

Refugees with Disabilities and International Protection

Abdou Chekaraou Ibrahim

Ph.D. Candidate, International Law, Faculty of Law, Zhongnan University of Economics and Law, Wuhan, China

*Corresponding Author:

Abdou Chekaraou Ibrahim

Email: abrahamzhaona@yahoo.com

Abstract: A fundamental tension exists today between the increasing willingness of States to participate in international efforts to protect fundamental human rights, and their desire to retain control over internal laws and procedures. The Refugee Convention provides international protection to individuals fleeing persecution in their countries of origin. This paper argues that the degrading and discriminating treatment of refugees with mental disabilities in certain countries constitutes the violation of the international protection. Furthermore, it argues that the language of the Refugee Convention and recent developments in case law relating to the scope of the "*particular social group*" category support the right of individuals with disabilities to seek international protection if they fear being persecuted on account of their particular mental disability. As a result, individuals who fear such treatment for reasons of their mental disability should be entitled to refugee protection. People with mental disabilities constitute a "*social group*," those who have a "well-founded fear of persecution" on account of their mental disability should qualify for refugee status. In addition, I address the concerns of those in opposition to the granting of refugee protection to the mentally disabled. I argue that the numerous elements that an applicant must establish in order to be granted refugee status prevents the granting of protection to those who do not genuinely face a "well-founded fear of persecution."

Keywords: Human Rights, Refugee Law, Humanitarian Law, International Protection, Mental Disability, Non-Discrimination, Non-Refoulement

INTRODUCTION

Throughout history, persons with mental disabilities have been neglected, discriminated, abused, and are victim of inhuman treatment. In many countries of the world, people with mental disabilities and forced to live in horrible conditions. In many cases, they are denied fundamental human rights such as life, liberty, and security. There are many examples of mistreatment include forced sterilization, physical and sexual abuse, inhumane living conditions, and limited contact with the outside world on these people around the world. Protecting the human rights of the mentally disabled requires more than simply access to better rehabilitation, education or transportation. In order for protection to be meaningful, it must be expanded to include the most fundamental of human rights, such as life, liberty, security, and freedom from degrading and inhumane treatment [1]. Due to the lack of an adequate system of effective international protection, the granting of asylum has become the primary means of protecting individuals facing human rights abuses [2]. The major international instrument providing asylum to refugees is the 1951 *Convention relating to the Status of Refugees* and its 1967 *Protocol relating to the Status of Refugees* [3].

The Refugee Convention provides protection to individuals who face persecution in their countries of

origin. According to the Refugee Convention, a refugee is a person who "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion ... is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" [4].

In order for an applicant to be granted asylum, he or she must comply with the required elements of this definition. Of central importance is that the treatment from which the refugee applicant is seeking a safe haven amounts to persecution. In addition, the persecution itself must be objectively "well-founded" in that the individual in question is unwilling or unable to rely on the protection of his or her country of origin.

In many respects, the underlying purpose of the Refugee Convention is the international protection of human rights. In its landmark decision of *Ward v. Canada (Attorney-General)* [5] the Supreme Court of Canada adopted the view that the purpose of the Refugee Convention is to provide a level of surrogate or substitute human rights protection to individuals whose country of origin does not or cannot provide:

At the outset, it is useful to explore the rationale underlying the international refugee protection regime, for this permeates the interpretation of the

various terms requiring examination. International refugee law was formulated to serve as a back-up to the protection one expects from the State of which an individual is a national. It was meant to come into play only when that protection is unavailable and then only in certain situations [6].

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

The general purpose of the convention is to enable the person who no longer has the benefit of protection against persecution for a convention reason in his own country to turn for protection to the international community [7].

Based on these viewpoints, it is clear that the Refugee Convention is a curative branch of international human rights law. Its express purpose is to guarantee that individuals, whose fundamental human rights are not protected on account of one of the enumerated grounds, are entitled to seek surrogate protection in any state party to the Refugee Convention [8].

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

Although states party to the Refugee Convention are bound to adhere to its provisions, the international community only recognizes an individual's right to seek asylum with no accompanying duty on states to in fact grant protection [9]. Consequently, states still maintain their sovereign right to control entry and access to their respective territory. In addition, states are left to their own accord as to how they will implement the Refugee Convention and how to determine who deserves protection.

This paper argues that the continuing cruel, degrading, discriminating, and inhumane treatment of people with mental disabilities in some countries of the world constitutes persecution under the Refugee Convention. As a result, individuals who fear such treatment for reasons of their mental disability should

be entitled to refugee protection. Furthermore, this article argues that the language of the Refugee Convention and recent developments in case law relating to the scope of the "*particular social group*" category support the right of individuals with mental disabilities to seek surrogate protection if they fear being persecuted on account of their particular mental disability. I discuss the international community's adoption of various instruments, as well as the United Nations' recent efforts to enact a binding treaty on the rights of people with disabilities. The focus of this paper is primarily on Canada and the United States as both jurisdictions offer a rather liberal interpretation of the Refugee Convention.

THE INTERNATIONAL PROTECTION ON PEOPLE WITH DISABILITY

Throughout history, people with mental disabilities have been stigmatized, marginalized and severely mistreated. Although the adoption of the International Bill of Human Rights [10] has had a profound worldwide impact on the protection of human rights and equality, persons with disabilities are not specifically mentioned as a distinct group vulnerable to violations of human rights. In fact, none of the equality provisions of the International Bill of Human Rights include disability as a protected ground. When reference is made to disabilities, it is usually in the context of social security or preventative measures.

In some countries, people with mental disabilities have been stigmatized, marginalized and severely mistreated. Although the adoption of the *International Bill of Human Rights* has had a profound worldwide impact on the protection of human rights and equality, persons with disabilities are not specifically mentioned as a distinct group vulnerable to violations of human rights.

Until very recently, people with mental or physical disabilities have been largely ignored in relation to anti-discrimination and human rights law. For much of the twentieth century, recognition of the disabled as a group has generally been confined to the charity and social welfare domain. This had the effect of viewing persons with disabilities as unfortunate victims of luck who, out of pity, needed social assistance [11].

A. International Declarations

Since the adoption of the United Nations Charter [12] and the Universal Declaration of Human Rights (UDHR), the international human rights movement has predominantly focused its attention on the activities of able-bodied visible minorities. The initial concern was the protection of rights based on race, ethnicity, religion, gender and so forth. However, during the last twenty-five years, there has been a

steady shift from focusing on the needs of able-bodied minorities toward addressing the particular issues faced by persons with mental and physical disabilities. The UN has been the chief catalyst, playing a pro-active role in establishing global recognition of human rights for individuals with disabilities [13]. The UN has been the chief catalyst, playing a pro-active role in establishing global recognition of human rights for individuals with disabilities.

In 1971, the UN adopted the *Declaration on the Rights of Mentally Retarded Persons* [14]. Despite its outdated use of the term "mentally retarded" the 1971 Declaration marks the first time that the United Nations formally recognized the rights of people living with mental disabilities. It embodies the principles of community integration, individualized treatment, equality, due process of law and provides the foundation for an international set of guidelines regarding the treatment and respect for the human dignity of people with mental disabilities [15].

The 1971 Declaration proclaims that individuals with "mental retardation" have "the same rights as other human beings"[16]. They also have rights to a "decent standard of living" [17] and legal protection from "abuse and degrading treatment"[18]. Most importantly, the 1971 Declaration recognizes the need for community integration and social involvement by holding that the "mentally retarded person should live with his own family or with foster parents and participate in different forms of community life" [19].

