

FUNDAMENTAL JUSTICE AND THE DEFLECTION OF REFUGEES FROM CANADA[©]

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Canada is preparing to implement a controversial provision of the *Immigration Act* that will deny asylum seekers the opportunity even to argue their need for protection from persecution. Under a policy labelled “deflection” by the authors, the claims of refugees who travel to Canada through countries deemed safe, likely the United States and eventually Europe, will be rejected without any hearing on the merits. Because deflection does not require substantive or procedural harmonization of refugee law among partner states, it will severely compromise the ability of genuine refugees to seek protection.

The article considers the impact of the *Singh* ruling of the Supreme Court of Canada and subsequent jurisprudence to determine whether a deflection system can be reconciled to the requirements of sections 7 and 1 of the *Canadian Charter of Rights and Freedoms*. Deflection mechanisms ought not to survive challenge under the *Charter*. The new procedure poses a risk to the security of the person of asylum seekers who are physically present in Canada. At the same time, it does not respect the principles of fundamental justice, and cannot be justified as necessary to deter abuse, advance national security, or promote international comity.

Le Canada se prépare à appliquer une disposition controversée de la *Loi sur l'immigration* qui refusera aux gens qui cherchent asile l'occasion même de soutenir leur besoin de protection contre la persécution. Selon cette politique, que les auteurs ont nommée la déflexion, les revendications des réfugiés qui voyagent au Canada en traversant des pays jugés être des lieux sûrs, probablement les États-Unis et éventuellement l'Europe, seront rejetées sans que les cas soient entendus. Comme cette politique n'exige pas d'harmonisation de procédure ou de loi traitant des réfugiés entre ces états, la déflexion mettra en péril la capacité des vrais réfugiés de chercher la protection.

L'article examine les conséquences du jugement de la Cour suprême du Canada dans l'arrêt *Singh* et la jurisprudence subséquente pour déterminer si un tel système peut être accordé avec les exigences des articles 7 et 1 de la *Charte canadienne des droits et libertés*. Les mécanismes de déflexion ne doivent pas survivre un défi constitutionnel sous la *Charte*. La nouvelle procédure constitue un risque à la sécurité de la personne des gens cherchant asile qui sont physiquement présents au Canada. En même temps, elle ne respecte pas les principes de la justice fondamentale, et ne peut être justifiée comme étant nécessaire pour décourager des abus, avancer la sécurité nationale ou promouvoir la courtoisie internationale.

I. INTRODUCTION 214

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II. FRAMING THE <i>CHARTER</i> CHALLENGE TO REFUGEE DEFLECTION	222
A. <i>Deflection in Canadian Law</i>	222
B. <i>The Right of Refugee Claimants to Invoke the Charter of Rights and Freedoms</i>	223
C. <i>Deflection as a Threat to Security of the Person: The Impact of the Singh Decision</i>	227
D. <i>The Illogic of Requiring a Statutory Interest to Protect Security of the Person</i>	232
III. DOES DEFLECTION EXCLUDE ONLY PERSONS NOT AT RISK?	235
IV. ARE THE POTENTIAL CONSEQUENCES OF DEFLECTION TOO REMOTE?	239
A. <i>Domestication of Foreign Conduct</i>	242
B. <i>Objective Foreseeability of Ultimate Consequences</i>	243
V. DOES DEFLECTION COMPLY WITH THE PRINCIPLES OF FUNDAMENTAL JUSTICE?	244
A. <i>Europe</i>	250
B. <i>The United States of America</i>	254
VI. IS DEFLECTION A REASONABLE LIMITATION ON RIGHTS IN A FREE AND DEMOCRATIC SOCIETY?	259
A. <i>Deterring Abuse of the Refugee Determination System</i>	262
B. <i>National Security</i>	264
C. <i>International Comity</i>	266
VII. CONCLUSIONS	269

I. INTRODUCTION

Involuntary migration is one of the most pressing human rights and security issues facing the international community. On any given day, thousands of people are on the move in search of temporary safety or permanent refuge. For the individuals concerned, the logic of flight from a country in which basic human dignity is at risk is clear. Involuntary migration has always been part of the social landscape, and will remain so until and unless there is a dependable answer to the threat of human rights abuse.

Because of its transnational character, states agreed that involuntary migration should be subject to interstate regulation. International refugee law aspires to guarantee surrogate protection to a critical subset of persons who would risk serious human rights abuse were they to be returned to their own country. At least insofar as the

risk of harm is not generalized, but derives from civil or political status, refugee law requires state parties to protect refugees until and unless a safe and dignified return is possible.

This system for collective management of involuntary migration is, however, very loosely constructed. For example, while there is a common definition of refugee status, each state applies that definition in its own way. There are no agreed mechanisms to determine refugee status, nor any duty to achieve consistency in interpretation of the definition. States commit themselves to abide by a common set of refugee rights, but there is no meaningful system to enforce those entitlements.

The result is a significant divergence in both the substance and structures of refugee law across states. Because each state party to the *Refugee Convention*¹ implements the protection system in whatever way it sees fit, similarly situated refugees who seek protection in different countries are often treated in disparate ways. The claim to refugee status may or may not be recognized. The refugee may be allowed to join a new community in the asylum state, or may be kept isolated behind barbed wire. Perhaps the refugee will be permitted to play a productive role in the host society, and to be joined by a spouse and children, or perhaps neither. The asylum state may respect the duty not to return a refugee until and unless it is possible to do so in safety, or it may engage in the forcible repatriation of refugees to dangerous situations.

From the perspective of refugees, the only modest compensation for this patchwork quilt of divergent treatment is the right to choose *where to seek protection*. This is not the same as a right to *receive* protection wherever the refugee prefers: the decision on whether or not to grant protection and, if so, what kind of protection, remains effectively the prerogative of the asylum country. But the right of each refugee to decide where to ask for asylum affords at least those refugees with knowledge and mobility some degree of control over their own fate. This is critical to the moral integrity of the refugee protection system. If states are to be allowed virtually unlimited discretion over how to define a refugee, what rights a refugee will receive, and even when it will be deemed safe to return the refugee to his or her country of origin, then surely the refugee must at least have the right to decide in which country *to ask* for protection.

¹ *Convention relating to the Status of Refugees* 38 July 1951, 189 U.N.T.S. 2545 (entered into force 22 April 1954), supplemented by the *Protocol relating to the Status of Refugees* 606 U.N.T.S. 8791 (entered into force 4 October 1967) [hereinafter *Refugee Convention*].

The right of the refugee to choose where to seek protection can, however, create real difficulties for governments. While developed states are rarely confronted by truly destabilizing refugee flows,² the right of the refugee to decide where to seek asylum can challenge their migration control objectives. With few avenues for legitimate immigration from South to North, many would-be economic migrants see exploitation of the refugee's right to choose an asylum state as the only way to immigrate to their preferred country. While these migrants do not qualify for refugee status, they nonetheless claim to be refugees upon arrival in the Northern state. Many hope that, during the time required to process their refugee claims, they can forge a personal or business relationship that will qualify them to remain. Others hope that refugee determination backlogs will force receiving governments to declare an amnesty, resulting in their permanent admission to the country. Some bogus asylum seekers intend simply to "disappear" into the communities of the asylum state once allowed to enter pending refugee status determination. The result is that, where refugee claimants come from a comparatively poor country, Northern receiving states are presently forced to contend with the problem of separating genuine refugees (those who are at risk of serious human rights abuse, and who choose to seek protection in a relatively advantaged country) from migrants (those who are not at risk in the state of origin).

