

**WHAT WOULD AN EXPANDED, MORE INCLUSIVE  
REFUGEE DEFINITION LOOK LIKE? *HOW THE  
U.S. OR CANADA COULD EXPAND REFUGEE  
PROTECTION AND SERVE AS A MODEL  
FOR OTHERS***

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It may seem counterintuitive, even delusional, to suggest expanding the refugee definition at a moment in history when the political tides that once provided at least partial buy-in to the proposition that people fleeing persecution deserve international protection have turned and been replaced by increasingly widespread dismissal, if not outright hostility, to the claims of those seeking asylum. Yet, the countervailing reality is that the number of people forcibly displaced and at risk is the highest in recorded history;<sup>1</sup> the construction of walls, closing of doors, and heightening of legal bars to protection will not make asylum seekers’ motivation to survive by crossing borders any less imperative or their reasons for fleeing any less valid. This article argues that dysfunctional asylum systems, backlogs of pending cases, and backlashes in public receptivity toward refugees are attributable, in large part, to an anachronistic and overly narrow refugee definition that has failed to align the legitimate need for protection of many of the today’s refugees with the standards needed to qualify for asylum. This article, therefore, will propose language for current or future legislators in Canada and the United States to consider expanding their country’s respective refugee definitions to encompass more realistically the drivers of

1. *Forced Migration or Displacement*, MIGRATION DATA PORTAL (Jun. 20, 2024), <https://perma.cc/Q36K-79D7> (reporting that 117.3 million people were forcibly displaced by the end of 2023—the highest figure on record—including an estimated 40% who were children).

forced migration in the mid twenty-first century and the actual threats to life and person returned people are likely to face.

Many of the life-threatening conditions that currently force people from their homes, including but not limited to lawless and indiscriminate violence, rising sea levels, desertification, and persecution based on gender or sexual orientation, were not recognized—or even contemplated—as grounds for international protection in 1951 by the drafters of the Convention Relating to the Status of Refugees (“1951 Convention”). In a world where millions are forcibly displaced for reasons that do not readily fit within the concept of being persecuted on one of the five protected grounds enshrined in the 1951 Convention, states and regions should consider a refugee definition that would encompass a broader set of people facing existential threats. While I recognize that the 47th U.S. president and the 119<sup>th</sup> Congress have signaled their intention to narrow the scope of protection provided in U.S. law, this essay will argue to the contrary that expanding the refugee standard would not only provide a more relevant and effective means of providing protection to deserving applicants but would also improve processing efficiency and lower costs.

### I. “CANADA COULD LEAD THE WAY”

The proposals in this article were prompted by a hearing on October 23, 2023, of the Standing Committee on Human Rights of the Canadian Senate on forced global displacement to which I was invited to testify. In the course of the hearing, the senators raised questions about the efficacy of the 1951 Convention, and whether the refugee definition is in need of revision.<sup>2</sup> The Acting Chairwoman of the Committee, Senator Ratna Omidvar, posed the question: “From your point of view, sitting today in 2023, when the world is falling apart in many regions, creating a level of forced displacement that we have not seen before, is the Convention still fit for purpose?”<sup>3</sup>

The United Nations High Commissioner for Refugees (UNHCR) Representative, Rema Jamous Imseis, answered in the positive:

I firmly believe that the Convention is fit for purpose and, moreover, that we have all of the instruments needed at our disposal in order to deal with global displacement, as well as an array of other issues that are subsets of that.

For me, what is absent in many cases are asylum systems that have the capacity to deal with these flows and international solidarity and support

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2. United Nations High Commissioner for Refugees (UNHCR), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, <https://perma.cc/DJ62-QNLK>; STANDING SENATE COMMITTEE ON HUMAN RIGHTS, 44th Parl., 1st Sess., No. 44 (Oct. 30, 2023), <https://perma.cc/3ENW-MSYW>.

3. *Id.*

for refugee-hosting countries . . . We need to support those countries that have been hosting refugees for decades. That's a form of international solidarity and contributes to the realization of the convention's goals. There are other ways in which you can strengthen asylum systems so that people can receive the protection they need . . . I believe that what is lacking in most instances is either capacity, resources or, frankly, political will and accountability, but the Convention itself is still quite fit for purpose. That would be my view.<sup>4</sup>

I answered in the negative, reminding the senators that regional instruments such as the Cartagena Declaration on Refugees ("Cartagena Declaration") and the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Refugee Convention") have introduced expanded refugee definitions that recognize the importance of the 1951 Convention standard of a well-founded fear of being persecuted, but go beyond it. I noted that the 1951 Convention does not include protection of victims of armed violence and victims of inhuman and degrading treatment. I also observed that the European Union's Qualification Directive has added those protections as subsidiary protection to what is provided in the 1951 Convention.<sup>5</sup>

I suggested that refugee protection could be expanded by drawing from the International Covenant on Civil and Political Rights as a standard for looking at protection based on threats to life and physical integrity. I also suggested that an expanded refugee definition could provide a framework for protection when the effects of climate change are life threatening, saying, "When you have rising sea levels and islands that are going to be under water, that's a direct threat to life. Such people should be recognized as refugees, because whether you die at the hands of the torturer or whether you die because you're drowning, your life is being threatened one way or the other."<sup>6</sup> To those who caution against opening the 1951 Convention for redrafting out of fear that the result will be a narrower, more restrictive instrument, I said:

You don't have to take on the whole rewriting [of] the Refugee Convention and putting that up for a vote, but Canada itself can look at its refugee definition and decide that, in addition to the 1951 Convention definition, it might want to expand the refugee definition to include women and victims of generalized violence when there is a nexus to a real threat of serious harm.<sup>7</sup>

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4. *Id.*

5. Council Directive 2011/95, 2011 O.J. (L 337) 9, 13 (EU), <https://perma.cc/M45K-BERG>.

6. STANDING SENATE COMMITTEE ON HUMAN RIGHTS, *supra* note 2.

7. *See id.*

I noted that the 1951 Convention does not specifically provide protection for people persecuted on account of their gender or sexual orientation in the same way that it protects people from the threat of being persecuted because of their race, religion, nationality, and political opinion. I said that sexual orientation and gender-related claims have had to be “shoehorned” into the category of membership of a particular social group, which has not provided as consistent or predictable protection for women or LGBT people being persecuted on the basis of their gender or sexual orientation.<sup>8</sup>

“Canada could lead the way,” I said. “Canada could provide a model for a refugee definition that actually addresses in a holistic and a real way the threats that the refugees of the world are facing today.”

## II. CURRENT REFUGEE DEFINITIONS IN CANADIAN AND U.S. LAW

Current immigration laws in the United States and Canada reflect earlier (and sometimes flawed) efforts to domestically implement the 1951 Refugee Convention (in the case of Canada) or its 1967 Protocol (in the case of the United States). The 1951 Convention defines a refugee as a person, who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”<sup>9</sup>

Canada’s Immigration and Refugee Protection Act explicitly creates the category of “Convention refugee” to show its fidelity to the 1951 Convention and says, “Refugee protection is conferred on a person when (a) the person has been determined to be a Convention refugee . . .”<sup>10</sup> A Convention 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, (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.<sup>11</sup>

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8. See James C. Hathaway & Jason M. Pobjoy, *Queer Cases Make Bad Law*, 44 N.Y.U. J. INT’L L. & POL. 324, 324–25 (2013).

9. Convention Relating to the Status of Refugees, art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137, <https://perma.cc/DQ55-6PN5>.

10. Immigration and Refugee Protection Act (IRPA), S.C. 2001, c. 27, § 95 (Can.).

11. *Id.* § 96.

Canada also includes a complementary category of a “person in need of protection” that includes:

A person in Canada whose removal . . . would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.<sup>12</sup>

The U.S. Immigration and Nationality Act defines a refugee as: “any person who is outside any country of such person’s nationality . . . who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>13</sup> The United States does not provide a form of complementary protection that would provide for asylum or protection beyond the confines of the refugee definition,<sup>14</sup> though it does provide for withholding of removal based on a higher “more likely than not” standard of proof that a person “would be threatened” on one of the five protected grounds of the refugee definition.<sup>15</sup> It also requires consideration of the likelihood of a person with a final order of removal being tortured after other claims for protection have been exhausted. The codification of the United States’s non-refoulement obligations under Article 3 of the Convention Against Torture declares:

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12. *Id.* § 97(1).

