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HUMAN RIGHTS IN REFUGEE TRIBUNALS

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1. INTRODUCTION

Refugee lawyers are intuitively aware that human rights law has a great deal to do with their work. Human rights abuses precipitate refugees’ flight from situations of persecution and violence in states that are no longer able or willing to protect their own people. The promise of protection of basic human rights in another country motivates asylum seekers to leave what is familiar for the unknown world of flight, displacement, and exile. When used to corroborate the personal stories of clients, human rights reports that detail present and past country conditions are a key element to obtaining protection in a country of asylum.

Yet the relationship between human rights law and refugee law is not always made explicit. The purpose of this article is to articulate the link between refugee law and human rights law and describe their complementary nature, as well as to show how human rights guarantees can be used in refugee status determination and to highlight sources of human rights documentation to be used in substantiating country conditions. The first section will trace the international refugee regime from its foundation in human rights documents to its current expression in UNHCR Executive Committee Conclusions on the relationship between human rights and refugee law. Section Two identifies the role of human rights guarantees in establishing norms for refugee status determination, considering the inclusion, cessation, and exclusion elements of the refugee definition. Section Three offers a brief overview on the use of human rights documentation in analyzing a claim before a refugee tribunal, surveying the basic resources that can be used as corroborating evidence.

2. THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND REFUGEE LAW

Human rights and refugee law are linked as a matter of doctrine. They also form a complementary partnership on the institutional level and in the day-to-day practice of refugee protection.

The founding of the United Nations heralded the beginning of the modern age of human rights. Starting with its preamble, the UN Charter dedicated the new organization to the reaffirmation “of faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.” Given the massive flows of Holocaust-
era refugees and continuing widespread displacement throughout Europe at the time of the signing of the Charter, one of the earliest preoccupations of the UN was to craft an effective means of recognizing the rights and resolving the plight of refugees.3

The Universal Declaration of Human Rights articulated the relationship between refugee law and human rights law, proclaiming that:

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.4

The Universal Declaration’s inclusion of the right to seek and enjoy asylum, as well as its anticipation of the exclusion clauses, situates refugee law in its proper context of the larger body of international human rights law.

Similarly, the human rights origins of refugee law are recalled in the opening words of the founding document of the modern refugee law regime:

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

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.5

Thus from the very start, the Refugee Convention presupposed the existence of fundamental rights and freedoms, and linked the rights of refugees to the body of human rights granted more broadly to all persons under the purview of the Charter and the Universal Declaration. Not only did the Refugee Convention connect the rights of refugees to the larger struggle for human rights, it also invoked the non-discrimination principle as a central aspect of the right of the individual to enjoy these rights and freedoms. According to the Refugee Convention, concern for refugees can manifest itself in the collective effort to assure refugees the widest possible exercise of their fundamental rights and freedoms.

In the intervening years since the signing of the Refugee Convention, UNHCR’s Executive Committee has adopted Conclusions further explicating the link between international human rights law and refugee law. The Executive Committee has formally noted the “direct relationship between the observance of human rights standards, refugee movements and problems of protection.”6 It has called for the “examination, where required, of existing law and doctrine in the light of the real situations being faced by refugees, taking into account the relevance of human rights principles in this context.”7

More recently, the Executive Committee has taken an even more explicit approach to recognizing the links between international human rights law and refugee law. In recognition of the fiftieth anniversary of the Universal Declaration of Human Rights, the Executive Committee reaffirmed the foundation of the institution of asylum in Art.14 of the UDHR, and acknowledged that violations
of human rights and fundamental freedoms are one of the principal reasons for refugee flows. In 2003, the Executive Committee made its clearest proclamation to date of the relationship between international human rights and refugee issues, as well as the respective bodies of law, when it:

Acknowledge[d] the multifaceted linkages between refugee issues and human rights [and] [n]ote[d] the complementary nature of international refugee and human rights law as well as the possible role of the United Nations human rights mechanisms in this area and therefore encourage[d] States, as appropriate, to address the situation of the forcibly displaced in their reports to the United Nations Treaty Monitoring Bodies, and suggest[ed] that these bodies may, in turn, wish to reflect, within their mandates, on the human rights dimensions of forced displacement.

Here, the Executive Committee articulated a basic premise of refugee protection: that the connection between refugee issues and human rights is profound, and that the respective bodies of law are inevitably related as well. The Executive Committee also identified a role for the United Nations treaty bodies in linking human rights to the problem of forced displacement, and using treaty body mechanisms to address the human rights elements of forcible displacement. This call for greater coordination, building since the 1993 World Conference on Human Rights, is a fundamental recognition of the interconnectedness of the refugee and human rights concerns of the United Nations.

UNHCR itself has made a concerted effort to foster the institutional relationship between human rights law and refugee law, most publicly in the annual speeches of the High Commissioner to the UN Human Rights Commission, an initiative begun by former High Commissioner Ogata and encouraged by the Executive Committee. At the working level, UNHCR attempts to assist a number of the human rights treaty bodies in their consideration of state reports by providing information relevant to refugee protection issues and by sharing its concerns.