States have a valid and important interest in ensuring that protection is reserved for genuine refugees. Management of the asylum system to share responsibility and avoid abuse is a sensible goal. Our concern, however, is that rather than having developed effective management tools to safeguard the refugee protection system, Northern governments have opted for what we term policies of *deflection*, that is, mechanistic rules designed to avoid responsibility to assess asylum claims. Deflection is not specifically targeted at abusers. Because deflection is directed against asylum seekers as an undifferentiated class, it stymies the arrival both of fraudulent claimants and of genuine refugees. As such, deflection undermines the very refugee protection system that it is presumably designed to safeguard.

² States near source countries may be confronted by the sudden arrival of large numbers of refugees. Unless international charity is forthcoming, these countries must choose among diverting scarce resources from their own people to the refugees, leaving the refugees in destitution, or simply closing their borders. In such circumstances, the absolute right of the refugee to choose where to seek asylum may simply not be tenable. A viable system of international responsibility sharing is clearly called for in order to respond to such circumstances.

An important deflection technique, developed by the states of the European Union, is the so-called “country of first arrival rule.”³ Contrary to the presumption in international refugee law that the asylum seeker ordinarily has the right to decide where to ask for protection,⁴ “country of first arrival” regimes dictate where the refugee *must* seek protection. States justify resorting to the “country of first arrival rule” on the ground that it is a strong deterrent to abuse of the asylum system by economic migrants. Governments argue that, since an individual genuinely motivated to flee by fear of persecution would in any event seek asylum in the very first non-persecutory state to which he or she is able to escape, true refugees suffer no harm under the rule. Insistence upon the “first arrival rule” is said to reduce the incentive for economic migrants to abuse the asylum system, since they will no longer be able to “pick and choose” their destination state. This is all the more true where, as in Europe, logistical and economic factors frequently dictate that the asylum seeker’s country of first arrival will be in the Eastern, Central, or Southern regions of the continent, rather than in wealthier Western Europe.

The logic of the rule is, however, faulty. Even genuine refugees may decide not to seek protection from the very first non-persecutory state at which they arrive. They may be motivated to continue their journey by the desire to seek asylum in a state where their language is spoken, where their culture or religion is respected, or where they believe they will have the best likelihood of re-establishing themselves

³ *Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities* 5 June 1990, arts. 4-8 [hereinafter *Dublin Convention*], reprinted in G.S. Goodwin-Gill, *The Refugee in International Law* 2d ed. (Oxford: Clarendon, 1996) at 454-63; and *Convention Applying the Schengen Agreement of 14 June 1985 relating to the Gradual Suppression of Controls at Common Frontiers, between the Governments of States Members of the Benelux Economic Union, the Federal Republic of Germany and the French Republic* 19 June 1990, art. 30 (entered into force 25 March 1995) [hereinafter *Schengen Convention II*], reprinted in Goodwin-Gill at 464-70.

⁴ UN High Commissioner for Refugees, Executive Committee of the High Commissioner’s Programme, *Refugees Without an Asylum Country*, UN Doc. HCR/IP/2 (1979) concl. 15 [hereinafter *EXCOM*]:

The intentions of the asylum seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account. Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another state. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State.

See generally J.C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 46-50 [hereinafter *Law of Refugee Status*].

economically and socially. None of these motivations in any way detracts from the genuineness of their claim to refugee status.

More fundamentally, refugees will not willingly stop in the country of first arrival if they believe that the status determination system or refugee rights regime in that state will not afford them solid protection. The buffer states of Southern, Central, and Eastern Europe, for example, tend to have rudimentary refugee protection systems, and to offer comparatively weak human rights guarantees to asylum seekers and recognized refugees. It is, therefore, profoundly logical that many refugees choose not to rely on these countries, but instead prefer to seek asylum from a state in Western or Northern Europe where they believe they will be better protected.

The critical point is that requiring an asylum seeker to pursue his or her claim in the “country of first arrival” may result in a denial of protection. Because substantive and procedural harmonization of protection is not a precondition to implementation of “country of first arrival rules,” efforts to deter abuse of the asylum system have been pursued at the expense of the integrity of the asylum system itself. Even though European governments know full well that there are major discrepancies among them in terms of the quality of protection afforded refugees, they argue that refugees should be content so long as they can make a claim to protection *somewhere*. Our view, in contrast, is that it is unethical to force asylum seekers to entrust their fate to a particular state absent a meaningful guarantee that their protection is not compromised by that assignment of responsibility.

Canadian law similarly authorizes the government to enter into interstate “responsibility sharing agreements,” under which asylum seekers may be summarily deflected to other countries with no examination of the merits of their claims.⁵ Canada released the text of a draft “country of first arrival” deal with the United States in 1995,⁶ and has expressed interest in a comparable arrangement with Europe.⁷ By virtue of Canada’s geographical position, very few individuals from refugee-producing countries are able to arrive here directly.

⁵ *Immigration Act*, R.S.C. 1985, c. I-2, s. 45 [hereinafter *Immigration Act*].

⁶ *Preliminary Draft Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in Examination of the Refugee Status Claims from Nationals of Third Countries*, 24 October 1995 [unpublished; hereinafter *Draft Agreement*].

⁷ Canada was among the states that successfully lobbied for a draft agreement that will eventually allow non-European Union states to participate in the EU’s deflection regime: see *Avant projet de convention parallèle à la Convention de Dublin du 15 juin 1990*, May 1992, Doc. SN 1729/2/92 [hereinafter *Dublin Parallel Convention*].

Agreements with the United States and the European Union alone have the potential to effectively shut down Canada as a country of asylum for most refugees.

Once coordination is achieved among industrialized governments, there is reason to believe that the next step will be common action to remove refugee claimants from the developed world altogether. Europe, for example, is already purchasing the assent of buffer states in the former East Bloc and Northern Africa to take back asylum seekers from the European first states of arrival.⁸ The United States and Canada have held informal discussions with Mexico with a view to having that country re-admit asylum seekers who have passed through its territory *en route* to the North.⁹ The potential for the chain deportation of refugees away from the industrialized world is quickly emerging.

Although Canada is home to only about one-half of one percent of the world's refugees,¹⁰ it apparently sees no inconsistency between active participation in a program of deflection and its much vaunted commitment to international burden sharing. Canada moreover refused point-blank to condition implementation of the "country of first arrival rule" on the kind of substantive and procedural harmonization among cooperating states that would have protected genuine refugees.¹¹ It is thus clear that the government is prepared vigorously to pursue deflection, whatever the cost to global solidarity or individual rights.

The deflection of refugees is not only morally reprehensible, but is also legally wrong. While international refugee law does not itself

⁸ See E. Ferris, "The Politics of Containment: Asylum in Europe and Its Global Implications" [1994] *World Refugee Survey* 20 at 24.

⁹ A. Helton, "Toward Harmonized Asylum Procedures in North America: The Proposed United States-Canada Memorandum of Understanding for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries" (1993) 26 *Cornell Int'l L.J.* 737 at 738.

¹⁰ UN High Commissioner for Refugees, *The State of the World's Refugees, 1995: In Search of Solutions* (Oxford: Oxford University Press, 1995) at 250 [hereinafter *The World's Refugees*].

¹¹ An amendment to the draft Memorandum of Agreement with the United States to condition implementation of the treaty on the existence of substantive and procedural harmonization between the two countries was tabled before the House of Commons Standing Committee on Citizenship and Immigration on 19 March 1996. The Committee rejected this proposal. Instead, the majority of the Committee found that each of Canada and the United States already meets "generally recognized international standards" for refugee protection. The Committee suggested that any substantive or procedural discrepancies could be adequately dealt with through the establishment of a standing oversight committee: see Canada, House of Commons, Standing Committee on Citizenship and Immigration, *Preliminary Draft Agreement Between Canada and the United States Regarding Refugee Claims: First Report* (Ottawa: Canada Communication Group, May 1996) (Chair: E. Bakopanos).

establish a mechanism to allow the record of Canada or other deflecting states to be adjudicated, complaints are likely to be lodged against Canada under the *Civil and Political Covenant*¹² and the *Torture Convention*.¹³ This is because deflection by Canada will put in motion a series of events that generates a risk to security of the person, in many cases including the threat of exposure to torture, or to cruel, inhuman, or degrading treatment.

