]ection 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity". There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these." (par 137)
it is submitted, a strong indication that section 7 of the Charter is engaged in this process. Furthermore, in light of its decisions in B. (R.) v. Children's Aid Society of Metropolitan Toronto⁶⁸ (where the Court concluded that parental rights did engage section 7), and in New Brunswick (Minister of Health & Community Services) v. G. (J.) [J.G.]⁶⁹ (where the Court concluded that a parent’s section 7 interests were engaged when the state seeks an order suspending a parent’s custody rights over her children), it is extremely likely that the Court would also conclude that section 7 is engaged in the case of the expulsion of the parent of a Canadian child.

There are also very strong indications that section 7 of the Charter is engaged in cases involving the deportation of permanent residents. Although the Supreme Court in Chiarelli⁷⁰ did not find it necessary to determine whether section 7 was engaged as it concluded that the procedure complied with the requirements of fundamental justice, the Federal Court of Appeal has dealt with this issue subsequently. In Grewal,⁷¹ the Federal Court of Appeal concluded that the deportation of a permanent resident as a result of criminal convictions does engage section 7 of the Charter.⁷²

Once section 7 is engaged, then the procedural and substantive guarantees of the principles of fundamental justice must be complied with. In order to ascertain the

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⁷⁰ Supra note 1.
⁷² See also Canepa etc.
requirements of fundamental justice, reference must be made to the context each particular case\textsuperscript{73} and to Canada's obligations under international human rights treaties.\textsuperscript{74}

In the case of removal back to torture, it is not difficult to determine the scope of the procedural requirements of the principles of fundamental justice. If the case is dealt with within the context of the refugee determination procedure, the person concerned has the right to an oral hearing before a quasi-judicial tribunal (the CRDD). However, if the person does not have a hearing before the CRDD,\textsuperscript{75} then, given that the interests at stake are virtually the same as those that come into play in the refugee hearing, there will be a requirement for a fair hearing, a right to receive reasons, and a right to judicially review an adverse decision.\textsuperscript{76} For the same reason, the standard of proof to be applied should be the same as that used in the refugee process, namely more than a mere possibility.\textsuperscript{77} Moreover, if credibility concerns arise, the person is entitled to an oral hearing before the decision maker.\textsuperscript{78}

But what of the substantial requirements of fundamental justice in these cases? Since the decision, and based on the reasoning, in the case of Berrera,\textsuperscript{79} the Government

\textsuperscript{73} Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, [1985] 2 S.C.R. 486.

\textsuperscript{74} Slaight Communications, supra note 59

\textsuperscript{75} A person asserting a fear of return to his or her country of nationality will usually be eligible to have a hearing before the CRDD. However, if the person is determined to be ineligible to have a hearing pursuant to section 46.01(1); is excluded from protection pursuant to Article 1F of the Refugee Convention; or asserts a fear of return only after he or she has become subject to a removal order, then the CRDD will not be required to make a determination as to the risk upon return. Moreover, the Convention refugee definition requires the person to establish that the fear of persecution is for a Convention ground.

\textsuperscript{76} See the dicta of Cory J. in Pushpanathan, supra note 60

\textsuperscript{77} Adjei v MEI [1989] 2 F.C. 680

\textsuperscript{78} See Kaberuka v. Canada (Minister of Employment & Immigration). [1995] 3 F.C. 252 (T.D.)

\textsuperscript{79} Supra note 36
of Canada has argued that fundamental justice does not in all circumstances preclude removal back to torture and that it is entitled to balance the risk to the individual against the risk to society. However, given the absolute prohibition against removal back to torture in Article 3 of the Convention against Torture and the affirmation of that position by the Human Rights Committee; the dicta of the European Court of Human Rights in Chahal;\(^8^0\) and the dicta of the Supreme Court of Canada in Kindler,\(^8^1\) it is arguable that removal back to torture would be a violation of the substantive protections of the principles of fundamental justice.\(^8^2\)

What of the removal of persons back to a situation where their life is in danger as a result of a need for medical treatment that is not available in the receiving state? There would seem to be no reason why the source of the danger to a person’s life should make any significant difference to a person’s human rights.\(^8^3\) It is certainly arguable that, before removal can take place in such circumstances, a competent official would be required to make a determination as to whether the person’s life would be in jeopardy in a manner consistent with the principles of fundamental justice. This could be achieved through an application for consideration on humanitarian and compassionate grounds. If the official consulted external sources she would have to disclose this information to the

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\(^8^0\) Chahal v. The United Kingdom, No. 70/1995/576/662, E.Ct.H.R., November 15, 1996.