In a recent analysis of Art. 1 of the Refugee Convention, UNHCR took note of the use of human rights language in the preamble to the Convention, and the evident goal of the drafters to incorporate human rights values into the treatment of refugees. Because of this, UNHCR urged that human rights principles inform the interpretation of the refugee definition and determinations of what kind of protection is owed to whom. Additionally, UNHCR indicated that the developments of international human rights law since the 1951 Convention should be incorporated into an evolving understanding of what constitutes persecution, building on the definition of persecution provided in the UNHCR Handbook. This approach was endorsed in the context of the Global Consultations and has continued to inform UNHCR’s ongoing efforts to promulgate guidelines on various interpretive issues.

At the root of the connection between the two bodies of law is the right to non-refoulement, the most basic human right at the heart of refugee protection. Widely acknowledged as a norm of customary international law, the principle of non-refoulement means that states, even non-signatories to the Refugee Convention, are obligated not to reject arriving asylum-seekers or to return them to
states where they risk persecution. The codifications of the principle of non-refoulement found in Art. 33 of the Refugee Convention and Art. 3 of the Convention against Torture, as well as judicial decisions construing a non-refoulement obligation in Art. 3 of the European Convention on Human Rights, provide further evidence of the cross-fertilization between refugee and human rights law.

3. HUMAN RIGHTS NORMS IN REFUGEE STATUS DETERMINATION

The role of human rights guarantees in establishing norms for use in refugee status determination varies according to the jurisdiction. The following survey does not exhaust the various approaches with which states employ human rights norms in their procedures for refugee status determination. Nevertheless, it provides a general picture of some state practice on the use of human rights norms as instruments for analyzing the inclusion, cessation, and exclusion clauses.

Inclusion: Human Rights Norms as a Tool for Defining Persecution

The UNHCR Handbook acknowledges that there is no universally accepted definition of persecution, and that attempts to establish such a definition have been largely unsuccessful. Nevertheless, the Handbook offers that a definition may be inferred from Art. 33 of the Refugee Convention: “A threat to life or freedom on account of” one of the five protected grounds “is always persecution. Other serious violations of human rights—of the same reasons—would also constitute persecution.” While clearly establishing that persecution is not limited to the notion of a threat to life or freedom, this definition is not particularly helpful in determining how far the concept of persecution may go, as it does not provide content to the phrase “other serious violations of human rights.”

Scholars of refugee law have attempted to define persecution with respect to international human rights. James Hathaway has called persecution “the sustained or systemic violation of basic human rights demonstrative of a failure of state protection.” Guy Goodwin-Gill has emphasized the dynamic nature of persecution, stressing the need for its definition to respond to current developments within the field of human rights. In that vein, Deborah Anker has shown how the developing understanding of women’s rights as human rights has created a framework in which gender-specific abuses are addressed as persecution. Rejecting the notion of adding a sixth enumerated ground, that of gender, Anker argues that refugee law properly interpreted can encompass gender-based violence within conventional human rights norms and definitions of persecution.

This growing framework that defines persecution at least partially in terms of human rights norms is gaining support from the refugee tribunals around the world. In a recent case, the New Zealand Refugee Status Appeal Authority (NZ RSAA) carefully worked through alternative characterizations of the “being persecuted” phrase of Art. 1 of the Refugee Convention. First, the NZ RSAA refused to apply the country of asylum’s domestic human rights standards, reasoning that since refugee law is an international law system, its proper adjudication in light of national politics and biases requires international definitions. Second, the NZ
RSQ categorically rejected a dictionary definition of "being persecuted" because this method would lead to "a sterile and mistaken interpretation of persecution." Instead, the authority chose to adopt a contextualized, holistic approach to defining "being persecuted" based on principles of treaty interpretation, and including two central elements: the failure of state protection and the sustained or systemic denial of core human rights. In so doing, the authority explicitly enlisted Hathaway's formulation of persecution, "that refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard."25

In its subsequent discussion, the NZ RSAA described this process of defining persecution in reference to core norms of international human rights law. Due to the commitment of the Refugee Convention to the assurance of fundamental rights and freedoms without discrimination, as evidenced by its invocation of the guarantees of the UN Charter and the Universal Declaration of Human Rights, the authority reasoned that "being persecuted" is rightly interpreted in reference to the International Bill of Human Rights: the Universal Declaration, as well as the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. Again looking to Hathaway, the authority suggested that the use of international human rights norms to interpret the meaning of persecution allows for the refugee definition to be a living document that can evolve according to the ongoing, authoritative update carried out by the mechanisms that support the development of human rights law.27 Yet the authority expressed reluctance to accept just any human rights norm, instead proposing to avoid both customary international law and what Hathaway called "soft laws" in favor of legal standards defined in the context of treaty law.28 By this reasoning, international human rights law instruments subsequent to the Covenants that have received wide ratification were also accepted, including the 1966 Convention on the Elimination of all Forms of Racial Discrimination, the 1979 Convention on the Elimination of Discrimination Against Women, and the 1989 Convention on the Rights of the Child.29 Similarly, the authority characterized the decisions of the UN treaty bodies established under the above-mentioned instruments as at times useful in adjudications, while simultaneously recognizing the controversy surrounding the jurisprudential value of these bodies’ decisions.30