In addition to contravening international law, we believe that deflection is also vulnerable to attack under the *Canadian Charter of Rights and Freedoms*.¹⁴ The Supreme Court of Canada determined in *Singh v. Canada (Employment and Immigration)*¹⁵ that the *Charter* requires that refugee claimants physically present in Canada be given an adequate opportunity to state their case, normally in the form of an oral hearing. Three of the six judges who heard the case based their decision on section 7, which provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."¹⁶

This paper considers the impact of the *Singh* ruling and subsequent jurisprudence to determine whether a deflection system, under which refugee claimants are removed from Canada without any examination of their claims to protection, can be reconciled to the *Charter's* requirements.

In Part II, we describe the legislative scheme that allows the Canadian government to sign and implement deflection agreements. We then analyze the basis upon which refugee claimants are entitled to invoke the protection of the *Charter*, and the merits of the argument that deflection poses a risk to the security of the person of asylum seekers.

¹² *International Covenant on Civil and Political Rights* 19 December 1966, 999 U.N.T.S. 171, arts. 7 and 9 (entered into force 23 March 1976) [hereinafter *Civil and Political Covenant*].

¹³ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 10 December 1984, U.N. Doc. A/RES/39/46, art. 3 (entered into force 26 June 1987) [hereinafter *Torture Convention*].

¹⁴ Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

¹⁵ [1985] 1 S.C.R. 177 [hereinafter *Singh*].

¹⁶ *Charter*, *supra* note 14, s. 7. Two sets of reasons were delivered by the Court in *Singh*. Each had the support of three justices. Wilson J. based her judgment on the *Charter*. Beetz J. chose to rely on s. 2(e) of the *Canadian Bill of Rights* S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III [hereinafter *Bill of Rights*], and expressly refrained from ruling on the applicability of the *Charter* to the case. Both judgments concluded that refugee claimants had the right to state adequately their case and respond, which would normally require an oral hearing.

Our assessment is that deflection involves a risk of the kind that is cognizable under section 7 of the *Charter*.

Part III assesses the claim that the class of asylum seekers caught by the deflection regime is limited to persons whose security interests cannot be jeopardized by summary removal to a partner state. If the legislation is carefully structured to ensure that only asylum seekers for whom the partner state is a “safe haven” will actually be deflected from Canada, then there is no breach of *Charter* protections. Our assessment, however, is that the Canadian eligibility procedure through which deflection is implemented does not sufficiently engage with relevant protection issues to ensure that only persons able to benefit from a “safe haven” in the partner state are sent away. As such, deflection poses a risk to the security interests of at least some asylum seekers.

In Part IV, we consider the possibility that the government might nonetheless contend that any risk to security of the person posed by deflection is too remote to attract *Charter* scrutiny. The risk of harm to the refugee claimant is not a direct consequence of a decision rendered in Canada. Whatever harm might befall the asylum seeker would instead occur by reason of a decision of the partner state to which he or she is deflected. Whereas in *Singh* the risk was of return by Canada directly to a persecutory state, deflection schemes interpose an intermediate country between Canada and the risk of harm. The argument, then, is that the Canadian action subject to *Charter* scrutiny is insufficiently proximate to the harm feared to bring section 7 into play. On the basis of an examination of both the Supreme Court’s jurisprudence and relevant international precedents on remoteness, we contend that intervention under section 7 of the *Charter* is warranted when Canadian actions expose an individual to a reasonably foreseeable risk outside Canada.

Part V examines the argument that the procedures by which deflection is to be implemented can, in any event, be reconciled to the requirements of section 7. The *Charter* does not prohibit all risks to security of the person, but requires only that any procedure that may compromise security interests comply with the principles of fundamental justice. While, as will be shown, the Canadian deflection process does not itself deliver fundamental justice to asylum seekers, the argument would be that Canada “subcontracts” its duty to meet fundamental justice standards to the states to which refugee claimants are deflected. This leads us to consider the protective mechanisms in place in the two most likely destinations for deflected refugees, Europe and the United States. Even applying a principled margin of appreciation to scrutiny of

efforts by these partner states, we conclude that fundamental justice will not be dependably guaranteed to deflected asylum seekers.

In Part VI, we consider the final way in which deflection might be upheld as consistent with the *Charter*. Even if Canada's deflection system poses a risk to the security of the person of asylum seekers, and does not simultaneously respect the principles of fundamental justice, the government could still invoke section 1 of the *Charter* to legitimate its actions. That is, it may be contended that the deflection of refugee claimants is a reasonable limit on the right to security of the person of the kind that is demonstrably justifiable in a free and democratic society. If so, there is no infringement of the *Charter*. We consider this argument in relation to the need to safeguard the asylum system from abuse, national security concerns, and to the value of promoting international comity. None of these objectives, in our view, justifies the mechanistic deflection program authorized by the *Immigration Act*.

We conclude that deflection mechanisms are unlikely to survive legal challenge under the *Charter*.

II. FRAMING THE *CHARTER* CHALLENGE TO REFUGEE DEFLECTION

Canadian immigration law has recently been reshaped to authorize the deflection of refugees. The Minister of Citizenship and Immigration, acting without parliamentary approval or review, now has the authority to enrol Canada in agreements with other states "for the purpose of facilitating the coordination and implementation of immigration policies and programs including ... agreements for sharing the responsibility for examining refugee claims" ¹⁷ The language of responsibility sharing aside, this provision purports to authorize the Minister to sign international deflection agreements based on the "country of first arrival rule." In granting this power, the *Act* implicitly declares deflection to be a legitimate goal of Canada's immigration policy.

A. *Deflection in Canadian Law*

The *Immigration Act* requires the denial of access to refugee determination in Canada to those individuals who, on their way to

¹⁷ *Immigration Act*, *supra* note 5, as am. by S.C. 1992, c. 49, s. 108.1.

Canada, pass through a country that is designated by Cabinet as a state that complies with the international duty not to return refugees to the risk of persecution (*non-refoulement*).¹⁸ As no country has thus far been so designated, the deflection system has yet to come into force.

Once deflection is engaged, persons who have passed through a designated country are to be excluded in a summary eligibility procedure of the kind traditionally used to identify persons who have already been recognized as *Convention* refugees in another country, or who are security risks, serious criminals, or repeat entrants into the Canadian system. The decision to exclude will be made by a senior immigration officer, without even the intervention of an immigration adjudicator. The claimant will never come before the Immigration and Refugee Board, the expert and quasi-independent tribunal responsible for refugee determination in Canada. If found ineligible, removal is to follow immediately. Not even an application for review by the Federal Court of Canada will ordinarily be allowed to delay deportation.

B. *The Right of Refugee Claimants to Invoke the Charter of Rights and Freedoms*

Deflection is simply the latest technique in a line of anti-asylum measures pursued by the government. Canada has traditionally deterred the arrival of refugees by means of a system of visa requirements and strict penalties imposed on transportation companies bringing undocumented refugee claimants and others into the country. Because a Canadian visa will not be issued for the purpose of seeking asylum in Canada, refugee claimants who are honest about their intentions will be denied the documentation necessary to come to Canada legally. If they nonetheless attempt to travel to Canada, airline ground staff are under strict instructions to refuse boarding to any person without a valid visa.¹⁹

Visa controls imposed on refugee-producing countries, coupled with a system of carrier sanctions, can undeniably result in the exposure

¹⁸ *Ibid.* ss. 46.01(1)(b), 114(1)(s), and 114(8). This right to protection against *refoulement* derives from the *Refugee Convention* *supra* note 1, art. 33, which provides that “[n]o Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

¹⁹ J.C. Hathaway, “The Conundrum of Refugee Protection in Canada: From Control to Compliance to Collective Deterrence” in G. Loescher ed., *Refugees and the Asylum Dilemma in the West* (University Park, Pa.: Pennsylvania State University Press, 1992) 71 at 79-80.

of genuine refugees to the risk of persecution.²⁰ The problem for refugees and their advocates, however, is that those impacted are outside the reach of the Canadian courts, and are therefore not normally entitled to the protection of Canada's laws.²¹ The new deflection regime, in contrast, is directed to individuals who are *present in Canada* and who have come forward at a port of entry or inside the country to claim *Convention* refugee status. Canadian courts will therefore have jurisdiction to determine the legality of the deflection scheme.