\(^8^2\) This issue has again been raised in the case of Suresh v. Canada (Minister of Citizenship & Immigration), IMM-117-98, June 11, 1999. The Federal Court of Appeal upheld the decision of the Trial Division and concluded that deportation back to a country where there was a risk of torture violated section 7 but was saved under section 1. See A-415-99 January 20, 2000 F.C.A. Leave to appeal has now been granted by the Supreme Court of Canada.

\(^8^3\) This position is consistent with that adopted by the European Court of Human Rights in D. v. United Kingdom, 146/1996/767/964, 2 May 1997.
applicant who would then have a reasonable opportunity to respond. However, since, as noted above, such an application does not defer removal, if the issue arises just prior to the execution of the removal order, the principles of fundamental justice would dictate that the removal be deferred pending a determination of risk.\(^8^4\)

In terms of the substantive rights that would accrue under the Charter if it were concluded that there was a risk to the person’s life due to the requirement for medical treatment, in light of the jurisprudence\(^8^5\), it is arguable that the Courts would be prepared to find that a person who has been receiving life-saving medical treatment in Canada has a substantive right to obtain that treatment and to resist deportation to a country where no treatment is available.

In terms of the rights of children, although the Supreme Court of Canada in Baker did not rely on the Charter, it is certainly arguable, in light of the Court’s decisions in that case and in New Brunswick v. J.G.,\(^8^6\) that the right of a child to have parental guidance is fundamental to the well-being of the child so that the principles of fundamental justice will require a fair procedure before the state will be permitted to interfere with that right. In Baker, the Supreme Court has already determined that, within the context of the humanitarian and compassionate procedure, the officer must consider

\(^8^4\) *Chieu, supra* note 10, indicates that issues related to what will happen in the home country must be considered only at the time of the execution of the removal order. In the *Vasquez case*, *supra* note 65 after Vasquez sought a stay of removal, Canadian officials contacted the embassy in Ecuador to ascertain whether treatment would be available for him in that country. The embassy advised that he could receive a transplant free of charge and an affidavit to that effect was filed in Court. Subsequent investigation by counsel for the applicant revealed that, although it was possible that a doctor might donate his services, there were many costs that would have to be paid by the applicant, including expensive drug treatments both before and after the transplant, so that he would not in effect have been able to obtain the required treatment. What this case highlights is the need for a fair and transparent process in which the question of risk can be properly evaluated.

\(^8^5\) See *Nguyen supra* note 36; *Kindler v Canada supra* note 81 *D. v. United Kingdom* (146/1996/167/964, 2 May 1997(European Court of Human Rights)
the "best interests of the children". As a result, it is certainly arguable that children have a procedural right to have their interests considered, so that a person ought to be able to successfully resist deportation by obtaining a stay until such time as a determination is made on the humanitarian and compassionate grounds application and the best interests of the child.\textsuperscript{87}

In terms of the substantive right of the children to have their parents in Canada, the \textit{dicta} of the Supreme Court of Canada in \textit{Baker} provide a strong indication that the best interests of the children will in most cases require that the parents be allowed to remain in Canada. In \textit{Baker}, the Court does indicate that there may be exceptional cases where the parents might be deported, but this will only occur in situations where there is an overriding state interest in removing the parent. Such a position is consistent with that of the European Court of Human Rights, which has placed a very high value on the interests of children in expulsion cases. As a result it is certainly arguable that the H & C guidelines that indicate that "the State's interests in protecting society and regulating immigration are to be weighed or balanced in relation to the interests of the individual facing removal and the impact of this removal on his/her family members"\textsuperscript{88} do not adequately reflect the substantive rights of children to have their "best interests considered".

\textsuperscript{87} In the \textit{Canada v Canadian Liberty Net} [1998] 1 S.C.R. 626 the Supreme Court of Canada concluded that the Federal Court had an inherent jurisdiction to grant a stay of deportation even if there was no matter pending before it. This reasoning could be applied by the Court to grant stays of deportation until the best interests of the child were considered.