New Zealand’s espousal of this evolving human rights approach to defining persecution is consistent with case law from other countries as well. Canada has adopted the link that Goodwin-Gill identified between persecution and the field of human rights, as well as the Hathaway definition of “being persecuted.” In its discussion of the limits on the notion of particular social groups, the Supreme Court of Canada noted the increasing prevalence of the “theme of international concern for discrimination and human rights [that] seem[ed] to underlie the recent trend in the jurisprudence of the Federal Court of Appeal.”32 The United Kingdom also has adopted its definition of persecution from Hathaway, although in a slightly different formulation: “persecution is most appropriately defined 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.”33
In contrast, US courts have not explicitly articulated a human rights-based analytical framework for refugee adjudications, yet in practice US adjudicators make extensive use of human rights materials and consider human rights in their determinations of whether persecution has occurred. The Basic Training Course for Asylum Officers indicates that asylum officers, the dedicated service corps that adjudicates first instance asylum claims in the US, should consider violations of basic or core human rights to constitute persecution, as suggested by Goodwin-Gill and Hathaway.

The adoption of a human rights approach to understanding persecution has several practical consequences. Most notably, under this model refugee law assumes the dynamic character of international human rights law as it evolves under changing conditions. This means that refugee law can correctly comprehend persecution through new or newly-understood human rights norms such as those relating to gender. For refugee advocates and adjudicators alike, this means paying close attention to developments in international human rights law so that judges can identify persecution and lawyers can document their claims for a comprehensive definition of it.

Human rights norms are also potentially useful in distinguishing between prosecution and persecution. The UNHCR Handbook suggests doing so by looking at domestic law to determine if it conforms to internationally-accepted human rights standards or, if that fails, assessing whether the law in question is applied in a discriminatory manner. Even then, given the difficulty in evaluating the laws of other countries, UNHCR recommends the use of international human rights instruments, to which many states are bound, to determine if a state has failed to observe its own legal obligations for the treatment of its people.

A common type of case involving the need to distinguish between prosecution and persecution arises with conscientious objectors, draft evaders, and deserters. In such cases, UNHCR advises that principled objection only to the conflict at hand, as opposed to a more general pacifist outlook, can be the basis for a refugee claim where the war has received international condemnation. At least one court in the US has interpreted this to require condemnation by the United Nations, and not from non-governmental organizations, an interesting counterpoint to the NZ RSAA’s concern that the proceedings of the UN Human Rights Commission are too politicized to provide a legal basis for interpreting the refugee definition.

Human rights norms may also have a role to play in establishing the ground of an asylum-seeker’s claim. The UNHCR Handbook employs human rights terminology to define the ground of race, noting that discrimination on the basis of race is “condemned worldwide as a striking violation of human rights.” Racial discrimination is a key element for determining the presence of persecution on the basis of race; when race-based discrimination affects human dignity so as to be “incompatible with the most elementary and inalienable human rights,” it has risen to the level of persecution. Similarly, the Handbook gives content to the ground of religion by citing the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and defines the ground
of the religion in relation to “the right to freedom of thought, conscience and religion.”

States have also employed human rights norms to give content to the grounds enumerated in the Refugee Convention. For example, Canada has defined particular social group in light of the “general underlying themes of the defence of human rights and anti-discrimination” that underpin the system of international refugee law. New Zealand has determined that international human rights law includes the right to change religion and the freedoms not to belong to or confess a religion; the NZ RSAA tests for persecution on the ground of religion according to this standard.

Cession

The “ceased circumstances” cessation clause of the Refugee Convention provides a framework for addressing the volatility of the situations from which refugees flee, acknowledging that a change of circumstances may alter the individual’s status under the Convention. Art. 1C(5) states that the Convention shall cease to apply to any person falling under the terms of Art. 1A if:

He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality[.] In contrast to the other cessation clauses, which relate to the refugee having (re-)obtained the protection of a state, this clause connects directly to human rights guarantees; at the point when the human rights situation is stable enough and positive enough that a refugee can return home without fear of persecution, the protections of the Refugee Convention cease to apply to that individual. In practice, defining the concept of ceased circumstances is harder than the Convention makes it appear. Given the norm of non-refoulement, the state providing protection is obliged to be certain that the situation causing the fear of persecution has truly ended, and that the change is an enduring one. UNHCR’s Executive Committee has stressed this point, asking states to:

carefully assess the fundamental character of the changes in the country of nationality or origin, including the general human rights situation, as well as the particular cause of fear of persecution, in order to make sure in an objective and verifiable way that the situation has ceased to exist.

The Executive Committee has encouraged states to use all available information to guarantee that the changed conditions are stable.