Specifically, while refugee claimants are neither citizens nor permanent residents of Canada, Wilson J., in *Singh*, held that refugee claimants are entitled to claim the protection of section 7 of the *Charter*, which provides that everyone shall enjoy security of the person. Section 7 applies to "everyone," and the Court saw no reason to exclude refugee claimants from its scope.²² This holding follows from the physical presence in Canada of refugee claimants, and their consequent amenability to Canadian law.²³ In essence, the Supreme Court of Canada embraced a theory of reciprocity of obligations and rights: if asylum seekers are to be subject to the full force of Canadian law, they are then logically entitled to benefit from Canadian standards of respect for human dignity.²⁴ It would be hypocritical to assert jurisdiction to deal with refugee claimants in accordance with our domestic law, while simultaneously denying the relevance of the fundamental safeguards set by the *Charter* for the application of Canadian law.

Since *Singh*, the Supreme Court has had occasion to examine the *Charter* rights of non-citizens in a variety of immigration and refugee protection contexts. *Charter* protection, or access to *Charter* remedies, has been denied in three significant cases. While the decisions in

²⁰ See generally J.C. Hathaway & J. Dent, *Refugee Rights: Report on a Comparative Survey* (Toronto: York Lanes, 1995) at 13-17 [hereinafter *Refugee Rights Report*].

²¹ D. Galloway, "The Extraterritorial Application of the Charter to Visa Applicants" (1991) 23 Ottawa L. Rev. 335 at 337.

²² Wilson J. declined to draw a line between individuals who are inside the country and those who are merely seeking entry: *Singh*, *supra* note 15 at 210.

²³ *Ibid.* at 202.

²⁴ The same result would follow from an understanding of the *Charter* as a document that expresses a community's devotion to humanist principles, not something that the Canadian people have solely negotiated for themselves to maximize their self-interest. See D. Galloway, "Strangers and Members: Equality in an Immigration Setting" (1994) 7 Can. J. Law. & Jur. 149 at 155.

Chiarelliv. Canada (Employment and Immigration),²⁵ *Dehganiv. Canada (Employment and Immigration)*,²⁶ and *Rezav. Canada (Employment and Immigration)*,²⁷ represent a partial retreat from the breadth of *Singh*,²⁸ they do not diminish the essential holding of that case—that refugee claimants physically present in Canada must have a meaningful opportunity to state their case and to know the case they have to meet.

This position is consonant with international human rights jurisprudence, particularly with the decisions of the European Court of

²⁵ [1992] 1 S.C.R. 711. The decision did not arise in a refugee context. The Court was faced with a *Charter* challenge to the *Immigration Act* *supra* note 5, provisions that call for the mandatory deportation of permanent residents involved in serious criminality. One of the arguments made was that the deportation process failed to deliver fundamental justice as required by s. 7 because the process before the Security Intelligence Review Committee (SIRC) took no account of the circumstances of the offence or of the offender. Writing for the Court, Sopinka J., at 733, emphasized that non-citizens do not have an unqualified right to enter or remain in Canada. In view of the limited rights of most non-citizens, Sopinka J. determined the deportation procedure sufficient to guarantee fundamental justice in this context. He did not find it necessary to address himself to the broader issue of whether aliens generally have statutory interests of the kind that can give rise to a s. 7 *Charter* claim. In *obiter*, however, Sopinka J. observed, at 734, that refugees are granted a statutory right to remain in Canada by s. 4(2.1) of the *Immigration Act*, a fact that sets them apart from other non-citizens. This focus on locating a specific statutory right to ground a s. 7 interest is unprincipled, for reasons elaborated in Part II(D), below. More fundamentally, a heightened standard of fundamental justice for refugees than for aliens in general might be justified on the basis that ordinary deportees face a significantly lower risk to security of the person than do refugees.

²⁶ [1993] 1 S.C.R. 1053 [hereinafter *Dehgan*]. The Court determined that ss. 7 and 10(b) of the *Charter* do not give rise to a right to counsel at the secondary examination refugees are required to undergo at Canadian ports of entry. The Court held that because these examinations are not a form of detention, there is no concomitant right to counsel under s. 10(b). In addressing the s. 7 claim, Iacobucci J. acknowledged, at 1078, that *Singh* requires that a refugee claimant be given an adequate opportunity “to state his case and know the case he has to meet.” In his view, the then-prevailing statutory scheme (which provided for a hearing before a credible basis tribunal, with a right to counsel) satisfied that requirement. The *Immigration Act* *supra* note 5, has since been amended to abolish the credible basis hearing, so the first examination of the substance of a claim to protection now occurs at the hearing before the Immigration and Refugee Board. Because deflection denies refugee claimants access to this or any other Canadian forum in which to state their need for protection, it is not in keeping with the basis for the Court’s decision in this case.

²⁷ [1994] 2 S.C.R. 394. This decision involved a refused refugee claimant who applied to a provincial court judge for *Charter* protection. The Court affirmed the right of the judge to decline jurisdiction on the basis that constitutional challenges to the *Immigration Act* *supra* note 5, are more appropriately heard in the Federal Court. In deciding whether or not to assume jurisdiction in such a case, the provincial court judge need only take account of “all relevant considerations.” This ruling does constrain the ability of refugee claimants to secure *Charter* protection in provincial courts, but it in no way diminishes the requirement set by *Singh*, *supra* note 15, that refugee claimants physically present in Canada be afforded protection of security of the person under s. 7 of the *Charter*.

²⁸ F.P. Eliadis, “The Swing from *Singh*: The Narrowing Application of the *Charter* in Immigration Law” (1995) 26 *Imm. L. Rev.* (2d) 130.

Human Rights and the United Nations Human Rights Committee. The European Court has developed a comprehensive line of cases clearly recognizing that all individuals, including aliens physically present within a state party to the *European Convention on Human Rights*²⁹ are protected by and entitled to invoke the provisions of the *Convention*, including the right to be free from torture, the right of access to an effective remedy against rights violations, and the right to respect for family life.³⁰ The United Nations Human Rights Committee similarly recognizes that it is an individual's presence in the jurisdiction of a state that triggers the right to claim protection under the *Civil and Political Covenant*.³¹ Being an alien does not reduce that entitlement.³² In its "General Comment" on article 9 of the *Covenant*, the Committee specified that the right to liberty and security of the person, guaranteed by that article, governs "immigration control" measures.³³ Further, in its "General Comment" on the position of aliens under the *Covenant*, the Committee stated that "each one of the rights of the *Covenant* must be guaranteed without discrimination between citizens and aliens."³⁴

²⁹ *Convention for the Protection of Human Rights and Fundamental Freedoms* (November 1950), 213 U.N.T.S. 221 (entered into force 21 September 1970) [hereinafter *European Convention on Human Rights*].

³⁰ See, for example, *Case of Vilvarajah v. United Kingdom* (1991), Eur. Ct. H.R. Ser. A, No. 215; *Case of Cruz Varas v. Sweden* (1990), Eur. Ct. H.R. Ser. A, No. 201 [hereinafter *Cruz Varas*]; and *Case of Beljoudi v. France* (1992), Eur. Ct. H.R. Ser. A, No. 234-A.