\textsuperscript{88} Humanitarian and Compassionate Guidelines IP-5 Section The guidelines were written after leave had been granted in Baker but prior to the decision being rendered by the Court. They have not been amended in the light of Baker.
In terms of rights of long-term permanent residents, the decision of the Supreme Court of Canada in Chiarelli supranote 1 remains the major stumbling block to the recognition of their human rights. As argued in the previous chapter, Chiarelli is completely out of step with international human rights jurisprudence.supranote 2 Ultimately, Chiarelli will have to be overruled before there can be any explicit recognition of the rights of long-term permanent residents to procedural or substantive rights under section 7 of the Charter. However, given the developments in the jurisprudence in Europe and that of the Supreme Court itself, there are good grounds for believing that Chiarelli will be revisited. If the Court in Kindler supranote 3 was prepared to accept that, in certain circumstances, extradition could be illegal if it shocked the conscience of Canadians, the way is open to asserting that, in similar circumstances, removal of long-term permanent residents is also a violation of the substantial protections of section 7.

What then would be the appropriate procedural guarantees so that the deportation of a permanent resident of Canada would be in accordance with the principles of fundamental justice? Certainly the hearing before the Appeal Division, which is currently available to most permanent residents pursuant to section 70 of the Immigration Act, could comply with the principles of fundamental justice if the Division properly applied human rights principles when considering the appeal. supranote 4 The Appeal Division is a Court

89 Supra note 1
90 Indeed even in Stewart supra note 27, where the Human Rights Committee upheld the deportation, the Committee relied extensively on the fact that Stewart had had an equitable review before the Appeal Board, something which the Supreme Court in Chiarelli concluded was not required, and something which is no longer automatic under Canadian law as a result of the danger certification procedure in section 70(5) of the Immigration Act.
91 Supra note 81
92 Section 70 (1) of the Immigration Act gives the Appeal Division of the Immigration and Refugee Board the jurisdiction to hear an appeal against a deportation order made by a permanent resident of Canada. The Board has the jurisdiction to dismiss the appeal, allow it or grant a stay of deportation subject to terms and conditions. The hearing is an oral hearing before a quasi-judicial tribunal. Interestingly
of Record and has the jurisdiction to consider and rule on whether the Charter issues. 93
The statute requires the Division to conduct an oral hearing where it considers whether in view of ‘all the circumstances of the case’ the appellant should be deported from Canada. 94

However, in cases where the person is denied a hearing before the Board because the Minister certifies him or her as a danger to the public, it is certainly arguable that the highly administrative procedure used 95 does not comply with fundamental justice. In the certification process there is no oral hearing, no requirement that the Minister provide reasons, and the only issue that is before the Minister is whether or not the person is a danger to the public. 96 Given this, there would appear to be strong arguments in favour of repealing section 70 (5) of the Immigration Act so that all permanent residents would have access to a process that is in accordance with fundamental justice. The concerns that

enough, in Stewart v Canada supra note 27, the majority decision of the Human Rights Committee that found that there was no violation relied extensively on the fact that there was an appeal to the Appeal Division as an important circumstance in support of their position.

93 Section 69.4 of the Immigration Act provides that the Appeal Division is a court of record, with an official shall which shall be judicially noticed. In the case of Law v Canada (Solicitor General) 144 D.L.R. (3d) 549 (Fed T.D.) rev in part 11 D.L.R. (49) 608 (F.C.A.) the Federal Court of Appeal concluded that the Board was a court of competent jurisdiction for the purposes of section 24 (1) of the Charter so that it can fashion a 24 (1) remedy when this is indicated.

94 One serious limitation on this procedure arises as a result of the decision of the Federal Court of Appeal in Chieu v Canada (MCI) Court File No. A-1038-96 Federal Court of Appeal December 3, 1998, (Leave to appeal granted to the Supreme Court of Canada, November, 1999) the Appeal Division is precluded from considering what might arise in the person’s country of nationality upon execution of the deportation order. Given that many of the human rights issues arise in the context of a consideration of the potential consequences of return to the country of nationality, this decision will have to be reconsidered if the hearing before the Appeal Division is to be considered an adequate remedy in cases involving the deportation of permanent residents.

95 Pursuant to section 70 (5) the Minister can certify a person who has been convicted of a serious criminal offence as being a danger to the public. Once certified the person loses his right to Appeal to the Appeal Division. Within the context of the certification process the person is permitted to make written submissions to the Minister. However, the Minister is not required to give reasons, and is directed to consider only one issue, namely whether or not the person constitutes a danger to the public.

96 Immigration Act Section 70 (5) The Federal Court of Appeal in Williams v MEI 212 N.R. 63 concluded that the Minister could consider other humanitarian factors but was under no obligation to do so.
prompted the implementation of the danger certification process 97 could be addressed through appropriate administrative measures.