UNHCR has invoked the cessation clause with respect to a group of recognized refugees on a relatively limited number of occasions. States have tended to use cessation clause analysis more frequently in refugee status determination procedures; even when considering human rights information in that regard, they do not usually enlist specific human rights standards from international instruments to articulate a threshold. Joan Fitzpatrick commented on the oddity of using the cessation clauses in the adjudication process, querying, “[h]ow can one cease recognizing something one has never recognized in the first place?” Fitzpatrick concluded that this is instead a re-conception of inclusion clauses, shifting the
temporal framework to consider the state of affairs in the country of origin at the time of the hearing.51

While explicit human rights norms tend not to be introduced into the adjudications, human rights information serves as a general guide to cessation decisions in refugee status determination. Adjudicators’ use of human rights conditions reports varies tremendously in determining if changed country conditions prevent the grant of asylum. Fitzpatrick urged adjudicators to reject the more generalized, national reports of human rights country conditions for a careful consideration of human rights reports specific to the asserted persecution before denying asylum on the basis of changed circumstances.52 Yet the temptation to cut corners often appears too great. A common problem is that macro-political changes such as elections or peace agreements are used to deny claims almost before the ink is dry on the document, seemingly without an understanding that positive changes on the local level, or for certain people, may not occur quickly or at all. Review authorities then must step in to insist upon an individualized assessment of risk. For example, in an unreported decision, the Federal Court of Australia remanded a case for rehearing because the Tribunal failed to consider all of the evidence of the human rights situation in Ethiopia, noting that while a ceasefire had been signed, the asylum-seeker had submitted news reports of some violence within the months preceding his hearing, and that the lower tribunal should weigh these incidents against the success of the ceasefire to determine if the situation was safe for return.53 In considering whether country conditions had changed enough to warrant denial of a claim, the NZ RSAA concluded that despite successful democratic elections, the existence of reports from diplomats and Amnesty International of ongoing human rights abuses, a history of torture, and continued unrest were adequate to grant asylum.54 The US Ninth Circuit Court of Appeals found that even when human rights documentation shows a widespread change of conditions, the individual circumstances of a particular refugee should still be considered in light of the fact that some isolated situations of abuse were ongoing, and might befall the refugee if she were returned home.55 The Canadian Court of Appeal rejected the documented return of large numbers of an asylum-seeker’s fellow citizens to the home country as evidence that changed country conditions render the claim void; rather, the Court in this situation focused its consideration on whether the applicant and the returnees were similarly situated.56

While courts in some cases have had to safeguard against the inappropriate use of information on changed country conditions, problems have arisen in other cases when human rights information is not current enough. Recently, the US Third Circuit Court of Appeals derided the processing of asylum claims in which the Appeals Courts receive “grossly out-of-date administrative record[s]” that omit current information on the political situations in asylum-seekers’ countries of origin.57 It called on the legislative and executive branches of the government to improve the system with adequate country conditions reporting so that the judiciary could make a well-reasoned decision about “the merits of the petitioner’s claim(s) in light of contemporary world affairs.”58 While the court in this case commented on a particularly weak element of the administrative system, this also
points to the difficulty in assessing current human rights situations to a sufficient degree of specificity as to determine if the changed circumstances have lessened the risk of persecution for a particular refugee.

Another potential application for human rights standards is the possibility provided for granting asylum to those suffering from severe past persecution, even where country conditions have changed, and the claimant is no longer in danger. While human rights norms are used to give content to the notion of persecution, courts in the US at least have not seemed to employ human rights standards to identify a category of super-violations that would constitute severe persecution. In the lead US case on the issue of past persecution, the Board of Immigration Appeals did not define a legal standard for severe past persecution using human rights norms, instead simply stating that the harms suffered by the asylum-seeker were sufficient to justify asylum on the basis of past persecution.

**Exclusion**

The exclusion clauses of the Refugee Convention define the group of asylum-seekers considered not to warrant protection through the grant of refugee status. Art. 1F states that:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

The essence of the exclusion clauses is the identification of parties that have perpetrated human rights abuses, violations of humanitarian law, or otherwise violent and harmful crimes outside the country of asylum, and the denial of refugee status to these parties. Simply put, persons who were bad actors before seeking asylum do not merit refugee status according to Art. 1F. Holding such actors accountable for their crimes rather than allowing them unfettered flight to a country of refuge is a central element of the enforcement of international human rights law, as well as international humanitarian law. Geoff Gilbert suggests that these exclusion clauses serve two goals: to reserve the status of refugee for those deemed to have meritorious claims and to deny impunity to those who should face prosecution for their crimes.

Art. 1F mandates that refugee tribunals analyze the actions of the asylum-seeker that preceded her or his arrival in the country of asylum to determine if the individual was party to the acts enumerated in the Convention. Much like in the inclusion analysis detailed above, individual states have enlisted human rights standards to interpret the content of the exclusion clauses. Because of the overlapping nature of crimes against peace, war crimes, and crimes against
humanity, some states interpret the three elements of Art. 1F(a) jointly. Serious non-political crimes remain an independent consideration in most cases.