In 1975, the United Nations went a step further by adopting the Declaration on the Rights of Disabled Persons, [20] calling for national and international action to protect the human rights of all persons with mental and physical disabilities. The overriding emphasis of the 1975 Declaration is the recognition that the disabled have the inherent right to have their human dignity respected. The protected rights enumerated in the 1975 Declaration are granted regardless of the origin, type or seriousness of one's disability. In particular, persons with disabilities have the same "fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and as full as possible." More importantly, the 1975 Declaration affirms that the disabled have the same civil, political, social and economic rights as all other human beings [21]. It also stresses the importance of governments introducing measures in order to assist in the "social integration or reintegration" of persons with disabilities in the community [22]. Above all, the 1975 Declaration encourages the disabled to live in an environment where their special needs are taken into consideration in order for them to "become as self-reliant as possible" [23]. Although the language of both Declarations may be

dated and narrow-minded, they still provide a positive step forward in the growing recognition of human rights for persons with disabilities.

B. International Year for Disabled Persons

A major turning point in the history of the treatment of persons with disabilities came when the United Nations declared 1981 to be the International Year for Disabled Persons [24]. The goal of this initiative was the "full participation" and equality of persons with disabilities throughout the world. The resolution established five key objectives to be carried out during that year. Chief among them was the desire to help persons with disabilities "in their physical and psychological adjustment to society."

In response, many countries established national committees to study, advise, and help implement changes to improve and ensure appropriate levels of services to the disabled in areas such as health care, education, and welfare. More importantly, the Year for Disabled Persons also marked the inclusion of disabled persons themselves in the planning and advising phases regarding services [25]. A major outcome of the International Year for Disabled Persons was the establishment of the World Programme of Action Concerning Disabled Persons (WPA). The WPA is a global strategy to enhance disability prevention, rehabilitation and equalization of opportunities, which pertains to full participation of persons with disabilities in social life and national development.

The WPA contains one of the first international statements regarding the equalization of opportunities for persons with disabilities. The WPA defines equalization of opportunities as "the process through which the general systems of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sport and recreational life, are made accessible to all."

In order for governments around the world to implement the objectives outlined in the WPA, the United Nations General Assembly declared the period between 1983- 1992 the United Nations Decade of Disabled Persons [26]. An important outcome of this decade was the adoption of another resolution by the United Nations providing guidelines relating to the education and employment of persons with disabilities.

The Decade for Disabled Persons also saw the appointment of two Special Rapporteurs, Erica-Irene Daes and Leandro Despouy, who put together the first international reports regarding the living conditions of person with mental and physical disabilities. Both reports found widespread human rights abuses of

persons with mental disabilities. Their reports revealed appalling living conditions and mistreatment of the disabled, mostly in developing countries. In addition, the Rapporteurs noted that the disabled experienced discrimination in almost every facet of life. In particular, the Reports revealed discrimination in employment, education, housing, public transportation and accommodations, and communications.

C. Principles for the Protection of Persons with Mental Illness

In 1991, the United Nations adopted the Principles for the Protection of Persons with Mental Illness [27] (Principles). Although not of a binding nature, the Principles do serve as an interpretative aid with respect to international treaty obligations and persons with mental disabilities. In particular, they play an integral role in the development of customary international law in the human rights protection of mental health [28]. The overriding theme of the Principles is all persons have the right to the best available mental health care and that all persons with mental disabilities have the right to be treated with respect and human dignity. According to the Principles, persons with mental illnesses have a number of civil and political rights, such as the right to confidentiality, the right to privacy, freedom of religion and communication, freedom from forced labor, and access to information. Further, the Principles incorporate protective criteria for the involuntary admission of persons with mental illness to mental health facilities.

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

To date, the Principles encompass the most direct expression of human rights protection in relation to persons with mental disabilities issued by the United Nations [29].

Although the Principles are not legally binding, they have been used as an interpretive aid in relation to the rights of persons with disabilities in the human rights context. In fact, the Inter- American Commission on Human Rights has held that the Principles are the "most complete standards for protection of the rights of persons with mental

disabilities at the international level." The Principles also "serve as a guide to States in the design and/or reform of mental health systems and are of utmost utility in evaluating the practices of existing systems."

D. Standard Rules

In 1993, the United Nations General Assembly adopted the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* [30] (Standard Rules). This was by far one of the major achievements of the Decade of Disabled Persons. Although not of a legally binding nature, the Standard Rules provide a strong political and moral commitment of Member States to take the necessary action to achieve equalization of opportunities for persons with disabilities. The Standard Rules are an important tool for policy-making and international cooperation. The purpose of the Standard Rules is:

... to ensure that girls, boys, women and men with disabilities, as members of their societies, may exercise the same rights and obligations as others. In all societies of the world there are still obstacles preventing persons with disabilities from exercising their rights and freedoms and making it difficult for them to participate fully in the activities of their societies. It is the responsibility of States to take appropriate action to remove such obstacles. Persons with disabilities and their organizations should play an active role as partners in this process [31].

Although not specifically directed at persons with mental disabilities, the Standard Rules provide human rights protection for persons with any type of disability. By concentrating on the "equalization of opportunities" and "full participation" in society for persons with disabilities, the Standard Rules embrace a wider approach to the rights of persons with disabilities than the Principles.

The Standard Rules promote the use of effective medical care, in particular, preventative treatment given by adequately trained and equipped medical personnel. They provide a guiding philosophical blueprint regarding government policies and program in order to support the "full participation and equality for persons with disabilities." They emphasize that States should promote the full participation of all persons with disabilities in family life, and in cultural, recreational, and religious activities. In addition, the Standard Rules call upon all governments to initiate procedures to bring legislation and governmental policies and programs regarding persons with disabilities in line with international human rights standards. Above all, the Standard Rules encourage States to raise awareness about persons with

disabilities, their rights, needs and full participation and contribution in society. Unlike the Principles, the Standard Rules also provide for a Special Rapporteur and committee to oversee their implementation.

According to the Committee on Economic, Social, and Cultural Rights, the Standard Rules provide a "particularly valuable reference guide in identifying more precisely the relevant obligations of States parties under the Covenant [ICESCR]" [32].

Although the Standard Rules are not binding, they can become international customary rules when applied by a great number of States with the intention of respecting a rule in international law [33]. Overall, the Standard Rules incorporate a much broader approach to the rights of the disabled than the Principles, focusing on the equalization of opportunities and the right of persons with disabilities "to remain within their local communities" [34].

E. General Comment No. 5

An important source regarding the interpretation of international conventions are General Comments issued by treaty-based committees or oversight bodies. Although General Comments are non-binding, they do provide an official interpretation of the particular convention at issue. Comments dealing specifically with the rights of persons with disabilities are considerable in their language and scope [35]. In 1994, the Committee on Economic, Social, and Cultural Rights issued General Comment No.5 [36] (General Comment) which emphasizes the importance and relevance of the ICESCR to the protection of persons with mental and physical disabilities. In particular, the Committee emphasized the important role that the Principles and the Standard Rules play in "ensuring the full range of human rights for persons with disabilities." The Committee also made it clear that Article 2(2) of the ICESCR, which offers protection against discrimination based on "other status", applies to discrimination based on disability. After reviewing the implementation of United Nations' initiatives, such as the WPA and the U. N. Decade of Disabled Persons, the General Comment concludes that "persons with disabilities are very often denied the opportunity to enjoy the full range of economic, social and cultural rights recognized in the Covent [ICESCR]." It also notes that States Parties have devoted very little attention to the rights of person with disabilities and have failed to take "decisive concerted measures that would effectively improve the situation of persons with disabilities. The General Comment is also critical of the fact that there is no universally accepted definition of "disability" and that major shifts in policy and program efforts for the disabled is required in every Member State.