³¹ *Supra* note 12.

³² See, for example, "Kindler v. Canada, Communication No. 470/1991, Views adopted on 30 July 1993" (1993) 14 H.R.L.J. 307 [hereinafter "HRC Kindler Report"].

³³ *Report of the Human Rights Committee* (UN GAOR, 37th Session, Supp. No. 40, UN Doc. A/37/40 (1982) ("General Comment 8(16)") at 95.

³⁴ *Report of the Human Rights Committee* (UN GAOR, 41st Sess., Supp. No. 40, UN. Doc. A/41/40 (1986) ("General Comment 15(27)") at 94. Indeed, the spirit of this international consensus is reflected in s. 3(f) of the *Immigration Act* *supra* note 5, which requires that persons seeking permanent or temporary admission to Canada should not be treated in a way that would constitute unlawful discrimination under the *Charter*. This suggests that all *Charter* protections are open to, *inter alia*, refugee claimants, on a non-discriminatory basis. To deny some *Charter* protections to immigrants and refugee claimants would logically be seen to run afoul of this provision.

C. *Deflection as a Threat to Security of the Person:
The Impact of the Singh Decision*

Assuming that asylum seekers physically present in Canada may invoke the protection of section 7 of the *Charter*, we now consider whether deflection schemes have an impact on interests that are logically within the scope of the guarantee of “security of the person.” Security of the person encompasses “a notion of personal autonomy involving, at the very least, control over one’s bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress.”³⁵ The judgment of Wilson J. in *Singh* established an analytical approach to the assessment of a risk to security of the person which has been routinely applied in subsequent decisions of the Federal Court involving the interests of refugee claimants.

Specifically, Wilson J. anchored her assessment of the risk to security of the person in an assessment of the threat to any of the three rights then statutorily guaranteed to a refugee, namely the right to status determination, to appeal a removal or deportation order, and to protection against *refoulement*. She stressed that impairment of these rights would threaten security of the person, as they were “the avenues open to [the refugee claimant] under the *Act* to escape from ... fear of persecution.”³⁶ Indeed, the right to protection against *refoulement* standing alone, was said to be sufficient to ground a section 7 claim:

It seems to me that even if one adopts the narrow approach advocated by counsel for the Minister, “security of the person” must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself. I note particularly that a Convention refugee has the right under s. 55 of the Act [now s. 53] not to “be removed from Canada to a country where his life or freedom would be threatened... .” In my view, the denial of such a right must amount to a deprivation of security of the person within the meaning of s. 7.³⁷

Having concluded that section 7 interests were at stake in the refugee protection process, Wilson J. then considered whether fundamental justice had been observed in the process by which these rights might be denied. She determined that the procedure then used in Canada to decide refugee claims did not comply with the principles of

³⁵ *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519 at 587-88, Sopinka J. [hereinafter *Rodriguez*]. See also *R. v. Morgentaler* [1988] 1 S.C.R. 30 at 54-57, Dickson C.J. [hereinafter *Morgentaler*].

³⁶ *Singh*, *supra* note 15 at 206, Wilson J.

³⁷ *Ibid.* at 207.

fundamental justice because it did not provide an adequate opportunity to claimants to state their case and to respond to contrary evidence.

Since *Singh* was decided, one of the three statutory rights of refugee claimants that Wilson J. viewed as raising security interests³⁸ has been statutorily abridged. The entitlement of asylum seekers to undergo status determination is now conditional upon success at the eligibility screening procedure, including screening to implement the “country of first arrival rule.”³⁹ In the result, not every asylum seeker in Canada has a statutory right to a determination on the merits of his or her claim to refugee status. The question therefore arises whether refugee claimants still possess interests which, if denied, would threaten their right to security of the person.

Most of the Federal Court of Appeal’s jurisprudence to date has taken the view that eligibility screening has terminated the right of refugee claimants to claim protection under section 7. In *Berrahma v. Canada (Employment and Immigration)*⁴⁰ the Court was faced with a claim that the *Charter* was offended by the portion of the eligibility procedure that denies access to previously refused refugee claimants who had been outside Canada for less than ninety days since their first claim was refused. The Court held that the interposition of the eligibility stage effectively insulates the rejection of refugee claimants from constitutional review:

[T]he reason the Supreme Court concluded as it did in *Singh* is that, to give effect to its international obligations assumed earlier, Parliament had recognized and granted foreign nationals the right to claim refugee status... . That, I think, is the difference between *Singh* and the case of an ineligible claimant: *Singh* was denied a status which the law gave him the right to claim without having an opportunity of showing that he met the conditions for obtaining it, whereas the ineligible claimant is not denied a status he is entitled to claim.⁴¹

The Federal Court of Appeal endorsed this formalistic hard line in *Nguyen v. Canada (Employment and Immigration)*⁴² The Court was emphatic that eligibility rules, which deny access to refugee status determination for individuals convicted of serious crimes in Canada, do not offend the *Charter*.

³⁸ See *supra* note 35 and accompanying text.

³⁹ *Immigration Act*, *supra* note 5, as am. by S.C. 1992, c. 49, s. 36 [now s. 46.01(1)(b)].

⁴⁰ (1991), 132 N.R. 202 (F.C.A.) [hereinafter *Berrahma*].

⁴¹ *Ibid.* at 212-13.

⁴² [1993] 1 F.C. 696 (C.A.) [hereinafter *Nguyen*], leave to appeal refused [1994] 1 S.C.R. ix.

A foreigner has absolutely no right to be recognized as a political refugee under either the common law or any international convention to which Canada has adhered [A] declaration of ineligibility does not imply or lead, in itself, to any positive act which may affect life, liberty or security of the person.⁴³

The only exceptions recognized by the Federal Court to this reading of the relationship between the *Charter* and the refugee eligibility procedures have involved exceptional circumstances: for example where an asylum seeker was misled or, through lack of informed consent, had been placed in a situation of ineligibility.⁴⁴

The Federal Court's conclusion that eligibility determination eliminates the asylum seeker's statutory security interests cries out for careful scrutiny. First, only one of the three rights relied upon by Wilson J. in *Singh* to find that refugee claimants have security interests protected by section 7 has been abrogated. It is true that there is no longer an automatic right to the determination of a claim to refugee status, but refugees are still entitled by statute to appeal against their deportation⁴⁵ and, most importantly, to be protected against removal to a country in which they face the risk of persecution (*non-refoulement*).⁴⁶

Even standing alone, the risk of *refoulement* was declared by the Supreme Court to "amount to a deprivation of security of the person within s. 7."⁴⁷ While entitlement to claim this protection is (because of eligibility screening) one step removed from the system considered in *Singh*, a finding of ineligibility still "has the effect of taking away the only possible barrier to the issuance of an unconditional deportation order, and as such [contributes to] the deprivation of liberty and, possibly, the security of the individual which results from deportation."⁴⁸

Second, the argument that security interests are not at stake in the eligibility procedure because success on eligibility is a prerequisite to the acquisition of a right to status determination runs afoul of Wilson J.'s admonition to avoid excessive formalism in applying the language of

⁴³ *Nguyen, supra* note 42 at 704.

⁴⁴ See, for example, *Canada (Employment and Immigration) v. Agbasi*, [1993] 2 F.C. 620 (T.D.); *Panjwani v. Canada (Employment and Immigration)*(1991), 76 F.T.R. 144 (F.C.T.D.); and *Kaur v. Canada (Employment and Immigration)*(1989), [1990] 2 F.C. 209 (C.A.).

⁴⁵ *Immigration Act, supra* note 5, s. 70(2)(a).

⁴⁶ *Ibid.* s. 53.

⁴⁷ *Singh, supra* note 15 at 207.