13. Immigration and Nationality Act (INA), § 101(a)(42)(A), codified as amended at 8 U.S.C. § 1101 (2018).

14. Temporary protected status (INA § 244(b)(1)) is not a form of complementary protection despite protection criteria that include “ongoing armed conflict,” “an earthquake, flood, drought, epidemic, or other environmental disaster,” or “extraordinary and temporary conditions . . . that prevent aliens . . . from returning to the state in safety,” because temporary protected status is not available to individual asylum seekers upon arrival or as part of their claims for asylum and withholding of removal. *See* Bill Frelick, *What’s Wrong with Temporary Protected Status and How to Fix It: Exploring a Complementary Protection Regime*, 8 J. Migration & Hum. Sec. 74 (2020), <https://perma.cc/27F8-75J2>.

15. INA § 241(b)(3)(A) (providing statutory basis for withholding of removal).

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.<sup>16</sup>

### III. EXPANDED REFUGEE DEFINITIONS IN AFRICA AND LATIN AMERICA

Prominent refugee scholars and civil society leaders have joined the UNHCR in cautioning against opening the 1951 Convention to change out of concern that drafters and states would seize the opportunity to fashion a narrower and more restrictive definition.<sup>17</sup> Short of negotiating a new treaty, however, individual states and regions can elect to expand the refugee definition, which could serve as a model for other states and regions and progressively contribute to the development of a universal reappraisal of the grounds for international protection that would more relevantly address the drivers of forced displacement and the threats that prevent refugee return.

There is, of course, precedent for this at both the state and regional levels. The OAU Refugee Convention was adopted in 1969, which incorporated the 1951 Refugee Convention definition, but held that the term ‘refugee’ shall also apply to every person who, “owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”.<sup>18</sup>

In 1984, the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama adopted the Cartagena Declaration with an expanded refugee definition:

[T]he definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees

16. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, Title XXII, § 2242(a), 112 Stat. 2681-761, 2681-822 (Oct. 21, 1998).

17. See the colloquy with Ambassador Allan Rock, in which he cited and paraphrased Professor James Hathaway as having said that “the refugee convention is fragile enough given the pressures put on it by despots, autocrats and crooks around the world and not to put further pressure on it by talking about it being renegotiated but to leave it as it is.” STANDING SENATE COMMITTEE ON HUMAN RIGHTS, *supra* note 2. Hathaway told the Committee, “Specifically, there is nothing wrong with the current 1951 Refugee Convention’s definition of a refugee. It works well. There is nothing wrong with the catalogue of rights that it gives refugees, rights of empowerment, by and large, that work quite well when respected. The drafters of the treaty knew, even in 1951, that there was a missing third leg, and that’s what the Global Compact on Refugees was supposed to fix and hasn’t. It is to create a mechanism to actually operationalize the global system in a way that is equitable and predictable for all countries. That should be the Canadian goal.” See STANDING SENATE COMMITTEE ON HUMAN RIGHTS, 44th Parl., 1st Sess., No. 45 (Oct. 31, 2023), <https://perma.cc/WJQ5-3JKU>.

18. Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention), art. I(2), Sept. 10, 1969, 1001 U.N.T.S. 45; <https://perma.cc/H22X-R3PZ>.

persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.<sup>19</sup>

A “Cartagena-inspired” refugee definition has been incorporated into domestic law in sixteen Latin American countries.<sup>20</sup>

The expanded refugee definitions in Africa and Latin America correlately extend the scope of the principle of nonrefoulement in those regions. The OAU Refugee Convention bars “rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for reasons set out in Article I, paragraphs one and two,” the references to the convention refugee definition as well as the expanded refugee definition.<sup>21</sup>

#### IV. HOW TO AMEND CANADA’S REFUGEE PROTECTION DEFINITION

In 1986, Canada became the first—and still only—country to be awarded the Nansen Medal, the UN’s highest recognition for aid to refugees. At a time when other countries that have provided leadership for international refugee solidarity are abandoning that role, Canada has an opportunity, or more accurately, a responsibility, to take up the mantle. A visionary way to buck this moral myopia would be to reimagine what it means to be a refugee.

To do so, Canadian legislators should start by striking the word “Convention” from the refugee definition in the Immigration and Refugee Protection Act (IRPA), eliminate bifurcated categories of protection, and introduce a single, more inclusive standard for refugee recognition that is not bound to the 1951 Convention.<sup>22</sup> Although the 1951 Convention remains foundational, it is from that foundation that a new refugee regime should be built.

The proposed amendment would strike language about refugee protection being “conferred.”<sup>23</sup> Refugee status is a process of discovery, not bestowal, as the opening paragraph of UNHCR’s *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* makes clear:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined.

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19. Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, art. 3, para. 3, Nov. 22, 1984 <https://perma.cc/TU9S-QZB6>.

20. Compiled by the Regional Legal Unit of the Bureau of the Americas, UNHCR, Table No. 1. Definition of refugees (Cartagena) Latin American countries that have incorporated it into their national legislation (In chronological order), United Nations High Commissioner for Refugees (UNHCR), June 2017 <https://perma.cc/BV6G-F4RK>.

21. Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 18, at art. II(3).

22. This amendment would need to occur in IRPA sections 95, 96, 98, 99, 108, and 115.

23. See IRPA, *supra* note 10, § 95(1)–(2).

Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.<sup>24</sup>

A. “Fear:” A Fundamentally Flawed Foundation for Refugee Status

The term “well-founded fear,” though nearly universally recognized in association with the refugee definition, is a confusing and less than self-evident term as it suggests a person’s subjective psychological state of fear is a significant measure of a person’s need for international protection. But, as pointed out by the Canadian Federal Court of Appeal, “the definition of a refugee is certainly not designed to exclude brave or simply stupid persons in favor of those who are more timid or intelligent.”<sup>25</sup> International law scholars James C. Hathaway and Michelle Foster have observed:

Neither the text of the Refugee Convention nor its object and purpose leads to the conclusion that subjective fear has any relevance whatever to the recognition of refugee status . . . it is a notion that should in our view simply be abandoned. The existence of a “well-founded fear” of being persecuted requires only that there be a forward-looking apprehension of risk, thus mandating a purely objective inquiry.<sup>26</sup>

In *Adjei*, the Canadian Federal Court of Appeal provided clearer alternative language by interpreting “well-founded fear” as “a reasonable chance” of being persecuted.<sup>27</sup> The court considered, but rejected “serious possibility,” but also entertained the phrase “a ‘reasonable possibility,’ as opposed to a mere possibility” of being persecuted.<sup>28</sup> The proposed amendment settles on “reasonable possibility,” drawing not only from *Adjei*, but also from *Cardoza-Fonseca*, in which the U.S. Supreme Court indicated that a “well-founded fear” should be interpreted as a “reasonable possibility”:

There is simply no room in the United Nations’ definition for concluding that, because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, he or she has no “well-founded fear” of the event’s happening. As we pointed out in *Stevic*, a moderate interpretation of the “well-founded fear” standard would indicate “that, so long as an objective situation is established by the evidence, it need not

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24. UN High Comm’r for Refugees (UNHCR), *Handbook on Proc. and Criteria for Determining Refugee Status and Guidelines on Int’l Prot. Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* 17, U.N. Doc. HCR/1P/4/ENG/REV.4 (April 2019) <https://perma.cc/39FQ-8HYK>.

25. *Yusuf v. Canada* (Minister of Employment and Immigration), [1992] 1 F.C. 629, 632 (Can.).

26. JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 105 (2nd ed. 2014).

27. *Adjei v. Canada* (Minister of Employment and Immigration), [1989] 2 F.C. 680, 683 (Can.).

28. *Id.*

be shown that the situation will probably result in persecution, but it is enough that persecution is a *reasonable possibility*.”<sup>29</sup>

B. *“Persecution” Misses the Point*

The Canadian refugee definition should be amended to replace the word “persecution”<sup>30</sup> with “*being persecuted*,” the terminology found in the 1951 Convention definition.<sup>31</sup> This shifts the focal point for determining refugee status from the intent of a persecutor to the serious harms that the abused person has experienced or fears experiencing and would make the refugee definition in Canadian law consistent with the object and purpose of the 1951 Convention, which is not to identify and hold persecutors accountable, but rather to provide protection to those who would be victimized by them.