With this General Comment, the United Nations has officially recognized that persons with disabilities are fully covered by the ICESCR. More importantly, it has recognized that in order to realize these protective rights, it must encourage the enactment of domestic antidiscrimination laws [37].

F. Disabilities Convention

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

According to the Working Text, the purpose of the proposed convention is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, and to promote respect for their inherent dignity" [38]. In order to achieve these goals, the proposed Convention provides a blueprint for non-discrimination and equality, special recognition of women and children with disabilities, the right to life, liberty, and security of the person, freedom from cruel, inhuman or degrading treatment or punishment, and the right to inclusion in all aspects of community and social affairs. Recognizing that persons with disabilities, especially women and girls, are often at a greater risk of becoming victims of violence, abuse, neglect or exploitation, the Working Text obliges all States Parties to institute the necessary measures to protect persons with disabilities both inside and outside the home. In particular, States Parties are under an obligation to "take all appropriate measures to prevent all forms of exploitation, violence, and abuse." In relation to victims of such acts, the Working Text requires States to provide for their physical, cognitive and psychological recovery, rehabilitation and social reintegration.

Although it is not certain whether the proposed convention will ever be adopted, the passage of an internationally binding treaty would definitely have a positive impact on the millions of persons with disabilities throughout the world. The adoption of such a convention would not only assist in providing additional protection from human rights abuses for persons with disabilities, it would also play an integral role in shaping government policies and programs. Above all, it would provide the basis for viable remedies for persons with disabilities. The major argument in favor of a convention on the rights of

persons with mental and physical disabilities is that it would not only create binding law but that it would foster the recognition of the human dignity of persons with disabilities and help reduce disability discrimination [39].

The UN has established an important framework for protecting the interests of persons with mental and physical disabilities. The existing UN resolutions and declarations, the Standard Rules, the Principles, and the General Comment, have already established a basis for the protection against discrimination for persons with disabilities under the international law [40]. As more and more countries adopt domestic laws that deal with discrimination against the disabled, and as the international community as a whole, primarily through the arm of the United Nations, pays greater attention to the interests of the disabled and looks to the existing international documents for guidance, the human rights of persons with disabilities may soon become part of customary international law. The present framework is also an important catalyst in the paradigm shift regarding how the world views persons with disabilities. For most of the twentieth century, issues regarding persons with disabilities were analysed in the confines of the medical model. That is, persons with disabilities were primarily viewed as objects in need of medical treatment. The disability itself, as opposed to the individual, was the focal point of discussion. Today, there is clearly a shift away from the medical model to that of the social model. In other words, persons with disabilities are now being viewed as worthy subjects of international human rights protection. As Theresia Degener has argued, "[t]o treat disability as a legally recognized discrimination category implies an acknowledgment that disabled people are people with rights, not problems" [41].

Although the growing emphasis on the human rights of persons with disabilities is definitely a step in the right direction, there is clearly more that the international community can do in order to greater protect persons with mental disabilities. The granting of refugee protection to persons who are persecuted because of their mental disability would provide an additional level of human rights protection.

HUMAN RIGHTS APPROACH

The preamble to the Refugee Convention invokes the Universal Declaration of Human Rights [42] (UDHR) as a means by which states, "have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination." The human rights approach, therefore, is concerned with protecting vulnerable people who have no choice but to leave their country of origin. The central premise here is that a form of humane protection

can reasonably be accommodated within the framework of the Refugee Convention. As one author has noted: "[contemporary refugee law ... is primarily human rights law]" [43].

One of the leading scholars in this field of refugee law is James C. Hathaway, in *The Law of Refugee Status*, [44] he seeks a new understanding of refugee law, in particular, the meaning of the term "persecution." One of Hathaway's goals is to introduce a concept of humane protection that can reasonably be accommodated within the refugee determination process. He states the following at page 108:

"refugee law ought to concern itself with actions which deny human dignity in any key way, and ... the sustained or systemic denial of core human rights is the appropriate standard" [45].

Hathaway notes that extending the Refugee Convention to include everyone in danger of being harmed, no matter the source of persecution, would undoubtedly be a position that the western industrialized nations would be unwilling to accept. In other words, he is developing his rationale within the realistic confines of state sovereignty and restrictive immigration policies [46]. Persecution, according to Hathaway, is the key to understanding refugeehood and the basis for offering protection. Hathaway defines persecution as "the sustained or systemic failure of State protection in relation to one of the core entitlements which has been recognized by the international community."

These core entitlements are the basic human rights which the international community has established as being worthy of protection. Within the refugee determination process, attempts have been made to categorize or prioritize rights into separate groups. In turn, this has led some to argue that a hierarchy of basic human rights exists within the international community and refugee law.

The argument is that this hierarchy has created the notion that there exist certain basic human rights that cannot, under any circumstance, be violated as opposed to other rights which are of secondary importance. In other words, certain human rights take precedence over other rights. Hathaway discusses the emergence of a hierarchy of rights contained in the *International Bill of Human Rights* which consists of the UDHR, the ICCPR and the ICESCR. In the first category are rights stated in the UDHR and codified in binding form in the ICCPR and from which no derogation whatsoever is permitted, even in times of national emergency.

The following rights are included within this category: freedom from arbitrary deprivation of life; protection against torture or cruel, inhuman, or degrading punishment or treatment; freedom from slavery; the prohibition of criminal prosecution for ex post facto offences; and freedom of thought, conscience, and religion. Any violation of these rights will always constitute persecution.

The second category contains those rights stated in the UDHR and also codified within the ICCPR but from which States are allowed to derogate in the course of a "public emergency" [47]. The following rights are included within this category: freedom from arbitrary arrest or detention;" the right to equal protection for all; the right in criminal proceedings to a fair and public hearing and to be presumed innocent unless guilt is proved;" the protection of personal and family privacy and integrity; the right to internal movement and choice of residence and the freedom to leave and return to one's country; the right to liberty of opinion, expression, assembly and association; the right to form and join trade unions; the ability to partake in government; the right to vote in periodic and genuine elections; and the ability to access public employment without discrimination. According to Hathaway, a State's failure to guarantee these rights will generally amount to a violation, unless the state can demonstrate that derogation was the result of an emergency, was not applied in a discriminatory fashion, and was not inconsistent with international law [48].

The third category in the hierarchy contains rights which are listed in the UDHR and are codified in the ICESCR. The following rights are included within this category:

the right to work; [49] just and favorable conditions of employment, remuneration, and rest; [50]entitlement to food, clothing and housing; [51] medical care; [52] social security; [53] basic education; [54] protection of the family, particularly children and mothers; [55]and the freedom to engage and benefit from cultural, scientific, literary, and artistic expression [56]. Unlike the ICCPR, the ICESCR only requires States to realize these rights in a non-discriminatory fashion, subject to the availability of resources.