Canada codified Art. 1F into its domestic law such that anyone who was a “senior member or official of a government that had engaged in terrorism, systematic or gross human rights violations or war crimes or crimes against humanity would be denied admission.” The Immigration and Refugee Board interpreted this clause to mean that even when an asylum-seeker was determined to be a Convention refugee due to his fear of persecution, he could still be denied asylum having admitted to his earlier status as a member of the government which the Board believed to have engaged in systematic or gross human rights violations. The Federal Court of Canada has also considered the content of the exclusion clauses by drawing from the Charter of the International Military Tribunal to delineate possible crimes against humanity, including “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime.” Recognizing that complicity in such acts also creates liability, the court denied admission to an asylum-seeker who had been involved in leadership positions with the Tamil Tigers.

Like Canada, New Zealand has also adopted the definition of crimes against humanity found within the Charter of the International Military Tribunal, as well the meaning given therein to crimes against peace and war crimes. In the same way, the NZ RSAA has employed Common Art. 3 of the Geneva Conventions to inform the content of Art. 1F. By setting forth these international instruments as the substance of the Refugee Convention’s exclusion clauses, the NZ RSAA articulated a language of human rights norms common to all states. In so doing, the NZ RSAA found, for example, that pillaging money and jewelry from the public and forcibly enlisting children to a military cause are inhuman acts consistent with the language of Art. 1F of the Refugee Convention. New Zealand considers complicity with the offenses of Art. 1F to be cause for exclusion, reasoning that the closer an individual in an organization is to its leadership, the more likely he or she is to be a knowing participant in the acts of the organization. On these grounds, the NZ RSAA excluded a Convention refugee from receiving asylum protection. More recently, the NZ RSAA has affirmed this reasoning, holding that a person who intentionally and repeatedly observed the torture and rape of prisoners in the course of his work with the Kuwaiti Ministry of the Interior was in fact willingly associating himself with extreme acts of torture, and by his presence, encouraged the torturers. As this was a crime against humanity, this was grounds for exclusion of the asylum-seeker.

The UK House of Lords has addressed the issue of serious non-political crime of Art. 1B in light of human rights guarantees. In its consideration of whether an individual’s involvement in the bombing of an airport for the purpose of protesting a fraudulent election was non-political, the House of Lords found that the human rights of the persons harmed through the bombing far outweighed those of the asylum-seeker who had partially caused the harm.
the political nature of the act, they included the concept of terrorism as making a crime non-political because of its targeting of the civilian population, and thus denied asylum.

However, defining a non-political crime is not a simple issue. Recognizing that “one country’s terrorist can often be another country’s freedom-fighter,” the US Ninth Circuit Court of Appeals recently applied a different test. Rooting its approach in an individual’s right to political expression, the Ninth Circuit found that while an asylum-seeker had engaged in terrorist activities in India, those activities were not a threat to the security of the United States, and determined that the alien was eligible for asylum if on remand, the lower court decided so to exercise its discretion.

Given the growing concern with issues of national security and the attendant tightening of national borders, the exclusion clauses present a potentially powerful tool for states seeking to limit the entry of persons suspected of posing a threat. At the same time, advocates are right to be wary of states’ excessive use of the exclusion clauses. Because the clauses express a limitation on an otherwise recognized human right, a significant degree of caution is necessary in the adjudication of exclusion so that deserving persons are not denied the protections of refugee status.

However, developments in international law outside of refugee law can have a marked impact on the treatment of an excluded asylum-seeker. While states may not be obliged to grant asylum, the norm of non-refoulement exists outside of refugee law in the provisions of the Convention Against Torture and elsewhere, and mandates that even those excluded from refugee protection not be returned to conditions of torture. Fitzpatrick additionally looks to other developing human rights norms that bar deportation under conditions that would deny the right to family life or risk return to unfair trial or arbitrary detention.

Beyond the norm of non-refoulement under CAT and elsewhere, Gilbert suggests other new developments in exclusion that will create an even greater role in coming years for the use of human rights norms in relation to those excluded from asylum relief. First, increased efforts to prosecute international criminals through the tribunals for Rwanda and the former Yugoslavia, universal jurisdiction, and the International Criminal Court mean that excluded asylum seekers may yet be held responsible for their actions. At the same time, new approaches to extradition have altered the possibilities for states in dealing with excluded asylum-seekers. While the prospect exists to prosecute, new extradition treaties create the concomitant responsibility not to extradite excluded asylum seekers to states where they will face inhumane treatment. Thus, international human rights law has an impact on excluded asylum-seekers in two key ways, creating an environment in which both prosecutions and protections of the most essential human rights are more likely.

Mass refugee flows contain especially challenging human rights dilemmas, as evidenced by the difficulties experienced in the Rwandan exodus of the 1990s. The competing goals of providing protection to refugees fleeing genocide, while simultaneously seeking to prevent the flight of the genocidaires, were impossible to
achieve together. The fundamental nature of a mass flow of refugees obviates the possibility of individualized exclusion determinations to keep the perpetrators of abuses from the overall group recognition as refugees. Yet this fact precipitated the harms that later befell the refugees in the camps.