As international refugee law scholar Michelle Foster has observed:

[W]hile frequently described as the short-hand ‘persecution,’ in fact the definition speaks of a refugee’s well-founded fear of ‘being persecuted.’ The fact that the test is framed in the passive voice is significant, as it again underlines the focus on the predicament of the applicant, rather than on an assessment of the situation from the perspective of the persecutor.<sup>32</sup>

C. *The Insufficiency of the Five Protected Grounds*

The Canadian definition then identifies the familiar protected grounds for refugee status: “race, religion, nationality, membership in a particular social group or political opinion.” I propose two amendments here: first, to add “*ethnicity or*” before the word “nationality.” Ethnicity adds a more accurate and straightforward meaning than nationality alone by clarifying that people can be persecuted because of their ethnicity, even when such ethnic groups do not have a recognized nationality based on that ethnicity (for example, the Kurds).

International refugee law scholar Guy S. Goodwin-Gill has observed that “the reference to persecution for reasons of nationality is somewhat odd, given the absurdity of a State persecuting its own nationals on account of their membership of the body politic.” He notes, however, that the term is typically interpreted broadly to include ethnic, religious, and cultural

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29. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (quoting *INS v. Stevic*, 467 U.S. 407, 424-25 (1984) (emphasis added)).

30. Immigration and Refugee Protection Act, S.C. 2001, c 27, § 96 (Can.).

31. U.N Convention Relating to the Status of Refugees, art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137.

32. MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 273 (Cambridge University Press, 2007) (discussing GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 50-51 (Clarendon Press, 2nd ed. 1996)).

communities.<sup>33</sup> The European Union's implementation of the 1951 Convention through the Qualification Directive clarifies that "the concept of nationality shall not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State."<sup>34</sup>

The proposed amendment would also add "*gender or sexual orientation*," to the list of protected grounds. In the Canadian case, this is more of a legislative "housecleaning" exercise, as jurisprudence has already clearly established gender or sexual orientation as protected grounds for refugee protection. In the landmark *Ward* case, the Canadian Supreme Court squarely positioned "individuals fearing persecution on such bases as gender, linguistic background and sexual orientation" as falling within the "embrace" of membership in a particular social group.<sup>35</sup>

Should that not be sufficient? Is there a risk that explicitly legislating gender or sexual orientation as a protected ground could sap Canadian jurisprudence on the refugee definition of its force as an interpretative tool in other states party to the 1951 Convention?<sup>36</sup> I recognize this risk, but, on balance, note there is no interpretive international consensus on various facets of "membership in a particular social group," in part, because the 1951 Convention lacks a supervisory body to provide universal interpretations of its terms. Further, key jurisdictions, including both Canada and the United States, have, in effect, narrowed the scope of protection for women because of their preoccupation with establishing the particularity of the social group. Consequently, women are generally not able to establish asylum claims for being persecuted on the basis of their gender, comparable to the protected grounds of race and religion, but rather are compelled to particularize their social group, often to absurdly small extremes.

Hathaway and Foster have noted, "[T]here is an unfortunate tendency to formulate overly complicated and unnecessarily detailed social groups, rather than simply recognize that in most cases it is women qua women that constitutes the relevant social group." They point out an extreme example of this phenomenon, the Canadian Federal Court's holding that the relevant group in one case was defined as: "[w]omen who have recently immigrated to Israel from the former Soviet Union and who, despite generous support by that host government, fail to integrate, are subsequently lured into prostitution, and are confronted with indifference by the front line supervisors responsible for their safety."<sup>37</sup>

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33. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 45 (Clarendon Press, 2nd ed. 1996).

34. Council Directive 2011/95, *supra* note 5, art. 10.

35. *Ward v. Canada* (Att'y Gen.), [1993], 2 S.C.R. 689 (Can.).

36. I thank James C. Hathaway for this insight in email correspondence of February 3, 2024, on file with the author.

37. JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS*, 439, (Cambridge Univ. Press, 2d ed., 2014) (citing *Litvinov v. Canada* (Sec'y of State), [1994] 83 F.C. 1061).

We will come later to amendments to U.S. refugee law but suffice it here to say the same problem exists in that jurisdiction. In the landmark *Fauzia Kasinga* case, a woman fleeing genital mutilation was granted asylum not based on her right not to be persecuted on the basis of her gender, but rather as a member of a particular social group defined as “young women who are members of the Tchamba-Kasungu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice.”<sup>38</sup> It would be hard to construct a narrower category for protection.

In responding to efforts by attorneys general in the first administration of President Donald Trump to further narrow qualification for women as members of a particular social group,<sup>39</sup> U.S. immigration law scholar Stephen H. Legomsky wrote:

What arguments could possibly be made for protecting people from racial or religious persecution but not from gender persecution? . . . it is only because gender is not on Congress’s list of specifically protected grounds that women and girls have had to fit their claims into ‘particular social group’ . . . [and] the artificial constraints that the board [of immigration appeals] has imposed for all claims based on ‘particular social group’ are both harmful and irrational.<sup>40</sup>

Similar artificial constraints superimposed on interpreting “membership in a particular social group” threaten to disqualify lesbian, gay, bisexual, and transgender (LGBT) people from refugee protection. For example, some jurisdictions, such as in the United States with Board of Immigration Appeals rulings in *C-A*,<sup>41</sup> and *A-M-E*,<sup>42</sup> are requiring the applicant to establish their “social visibility” as a particular social group member.

This test, according to refugee law scholar Fatma E. Marouf:

[M]ay have a profound, negative impact on asylum cases related to sexual orientation and gender, where not only the harm is hidden in the private sphere, but the group members themselves may be veiled from sight. With respect to sexual orientation, the United States and international authorities have rejected the notion that gays and lesbians who remain ‘discreet’ – and therefore ‘invisible’ – are not protected by the refugee definition. Under the ‘social visibility’ test, however, their claims

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38. *Matter of Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

39. See *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018). This demonstrates the broader problem with reliance on jurisprudence rather than legislation in the U.S. context because immigration judges and the Board of Immigration Appeals are situated within the Department of Justice and not insulated from political interference.

40. Stephen H. Legomsky, *Gender-Related Violence Should Be Grounds for Asylum: Congress Must Fix This for Women*, USA TODAY (Jan. 2, 2019) <https://perma.cc/EMX2-88N6>.

41. *Matter of C-A-*, 23 I. & N. Dec. 951 (B.I.A. 2006).

42. *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (B.I.A. 2007).

may well be denied. Indeed, even claims brought by ‘out’ gays and lesbians may be rejected if they come from societies that do not recognize homosexuals as a group or homosexuality as a social identity.<sup>43</sup>

Of course, being a woman or an LGBT person per se is not a ground for asylum any more than being a member of a race, nationality, or a religion, but gender and sexual orientation should be recognized comparably as a ground deserving protection if it is the basis for being persecuted.

#### D. *“Protected Persons” in Canadian Law*

The Canadian statute extends protection beyond the strict limits of those who qualify as Convention refugees through the concept of “protected persons,” which includes Convention refugees but also provides protection to people in Canada who, if returned, would face the threat of torture or, under certain circumstances, a risk to their life or to a risk of cruel and unusual treatment or punishment.<sup>44</sup>

The proposed amendment would eliminate the bifurcated categories of protected persons, and in the process, would make other changes as well. For example, a person in need of protection is identified as being “a person in Canada.”<sup>45</sup> To this should be added, “or under the effective power or control of Canada.” This would extend refugee protection to refugees outside the territory of Canada but who may be within the effective power or control of Canada, for example, in the case of Canadian military or coast guard rescue or interdiction of vessels on the high seas that might be carrying asylum seekers or in the event Canada would try at some future point to externalize migration controls by instituting offshore processing, as has been attempted by Australia (Nauru and Manus Island, Papua New Guinea) and the United States (Guantánamo). This would prevent offshore detention and processing as a means of evading the protective reach of the Immigration and Refugee Protection Act.<sup>46</sup>

#### E. *The Rights to Life and Security of Person as Grounds for Refugee Protection*

I propose adding after “risk to their life” the phrase “or security of person according to Articles 6 and 9 of the International Covenant on Civil and Political Rights.” In addition to threats to life, which are recognized under the current statute, this amendment would add threats to “security of person,”

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43. Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47, 50 (2008).