According to Hathaway, a State is in breach of its obligations under this category if it "ignores these interests notwithstanding the fiscal ability to respond, or where it excludes a minority of its population from their enjoyment" [57]. The fourth and final category contains those rights listed in the UDHR but which have not been codified in any binding force in either the ICCPR or the ICESCR. Such rights include the right to be

protected from unemployment [58] and the right to own and be free from arbitrary deprivation of property [59]. According to Hathaway, these rights are likely outside the scope of a state's duty of protection. Therefore, a violation of these rights will not ordinarily, in and of themselves, give rise to persecution or refugee status [60].

Niraj Nathwani argues against the human rights theory because he believes it narrows State responsibility which in turn restricts the scope of the refugee concept in the international community. In Nathwani's opinion, "the proliferation of human rights entails that not all human rights violations can give rise to refugee status. Otherwise, states could not pursue their restrictive immigration policy" [61]. Therefore, certain human rights violations are emphasized over others. In particular, civil and political rights are viewed as more important than economic and social rights. According to Nathwani, this is due to the fact that economic and social rights affect more people and thus come into conflict with the restrictive immigration policies of the industrialized Western nations [62].

Although this is a valid criticism, on the whole, the human rights perspective is an appropriate way to analyze refugee law in the post-Cold War era. Within the international community, the focus has shifted from viewing persecution as stemming primarily from political reasons to a more human aspect of each individual's right to live life with certain basic rights. This approach is also in line with judicial determinations in the area of refugee law of many common law jurisdictions [63]. Recently, domestic courts have stated that international human rights, in particular the concept of non-discrimination, provides an appropriate framework within which to determine the parameters of refugee protection [64]. To reiterate, States are under no legal obligation to grant asylum to refugees. In an ideal world, States would allow entry and stay to all refugees who seek protection. In reality, however, states party to the Refugee Convention continue to implement restrictive immigration policies.

Although granting refugee protection based on the human rights approach will still exclude some claimants from protection, this approach allows for a more humane distribution of "substitute protection" to those who have no alternative. To a great extent, refugee law has been at the forefront of the international human rights movement. Specific challenges, such as gender-related persecution, have been analyzed with much success within this framework. In many cases, granting refugee protection has provided an effective remedy for victims of human rights violations. This trend will likely continue as long as the refugee determination process continues to be developed within this framework. The human rights approach may also

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

A. Necessity-based Approach

Niraj Nathwani has recently published a book which analyses the purpose of refugee law [65]. In this book the author argues that the prevailing theories relating to refugees are not adequate to explain why States grant asylum in light of restrictive immigration policies. In Nathwani's opinion, the prevailing theories should be replaced and his objective is to formulate a new theory of refugee law. In particular, his aim is to "achieve an interpretation of the refugee concept that is stringent and convincing, and supports the advocates of a generous refugee policy in the rich West" [66]. His answer is to replace the prevailing approaches with a "necessity-based" understanding of refugee law.

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

Nathwani analyses the concept of necessity in the realm of criminal law. He notes that criminal law allows for the lawful defense of necessity under certain circumstance where the defendant in question had no other choice but to commit the criminal offence at issue. Nathwani's contention, therefore, is that if an accused's argument is considered convincing enough to warrant exempting the act from criminal responsibility, then it would have even more strength in refugee law. He sums this concept as follows:

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

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

and not objective:

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

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

Overall, Nathwani offers an interesting argument but falls short of developing a concrete means of explaining why states grant, or should grant, refugee status to certain individuals in light of the fact that most states implement restrictive immigration policies. The approaches to refugee law that Nathwani critiques, already, in some degree, encompass the concept of necessity. For example, Grahl-Madsen's theory and the human rights approach operate with the assumption that refugees leave their state of origin because it was necessary and now it is necessary for the state of refuge to grant refugee protection [67]. Therefore, this theory does not really add anything new save for the recommendation that the refugee determination process become primarily a subjective-oriented process. Although this recommendation is laudable, it will likely not be supported by refugee host states who already operate from a restrictive immigration standpoint. Focusing just on the subjective elements fear will likely make the Refugee Convention into a "self-defining" mechanism [68].

In addition, Nathwani's subjectively conceived notion of necessity fails to address the fact that the objective arm of the refugee determination process is not very high. For example, in *Adjei v. Canada* [69] the Canadian Federal Court of Appeal held that the proper test in determining the objective arm of "well-founded fear" of persecution is whether there is a "reasonable chance" that persecution would take place, or "good grounds" for fearing persecution. The court also stressed the fact that a claimant need not prove that persecution will take place on the balance of probabilities, but that there must be more than a

minimum possibility of persecution. This concept could also be expressed as a "reasonable" or even a "serious possibility." Nathwani also fails to note that objective evidence relating to a claimant's fear of persecution can be beneficial in many respects. For example, some claimant's do not make good witnesses due to language and cultural differences and the stress of recounting traumatic events. Objective evidence, in many cases, will help the claimant make his or her case more credible and help fill in any gaps. In many cases, evidence of a poor human rights record is a powerful tool in corroborating a claimant's testimony that he or she is at risk.

Mark Gibney has also made the case for the importance of objective evidence in refugee determination proceedings. One of his studies reveals a strong relationship between levels of human rights abuses and the phenomenon of refugee flight [70]. His argument is that the most violent countries in the world produce nearly all the world's refugees, thus refuting the myth in Western states that the majority of asylum seekers are abusing the system (back door immigration). Gibney argues that most of the violence that refugees encounter is quite predictable and the details of it are known with certainty, based on examination of country reports. This leads him to conclude that "[i]n the absence of any other form of effective international mechanisms, refugee relief has been almost the sole means of protecting the suffering from human rights abuses." It known that the human rights approach, in relation to the refugee determination process, constitutes a consistent and principled basis for granting refugee status and best explains the willingness among states to grant protection notwithstanding their right to control their borders. Refugee determination, based on human rights principles, offers an appropriate means for reconciling the sovereign right of states to implement restrictive immigration policies with the reality that those seeking protection will find a way to enter the territory of the refuge state

In addition, granting refugee status on the human rights rationale also legitimizes a State's claim to being democratic and liberal. It legitimizes the State in the sense that it upholds certain values, such as freedom and equality, that liberal democratic states have argued are essential to the proper functioning of a free and democratic society [71].

B. Conclusion

The chief criticism of the human rights approach has been that it has failed to adequately address two major challenges:

" (i) the Western States' lack of motivation to receive refugees; and (ii) the need to create a hierarchy of human rights for the purposes of

refugee law in order to take account of the restrictive immigration policy of the rich States of the West" [72].

Although there is some truth to this statement, on the whole, the criticism is rather harsh. As recent case law has shown, the human rights approach to refugee determinations has provided additional protection to certain persecuted groups (e.g. victims of gender-related persecution) that were not necessarily envisioned by the framers of the Refugee Convention. In light of the fact that states are free to implement their own refugee determination process, as long as they do not violate the *non-refoulement* principle, the human rights approach provides a "unifying theory binding different bodies of national jurisprudence [73]. This is evident from the analysis provided in *Shah and Islam* [74].

PEOPLE WITH MENTAL DISABILITIES CONSIDERED AS MEMBERS OF A "PARTICULAR SOCIAL GROUP"

My argument will be made that persons with mental disabilities fall within the "social group" category and, thus, should qualify for refugee protection if they fear "persecution" on account of their disability. As Helton has argued, the "social group" category is a broad and flexible concept that should be read expansively [75].

Although the Refugee Convention does not specifically make reference to people with mental disabilities, the motive behind the framers' decision to incorporate the "particular social group" category was to deal with the needs of persons who have suffered the kind of discrimination and maltreatment to which persons with mental disabilities have been subjected to throughout history and which many continue to endure.