In terms of the substantive rights that should be available to permanent residents under the Charter, I would argue that in light of the human rights principles that are now gaining acceptance in Europe and in other jurisdictions, there are permanent residents who do have a right to be exempt from deportation. Although it is difficult to provide a description of which immigrants would fit into this category it should include persons who have lived in Canada for the majority of their lives so that they can be considered as products of our society and as persons who have all of their connections and roots here. Such people would suffer unduly if deported.

In light of all the developments in international human rights law over the course of the past twenty years, it is no longer possible to maintain that Canada or any other state has an unfettered discretion in the area of expulsion. As in other areas of law, the power of the state in the area of regulation of immigration must be tempered by the acceptance that all persons have fundamental human rights, and that in certain circumstances those rights will take precedence over the interests of the state.

Immigrants, who have traditionally been amongst the most marginalized in our society, have, in many ways been the last to benefit from the recognition that all laws of Canada must cede to the fundamental human rights protected by the Charter. In part, this

97 The danger certification procedures were introduced in 1994 in response to the public outcry over the murder of a Toronto woman. (The Just Desserts Incident) The initial information suggested that the perpetrator was a permanent resident of Canada who had been ordered deported but whose deportation was stayed. In the hue and cry that followed the incident the government introduced section 70 (5) which was presented an expeditious procedure to deport persons who posed a danger to the public in Canada. Ironically, of the three accused, the only to be acquitted was the permanent resident. The two were convicted were citizens of Canada who are not subject to deportation.
has been due to the reluctance of the Courts to apply the Charter in immigration cases, but it is the result of the failure of advocates to bring the international human rights jurisprudence into the Canadian context.

This fact is reflected in the decision of the Supreme Court in Chiarelli, where not one decision of the European Court of Human Rights is mentioned in the decision at a time when that court had already moved a long way towards acknowledging the rights of long-term residents to resist deportation in certain circumstances. There is no doubt that Chiarelli represents the low point in Canadian jurisprudence as it relates to the protection of human rights of non-citizens. By reducing fundamental justice to the most minimal formal procedural protection, and by emphasising the rights of the state to deport to the exclusion of any substantive right for non-citizens, the Court authorized the subsequent legislative initiatives that have eroded the rights of immigrants. It also set a precedent that has been relied on countless times by the government when its actions in an immigration context are challenged under the Charter.

Since Chiarelli, the Court has decided Pushpanathan where it recognized that the human rights treaties must be interpreted in a manner consistent with their purpose—the protection of those rights. It also rendered judgement in Baker where it acknowledged the need to interpret domestic legislation in a manner that is consistent

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98 In order to demonstrate this point I can point to the fact that the issue of the engagement of section 7 life, liberty and security of the person interests in deportation has not been finally resolved some 17 years after the Charter came into force.

99 supra, note 1. The case of Moustaquim v. Belgium. 26/1989/186/246, 25 January 1991, (European Court of Human Rights) was decided in January, 1991. In it the Court held that there was a violation of Article 8 of the Convention and prohibited deportation in the case of a long term permanent resident. Chiarelli was not argued before the Court until October, 1991.

100 Section 70 (5) that deprives immigrants of a right to appeal to the Appeal Division of the IRB on equitable grounds is but one example of this type of legislation.

101 Supra note 1

102 Supra note 60
with our international obligations as set out in these treaties and conventions. Baker \textsuperscript{104} has serious limitations because it fails to address the issues in the context of the Charter, leaving unanswered the extent to which the Charter will come into play in the immigration area. \textsuperscript{105} Nonetheless, these two decisions make it clear that the pendulum has begun to move away from Chiarelli \textsuperscript{106} towards a more balanced approach, one that accepts the general principle that governments maintain a significant amount of discretion in the area of immigration, but one that also acknowledges the existence of fundamental human rights that will, in certain circumstances, taken precedence over the assertion of state interests.

Although it is impossible to provide one test that can be applied in all cases, I would argue that the \textit{dicta} of Mr. Justice La Forest in Kindler \textsuperscript{107} come the closest to providing us with one that can be applied when assessing the legality of government action in the area of immigration under the Charter. His Lordship indicated “[t]here are . . . situations where the punishment imposed following surrender — torture, for example — would be so outrageous to the values of the Canadian community that the surrender would be unacceptable”. \textsuperscript{108} If we substitute consequences for punishment and deportation for surrender we have the following formulation: “Would the consequences of deportation be so outrageous to the values of the Canadian community that expulsion would be unacceptable?” It is key to note that it is the general principle that supplies the