44. Immigration and Refugee Protection Act, S.C. 2001, c 27, § 97 (Can.).

45. *Id.*

46. To conform to this amendment, IRPA section 99(3) on Claims for Refugee Protection should also be amended to include asylum seekers “under the effective power or control of Canada.”

which is guaranteed under the International Covenant on Civil and Political Rights (ICCPR) Article 9. Another option would be the term “physical integrity” from Article 5(1) of the American Convention on Human Rights, which guarantees the right to “physical, mental, and moral integrity.”<sup>47</sup> The United Nation Human Rights Committee’s (“Human Rights Committee’s”) General Comment 35 on ICCPR Article 9 says, “Security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity,”<sup>48</sup> which indicates that “physical integrity” is seen as a key component of “security of person.”

General Comment 35 also states that the right to security of person obliges States parties to take appropriate measures “to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors.”<sup>49</sup> The notion that people have a right to be protected from “foreseeable threats” to life or bodily integrity is particularly relevant to the non-refoulement principle. General Comment 35 makes a reference to the principle of non-refoulement in this context, saying, “Returning an individual to a country where there are substantial grounds for believing that the individual faces a real risk of a severe violation of liberty or security of person such as prolonged arbitrary detention may amount to inhuman treatment prohibited by article 7 of the Covenant.”<sup>50</sup>

General Comment 35 also discusses the relationship between the right to life and the right to security of person:

The right to life guaranteed by article 6 of the Covenant, including the right to protection of life under article 6, paragraph 1, may overlap with the right to security of person guaranteed by article 9, paragraph 1. The right to personal security may be considered broader to the extent that it also addresses injuries that are not life-threatening.<sup>51</sup>

What are the kinds of threats to life and physical integrity that a relevant and inclusive refugee definition should encompass? Torture, as has been noted, and which is already included in Canadian law, is certainly one. Existing Canadian law also includes “cruel and unusual treatment or punishment.”<sup>52</sup> I would propose amending that to say, “a real risk of cruel and unusual, or *inhuman or degrading* treatment or punishment.”

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47. American Convention on Human Rights, art. 5(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N. T.S. 123.

48. Human Rights Comm., *General Comment No. 35: Article 9 (Liberty and Security of Person)*, ¶ 3, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

49. *Id.* ¶ 9.

50. *Id.* ¶ 57.

51. *Id.* ¶ 55.

52. IRPA, *supra* note 10, §§ 97(1)(b), 115(1).

While protection from “cruel and unusual treatment or punishment” is guaranteed in the Canadian Charter of Rights and Freedoms,<sup>53</sup> Canada as party to the International Covenant on Civil and Political Rights (ICCPR) is also bound under Article 7 not to expose anyone to inhuman or degrading treatment or punishment.<sup>54</sup> In its General Comment 20 on Article 7, the Human Rights Committee, the expert body that interprets and assesses state compliance with the ICCPR, said, “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.”<sup>55</sup>

#### F. *The Real Risk of Violence as a Ground for Refugee Protection*

I propose that the criteria for refugee protection also include people who, if returned to their country, would personally face a serious threat to life or physical integrity “because of a real risk of violence.” Although the EU’s criteria for subsidiary protection provides protection for people who would face a “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict,”<sup>56</sup> and temporary protected status in the United States is provided to members of a nationality group when “there is an ongoing armed conflict within the state . . . that . . . would pose a serious threat to their personal safety,”<sup>57</sup> this amendment would not further qualify the type of violence, but focus rather on the intensity or gravity of that violence and the likelihood of it occurring. To qualify as a ground of refugee protection, it would need to be established that there was a real personal risk of the violence occurring and that it would seriously threaten life or security of person/physical integrity.

I acknowledge that violence, per se, is not recognized in existing international human rights, humanitarian, or refugee law as a violation. While there is certainly scope within the existing frames of the international human rights law concepts of torture and other cruel, inhuman, or degrading treatment or punishment, various international humanitarian law terms, including armed conflict, and the refugee law notion of persecution, to identify and protect victims of various forms of violence, I maintain that the individual and combined force of these international law instruments is not sufficient to identify and protect deserving asylum seekers from other real and serious threats of violence that do not arise from armed conflict, persecution, and torture or other cruel, inhuman or degrading treatment or punishment. While it is true

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53. Canadian Charter of Rights and Freedoms, § 12, Part 1 of the Const. Act, 1982, enacted as Schedule B to the Canada Act 1982, c. 11 (UK).

54. Canada ratified the ICCPR on May 19, 1976 <https://perma.cc/HMD6-AANF>.

55. Hum. Rights Comm., *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, ¶ 9, U.N. Doc. HRI/GEN/1/Rev.1 (Mar. 10, 1992), <https://perma.cc/P8CY-VMCX>.

56. Council Directive 2011/95, *supra* note 5, art. 15(c).

57. Immigration and Nationality Act § 244(b)(1)(A).

that some refugee case law has found grounds for protection for people fearing domestic violence or gang violence, this is far from universal or secure, and people at high risk of generalized violence outside of armed conflict are often excluded from protection, despite real risks to life and limb. A relevant refugee definition should be unambiguously inclusive of people faced with real and serious threats of violence, from whatever source, when their own states are unwilling or unable to protect them.

The term “real risk” refers to the likelihood of facing a threat of violence or other exceptional circumstances but does not refer to the severity of the violence or other harm feared. For example, if an asylum seeker claims he or she would face a serious threat of violence if returned to a country plagued by rampant gang abuses, the person would need to establish that there is a real risk of them being harmed by such violence. This proposal reflects the relatively high evidentiary standard for complementary protection in existing international law. Neither the Cartagena Declaration nor the OAU Refugee Convention retain the “well-founded fear” standard in their expanded refugee definitions. The expanded refugee definition in the Cartagena Declaration is for people who “have been threatened” by generalized violence and other harms. The OAU Refugee Convention’s expanded definition applies to people who were “compelled to leave” events seriously disturbing public order and other drivers of forced displacement. While both Cartagena and the OAU Convention look back at harms that objectively occurred in the past, the European Union and the Human Rights Committee apply a higher evidentiary burden to future threats. The Human Rights Committee’s General Comment 35 on the ICCPR discusses “foreseeable threats” to life or bodily integrity where there are “*substantial grounds* for believing that the individual faces a *real risk*” of a severe violation of liberty or security of person.<sup>58</sup>

The “real risk” language chosen for this proposal is drawn from General Comment 35 and the European Union’s Qualification Directive: a “‘person eligible for subsidiary protection’ means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom *substantial grounds have been shown* for believing that the person . . . would face a *real risk* of suffering serious harm as defined in Article 15 . . .”<sup>59</sup> While there would be some satisfaction and consistency in arguing for a “reasonable possibility” evidentiary standard for all protection-based claims, a proposal to the Canadian Parliament and the U.S. Congress to expand their refugee definitions should, at the start, be aimed at achieving consistency throughout the Americas, Africa, and Europe based on the current standards applicable in those jurisdictions.

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58. Hum. Rights Comm., General Comment No. 35, *supra* note 48 (emphasis added).

59. Council Directive 2011/95/EU, *supra* note 5, art. 2(f).

### G. *Exceptional Situations that Threaten Life of Physical Integrity*

The non-refoulement criteria should also include real risks to life or physical integrity because of “exceptional situations, such as extreme weather events or rising sea levels, for which there is no adequate domestic remedy.” The phrase “exceptional situations” is comparable to events or circumstances “seriously disturbing public order” in the Cartagena Declaration and the OAU Refugee Convention. This proposed amendment opts not to propose “seriously disturbing public order” as a ground for protection, but rather offers the more succinct “exceptional situations” as protection ground because, read with the qualifier “for which there is no adequate domestic remedy,” it more clearly draws a line to exclude from protection people who seek refuge from situations such as poverty, corruption, poor governance, lack of social services, or environmental conditions that cause hardship but are not threatening to life or limb.