Throughout the world, the stigma attached to people with mental disabilities has fuelled the continued prejudice, discrimination, and fear against this social group. In turn, this has contributed to the human rights violations of this group as a result of their particular disability. Therefore, people with mental disabilities not only fall within the very group of refugees the framers initially intended to protect, but they also constitute a "particular social group" due to the continual maltreatment, discrimination, and prejudice afforded by societies today. Furthermore, recent case law suggests that the door has been opened to recognizing persons with mental disabilities as members of a particular social group.

A. Historical Law Cases

In Re Santiago-Carrillo, [76] the Board of Immigration Appeals (BIA), in an unreported decision, addressed the issue of a mentally disabled refugee

claimant fearing persecution if sent back to Mexico. In this case, the claimant was classified as an "abandonado," a name given to mentally ill people placed in Mexican mental hospitals. At the initial hearing, a California immigration judge granted Santiago-Carrillo a withholding of removal to Mexico based on the fact that he would likely face "persecution" if sent back due to his membership in a particular social group, namely, the "abandonados." The immigration judge based his decision on a report by the Medical Device Research Institute (MDRI), on the Mexican mental health system and the offensive mistreatment of many institutionalized persons in Mexico.

The judge held that the conditions in Mexico's mental institutions constituted persecution. On appeal, the BIA agreed that the "abandonados" constituted a particular social group given their close affiliation and immutable characteristic of mental disability, and because they shared a common fate of being "readily identified either through misbehavior or an inability to function in society at large, and are subsequently involuntarily hospitalized, oftentimes for life." However, the BIA reversed the immigration judge's decision that Santiago-Carrillo would be persecuted.

The BIA held that without "any evidence of any ill will or animus supplying a motive for the government to harm the respondent" the institutionalization of Santiago-Carrillo without treatment did not amount to persecution. Instead, the BIA held that upon his return, the Mexican government would institutionalize the claimant in order to "protect both he and society in general."

In an unreported 2001 decision, the Chicago Immigration Court, granted refugee protection to an autistic boy with obsessive-compulsive disorder based on his well-founded fear of persecution on account of his mental disability. The Letter Opinion, issued by the Director of the Chicago Asylum Office, Robert Esbrook, did not disclose the facts of the case, but news reports were able to shed light on the issue at hand. The claimant, Umair Choudhry, was a boy from Pakistan who developed autism at the age of three [77]. Because Umair's behavior included violent self-abusive outbursts, he wore a helmet and mittens for protection against self-mutilation [78].

In Pakistan, Umair's relatives and neighbours said that he was cursed by Allah and possessed by demons. In order to help "cure" Umair of his affliction, he was subjected to degrading treatments in Pakistan, such as being forced to drink dirty water meant for cows, in order to expel Allah's curse. Umair's mother feared that if he were sent back to Pakistan, he would be taken to a pagal khana (mad house) where he would be locked away in a cage. Based on the evidence at hand,

the Chicago Immigration Court concluded that Umair fit the classic definition of a refugee claimant. According to Robert Esbrook, Umair was granted asylum not on the basis of being disabled or autistic, but rather, because of the persecution his disability itself caused. This case marked the first time that an individual was granted asylum on account of a mental disability in the U.S.

Although the decision to grant Umair refugee status was a major step forward in the human rights protection of persons with mental disabilities, only two years later, the movement was stalled by the Eighth Circuit Court of Appeals.

In *Raffington v. INS*, [79] the Court upheld a BIA decision denying the refugee claimant's motion to reopen deportation proceedings to permit her to apply for asylum. Raffington argued that she would be persecuted because of her membership in a particular social group comprised of mentally ill women in Jamaica. The BIA denied the motion on the ground that she failed to establish a prima facie case that she would be persecuted if returned to Jamaica. In support of her motion, Raffington presented evidence that she had a history of depression and suicide attempts and that her mental illness was being effectively treated in the United States. Raffington argued that deportation back to Jamaica would deny her the necessary psychiatric and counseling care she was receiving. According to the BIA, Raffington "failed to provide any evidence which would support her assertion that she ha[d] a well-founded fear of persecution upon her return to Jamaica based upon her mental disability." Based on this finding, the BIA concluded that there was no evidence in the record that she would be singled out for persecution based upon one of the grounds enumerated for refugee protection.

The Eighth Circuit Court of Appeals affirmed this decision stating that Raffington failed to establish a prima facie case that the mentally ill or mentally ill women have been persecuted in Jamaica due to their mental disability. The fact that the Jamaican government devoted limited resources to treating the mentally disabled did not establish a pattern of discrimination or harassment amounting to persecution on account of mental disability. The importance of this case, however, is in relation to the court's discussion regarding Raffington's argument that she was a member of a particular social group. According to the court, there was not enough evidence to conclude that mentally ill Jamaicans, or mentally ill female Jamaicans, meet the requirements of the "particular social group" category. In the court's opinion, mentally ill women in Jamaica are not a "collection of people closely affiliated with each other, who are actuated by some common impulse or interest ... the mentally ill are

too large and diverse a group to qualify." Although this case is definitely a strike against the adoption of the mentally disabled as a "particular social group," the Court's holding should be read in light of a recent case handed down by the Ninth Circuit Court of Appeals.

In *Tchoukhrova v. Gonzales* [80] the Ninth Circuit Court of Appeals addressed the issue of whether a child with cerebral palsy fell within the parameters of the "particular social group" category. The Court noted that persons with disabilities are precisely the kind of individuals that the Refugee Convention contemplates with its reference to the "social group" category [81].

In addition, although not all mental or physical disabilities are "inherent" or "innate," due to the fact that some are acquired, in the Court's opinion, they are usually "immutable." Since mental and physical disabilities constitute precisely the sort of "immutable characteristic" that a refugee claimant cannot change, as contemplated under the Refugee Convention, the Court had no trouble concluding that persons with disabilities can "constitute a 'particular social group' for purposes of asylum and withholding of removal." Although this is a very important holding regarding the protection of persons with mental disabilities throughout the world, the Court was quick to limit the scope of this particular group. The group considered by the Ninth Circuit does not include all "disabilities" as it is restricted to individuals whose disabilities are "serious and long lasting or permanent in nature."

This is a clear example of how the "immutable characteristics" test can be overly restrictive in excluding groups that are worthy of international protection. The fact that not all disabilities are "innate" or "unchangeable" should not be the basis for denying refugee protection to individuals who will face persecution if sent back to their country of origin. Again, this relates back to the fact that in many instances societies perceive certain individuals to be different and that this difference poses a threat. For example, the fact that a mentally disabled person may eventually procreate and bring forth another mentally disabled human being makes many able bodied people uneasy. This uneasy feeling, as history has shown, has to lead to the forced sterilization of millions of people and other forms of discrimination and mistreatment.

In Canada there are signs that persons with mental disabilities would fall within the "social group" category, however, there is a lack of reported decisions that address the issue in any detail. In *Re F. (G.E.)* the Canadian Immigration and Refugee Board (Convention Refugee Determination Division) stated that it would accept that persons with the "inherent and substantially immutable characteristic of mental disability may collectively be seen to form a social group, of which the

claimant is a member." However, the claimant was not granted refugee protection, as the evidence did not establish that the Somali police had a habit of persecuting the mentally disabled. Like the American decisions above, the tribunal sought fit to restrict the scope of this group to matters of "immutability." Most recently, the Federal Court of Canada was given the opportunity to discuss the issue of mental disabilities and social group in *Liaqat v. Canada (Minister of Citizenship and Immigration)* [82]. In that case, a Pakistani claimant was diagnosed as having schizophrenia while in Canada. During the refugee hearing, the claimant argued that his mental illness was an innate and unchangeable characteristic and that he feared being persecuted on account of his mental illness if sent back to Pakistan. According to the applicant, the mentally ill in Pakistan are severely mistreated in public areas and in state institutions where treatment plans include electroshock therapy [83].