The Lawyers Committee for Human Rights, now Human Rights First, identified best practices in order to serve these dual goals. Disarming refugees, intern- ing active combatants, monitoring camps closely, and other social service based strategies can aid in the safe and effective maintenance of a population that has fled. Furthermore, separation, as a distinct tool from exclusion, can also be an effective way of keeping populations of refugees safe during times of mass influx and turmoil. Whereas exclusion is a legal concept of withholding refugee protections from certain groups of persons under Art. 1F, separation comprises a wide variety of non-legal strategies for safeguarding a group of refugees. In all cases, for included, excluded, and separated refugees, the Lawyers Committee emphasizes that human rights guarantees are available to all. So, even where refugee status is denied to persons involved in excludable acts, those individuals cannot be returned to a state where they would face torture, cruel or inhumane treatment, or unfair trial.

Thus, even for groups of refugees excluded from the protections of the Convention, human rights standards still guarantee a safety net of just treatment.

4. HUMAN RIGHTS DOCUMENTATION AS A TOOL FOR ADVOCATES

Due to the circumstances in which asylum-seekers take flight, many arrive in their country of asylum without their personal legal documents, much less written evidence of the persecution suffered at home. Given this reality, the UNHCR Handbook states that aside from the normal burden of the asylum-seeker to provide evidence of his or her claim, it may be necessary for the tribunal to conduct independent research to verify his or her statement. Even with research, it may be impossible to corroborate precisely the claimed persecution. In such cases, UNHCR advises that credible testimony from the applicant, in the absence of good reasons to the contrary, should be given the benefit of the doubt in adjudicating asylum claims. That said, in practice, submission of documentation to corroborate the persecution of the asylum-seeker is often a necessary element for success in any asylum claim. For example, the US Code of Federal Regulations states that “the testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.” US courts have split on this question: the Third Circuit Court of Appeals has held that even asylum-seekers who testify credibly must submit corroborating evidence when it is reasonable to do so and that the failure to submit such evidence or explain its absence may lead to the failure of the claim; while the Ninth Circuit Court of Appeals has consistently held otherwise.

The documentation work published by inter-governmental, governmental, and non-governmental organizations is one of the most public faces of “human rights” in the world at large. Human rights documentation can establish
accountability with regard to states that perpetrate or tolerate human rights abuses within their borders. Human rights reporting also provides those who have fled human rights abuses with confirmation of the persecution they fled in their country of origin. For decision-makers and advocates, these documents serve the critical need of drawing connections between conditions in unstable, distant lands and the story of persecution that an asylum-seeker may tell upon arrival in a country of asylum.

The courts and refugee tribunals of several states take such documentation seriously as proof of the country conditions that spawned the persecution from which an asylum-seeker fled. One of the most useful sources of this information is the various UN bodies, which offer information and commentary on human rights conditions in states worldwide. The NZ RSAA has looked to comments from UNHCR and the UN Assistance Mission to Afghanistan to assess the likelihood of persecution by former members of the Taliban.84 Elsewhere, the NZ RSAA has looked to the reports of the Special Rapporteur on Violence Against Women to the Commission on Human Rights to document domestic violence as a form of persecution,85 as has the High Court of Australia.86 The US Board of Immigration Appeals has referred to UN condemnation of female genital surgery as proof of the persecutory nature of the practice.87 Similarly, the US Ninth Circuit Court of Appeals has cited resolutions of the UN General Assembly to highlight the prevalence of human rights abuses against ethnic Albanians in Serbia-Montenegro.88

In the US, federal courts and the Board of Immigration Appeals alike turn to the US Department of State Country Reports on Human Rights Practices as documentation of human rights conditions in other countries.89 However, government attorneys and refugee advocates often differ on the applicability of the State Department reports to the claim at hand, particularly when used to deny a claim where the applicant has produced more specific evidence on point.90 In addition, the possibility for politically-influenced judgments has concerned many commentators. Fitzpatrick has observed that the Department of State Reports “engage in wishful thinking about human rights conditions in friendly states.”91 With respect to the particular issue of religious freedom, the US Congress indicated its concern about possible State Department bias by establishing an independent Commission whose responsibilities include the preparation of human rights reports on religious freedom.92

US courts as well as the NZ RSAA have looked to reports from other countries’ governments to document human rights conditions.93 Yet some tribunals have also indicated that they do not consider such reporting to be authoritative descriptions of the human rights situations on the ground to the exclusion of other, more specific documentation that may provide greater detail in contradiction of the more generalized claims of the governmental reports.94 Rather, the tribunals use these reports in conjunction with other kinds of documentation to try to draw a clearer picture of the situation in a particular country.