⁴⁸ *Nguyen, supra* note 42 at 705, Marceau J.A. This analysis led the Federal Court of Appeal to conclude that "[i]t is appropriate ... to assume that section 7 of the *Charter* is brought into play with respect to the scheme as a whole, that is to say with respect not only to the deportation order, but also to the ineligibility decision."

rights and privileges, a distinction that had developed in jurisprudence under the *Bill of Rights*⁴⁹ In *Singh*, Wilson J. rejected “[t]he creation of a dichotomy between privileges and rights” for *Charter* review purposes,⁵⁰ holding that a right to security of the person arises whenever the abridgement of an interest, however classified, may lead to the risk of grave harm. To illustrate the point, she adopted the dissenting opinion of an earlier *Bill of Rights* case, observing that section 7 of the *Charter* governs the “mere privilege” of an inquiry into parole revocation because of the seriousness of the consequences for the individual concerned.⁵¹ Similarly, the refugee claimant’s interest in gaining access to status determination through the eligibility procedure involves security of the person because of the potentially serious consequences of a denial of eligibility.

Third, the Federal Court of Appeal erred in asserting that “[a] foreigner has absolutely no right to be recognized as a political refugee under either the common law or any international convention to which Canada has adhered”⁵² To the contrary, as pointed out by the Supreme Court in *Singh*,

s. 2(2) and s. 3(g) of the *Immigration Act, 1976* envisage that the *Act* will be administered in a way that fulfils Canada’s international *legal obligations*[A] Convention refugee who does not have a safe haven elsewhere is *entitled* to rely on this country’s willingness to live up to the *obligations* it has undertaken as a signatory to the *United Nations Convention relating to the Status of Refugees*.⁵³

While recognition is of course a function of the merits of the claim presented, it would make a mockery of Canada’s legal undertaking to avoid the *refoulement* of refugees simply to refuse to identify refugees, thereby insulating ourselves from our freely assumed international duty to ensure their protection. An interpretation of the *Immigration Act* suggesting that the imposition of an eligibility screen means that Canada no longer intends to abide by its *non-refoulement* obligations cannot stand. As Patricia Hyndman has observed,

[i]t is a basic principle that a State may not by its domestic law avoid its international obligations. There can be no doubt that once a refugee has passed the physical frontier of a State’s territory the obligation of *non-refoulement* under Article 33 [formalized in section 53 of the Canadian *Immigration Act*] applies and this may in return require access

⁴⁹ *Supra* note 16.

⁵⁰ *Singh, supra* note 15 at 207-09.

⁵¹ *Ibid.* at 209-10.

⁵² *Nguyen, supra* note 42 at 704.

⁵³ *Singh, supra* note 15 at 192-93 [emphasis added].

to full and fair determination procedures, and it does not matter that national provisions deem the refugee for immigration purposes to be in an “international zone” or “not to have entered” the country.⁵⁴

This view is consistent with the general rule that Canadian law requires that a domestic statute be interpreted in light of any underlying international treaty obligations: “where the text of the domestic law lends itself to it, one should *strive* to expound an interpretation [of the domestic law] which is consonant with the relevant international obligations.”⁵⁵

The use of the word “strive” here suggests an active search for an interpretation that avoids placing Canada in conflict with its international treaty obligations. It is also important to emphasize that the *Vienna Convention on the Law of Treaty*⁵⁶ to which Canada is a party, stipulates that a state party “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁵⁷

Refugee claimants physically present in Canada, even those not yet successful at the eligibility procedure, do therefore have the *prima facie* right, recognized in both domestic and international law, to argue their need for protection from *refoulement*, clearly an aspect of security of the person. Canada remains bound to uphold this provision and cannot simply legislate around it. If, therefore, a statutory interest is required to ground a right to security of the person, asylum seekers easily satisfy this requirement.

⁵⁴ P. Hyndman, “The 1951 Convention and Its Implications for Procedural Questions” (1994) 6 Int'l. J. Refugee L. 245 at 249.

⁵⁵ *National Corn Growers Association v. Canada (Import Tribunal)* [1990] 2 S.C.R. 1324 at 1371, Gonthier J. [emphasis added]. See also *Thomson v. Thomson*, [1994] 3 S.C.R. 551 at 578, La Forest J.

⁵⁶ (23 May 1969) 1155 U.N.T.S. 331, art. 27 (entered into force 27 January 1980) [hereinafter *Vienna Convention*].

⁵⁷ This has recently been reiterated by La Forest J., writing for the dissent in the 4-3 decision in *Chan v. Canada (Employment and Immigration)* [1995] 3 S.C.R. 593 at 627-28 [hereinafter *Chan*]. He expressed concern that an “unremitting approach” to assessment of the credibility of claimants or an “unduly stringent application of exacting legal proof” might “thwart” Canada’s undertaking to refugee protection. La Forest J. emphasized that until such time as Canada renounces its “voluntarily adopted obligations to grant asylum for *Convention* refugee claimants,” it remains bound by the resulting duty to admit refugees. The majority did not disagree with this observation.

D. *The Illogic of Requiring a Statutory Interest to Protect Security of the Person*

More fundamentally, one might question the logic of adherence to the analytical approach developed by Wilson J. in *Singh* for identification of a constitutionally protected interest in security of the person. In order to decide whether refugee claimants possessed a protected security interest, Wilson J. canvassed the various statutory interests of a refugee claimant (whether rights or privileges) which, if denied, might jeopardize security of the person. This approach was followed by the Federal Court of Appeal in *Berrahma*,⁵⁸ holding that because refugee claimants had no right to status determination under the revised legislation, they had no statutory interest that could attract *Charter* protection. The mechanistic conclusion reached was that there had consequently been no abridgement of any constitutionally protected interest in security of the person.

Putting to one side the Federal Court's failure to take note of the subsisting interest of refugee claimants to appeal against their removal and, in particular, to protection from *refoulement* Wilson J.'s approach is fundamentally flawed in that it suggests that constitutional rights somehow "spring to life" only by the wave of a statutory wand.⁵⁹ If the goal of constitutional entitlement to protection of security of the person is to avoid a situation in which an individual may be harmed by application of the force of Canadian law without simultaneously enjoying the benefit of the fundamental protections set by Canadian law,⁶⁰ then it is difficult to see why constitutional protection should be conditioned on the identification of a compromised right *that exists outside of the Charter itself*. It should be sufficient to show that the

⁵⁸ *Supra* note 40.

⁵⁹ It may be that Wilson J. believed this statute-based inquiry to be necessary in considering a claim under s. 7 of the *Charter* to conform to earlier decisions interpreting the scope of s. 2(e) of the *Bill of Rights* *supra* note 16. The language of the two provisions is not, however, identical. The *Bill of Rights* provides that "no law of Canada shall be construed so as to ... deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice *for the determination of his rights and obligations...*" [emphasis added]. This section therefore requires compliance with the principles of fundamental justice *only* where rights and obligations are at stake. Section 7 of the *Charter*, in contrast, requires respect for the principles of fundamental justice whenever there is a risk of deprivation of life, liberty, or security of the person. There is, therefore, no textual basis for limiting the application of s. 7 to situations in which the risk exists in relation to a statute-based right. We are grateful to Bruce Ryder for drawing this possible explanation for Wilson J.'s analytical approach to our attention.

⁶⁰ See *supra* notes 21-24 and accompanying text.

individual may be subjected to action under Canadian law which has the effect of endangering his or her physical or psychological welfare.