In addition, the applicant argued that he would receive very little, if any, medical treatment for his schizophrenia if sent back due to the limited resources Pakistan devotes to its mental health system [84]. This lack of treatment, the applicant argued, would also amount to persecution. In reaching its decision, the Court noted that the respondent Minister conceded that the applicant was a member of a particular social group. In light of this fact, the Court also agreed with this submission. Unfortunately, the Court failed to provide a detailed analysis as to why the applicant was a member of a "particular social group." Given the fact that the applicant had initially argued that his mental illness was an "innate and unchangeable characteristic" the assumption can be made that the Court had this in mind when reaching its decision. Overall, the case turned on the lack of evidence that Liaqat would face persecution in Pakistan. According to the available evidence, the Court concluded that Liaqat would receive conventional psychiatric treatment. Even though the level of care would not be the same as in Canada, in the court's opinion, State protection is not expected to be perfect. Thus, it could not be held that Liaqat would face a real chance of persecution if sent back to Pakistan [85].

Although the above cases are a significant step forward in fully recognizing persons with mental disabilities who are persecuted on account of their disability as deserving of refugee protection, there is a concern that the adoption of the "immutable characteristics" test by administrative tribunals and courts will overly restrict the potential scope of this "particular social group". The "social group" category was intended to include individuals who share common social characteristics that are the target of persecution but who do not necessarily fall within the categories of race, religion or political opinion. Limiting refugee protection to persons with an innate or immutable

mental disability will likely limit the group of mentally disabled who may qualify for refugee status. To reiterate, the central concern of the Refugee Convention is to protect persons from being persecuted. Persecution is the key and not what constitutes a protected ground such as "particular social group." As noted above, this term was purposely left undefined in order to allow for a flexible and open-ended approach. Limiting the discussion to whether an individual has an "innate" characteristic cuts short the Refugee Convention's objective of protecting human rights. The more favorable approach would be to adopt the progressively developed "social perception" test in the refugee determination process. In many cases, it is the perception of a particular group as posing some threat to those in power or society at large that essentially leads to persecution. People with mental disabilities clearly fall within a group that shares a common unifying characteristic that sets them apart from as a cognizable group within society.

People diagnosed as having a mental disability, such as schizophrenia, for example, form a cognizable group in terms of their particular social and medical status. They are generally treated as a cognizable group in that members of the public generally respond to people with mental disabilities on the basis of their particular disability, developing and acting upon stereotyped notions of what a mental disability, such as schizophrenia, signifies. Reactions and attitudes based on fear, ignorance, and prejudice are generally applied to individuals due to their perceived membership of that particular social group. It is the stigma of being labeled as "schizophrenic," "psychotic," or "mentally ill" that sets the mentally disabled apart from the general public and not the fact that they may or may not have an "innate" or "immutable" characteristic. In most scenarios, the two approaches may very well reach the same conclusion regarding the status of the mentally disabled as members of a particular social group. In many respects, their distinguishing characteristics are "immutable" in so far as they are readily identifiable to persecutors based on the never-ending ignorant, prejudicial and stereotypical attitudes towards the mentally disabled. However, the "social perception" approach has the potential to fill in any gaps that may result from a "protected characteristics" analysis. In this case, the gap relates to the fact that there is no clear consensus regarding the cause of mental disabilities.

Essentially, there are two general models regarding the cause of mental disabilities that mental health professionals subscribe to: the medical and psychosocial models [86]. In its strictest form, the medical model suggests that mental disabilities are illnesses in the same manner that physical disabilities are illnesses. This model conceptualizes an individual's

maladaptive behaviour and mental malfunction as stemming from a biological, genetic or organic cause, primarily in the brain [87]. As such, this model is in line with the "immutable characteristics" approach to refugee determination.

The psychosocial model, on the other hand, conceptualizes an individual's mental disturbances as psychological, resulting from social, environmental, cultural, and ethical factors. The essential element here is the cumulative effect of environmental stressors on the individual in question and not a particular "innate" biological quality. To varying degrees, the everyday stresses of life have proven to be important in the causation of many forms of mental illness [88].

The other danger associated with adopting the "immutable" standard is that it reinforces the stereotypes associated with mental disabilities. Prejudice against persons with mental disabilities has been extensively documented with dangerousness and unpredictability the most often reported perceptions among members of the general public. [89] Studies have revealed that the "medical model" approach to mental disabilities, which generally focuses on "innate" and "immutable" characteristics, significantly increases this perception of unpredictability and dangerousness [90].

A recent New Zealand study has shown that the more the public believes in "biogenetic causes" the more negative their attitude towards persons with mental disabilities [91]. In particular, those who hold biogenetic causal beliefs view "mental patients" as more dangerous and unpredictable [92]. The same study also revealed that when members of the public are presented with psychosocial causes of mental disabilities, attitudes regarding dangerousness and unpredictability significantly improve [93]. This is the added danger of adhering to the "immutable characteristics" test in determining refugee status for persons with mental disabilities. In many respects, some mental disabilities may have a genetic or biological cause which makes the disability in question "immutable."

In light of the dangers associated with limiting the definition of the "social group" category to "immutable characteristics," adoption of the UNHCR's reconciliatory approach to the "social group" category emerges as the most reasonable option. The mentally disabled, as a community, share a common characteristic and are perceived as a distinct group by society. In some cases, but not all, the distinction may have its basis on an immutable characteristic. This distinctive characteristic often leads to exclusion from society and the deprivation of such fundamental human rights as life, liberty, security of person, education and privacy. The exclusions, in many respects, stem from

the social perception of this group, which is largely based on ignorance, prejudice, stereotypes and fear. In light of these factors, people with mental disabilities should qualify as a "particular social group" under the Refugee Convention.

Therefore, to the extent that people with mental disabilities can prove that the mistreatment they face constitutes "persecution," that they are being "persecuted" on account of their mental disability and that their country of origin is either the agent of persecution or is unwilling or unable to offer protection, States party to the Refugee Convention should recognize that the mentally disabled qualify for refugee protection. The granting of refugee status to individuals with mental disabilities, especially in Canada and the United States, will send a message to governments around the world that discrimination against the mentally disabled is a violation of human rights and will not be tolerated at the international level.

CONCLUDING REMARKS

The general spirit of the adoption of the Refugee Convention was a humanitarian desire to develop a better international system. In light of the fact that a perfect world is an Utopian dream, "it should at least be ensured that victims of oppression and persecution be decently treated by the international community" [94]. It was for this reason that the UDHR included the right to seek asylum as a fundamental human right. As this paper has argued, the Refugee Convention is marked by an ambition to further develop the fundamental human rights expressed in the United Nations Charter and the UDHR. As the opening two paragraphs of the preamble to the Refugee Convention state:

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights ... have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms.

With its preamble grounded in the concept of non-discrimination, the Refugee Convention encompasses an ever-evolving definition of refugeehood and offers the greatest protection for asylum seekers within the international community. Based on this premise, this paper has argued that the mentally disabled form a "particular social group" in society and that those individuals who are persecuted on account of their mental disability should be granted refugee protection.