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\textsuperscript{103} Supra note 12
\textsuperscript{104} ibid
\textsuperscript{105} In light of the fact that a person must obtain leave to commence an application for judicial review, the existence of the binding precedent of Chiarelli is a serious impediment to any development in the interpretation of the Charter in an immigration context.
\textsuperscript{106} Supra note 1
\textsuperscript{107} Supra note 81
\textsuperscript{108} Ibid. at 835.
\end{flushleft}
test, not the specific content of the most outrageous affront to Canadian values (i.e. torture) Separating children from a parent with no overriding reason to do so or uprooting a person from their real country or depriving a person of access to medical care—all of these strike at the heart of the fundamental value structure of Canadian society and are, as such, unacceptable.

Here it is important to note that I said the Kindler dicta "came the closest". The choice of the term "outrageous" sets, it is submitted too high a threshold. That term certainly applies to the harm resulting from torture and it is thus understandable that La Forest J. would use the term. But, the key concept should be unacceptability. Cases of outrageous affronts to Canadian values should be open and shut cases. The other kinds of harms occasioned by deportation present harder cases. In considering these cases, I would submit that the La Forest J. formulation be retained except that a more appropriate word that "outrageous" be allied with the idea of "unacceptable." According the following test is suggested: "Would the consequences of deportation be unacceptable by virtue of striking at the heart of the values of the Canadian community?"

Applying this test to an individual case would allow the Court to balance the legitimate interests of the state in controlling immigration and crime as against the human right of the individual to not be placed in situations where she would be subject to torture or other forms of cruel, inhuman or degrading treatment whether occasioned by conduct of officials in the receiving state, third parties or as a result of a lack of resources there. It would require the government of Canada and the Court's sitting on judicial review to ensure that expulsion does not cause undue suffering to children by separating them from
their parents or by removing a person from a country where she has all of her roots and connections.

Despite the developments in international human rights law and the obligations that the government of Canada has assumed by signing the various human rights conventions, state practice in Canada does not yet comply with international standards. Government officials continue to act as if the power of the government of Canada in matters of expulsion is unfettered. They argue before the Courts that the obligation to not expel persons to torture is not absolute and that state officials can balance their obligations under the conventions against state interests. The position of the courts as protectors of human rights of non-citizens remains somewhat ambivalent, given the Chiarelli precedent. However, over time, I hope that both the courts and the government that will take the lead of recent case law and come to accept that the recognition of the fundamental human rights of non-citizens does not make our country weaker and more vulnerable. Rather, by accepting and protecting the rights of those who are weakest and most vulnerable, our society and our institutions becomes stronger and our democracy is enhanced.
BIBLIOGRAPHY

CASES CONSIDERED

SUPREME COURT OF CANADA
Prata v. Canada (Minister of Manpower & Immigration) [1976] 1 S.C.R. 37 (S.C.C.)
Reference re: seabed and subsoil of the continental shelf offshore Newfoundland, [1984] 1 S.C.R. 86
Rodriguez v B.C. 1993, 3 S.C.R. 519 (S.C.C.)
Singh v. Canada (Minister of Employment & Immigration), 58 N.R. 1 (S.C.C.)

FEDERAL COURT OF APPEAL

Barrera v. Canada (Minister of Employment & Immigration), 18 Imm. L.R. (2d) 81, Federal Court of Appeal
Berrahma v. Canada (Minister of Employment & Immigration), 132 N.R. 202 (F.C.A.)
Canepa v. Canada (Minister of Employment & Immigration), 93 D.L.R. (4th) 589 (F.C.A.)
Longia v. Canada (Minister of Employment & Immigration), A-1058-90, September 23,
1991. (F.C.A.)
Madelat v. Canada (Minister of Employment & Immigration), A-537-89, January 28,
Nguyen v. Canada (Minister of Employment & Immigration), [1993] 1 F.C. 696 (F.C.A.)
May 21, 1999
Rajudeen v. Canada (Minister of Employment & Immigration), 55 N.R. 129 (F.C.A.)
Rizkallan v. Canada (Minister of Employment & Immigration), A-606-90, May 6, 1992
(F.C.A.)
Thirunavukarasu v. Canada (Minister of Employment & Immigration), 109 D.L.R. (4th)
Williams v. Canada (Minister of Citizenship & Immigration), [1997] 2 F.C. 646 (C.A.),
(F.C.A.)