This point may be illustrated by the predicament of an alien in Canada who does not claim to be a *Convention* refugee, but who is nonetheless at risk of removal to a situation of ongoing war or serious violence in his or her country of origin. At least under Canadian domestic law, such a person has no right to claim any kind of status. There is no statutory basis even to resist removal from Canada.⁶¹ If one were strictly to follow the analytical method used in *Singh*—that is, looking for a statutory entitlement of the individual which is important enough to raise issues of security of the person—the result would be that an individual about to be deported into an ongoing war would be incapable of asserting a claim to protection of his or her security of the person. Yet the gravity of harm feared by the alien would clearly rise to the level of seriousness which the Supreme Court argued to be the defining element of a right to security of the person, and the alien's amenability to the force of Canadian law would be absolute.

The inappropriateness of this search for a statutory right upon which to build the case for section 7 protection is similarly apparent when we look more closely at the decision of the Federal Court of Appeal in *Nguyen*⁶² The Court held that deporting someone to a situation of possible torture or death would certainly violate section 7 and, quite possibly, section 12 of the *Charter*. But, in holding that the *Charter* does not govern the eligibility procedure which is all that stands between the individual and the risk to security of the person consequent to deportation, the Court effectively authorized precisely the consequence it found to be unacceptable.

In order to avoid this conflict between principle and the analytical approach to its implementation, the issue of whether there is a protected interest in security of the person should be decided by a straightforward examination of the extent to which either bodily integrity or psychological well-being is threatened by official action. This form of direct inquiry has been pursued in the post-*Singh* case law of the

⁶¹ The *Refugee Conventions* *supra* note 1, does not enfranchise persons who are at risk of purely generalized war or violence; only those differentially at risk because of their race, religion, nationality, membership of a particular social group, or political opinion qualify as refugees. See *Law of Refugee Status*, *supra* note 4 at 90-99.

⁶² *Supra* note 42.

Supreme Court of Canada, including *Morgentale*⁶³ and *Rodriguez*⁶⁴ Wilson J.'s insistence on the identification of a *statute-based interest* held by refugee claimants as a prerequisite to protecting their security of the person simply cannot be reconciled to the consequence-driven logic of these more recent judgments.

While the pervasiveness of legal rights will undoubtedly mean that most section 7 challenges can be defined in relation to statute-based claims, the logic of demanding such a relationship is unclear. Indeed, the theory of the reciprocity of rights and obligations that underpins the decision in *Singh* itself argues strongly for an inquiry into compliance with principles of fundamental justice whenever the state proposes to expose an individual to the risk of serious physical or psychological harm. If we are truly committed to ensuring that all those to be impacted by official action have the right to be treated in accordance with basic standards of fairness, it would be wisest simply to scrutinize the level of protection of physical and psychological well-being afforded in the light of potential risks, whether or not anchored in specific statutory or other legal rights.

To summarize, refugee claimants physically present in Canada who face deflection to intermediate countries and denial of access to refugee status determination in Canada can claim that their interest in security of the person, recognized under section 7 of the *Charter*, is brought into play. Applying the *Singh* analysis, two of the refugee-specific interests, which were found to give rise to the logic of section 7 protection, subsist, namely the right to appeal against deportation and, most notably, the key right of *non-refoulement*. In any event, the *Morgentale* and *Rodriguez* decisions suggest that refugee claimants have a protected section 7 interest by virtue of the risk they face of official interference with their physical and psychological integrity.

⁶³ *Supra* note 35 at 54-57. Dickson C.J., at 54, emphasized that a denial of security of the person is identifiable in large part by the "severe consequences" for the individual's physical or psychological health.

⁶⁴ *Supra* note 35. The focus on a threat to physical and psychological well-being is clear from the considerations canvassed by the majority opinion of Sopinka J. at 588:

She fears that she will be required to live until the deterioration from her disease is such that she will die as a result of choking, suffocation or pneumonia caused by aspiration of food or secretions. She will be totally dependent upon machines to perform her bodily functions and completely dependent upon others. Throughout this time, she will remain mentally competent and able to appreciate all that is happening to her.

III. DOES DEFLECTION EXCLUDE ONLY PERSONS NOT AT RISK?

Assuming that refugee claimants are entitled to invoke the protection of section 7 of the *Charter*, it might nonetheless be contended that deflection is constructed so as to capture only the subset of asylum seekers whose security interests are not in fact at stake. If the eligibility procedure is fine-tuned to deflect only those refugee claimants whose security interests cannot be jeopardized by summary removal from Canada, then there is no *Charter* violation.

Canada does not, of course, have an absolute responsibility to protect every asylum seeker who arrives at its borders. Specifically, Wilson J. recognized in *Singh* that there is no inconsistency between the legal obligation to protect the security of the person of refugee claimants and the refusal to grant protection to asylum seekers who already “have a safe haven elsewhere.”⁶⁵ If, therefore, the deflection process accurately identifies asylum seekers who already have “a safe haven elsewhere,” it does not violate section 7. This is because deflection to a true safe haven cannot adversely affect basic security interests.

How should “a safe haven” be defined? A comparable international principle authorizes the summary removal of a refugee claimant who has “already found protection” both of basic human rights and against *refoulement* in another state.⁶⁶ This provision is essentially an elaboration of the *Refugee Convention*'s exclusion from status of so-called *de facto* nationals of another safe state, by virtue of which no claim is receivable from persons who possess most of the rights normally enjoyed by citizens, clearly including full protection against deportation or expulsion.⁶⁷ Such persons have no need of the surrogate international protection that refugee law is meant to provide, as they already enjoy meaningful protection elsewhere.⁶⁸

⁶⁵ *Singh*, *supra* note 15 at 193, Wilson J.: “I believe ... that a Convention refugee who does not have a safe haven elsewhere is entitled to rely on this country's willingness to live up to the obligations it has undertaken as a signatory to the United Nations Convention Relating to the Status of Refugees.”

⁶⁶ *EXCOM*, *supra* note 4, concl. 58 [emphasis added].

⁶⁷ *Refugee Convention* *supra* note 1, art. 1(e). See generally *Law of Refugee Status* *supra* note 4 at 57-59.

⁶⁸ *Ward v. Canada (Employment and Immigration)* [1993] 2 S.C.R. 689 at 716, La Forest J. [hereinafter *Ward*]:

The international community was meant to be a forum of second resort for the persecuted, a “surrogate,” approachable upon failure of local protection. The rationale

This standard provides a sound way to give meaning to Wilson J.'s "safe haven" criterion.⁶⁹ Were deflection to be restricted to persons who had already found meaningful surrogate protection of basic human rights in another country, including protection against deportation or expulsion from that country, it would not pose a risk to security of the person. Canada could summarily return asylum seekers to a "safe haven," so defined, without fear of violating the *Charter*.

The *Immigration Act* goes some distance to the conditioning of deflection on these substantive "safe haven" concerns, albeit in a rather circuitous way. The *Act* authorizes a finding of ineligibility to claim refugee status if a claimant has come to Canada, directly or indirectly, from a "prescribed country."⁷⁰ In contrast to the mechanistic European practice, prescription by Cabinet requires a finding that the partner state complies with the *Refugee Convention's* prohibition on the *refoulement* of refugees.⁷¹ Refugees therefore cannot be deflected from Canada (as they can in Europe) simply because there is an interstate agreement that allows for that possibility. Deflection from Canada can only occur if the destination state is a country which, in the opinion of Cabinet, complies with the critical *non-refoulement* obligation set by article 33 of the *Refugee Convention*

While a significant improvement over European practice, the decision to authorize deflection on the basis of scrutiny only of a destination country's record on *non-refoulement* is nonetheless a curious approach. It suggests that a country that refrains from the *refoulement* of refugees may be a "safe haven" for refugees even though it routinely breaches other provisions of the *Refugee Convention* or of general human rights law. What, for example, of a partner state that denies refugees freedom of religion, incarcerates them indefinitely, or refuses them the means to earn a livelihood? Even though in serious breach of other aspects of international law, such a government could still be determined to comply with article 33 (by not sending refugees away). Standing alone then, the *Immigration Act's* eligibility test is an inadequate measure of the "safe haven" standard.

upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution.