While extreme poverty can give rise to circumstances that threaten a person’s life or physical integrity, the proposed refugee definition would only apply to prevent the return of people to situations of extreme poverty in exceptional situations, such as severe food insecurity or the collapse of government institutions and services. Such exceptional situations would often be accompanied by other factors, such as environmental disaster or generalized violence, that would make return likely to threaten an individual’s life or physical integrity.

### H. *The Effects of Climate Change*

The proposed amendment offers a dependent clause example of such exceptional situations: “such as extreme weather events or rising sea-levels.” In January 2020, the Human Rights Committee handed down a decision which recognized that threats to life posed by rising sea levels and other effects of climate change necessitate a broadening of the principle of non-refoulement. Citing ICCPR Article 6’s provision on the right to life, the Human Rights Committee held, “The obligation not to extradite, deport or otherwise transfer may be broader than the scope of [the principle of] non-refoulement under international refugee law, since it may also require the protection of aliens not entitled to refugee status.”<sup>60</sup>

The case involved the Teitiota family who sought asylum in New Zealand after fleeing the island of Tarawa in the Republic of Kiribati. The family maintained that crops were dying and the land was overcrowded, leading to conflicts and the spread of disease. Holding out hope that Kiribati still had time to protect its citizens through relocation and other measures, the Human Rights Committee denied the family’s asylum claim. But it noted that both sudden onset events, such as storms, and slow-onset processes, such as salinization and land degradation, “can propel cross-border movement of

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60. *Ioane Teitiota v. New Zealand* (advance unedited version), CCPR/C/127/D/2728/2016, U.N. Hum. Rights Comm. (UNHRC), art. 9.3 (Jan. 7, 2020) <https://perma.cc/8UWM-R94A>.

individuals seeking protection from climate-change related harm . . . thereby triggering the non-refoulement obligations of sending states.”<sup>61</sup>

While it might be debatable whether sea-level rise is an “exceptional situation,” I would argue that it would be exceptional for those countries where sea-level rise would present an existential threat, such as Kiribati and other low-elevation Pacific Island states, as opposed to littoral states where coastal inhabitants would generally have internal relocation options.

### I. *Domestic Remedies; Internal Protection Alternatives*

The proposed amendment qualifies such exceptional situations to ones “for which there is no adequate domestic remedy.” This specifies that the exceptional situations that give rise to serious threats to life and physical integrity are beyond the capacity or willingness of the person’s home state to manage or that another domestic remedy (such as an international humanitarian intervention into the country of origin or an internal flight alternative) is otherwise unavailable.

While the proposed amendment would add “for which there is no adequate domestic remedy,” it would delete the phrase in the current law that says, “the risk would be faced by the person in every part of that country.”<sup>62</sup>

The current language of the Canadian statute overstates the 1951 Convention’s refugee definition by requiring that the fear of being persecuted must be “in every part” of the applicant’s country. As UNHCR has stated in its guidance on the 1951 Convention: “The 1951 Convention does not require or even suggest that the fear of being persecuted need always extend to the whole territory of the refugee’s country of origin.”<sup>63</sup>

It is also noteworthy that the expanded refugee definition in the OAU Refugee Convention specifically includes “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order *in either part or the whole* of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality [emphasis added].”<sup>64</sup>

### J. *Why Must Serious Threats Be Individually Targeted?*

The proposed amendment would also delete: “and is not faced generally by other individuals in or from that country.”<sup>65</sup> The requirement that the threat

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61. *Id.*, art. 9.11.

62. IRPA, *supra* note 10, § 97(1)(b)(ii) (Can.).

63. U.N. High Comm’r for Refugees (HCR), Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, HCR/GIP/03/04 (July 23, 2003), <https://perma.cc/S6Q5-P5CH>.

64. OAU Convention, *supra* note 18, art. 1(2).

65. IRPA, *supra* note 10, § 97(1)(b)(ii) (Can.).

is not generally faced by other individuals from or in that country should be deleted because it is not relevant to serious harms to life and physical integrity. Whether a person is individually targeted or would be seriously harmed personally because of a more generalized threat, the real risk of serious harm is the same.

To deny protection because the threat to the individual also represents a threat faced generally by others is perverse and defeats the object and purpose of the 1951 Convention of providing protection to refugees. Further, this exception is problematic because the courts have treated section 97(1)(b)(ii) as creating two distinct, conjunctive elements. For instance in *Prophet*, the Canadian Federal Court of Appeal said: “To be a person in need of protection, the appellant had to show the Board, on a balance of probabilities, that his removal to Haiti would subject him personally, in every part of that country, to a risk to his life or to a risk of cruel and unusual treatment that is not faced generally by other individuals in or from Haiti.”<sup>66</sup>

The existing Canadian refugee statute excludes persons from protection when “the risk is not caused by the inability of that country to provide health or medical care.”<sup>67</sup> The proposed amendment would add “unless Canada is able to provide such care.” In *Covarrubias*, the Canadian Federal Court of Appeal rightly held that a person may qualify for refugee protection if their country would deliberately deny or limit the treatment for their illness or disability “as has happened in some countries with patients suffering from HIV/AIDS.”<sup>68</sup> However, by distinguishing as grounds for protection “refusal to provide the care and not the ability to do so,”<sup>69</sup> the Court, guided by IRPA section 95(1)(iv), denied protection to a person whose life or physical integrity was seriously threatened by his return.<sup>70</sup>

As in the discussion, above, which noted that the 1951 Convention uses the passive voice “being persecuted,” rather than “persecution,” the fundamental purpose of refugee law is not to assign blame to persecutors but rather to protect refugees from serious harm. From a human rights perspective, the key question is not the agent of persecution or driver of forced migration but rather whether the return of a person to such a predicament would violate their fundamental rights by exposing them to serious harm and whether that person’s own government is able or willing to exercise its responsibility to protect them.

My proposed amendment includes the phrase “for which there is no adequate domestic remedy,” to indicate that the exceptional situations that give rise to serious threats to life or physical integrity are either beyond the capacity of the state to manage or that the state is unwilling to manage, and

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66. *Ralph Prophète v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, ¶ 3 (Can.).

67. IRPA, *supra* note 10, § 97(1)(b)(iv) (Can.).

68. *Covarrubias v. Canada*, 2006 FCA 365, ¶ 39 (Can.), <https://perma.cc/ZX6D-BB29>.

69. *Id.*

70. See *Hathaway and Foster*, *supra* note 26, at 237–238.

that a domestic remedy is otherwise unavailable. Whether the failure to provide life-saving treatment is because of intentional denial or inability, in either case the person will die. If Canada can save a person who otherwise would die by being returned, that person should be protected, that is, to be spared being returned to what, in effect, would be an otherwise avoidable death sentence.

K. *Proposed Amendments to Canada's Immigration and Protection Act*

To summarize, Sections 95, 96, and 97 would be amended as follows:

95 (1) **Refugee status** is **recognized** ~~conferred on a person~~ when

(a) the person has been determined to be a ~~Convention~~ refugee ~~or a person in similar circumstances~~ under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons; **or**

(b) the **Minister or the Board** determines the person to be a ~~Convention~~ refugee ~~or a person in need of protection; or~~

~~(c) except in the case of a person described in subsection 112(3), or the Minister allows an application for the need for protection determines the person to be a refugee.~~

**Protected person**

~~(2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).~~

**Convention Refugee**

96 A ~~Convention~~ refugee is

(1) a person **in Canada or under the effective power or control of Canada** who, by reason of a ~~well-founded fear~~ **reasonable possibility of persecution being persecuted** for reasons of race, religion, **ethnicity** or nationality, **gender or sexual orientation**, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; **or**

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country; **or**

**Person in need of protection**

~~97 (1)~~ (2) A person ~~in need of protection is a person~~ in Canada **or under the effective power or control of Canada** whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a real risk of cruel and unusual **or inhuman or degrading** treatment or punishment **within the meaning of Article 7 of the International Covenant on Civil and Political Rights**; or to

(c) a serious threat to their life or security of person **within the meaning of Articles 6 and 9 of the International Covenant on Civil and Political Rights** because of a real risk of

(i) violence; or

(ii) exceptional situations, such as extreme weather events or rising sea-level disasters, for which there is no adequate domestic remedy,

if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

~~(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,~~

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care **unless Canada is able to provide such care.**