NGOs also issue accounts of human rights situations on which refugee tribunals rely for country conditions information. Reports from the largest international human rights organizations, Amnesty International95 and Human Rights...
Watch,\textsuperscript{96} are cited for evidentiary and documentation purposes in cases from the NZ RSAA, US Circuit Courts and the Board of Immigration Appeals, the Supreme Court of Canada and the Canadian Federal Court, the High Court of Australia, and courts of the United Kingdom.\textsuperscript{97} Indeed, such country reports have been called “the most appropriate and perhaps the best resource for information on political situations in foreign nations” in multiple US Circuit Courts.\textsuperscript{98}

Other kinds of documentation have also been used in cases before refugee tribunals. Articles in academic journals that describe human rights situations with sufficient specificity can show patterns of human rights abuses that support claims of persecution.\textsuperscript{99} Similarly, academic books about human rights in various countries or regions can corroborate claims of patterns of persecution.\textsuperscript{100} Media accounts of country conditions can also be persuasive, particularly when multiple sources are available.\textsuperscript{101} Aside from personal testimony, statements, affidavits, and letters describing persecution, letters from regional and local human rights organizations have also been used to demonstrate human rights conditions in particular localities.\textsuperscript{102}

Likewise, where refugee claims are based on specific criteria, such as persecution on the ground of membership of a particular social group defined by characteristics of gender or sexual orientation, organizations dedicated to that particular issue may provide topic-specific documentation otherwise unavailable from generalist organizations. For example, the NZ RSAA has cited the International Lesbian and Gay Association’s World Legal Survey to corroborate claims of persecution on the basis of sexual orientation.\textsuperscript{103} Accessing country conditions documentation can be a challenge for advocates of asylum-seekers, as information may be difficult to locate, or inadequately specific to provide the corroboration sought. Resources are available to assist in this process, rendered significantly easier by the advent of reliable research guides for the use of the internet and topical search engines. Researching International Human Rights Law, an online research guide developed by Marci Hoffman at Boalt Hall School of Law, University of California, Berkeley, is an extensive and user-friendly gateway to accessing country conditions reports from myriad organizations, as well as refugee tribunal jurisprudence in countries around the world.\textsuperscript{104}

5. CONCLUSION

It is no longer possible, if it ever was, to understand refugee law without understanding human rights. The astonishing growth of human rights law in the fifty-plus years since the Refugee Convention was drafted has enriched refugee jurisprudence immensely. Human rights standards are regularly invoked to analyze the nature of persecution and other elements of the refugee definition. Human rights documentation is all but required in order to establish a claim. Refugee adjudicators and advocates need a thorough grounding in human rights norms and resources in order to do justice to an asylum-seeker’s claim. The dynamism of human rights law challenges refugee lawyers to keep up, while providing inspiration and ideas for the kind of creative and well-reasoned advocacy that refugees need today more than ever.
Notes

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6 Executive Committee Conclusion No. 50 (1988), para. (b).

7 Executive Committee Conclusion No. 56 (1989), para. (b)(vi).

8 Executive Committee Conclusion No. 85 (1998), para. (f) and (h); see also Executive Committee Conclusion No. 99 (2004), para. (i).

9 Executive Committee General Conclusion No. 95 (2003), para. (k) and (l).


13 Id. at 82.

14 See Summary Conclusions: Gender-related Persecution, in Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection 351 (Erika Feller et al. eds., 2003), and Guidelines on International Protection No. 1 “Gender-related Persecution” (HCR/GIP/02/01); Summary Conclusions: Membership of a Particular Social Group, in Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection 312 (Erika Feller et al. eds., 2003) and Guidelines on International Protection No. 2 “Membership of a Particular Social Group” (HCR/GIP/02/02); Summary Conclusions: Cessation of Refugee Status, in Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection 545 (Erika Feller et al. eds., 2003), and Guidelines on International Protection No. 3 “Cessation of Refugee Status” (HCR/GIP/03/03); Summary Conclusions: Internal Protection/Relocation/Flight Alternative, in Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection 418 (Erika Feller et al. eds., 2003), and Guidelines on International Protection No. 4 “Internal Flight or Relocation Alternative” (HCR/GIP/03/04); and Summary Conclusions: Exclusion from Refugee Status, in Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection 479 (Erika Feller et al. eds., 2003), and Guidelines on International Protection No. 5 “Application of the Exclusion Clauses” (HCR/GIP/03/05).


18 Id.


Id. at para. 41.

Id. at para. 50-51.


Id. at para. 65.


Id. at para. 63, 68.

Id. at para. 69.

Id. at para. 73. The court flatly rejected the use of the work of the UN Human Rights Commission as guidance in defining persecution, noting the excessively politicized nature of the Commission and its resulting documents. See id. at para. 78.


Id. at 735.


See, e.g., In re C-Y-Z., 21 I. & N. Dec. 915, 927 (BIA 1997) (considering the “fundamental human rights at stake” in forcible sterilizations as a portion of its rationale that persecution had occurred).


UNHCR Handbook at para. 59.

Id. at para. 60.

UNHCR Handbook at para. 171.


See Refugee Appeal No. 74665/03, supra note 29 and accompanying discussion.