Human rights approach constitutes a consistent and principled basis for granting refugee status and best explains the willingness among states to grant protection notwithstanding their right to control their borders. This approach offers an appropriate means for reconciling the sovereign right of states to implement restrictive immigration policies with the reality that those seeking protection will find a way to enter the territory of a refuge state. Furthermore, it legitimizes a state's claim to being democratic and liberal by upholding values such as freedom and equality [95]. The stigma attached to people with mental disabilities has fuelled the continued prejudice, discrimination and fear against this social group.

I argued that the mentally disabled share a common social identity and are perceived as a distinct group by society. This common identity is often associated with an inferior social status by those who persecute them. In addition, the mentally disabled form a readily identifiable group based on the premise that they are different. The social identity, label or stigma attached to this social group cannot be avoided due to the persecutor's faulty assumption that the particular group is inferior, weak, or dangerous.

In many cases, people with mental disabilities are unable to distance themselves from their given social status and are readily recognizable to persecutors. In turn, this social stigma precipitates discrimination and harassment and eventually persecution. The mentally disabled not only fall within the very group of refugees the framers initially intended to protect, but they also constitute a "particular social group" due to the continual maltreatment, discrimination, and prejudice afforded by societies today [96].

The mentally disabled, therefore, deserve international protection on account of the inferior social status that is ascribed to them by members of the public and the state [97].

Taken as a whole, I argued that the principles of non-discrimination and human rights for people with mental disabilities have reached center stage in the international community. I also argue that the principle of non-discrimination in Article 2 of the International ICESCR holds that its rights are equally applicable to 'everyone' [98]. In light of this reconceptualization of international human rights law as inclusive of issues regarding the mentally disabled, I proposed that the granting of refugee protection to persons with mental disabilities would further advance an enforceable human rights regime for the promotion and protection of the rights of the mentally disabled. By upholding the rights of people with mental disabilities to seek and obtain surrogate protection from persecution on account

of being a member of a particular social group of people with mental disabilities, both Canada, Australia, and the United States can lead they way in fulfilling the Refugee Convention's human rights guarantee of nondiscrimination and fully recognize the dignity and human rights of the mentally disabled.

REFERENCES

1. Light, L. (2005). "Disability and Human Rights: The Persistent Oxymoron" in Anna Lawson and Caroline Gooding, eds. *Disability Rights in Europe: From Theory to Practice* (Oxford: Portland, Oregon: Hart Publishing) 9 at 9-10.
2. Gibney, M. (2002). "Certain Violence, Uncertain Protection" in Daniele Joley ed. *Global Changes in Asylum Regimes* (New York: Palgrave/Macmillan) 15 at 26.
3. *Convention relating to the Status of Refugees*, 189 U.N.T.S. 2545, entered into force April 22, 1954 and the *Protocol relating to the Status of Refugees*, 606 U.N.T.S. 8791, entered into force October 4, 1967. [Hereinafter collectively referred to as the Refugee Convention].
4. Refugee Convention, at Article 1A(2).
5. *Ward v. Canada* (Attorney-General). (1993), 103 D.L.R. (4th) 1 (S.C.C.).
6. *Ibid*, at 12.
7. Horvath, V. (2000). *Secretary of State for the Home Department*. 3 All E.R. 577 (House of Lords) at 581, per Lord Hope of Craighead.
8. Hathaway, J. C. (2005). *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press) at 5.
9. Article 14 of the Universal Declaration of Human Rights, adopted 10 December, 1948, U.N.G.A. Res. 217A(III), (hereinafter, UDHR) provides for "the right to seek and enjoy in other countries asylum from persecution." Although there is no duty in international law for a state to permit entry to a foreign alien, states must, at a minimum, allow the applicant to make his or her case for protection before being deported.
10. The International Bill of Human Rights generally refers to the UDHR, *supra* note 11, the ICCPR, *supra* note 87, and the ICESCR, *supra* note.
11. As Arlene Kanter has noted: "Discrimination against people with disabilities and their exclusion from society leads to economic hardship and a loss of their productive capacity to society. It also leads to the perpetuation of stereotypes of people with disabilities as objects of pity and charity, but not as human beings entitled to political, social, and civil rights: Arlene S. Kanter, "The Globalization of Disability Rights Law" (2003) 30 Syracuse J. Int'l L. & Com. 241 at 246.
12. UN Charter entered into force 24 October 1945.
13. Koh, H. H., & Gostin, L. O. (2003). "Introduction: The Human Rights Imperative" in Stanley S. Herr, Lawrence O. Gostin & Harold Hongju Koh, eds. *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* (Oxford: Oxford University Press) 1 at 2.
14. Declaration on the Rights of Mentally Retarded Persons, A/RES/2856 (XXVI), U.N. Doc. A/8429 (1971).
15. Herr, S. S. (1999). "Rights of Disabled Persons: International Principles and American Experiences" (1980-81) 12 Colum. H.R.L. Rev. lat 5.
16. Declaration, *supra* note 167 at Article 1, 1971.
17. *Ibid*, at Article 3.
18. *Ibid*, at Article 6.
19. *Ibid*, at Article 4.
20. Declaration on the Rights of Disabled Persons, A/RES/3447 (XXX), U.N. Doc. A/10034 (1975).
21. *Ibid*, at Article 4, 7.
22. *Ibid*, at Article 6. Measures include, inter alia, the right to medical, psychological and functional treatment, education, and counseling.
23. *Ibid*, at Articles 5, 8. *See also* Stanley S. Herr, "From Wrongs to Rights: International Human Rights and Legal Protection" in Stanley S. Herr, Lawrence O. Gostin & Harold Hongju Koh, eds., *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* (Oxford: Oxford University Press, 2003) 115 at 121.
24. A/RES/31/123, of December 16, 1976, U.N. Doc.A/31/39 (1976).
25. Mittler, P. (2003). "Meeting the Needs of People with an Intellectual Disability: International Perspectives" in Stanley S. Herr, Lawrence O. Gostin & Harold Hongju Koh, eds., *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* (Oxford: Oxford University Press) 25 at 38.
26. A/RES/37/53, of 3 December 1982.
27. Principles for the Protection of Persons with Mental Illness, A/RES/46/119, U.N. Doc.A/46/49. (1991).
28. Rosenthal, E., & Rubenstein, L, S. (1993). "International Human Rights Advocacy under the 'Principles for the Protection of Persons with Mental Illness'" 16 Int'l J.L. & Psychiatry 257 at 268.
29. Rosenthal, & Rubenstein. *supra* note 190 at 268.
30. Standard Rules on the Equalization of Opportunities for Persons with Disabilities, A/RES/48/96, U.N. Doc. A/48/627 (1993).
31. Standard Rules, *supra* note 204 at para. 15 of Introduction.
32. Committee on Economic, Social and Cultural Rights, *Report on the Tenth and Eleventh Session, General Comment No. 5* (1994): *Persons with Disabilities*, U.N. Doc. E/1995/22- E/C.12/1994/20 at para 7. [Hereinafter General Comment].
33. Standard Rules, *supra* note 204 at para. 13 of