~~(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.~~

Amending IRPA Sections 95, 96, and 97 on the definition and scope of refugee protection would also require amending Section 115 on the principle of non-refoulement to bring it into conformity with the expanded refugee definition. Section 115 (1) would be amended as follows:

**115 (1) A ~~protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned~~ shall not be removed from Canada to a country where they would be at risk face a reasonable possibility of persecution being persecuted for reasons of race, religion, ethnicity or nationality, gender or sexual orientation, membership in a particular social group or political opinion or would face a real risk of torture or cruel and unusual or inhuman or degrading treatment or punishment or a serious threat to their life or security of person because of a real risk of violence or exceptional situations, such as extreme weather events or rising sea-levels, for which there is no domestic remedy.**

#### L. *The Principle of Non-Refoulement in Canadian Law*

The exceptions to the principle of non-refoulement should also be amended. IRPA section 1156(1)(a) should start with the phrase “Except for persons for whom there are substantial grounds for believing they would be in danger of being subjected to torture,” before listing refugees who could be refouled. This is because the Convention Against Torture, Article 3, establishes an absolute and non-derogable prohibition on the return of any person for whom there are substantial grounds for believing they would be in danger of being subjected to torture.

The Supreme Court of Canada erred in its *Suresh* judgment, the result of which is that Canada is not compliant with its treaty obligations as a party to the Convention Against Torture or to the principle of non-refoulement to torture as a peremptory norm of customary international law. In *Suresh*, the Court held that the Canadian Charter of Rights and Freedoms allows a balancing test of national security interests against those of the individual who would face torture if deported.<sup>71</sup> International refugee law scholar Jane McAdam observes, “The effect of *Suresh* is to render the principle of non-refoulement to torture non-absolute in Canada. As a matter of international law, the decision is incorrect and sets a dangerous precedent, necessarily weakening torture-based human rights protection in Canada.”<sup>72</sup>

The exception to the prohibition on refoulement on the grounds of serious criminality should also be amended to bring Canadian law into conformity with the 1951 Convention. The proposed amendment would strike “who is

71. *Suresh v. Canada*, 2002 SCC 1, ¶ 42 (Can.), <https://perma.cc/KT2K-WQH5>.

72. JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 130 (2007).

inadmissible on grounds of serious criminality” and replace that phrase with “who has been convicted by a final judgment of a particularly serious crime.”<sup>73</sup> This amendment adopts Article 33(2) of the 1951 Convention, which denies the principle of non-refoulement for a refugee “convicted by a final judgment of a particularly serious crime.” The absolute bar in IRPA Section 115(1)(a) on returning a refugee to the danger of being tortured would remain in place regardless of existing or amended language in IRPA Section 115(1)(b).

I would retain the IRBA’s “and who constitutes, in the opinion of the Minister, a danger to the public in Canada.”<sup>74</sup> Although the IRPA failed to include the safeguard of a “final judgment” of a “particularly serious crime,” it improved upon the 1951 Convention by saying “*and* who constitutes, in the opinion of the Minister, a danger to the public in Canada [emphasis added].” By doing so, the IRPA clarified that a two-pronged test is needed to assess whether the refugee with a conviction for a particularly serious crime remains a danger to the community of the host country. The text of the 1951 Convention is not as clear on this point because it does not include the word “and” in the phrase “. . . who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger,” which leaves subject to interpretation whether a separate test of one’s dangerousness is needed once a person has been convicted of a particularly serious crime in order to disqualify that person from the protection of refugee status.

The IRPA language is consistent with Hathaway’s interpretation of the 1951 Convention that “the criminality branch of Art. 33(2) requires conviction by a final judgment of a particularly serious crime. Beyond this, Art. 33(2) requires an additional determination that the offender ‘constitutes a danger to the community.’”<sup>75</sup> To take the extraordinary step of excluding a refugee from the protection of the principle of non-refoulement because of that refugee’s criminality and dangerousness, a refugee should both have been convicted by a final judgment of a particularly serious crime and have been found to be a danger to the public.

#### THE REASONABLENESS OF EXPANDING THE UNITED STATES’ REFUGEE DEFINITION

While a proposal to expand the refugee definition in the United States may appear to fly in the face of strong political winds in the opposite direction,<sup>76</sup>

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73. IRPA, *supra* note 10, § 115(2)(a).

74. *Id.*

75. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 402–403 (2<sup>nd</sup> ed. 2021).

76. Bill Frelick, *US Closing the Door to Refugees, Asylum Seekers, and Migrants: Trump’s Executive Orders Herald a More Inhumane, Dangerous World*, HUM. RTS. WATCH (Jan. 22, 2025), <https://perma.cc/H5RJ-4FCN>. See also Bill Frelick, *Biden Must Not Trade Away the Right to Seek Asylum*, THE HILL (Dec. 19, 2023), <https://perma.cc/AJ5H-29T4>.

doing so would likely result in more expeditious, cost-effective, and orderly processing of asylum claims.

Amidst congressional paralysis on immigration reform, U.S. policymakers in successive Democratic and Republican administrations have spent much of the past two decades ineffectively trying to construct workable asylum procedures. Despite their efforts, an immigration court backlog that stood at about 186,000 pending cases at the beginning of President Obama's term in 2009 grew to about 540,000 at the 2017 beginning of President Trump's tenure. President Biden came into office with a backlog of over 1.29 million cases, and at the close of 2023, the immigration court backlog passed three million.<sup>77</sup>

Procedures of convoluted complexity have made establishing an asylum claim nearly impossible, especially for asylum seekers trying to navigate the legal underbrush without a lawyer, while the backlog of cases both leaves asylum seekers in limbo as well as undermining the integrity of the system by inviting frivolous claims into a clogged system that has proven incapable of keeping current with incoming applications. The straightforward solution to this morass is to cut the procedural Gordian knot by broadening the protection standard.

U.S. lawmakers should consider the example of Germany. In 2015, Germany appeared to be overwhelmed with an influx of about 890,000 asylum seekers.<sup>78</sup> By applying a complementary protection standard drawn from human rights conventions, it eliminated its backlog by September 2017 and was keeping current with new applications.<sup>79</sup>

Broadening the grounds for protection resulted in a quick and fair thumbs up or down. About 725,000 asylum seekers from Eritrea, Iran, Iraq and Syria had approval rates of over fifty percent.<sup>80</sup> Meanwhile, ninety-nine percent of the more than 275,000 nationals from countries in the Western Balkans – where many of the gravest human rights abuses have declined – were rejected.<sup>81</sup>

Using a broader standard, U.S. Citizenship and Immigration Services asylum officers would be able to grant deserving cases at the outset, obviating the need for pre-screening interviews and keeping many easily granted cases out of overloaded immigration courts. Applying a complementary protection standard would enable adjudicators to grant asylum to people fleeing violence without requiring exhaustive examination of whether the perpetrators had persecutory intent. It would not only reduce the immigration court backlog but also

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77. *Immigration Court Backlog Tops 3 Million; Each Judge Assigned 4,500 Cases*, TRAC IMMIGR. (Dec. 18, 2023), <https://perma.cc/JA5T-8M4M>.

78. See MICHAEL KALKMANN, ASYLUM INFORMATION DATABASE, COUNTRY REPORT: GERMANY 15 (2017), [https://asylumineurope.org/wp-content/uploads/2018/03/report-download\\_aida\\_de\\_2017update.pdf](https://asylumineurope.org/wp-content/uploads/2018/03/report-download_aida_de_2017update.pdf) [<https://perma.cc/2DA7-6NLY>].

79. *Id.* at 15.

80. *Id.* at 8.

81. See Janne Grote, *The Changing Influx of Asylum Seekers in 2014-2016: Responses in Germany* 18-19, FEDERAL OFFICE FOR MIGRATION AND REFUGEES (2017), <https://perma.cc/56XJ-76AT>.

make more likely the ability to keep current with new applications. Deserving claimants who under existing law do not qualify for asylum could be protected quickly, authorized to work, and without delay put on a path of social and legal integration to become productive members of U.S. society, while those whose claims do not meet the asylum and withholding standards would be processed more efficiently and more quickly removed without compromising fairness.