FEDERAL COURT—TRIAL DIVISION

Farhadi v. Canada (Minister of Citizenship & Immigration), IMM-3846-96, March 20,
1998, F.C.T.D.
Samokhvalov v. Canada (Minister of Citizenship & Immigration), (Fed Ct Trial Division)
Shchelkanov v. Canada (Minister of Employment & Immigration), IMM-1515-94, April
12, 1994 (F.C.T.D.)
Sinnapci v. Canada (Minister of Citizenship & Immigration), [1997] 2 F.C. 791 (Fed Ct
Trial Division)
Sovalbarro v. Canada (Minister of Citizenship & Immigration), [1999] IMM-5049-98,
August 26, 1999 F.C.T.D.
(Fed Ct T.D.) Appealed to the Court of Appeal , judgement reserved October 5, 1999
Vasquez v. Canada (Minister of Citizenship & Immigration), IMM-1246-96

ONTARIO COURT OF APPEAL

Re Regina and Palacios, 45 O.R. (2d) 269. (Ontario Court of Appeal)

ONTARIO COURT SUPERIOR DIVISION

Suresh v. Canada, 49 C.R.R. (2d) 131, Ontario Court Superior Division

NEW BRUNSWICK COURT OF QUEEN'S BENCH

U.S. CASES
Ex Parte Kurth et al 28 F. Supp 258 (1939). (U.S. District Court-California)
Nishimura Ekiu v. United States, 142 U.S. 651 (1892);
Gonzales v. Williams, 192 U.S. 1 (1903). (U.S. Supreme Court)
Perkins v. Elg 307 U.S. 325 (1939). (U.S. Supreme Court)

HOUSE OF LORDS
Musgrove v. Chun Teesong Toy, [1891] A.C. 272;

BRITISH COURT OF APPEAL

IRISH SUPREME COURT

AUSTRALIAN SUPREME COURT
Teoh v Australia (1995) 128 A.L.R (Australina Supreme Court)

NEW ZEALAND COURT OF APPEAL
Tavita v. Minister of Immigration (1993), 2 NZLR 257 New Zealand Court of Appeal

UNITED NATIONS HUMAN RIGHTS COMMITTEE

United Nations Human Rights Committee, General Comment, No. 20, CCPR/C/21/Rev. 1/Add. 3, April 1993
United Nations Human Rights Committee, General Comment, No. 20, CCPR/C/21/Rev. 1/Add. 3, April 1993

INTERNATIONAL COURT OF JUSTICE


INTER AMERICAN COMMISSION FOR HUMAN RIGHTS


EUROPEAN COURT OF HUMAN RIGHTS

Ahmed v Austria No. 71/1995/57/663, 17 December 1996. (European Court of Human Rights)
Berrehab v Netherlands 3/1987/126/177, (European Court of Human Rights)
Boujilifa v. France, 122/1996/741/940, 21 October 1997(European Court of Human Rights)
D. v. United Kingdom (146/1996/767/964, 2 May 1997(European Court of Human Rights)
Djeroud v France, 34/1990/246, January 23, 1991; (European Court of Human Rights)
Ireland v. United Kingdom European Court of Human Rights, January 18, 1978 (European Court of Human Rights)


Smith & Grady v. U.K., Applications no. 33985/96 and 33986/96, September 27, 1999. (European Court of Human Rights)


UNITED NATIONS COMMITTEE AGAINST TORTURE

Elmi v. Australia, heard in the May 1999 UNCAT CAT


INTERNATIONAL INSTRUMENTS:

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/46, Dec. 1984, CTS/91


European Convention for the Protection of Human Rights and Fundamental Freedoms; ETS No. 005 Rome, as amended by Protocol No. 11 (ETS No. 155) of 11 May 1994

Inter-American Declaration on the Rights and Duties of Man Charter of the Organization of American States, CTS 1990/23; Inter-American Declaration on the Rights and Duties of Man, Arts. XVIII, XXV.

International Covenant on Civil and Political Rights, UNGA Res. 2200 A (XXI), Dec. 16, 1966, CTS/76

Maastricht Treaty.

Optional Protocol to the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entered into force 23 March 1976

BOOKS


Dirks, Gerald, *Canada's Refugee Policy*, McGill-Queen's University Press, Montreal, Quebec, 1977


Hawkins, Freda, *Critical Years in Immigration: Canada and Australia Compared*, McGill University Press, Montreal, Quebec, 1989


UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*


Articles:


Boed, Roman: *The State Of The Right of Asylum In International Law* 5 Duke J. Comp. & Int'l L. 1


The Functionality of Citizenship 110 Harvard Law Review 1814