UNHCR Handbook at para. 68.

Id. at para. 69.

Id. at para. 71.


Refugee Convention, Art. 1C. However, this clause may not apply to a refugee whose claim to asylum results from reasons relating to previous persecution in the country of former habitual residence.

Executive Committee Conclusion No. 69 (1992), para. (a).

Id. at para. (b).


Joan Fitzpatrick, The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection, 13 Georgetown Immigration L.J. 343, 356 (1999); see also Fitzpatrick & Bonoan, supra note 46, at 530 (identifying the confusion that can result when cessation elements are used in the context of refugee status determination).


See id. at 358-59.


Lal v. INS, 255 F.3d 998, 1010-11 (9th Cir. 2001).


Id.

See Refugee Convention Art. 1C (5) (providing that cessation for changed circumstances will not apply in instances where the refugee can “invoke compelling reasons arising out of previous persecution”); see also 8 C.F.R. § 208.13 (b) (1) (2003).
60 See, e.g., Brucaj v. Ashcroft, 381 F.3d 602 (7th Cir. 2004) (stating that the past persecution must be so severe that repatriation would be inhumane).
62 Refugee Convention Art. 1F.
63 Some jurisdictions use Art. 35(2) as a further statement of exclusion principles with specific regard to the standard of non-refoulement, denying the foundational right of non-return to situations of persecution to a person reasonably regarded as a danger to the country in which he is, or who, owing to conviction for a particularly serious crime, is deemed a “danger to the community” of that country. This, however, is not strictly speaking an exclusion principle as it is intended for application to persons already within a country of asylum. By contrast, the analysis that Art. 1 mandates focuses on acts committed prior to arrival in the country of asylum. The practical intent of Art. 33(2) is to allow states to remove refugees who have proven themselves to be of particular danger to the country that has granted them asylum. In practice, the US, for example, uses Art. 33(2) to justify the removal of recognized refugees even for the commission of minor criminal offenses.
65 Immigration Act, R.S.C., ch. I-2, § 19 (1985) (Can.). Although this permutation of the Immigration Act was subsequently repealed, its relevant language was again codified in its entirety in the Immigration and Refugee Protection Act, S.C. ch. 27 § 35 (1) (b) (2000) (stating that “[a] permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic gross human rights violations or genocide, a war crime or a crime against humanity.”).
69 Id.
72 Cheema v. Ashcroft, 2004 WL 1977671, 9-10 (9th Cir.).
73 Id. at 11.
77 Id. at 431.
80 UNHCR Handbook at para. 196.
81 8 C.F.R. § 208.13 (a).
82 See Abdulai v. Ashcroft, 339 F.3d 542, 553-54 (3d Cir. 2001).
83 See, e.g., Kaur v. Ashcroft, 379 F.3d 876, 889-90 (9th Cir. 2004).
88 Hoxha v. Ashcroft, 319 F.3d 1179, 1183 (9th Cir. 2003).
89 See, e.g., Ontunez-Tursios v. Ashcroft, 303 F.3d 341, 345; Abebe v. Ashcroft, 2004 WL 1801881 (9th Cir. 2004) (No. 02-72390) (citing State Department Country Report on Human Rights Practices in Ethiopia to show that women were able to prevent their daughters from being subjected to FGM by relatives); Balogun v. Ashcroft, 374 F.3d 492, 506-07 (7th Cir. 2004) (citing the State Department Country Report on Human Rights Practices in Ethiopia to show that women were able to prevent their daughters from being subjected to FGM by relatives);
Rights Practices in Nigeria from 2000 to show that FGM is declining in prevalence in the region of the country in question); In re G-A, 23 I & N. Dec. 366 (BIA 2002). These reports can be found at http://www.state.gov/g/drl/hr/c1470.htm.

90 See, e.g., Chen v. Ashcroft, 376 F. 3d 215, 225-26 (3d Cir. 2004) (stating that “[w]e have previously questioned such wholesale reliance on the Department of State’s country reports” in finding that the BIA erroneously rejected proffered evidence based on nothing more than the country report); Sael v. Ashcroft, 2004 WL 2303444 (9th Cir. 2004) (finding that the State Dept. report had “little relevance” to the claim, compared to the evidence proffered by the applicant); Lian v. Ashcroft, 379 F.3d 457, 460 (7th Cir. 2004) (considering a CAT claim).


95 Current and past reports from Amnesty International are available at http://www.amnesty.org/ailib/aireport/index.html (the homepage of the Amnesty International Annual Reports).

96 Current and past reports from Human Rights Watch are available at http://www.hrw.org/countries (available reports and documents listed by country).


98 Zubeda v. Ashcroft, 333 F.3d 463, 478 (3d Cir. 2003) (quoting Kalauskas v. INS, 46 F.3d 902, 906 (9th Cir.1995) (quoting Rojas v. INS, 937 F.2d 186, 190 n. 1 (5th Cir., 1991)).


104 This research guide is available at http://www.law.berkeley.edu/library/online/guides/international_foreign/humanRights/index.html.