#### V. HOW TO AMEND THE REFUGEE DEFINITION IN THE U.S. IMMIGRATION AND NATIONALITY ACT

Where the amendments I am proposing for the U.S. Congress would be made for the same reasons as in the Canadian definition, I will not repeat the same reasons here, but simply suggest the amendments that should be made to the refugee definition and related provisions in the U.S. Immigration and Nationality Act on asylum and the principle of non-refoulement.

The refugee definition in section 101(a)(42) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(42)) should be amended as follows:

The term ‘refugee’ means

- (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided; and is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of ~~persecution~~ **having been persecuted**, or a ~~well-founded fear~~ **having a reasonable possibility of persecution being persecuted**, on account of race, religion, **ethnicity or** nationality, **gender or sexual orientation**, membership in a particular social group, or political opinion; or
- (B) in such circumstances as the President, after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person’s nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing; and is persecuted, or who has a ~~well-founded fear~~ **reasonable possibility of persecution being persecuted**, on account of race, religion, **ethnicity or** nationality, **gender or sexual orientation**, membership in a particular social group, or political opinion; or
- (C) any person who would face a real risk of their life or security of person being seriously threatened because of
  - a. violence or
  - b. exceptional situations, such as extreme weather events or rising sea-levels, for which there is no domestic remedy.

To reflect the changes in the refugee definition, the refugee admissions provision, Section 207, and the asylum provision, Section 208, should be amended to include the new sections (C) of 101(a)(42).

While this amendment would maintain the standard for qualifying for asylum, which under current U.S. law often hinges on the motives behind the persecution and nexus to protected grounds, it would expand the refugee definition to include exposure to harms for which the particular intent of the persecutory agent or the cause of the harm is less relevant than whether the person's return would put their life or physical integrity at serious risk, and whether the receiving state's government is able or willing to exercise its responsibility to protect them.

The U.S. refugee definition goes beyond the 1951 Convention and its 1967 Protocol by recognizing past persecution alone as a basis for refugee status in addition to well-founded fears of future persecution.<sup>82</sup> For the reasons articulated above that a well-founded fear is a forward-looking assessment of the reasonable possibility of harm, the grant of asylum based on past persecution in the U.S. code should be understood as a discretionary exercise of humanitarian compassion.<sup>83</sup>

Under this proposal, in a single, comprehensive hearing or interview, an immigration judge or U.S. Citizenship and Immigration Service (USCIS) officer would apply any of the categories of the definition, presumably applying first the easiest to adjudicate. Since generalized violence and exceptional situations are more likely to be broadly threatening than persecution, it would generally be more expedient and efficient to determine if a person is part of a larger community facing broad threats that are not tied to an agent of persecution whose persecutory intent would need to be established for an individualized grant of asylum.

There should be no differentiation of benefits between a person granted asylum and someone granted complementary protection. As McAdam argues:

There is no legal basis, or . . . common sense basis, for differentiating between the status of a person who fears persecution in his or her country of origin on grounds of political opinion, and someone who has lost his or her home or fears for his or her life due to an armed conflict in the country of origin . . . differentiating between rights and entitlements on the basis of the source of the non-refoulement obligation has no cogent legal justification, and overlooks the substantially similar circumstances and needs of those concerned.<sup>84</sup>

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82. See 8 U.S.C. § 1101(a)(42)(A).

83. See *Matter of Chen*, 20 I&N Dec. 16 (B.I.A. 1989).

84. JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 198–99, 251 (2007).

For the integrity of the 1951 Convention, UNHCR has been insistent in every discussion of complementary protection that a refugee status determination precede examination of a complementary protection claim,<sup>85</sup> but if the benefits are the same, there are compelling practical efficiency reasons for first considering claims under the simpler, broader criteria and then considering more complex claims.

#### VI. FULFILLING THE UNITED STATES' NONREFOULEMENT OBLIGATIONS<sup>86</sup>

Through the *Stevic* and *Cardoza-Fonseca* cases, the U.S. Supreme Court has established a higher standard of proof to qualify for the mandatory non-refoulement bar on return to torture or persecution—that the threatened harm would be “more likely than not”<sup>87</sup> to occur—than the standard of proof to qualify for refugee status and to be granted asylum—a well-founded fear, interpreted as a “reasonable possibility” of being harmed.<sup>88</sup> As Deborah E. Anker observes, “Few if any states parties to the U.N. Refugee Convention other than the United States, distinguish in terms of the critical issue of the standard or proof between asylum status and the withholding/non-refoulement obligation.”<sup>89</sup>

Ideally, the “reasonable possibility” evidentiary standard used for asylum in the United States would apply for nonrefoulement protection as well, but the function of Convention Against Torture protection as a mandatory non-refoulement bar of last resort for a person otherwise excluded from refugee status and asylum in the United States has long been held to dictate close adherence to the Convention Against Torture’s evidentiary standard of “*substantial grounds* for believing that he *would be* in danger of being subjected to torture.”<sup>90</sup> Because the Convention Against Torture explicitly requires “the competent authorities” to proactively determine whether there are such grounds for withholding the removal of a person,<sup>91</sup> U.S. ratification of the Convention Against Torture stands as the last remaining safety net for a person who has exhausted all other challenges to removal. As noted by Anker, “Unlike asylum . . . article 3 protection is a non-refoulement obligation; it does not confer a status, only a protection from return to the offending state.”<sup>92</sup>

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85. UNHCR “encourages States to consider whether it may be appropriate to establish a comprehensive procedure before a central expert authority making a single decision which allows the assessment of refugee status followed by other international protection needs, as a means of assessing all international protection needs without undermining refugee protection...” U.N. High Comm’r for Refugees (UNHCR), *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection*, ¶ Q, U.N. Doc. A/AC.96/1021 (Oct. 7, 2005).

86. Some of these thoughts on the principle of non-refoulement are reflected in proposals the author and Yael Schachter made jointly to the offices of Senator Patrick Leahy and Representative Zoe Lofgren when they were considering language for the Refugee Protection Act. See Refugee Protection Act, S. 5353, 117th Cong. (2022).

87. *I.N.S. v. Stevic*, 467 U.S. 407, 429–30 (1984).

88. *Id.* at 424–25.

89. DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* 15 (3d ed. 1999).

90. G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 3 (Dec. 10, 1984).

91. *Id.*

92. ANKER, *supra* note 89, at 470.

This amendment proposes to extend in U.S. law the treaty bar on return to torture to also prohibit the return of anyone to face the threat of cruel, inhuman or degrading treatment or punishment. As with the Convention against Torture treaty obligation, the United States is similarly bound through its ratification of the International Covenant on Civil and Political Rights not to return anyone to a real risk of inhuman or degrading treatment or punishment. Article 7 of the ICCPR provides that no one should be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. The Human Rights Committee has said, "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."<sup>93</sup>

In *Matter of J-E*,<sup>94</sup> the U.S. Board of Immigration Appeals dismissed the appeal of a Haitian man who showed that he would most likely be subjected to inhuman and degrading treatment upon return, saying, "we find that the respondent has failed to establish that these severe instances of mistreatment are so pervasive as to establish a probability that a person detained in a Haitian prison will be subject to torture, as opposed to other acts of cruel, inhuman, or degrading punishment or treatment."<sup>95</sup> Thus, the United States has rejected any obligation to prevent people from being returned to face the risk of cruel, inhuman, or degrading treatment or punishment that does not rise to the level of torture. Because this obligation is not reflected in the U.S. Immigration and Nationality Act and has not been recognized in U.S. courts, lawmakers ought to bring the U.S. statute into compliance with its ICCPR obligations.

Because various grounds for exclusion apply in the asylum context, mostly relating to the criminal history of the person being considered but also for failure to meet the one-year deadline for filing an asylum claim,<sup>96</sup> the United States needs to retain this separate post-removal order examination of claims under the Convention Against Torture and the ICCPR for people who might be excluded from status on other grounds.

## VII. SUBSIDIARY PROTECTION IN THE EUROPEAN UNION

In this context, it might be helpful to look to the European Union's Qualification Directive, which establishes European Union standards for third-country nationals or stateless persons to qualify for international protection. First, the Qualification Directive adopts the 1951 Convention definition as the basis to qualify for a grant of asylum,<sup>97</sup> but also includes a ground for complementary protection, termed "subsidiary protection," to which beneficiaries qualify if there are substantial grounds for believing a removed person

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93. *General Comment No. 20*, *supra* note 55.