- Introduction.
34. Ibid, at para. 27 of Introduction.
35. Rosenthal, E., & Kanter, A. (2002). "The Right to Community Integration for people with Disabilities Under United States and International Law" in Mary Lou Breslin and Silvia Yee, eds., *Disability Rights Law and Policy: International and National Perspectives* (Ardsley, N.Y.: Transnational Publishers) 309 at 336.
36. General Comment, *supra* note 213.
37. Stanley, S., & Herr, *supra* note 177 at 123.
38. See Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities < <http://www.un.org/esa/socdev/enable/rights/ahc7report-e.htm> > accessed April 10, 2017.
39. Degener, T., & Quinn, G. (2002). "A Survey of International, Comparative and Regional Disability Law Reform" in Mary Lou Breslin and Silvia Yee, eds. *Disability Rights Law and Policy: International and National Perspectives* (Ardsley, N.Y.: Transnational Publishers) 3 at 18.
40. Rosenthal, & Kanter, *supra* note 216 at 341.
41. Degener, *supra* note 241 at 90.
42. UDHR, *supra* note.
43. Garvey, J. I. (1985). "Toward a Reformulation of International Refugee Law" 26 Harv. Int'l L. J. 483, at 483.
44. Hathaway, J. C. (1991). *The Law of Refugee Status* (Toronto: Butterworths).
45. Ibid.
46. "Refugee law is a politically pragmatic means of reconciling the generalized commitment of States to self-interested control over immigration to the reality of coerced migration ... The challenge for States has always been the definition of refugee status - the exception to the rule- in terms which are sufficiently broad to encompass those whose need to move is unassailable, yet simultaneously to tailor and constrain the scope of the refugee class to meet the self interested pre-occupations of asylum States": *ibid*, at 231. See also Andrew Shacknove, "Who is a Refugee," (1985) *Ethics* 274 at 281, who defines a refugee as a person whose country of origin has "failed to secure [his or hers] basic needs. There is no justification for granting refugee status to individuals who do not suffer from the absence of one or more of these needs. Nor is there reason for denying refugee status to those who do. Moreover, because all of these needs are equally essential for survival, the violation of each constitutes an equally valid claim to refugeehood."
47. ICCPR, *supra* note 87 at Art. 4.
48. Hathaway, *supra* note 97 at 110.
49. ICESCR, *supra* note 87 at Art. 6.
50. Ibid. at Art. 7.
51. Ibid. at Art. 11.
52. Ibid. at Art. 12.
53. Ibid. at Art. 9.
54. Ibid. at Arts 13, 14.
55. Ibid. at Art. 10.
56. Ibid, at Art. 15.
57. Hathaway, *supra* note 97 at 111.
58. UDHR, *supra* note 11 at Art. 17.
59. Ibid, at Art. 23.
60. Hathaway, *supra* note 97 at 111.
61. Nathwani, *supra* note 83 at 73.
62. Ibid.
63. See Ward, *supra* note 7 and Shah and Islam, *supra* note 89.
64. See Mark R. von Sternberg, *The Grounds for Refugee Protection in the Context of International Human Rights and Humanitarian Law* (New York: Martinus Nijhoff, 2002) at 10. See also Ward, *supra* note 7 and Shah and Islam, *supra* note 89 whereby both Courts held that the concept of human rights protection and anti-discrimination principles are essential to understanding the Refugee Convention.
65. *Supra* note 83.
66. Ibid. at 85.
67. James C. Hathaway, (2004) 98 A.J.I.L 616 at 619-620.
68. Hathaway, *supra* note 151 at 620.
69. Canada, A. V. (1989). (Minister of Employment and Immigration), 7 Imm. L.R. (2d) 169 (Fed. C.A.).
70. See Mark Gibney, "Certain Violence, Uncertain Protection" in Daniele Joly, ed., *Global Changes in Asylum Regimes* (New York: Palgrave Macmillan, 2002) 15 at 16.
71. See Liza Schuster, *The Use and Abuse of Political Asylum in Britain and Germany* (London: Frank Cass, 2003) at 56-57. See also Nathwani, *supra* note 83 at 20: "Ultimately, the legitimacy of the State of refuge depends on the legitimacy of the state system as a whole. The duty derives from the claims of the State of refuge to exercise power legitimately in a world divided into States. States are obliged to assist refugees in order to justify their own legitimacy in a world made up of States."
72. Nathwani, *supra* note 83 at 26.
73. Anker, *supra* note 142 at 136.
74. See also Refugee Appeal No. 71427/99, [2000] N.Z.A.R. 545, and *Minister for Immigration and Multicultural Affairs v. Khawar*, [2000] F.C.A. 1130, two other high profile refugee cases that dealt with gender-related persecution paralleling the human rights approach of Shah and Islam, *supra* note 89.
75. Helton, *supra* note 296 at 45-46.
76. Re Santiago-Carrillo, *supra* note 396; Arlene S. Kanter et al, *supra* note 396.
77. Julie Deardroff, "Mom Wins Asylum for Son with

- Autism: INS Agrees Boy Faced Persecution in Pakistan Because of his Disability" *Chicago Tribune* (Feb. 21, 2001) available on Westlaw at 2001 WLNR 10615171.
78. Julie Deardroff, "Mom Says Asylum Bid a Plea for Son's Life: Pakistani Woman Hopes U.S. Law will Stretch to Shelter Autistic Boy" *Chicago Tribune* (Sep.19, 2000) available on Westlaw at 2000 WLNR 8208501.
79. *Raffington v. INS*, 340 F. 3d 720 (8th Cir. 2003).
80. Tchoukhrova. *supra* note.
81. Tchoukhrova. *supra* note 124 at 1189.
82. Canada, L. V. (2005). (Minister of Citizenship and Immigration) F.C.J. No. 1119 (F.C.) (QL).
83. *Ibid*, at para. 17.
84. *Ibid*, at para. 17.
85. *Ibid*, at paras. 36-39.
86. Wyatt, R. C., & Livson, N. (1994). "The Not So Great Divide? Psychologists and Psychiatrists Take Stands on the Medical and Psychosocial Models of Mental Illness" 25 *Professional Psychology: Research and Practice* 120.
87. Tyrer, P., & Steinberg, D. (2005). *Models for Mental Disorders*, 4th ed. (Chichester, West Sussex, England: John Wiley & Sons) at 7-8.
88. *Ibid*, at 102.
89. Read, J., & Harre, N. (2001). "The Role of Biological and Genetic Causal Beliefs in the Stigmatization of Mental Patients" 10 *J.M.H.* 223 at 223.
90. Walker, I., & Read, J. (2002). "The Differential Effectiveness of Psychosocial and Biogenetic Causal Explanations in Reducing Negative Attitudes toward "Mental Illness" 65 *Psychiatry* 313; *see also* Read and Harre, *supra* note 569 at 223.
91. *Ibid*, at 315; "propagation of the medical model ... perpetuate[s] stigma: information on genes and 'chemical imbalances' implies that those with mental illness have no control over or responsibility for their actions": Peter Byrne, "Psychiatric Stigma" (2001) 178 *B.J.P.* 281 at 284.
92. *Ibid*.
93. *Ibid*, at 315.
94. Jackson, I. C. (1991). "The 1951 Convention relating to the Status of Refugees: A Universal Basis for Persecution" 3 *Int'l J.R.L.* 403 at 403.
95. Schuster, *supra* note 158 at 56-57.
96. *Ibid*.
97. Violette, N. L. (1997). "The Immutable Refugees: Sexual Orientation in Canada (*A.G.*) v. *Ward*" 55 *U.T. Fac. L. Rev.* 1 at 41.
98. UN General Assembly. (1966). *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 (ICESCR).