94. *Matter of J-E*, 23 I&N Dec. 291 (B.I.A. 2002).

95. *Id.* at 304.

96. INA, *supra* note 13, § 208(a)(2)(B).

97. Qualification Directive, *supra* note 5, at Art. 2(d).

would face a real risk of suffering serious harm.<sup>98</sup> Serious harm is defined as consisting of “(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”<sup>99</sup>

Noteworthy here is that the European Union has affirmed its obligation to respect the principle of non-refoulement not only for the those fearing persecution or who would face the threat of being tortured, but also for people at real risk of being returned to face the threat of inhuman or degrading treatment or punishment. The United States is an outlier in its omission of this ground of protection.

Outside Europe, other countries, such as New Zealand<sup>100</sup> and Australia,<sup>101</sup> have specifically cited the ICCPR in articulating grounds for complementary protection that include the prospect that the person, if returned, would face cruel, inhuman, or degrading treatment or punishment.

U.S. legislators should also contemplate the European Union’s inclusion of the death penalty or execution as the first listed ground for subsidiary protection.<sup>102</sup> It will be recalled that the European Court of Human Rights has found a violation of the non-refoulement prohibition in the proposed extradition to the United States of an accused murderer who might face the death penalty.<sup>103</sup> Given that the death penalty is inherently cruel, most often carried out in a discriminatory manner, and is irreversible, so that miscarriages of justice can never be corrected, I would also include return to face the death penalty or execution as a basis for U.S. withholding of removal, except I acknowledge that this is a “bridge too far,” given the failure of the United States, thus far, to abolish the death penalty. It would be illogical, to say the least, for the United States to bar a person’s return to face a fundamental violation of their right to life when it sanctions and practices that same violation.

Although the European Union’s Qualification Directive includes torture or inhuman or degrading treatment or punishment (CIDTP) as a criterion for complementary (subsidiary) protection, I am suggesting that CIDPT should be considered separately as part of the mandatory nonrefoulement bar applied under Article 3 of the Convention Against Torture, which immigration judges already consider as a last resort before ordering a person removed. Immigration judges should, likewise, be duty bound under the ICCPR to assess the risk of

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98. *Id.* at Art. 2(f).

99. *Id.* at Art. 15.

100. Immigration Act 2009 (N.Z.).

101. Migration Amendment (Complementary Protection) Bill 2011 (Cth) sch. 1, item 1 (Austl.).

102. The Second Optional Protocol to the ICCPR calls on each State Party to “take all necessary measures to abolish the death penalty within its jurisdiction.” Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, art. 1 (2), Dec. 15, 1989, 1642 U.N.T.S. 414.

103. *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. Ct. H.R. (ser. A) 439, 104 (1989), <https://perma.cc/6MQK-9QEC>.

serious harm arising from cruel, inhuman, or degrading treatment or punishment, and need to be directed to do so through implementing legislation.

### VIII. HOW TO AMEND THE U.S. IMMIGRATION AND NATIONALITY ACT ON NON-REFOULEMENT

The proposed amendment would change Section (241(b)(3) of the U.S. Immigration and Nationality Act on withholding of removal as follows:

**Restriction on removal, ~~expulsion, or return in any manner whatsoever from any place where the United States has jurisdiction or exercises effective power or control~~ to a ~~country~~ place where there is a real risk the ~~alien's~~ non-citizen's life, security of person, or freedom would be threatened—**

**(A) . . . the Attorney General ~~may~~ shall not remove an ~~alien~~ a non-citizen to a country if the Attorney General decides ~~that the~~ there is a real risk the ~~alien's~~ person's life, security of person, or freedom would be threatened because of the ~~alien's~~ person's race, religion, ethnicity or nationality, gender or sexual orientation, membership in a particular social group, or political opinion; or**

**(B) The Attorney General decides there is a real risk the non-citizen would be subject to torture or to cruel, inhuman or degrading treatment or punishment, or that their life, security of person, or freedom would be threatened.<sup>104</sup>**

The amendment draws the phrase “in any manner whatsoever” from Article 33.1 of the 1951 Convention. As Sir Elihu Lauterpacht and Daniel Bethlehem have observed, “The phrase ‘in any manner whatsoever’ leaves no room for doubt that the concept of refoulement must be construed expansively and without limitation.”<sup>105</sup>

By prohibiting return “from any place where the United States has jurisdiction or exercises effective power or control,” this amendment would effectively put an end to extraterritorial violations of the principle of non-refoulement countenanced by the U.S. Supreme Court in *Sale v Haitians Center*

104. If INA 241(b) was so amended, it might render changes to the Foreign Affairs Reform and Restructuring Act of 1998 unnecessary. However, so that they are in conformity, Congress could amend § 1242 of that Act to explicitly prohibit the return of individuals to countries where they face a substantial risk of torture or cruel, inhuman, or degrading treatment, regardless of physical presence in the United States. See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681-761, 2681-822 (1998).

105. Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON REFUGEE LAW, 87, 112 (Erika Feller, Volker Turk & Frances Nicholson eds., Cambridge Univ. Press 2003), <https://perma.cc/4VF8-79RK>.

Council.<sup>106</sup> The UNHCR characterized the *Sale* decision as a “setback to modern international refugee law,” because “the obligation not to return refugees to persecution arises irrespective of whether governments are acting within or outside their borders.”<sup>107</sup>

The amendment would replace the word “country” with “place.” Article 33.1 of the 1951 Convention prohibits forcible return “to the frontiers of territories.” The use of the plural and the absence of reference to specific countries indicates that the drafters of the 1951 Convention were aware of the possibility of expulsion to places other than countries where a refugee could face serious harm, such as disputed territories. Lauterpacht and Bethlehem write that the implication of the use of the word “territories” rather than countries or states “is that the legal status of the place to which the individual may be sent is not material. The relevant issue will be whether it is a place where the person concerned will be of risk.”<sup>108</sup>

This brings to mind pushbacks or pushouts of boat migrants to drift in the high seas by Thai, Indonesian, and Malaysian authorities; thousands have been set adrift in places that could neither be characterized as countries or territories, but where their lives and physical integrity are nevertheless threatened.<sup>109</sup> On land or water, no one should be returned, expelled, or forced in any manner whatsoever to any place where their life, freedom, or physical integrity would be at risk.

Throughout the INA, I propose replacing the term “alien” with “non-citizen” or “person.” In recognition that the word “alien” is dehumanizing, the Biden administration has directed the executive branch to avoid the term. In addition, the major Democratic-sponsored immigration reform bill introduced in 2021 would replace the word “alien” with “non-citizen” wherever it appears in the INA.<sup>110</sup>

These proposed amendments to the INA and the Foreign Affairs Reform and Restructuring Act of 1998 would: (1) bring the United States into compliance with its obligations as a party to the International Covenant on Civil and Political Rights; (2) ensure the United States adheres to its non-refoulement obligation under 1967 Protocol relating to the Status of Refugees wherever it exercises jurisdiction or control; and (3) clarify that threats protected by the principle of non-refoulement are not limited to life and freedom, but also, consistent with the ICCPR, include threats to physical and moral integrity.

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106. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 158 (1993).

107. UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*, 32 I.L.M. 1215, 1215 (1993), *quoted in* Harold Hongju Koh, *The Enduring Legacies of the Haitian Refugee Litigation*, 61 N.Y.L. SCH. L. REV. 31, 43 (2016-2017), <https://perma.cc/Q6XB-GXGX>.

108. Lauterpacht & Bethlehem, *supra* note 105, at 122.

109. *Southeast Asia: End Rohingya Boat Pushbacks: Thailand, Malaysia, Indonesia Should Act Urgently to Save Lives*, HUMAN RIGHTS WATCH (May 14, 2015), <https://perma.cc/3UA8-KNCG>.

110. Daniel Hernandez, *From ‘alien’ to ‘noncitizen’: Why the Biden word change matters in the immigration debate*, L.A. TIMES (Feb. 18, 2021), <https://perma.cc/YF9E-KS8Z>.