⁶⁹ *Ibid.* at 709: "At the outset, it is useful to explore the rationale underlying the international refugee protection regime, for this permeates the interpretation of the various terms being examined." See generally *supra* note 55.

⁷⁰ *Immigration Act, supra* note 5, as am. by S.C. 1992, c. 49, s. 36(1)-(2) [now s. 46.01(1)(a)].

⁷¹ *Ibid.* s. 114(1)(s).

The *Immigration Act* however, goes on to suggest (though not to require) that, in order to decide whether a state protects refugees from *refoulement*, Cabinet “shall take ... into account” four factors.⁷² First, is the state to which return is to be effected a party to the *Refugee Convention*? Second, what are its actual policies and practices with respect to *Convention* refugee claims? Third, what is its human rights record? Finally, though not imperative, is there a formal agreement between the state and Canada regarding shared responsibility to examine refugee claims? While all are potentially important questions, this oblique construction of the article 33 compliance test (and, indirectly, with Wilson J.’s “safe haven” standard) raises two central concerns.

Are these criteria relevant only insofar as they speak to the stipulated objective of assessing compliance with the duty to avoid the *refoulement* of refugees? While their more inclusive ambit appears to broaden the base of the inquiry away from mere compliance with article 33 and toward the more appropriate “safe haven” standard, they are textually subordinate to the primary and more constrained goal of identifying states that do not return or expel refugees (though perhaps otherwise treating refugees inappropriately). This is particularly highlighted by the permissive rather than obligatory nature of the requirement that Cabinet take these points into account in designating a country. This disjuncture was drawn to the attention of the parliamentary drafters but not corrected,⁷³ suggesting that prescription by Cabinet cannot be taken to reflect a judgment that the state in question is, in any holistic sense, truly a “safe haven.”

Second, while refugee status determination under the the *Refugee Convention* is conceived as an individuated process,⁷⁴ the *Immigration Acts* intermediate country eligibility scheme leaves no room for the consideration of particularized evidence of risk. Cabinet’s

⁷² *Ibid.* s. 114(8).

⁷³ Canada, House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-86, An Act to Amend the Immigration Act and other Acts in consequence thereof* 3d sess., 34th Parl., 1991-92, Issue No. 7 (11 August 1992) at 114-15.

⁷⁴ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva: Office of the United Nations High Commissioner for Refugees, 1979), paras. 44-45:

While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees Apart from [this kind of situation] ... an applicant for refugee status must normally show good reason why he individually fears persecution.

prescription of a partner state as one that complies with its duty of *non-refoulement* is dispositive of eligibility. There is, therefore, no opportunity for an individual claimant to lead evidence that contradicts a Cabinet determination of respect for article 33 in his or her particular circumstances, much less to demonstrate other affronts to human dignity that would undercut the classification of the state in question as “a safe haven.” This *en bloc* disfranchisement is in keeping neither with the *Refugee Convention* nor with the particularity suggested by the phrasing of the Supreme Court of Canada’s reference to the exclusion of refugees who benefit from “a safe haven.”⁷⁵

In sum, Canada’s eligibility process engages only in part with the international legal test for permissible exclusion. In contrast to the superficiality of European regimes, the *Immigration Act* does not authorize exclusion from the hearing process by reference to the simple fact of ability to enter another state. Cabinet scrutiny of the sufficiency of protection in all proposed safe states is interposed, and is moreover subject to ongoing monitoring and review.⁷⁶

However, Cabinet’s analysis is directed primarily, and perhaps exclusively, to the issue of compliance by the state in question with the duty of *non-refoulement*. The statutory scheme does not appear to condition ineligibility on the partner state’s respect for the balance of the *Refugee Convention*’s refugee rights regime or for binding human rights norms more generally, surely implicit in any meaningful construction of “safe haven.” Equally important, because ineligibility is exclusively a function of Cabinet’s country-specific prescriptions, refugees have no opportunity to present evidence to the decision maker of individuated risks which contradict Cabinet’s determination, and which may render a partner country an unsuitable guarantor of the particular claimant’s safety.

There is also the more fundamental question of whether the eligibility procedure can be said to identify other countries which are a “haven” (safe or otherwise) for those to be deflected. There is no requirement that the asylum seeker already “*have a safe haven*,”⁷⁷ “*have already found protection*”⁷⁸ in the destination state, or even that he or she be allowed to remain there. All that is required to effect deflection is

⁷⁵ *Singh*, *supra* note 15 at 193, Wilson J.

⁷⁶ There is no guarantee, however, that the ongoing monitoring and review will allow for a timely response to a deterioration of conditions in a prescribed country.

⁷⁷ *Singh*, *supra* note 15 at 193 [emphasis added].

⁷⁸ *EXCOM*, *supra* note 4, concl. 58 [emphasis added].

the returnability of the refugee claimant to the prescribed country. This is a far cry from any reasonable understanding of denying refugee status to persons who already benefit from surrogate protection of their basic security interests. Rather than focusing on whether or not asylum seekers need protection, deflection concerns itself only with whether they can be sent elsewhere.

For all of these reasons it is unlikely that a court will find that deflection, as presently structured in Canadian law, does no more than send refugee claimants to "a safe haven." To the contrary, the inadequate canvassing of both basic protection and general human rights concerns means that the eligibility process is likely to send persons to partner states that may not in fact be "safe." Nor is there any concern to identify "havens," but rather simply countries to which removal can be effected. It cannot therefore be said that the impact of deflection is restricted to persons whose security interests are not jeopardized by summary removal from Canada.

IV. ARE THE POTENTIAL CONSEQUENCES OF DEFLECTION TOO REMOTE?

One response is likely to be that, even though deflection starts a process that may lead to a risk to security interests, the ultimate harm is simply too remote from Canadian action to give rise to *Charter* liability. There is clearly a proximate risk to security of the person if Canada removes an asylum seeker directly to a country of origin where persecution may occur.⁷⁹ Deflection, in contrast, will only send the refugee claimant to a partner state (likely the United States or Europe) in which there is no immediate threat to security interests. The danger for asylum seekers arises not from the immediate action of Canadian authorities, but instead from the risk that the partner state may in turn fail to protect the refugee claimant from return to persecution.

On one hand, it is clear that, in such circumstances, the Canadian decision to deflect asylum seekers is an essential ingredient in the chain of events that may ultimately jeopardize their security interests. Yet it remains that deflection interposes a partner state between Canada and the risk of harm. The question, then, is whether the indirect nature of the risk engendered by deflection effectively absolves Canada of responsibility for any threat to security of the person that may arise. Simply stated, ought the *Charter* to protect asylum

⁷⁹ *Singh*, *supra* note 15.

seekers against a risk that follows not from the Canadian act of deflection to a partner state, but rather from the secondary removal by that partner state back to the country of origin?

While remoteness did not arise on the facts of *Singh*, (which involved the risk of removal directly to a persecutory state), Wilson J. acknowledged the possibility of invoking remoteness to counter at least some allegations of *Charter* infringement:

There may be some merit in counsel's submissions that closing off the avenues of escape provided by the Act does not *per se* deprive a Convention refugee of the *right to life or to liberty*. It may result in his being deprived of *life or liberty* by others, but it is not certain that this will happen.⁸⁰

Even if Canadian action in that case was too remote to be said to jeopardize life and liberty, Wilson J. concluded, it would still give rise to a proximate risk to security of the person.⁸¹ This reasoning suggests that the infringement of one's right to security of the person may not be answerable by a remoteness defence.

The Supreme Court of Canada's extradition case law similarly holds that, while remoteness may be a defence to some *Charter* challenges such as those under section 12, it is not an answer to the claim that section 7's guarantee of security of the person has been infringed. The Court's most explicit invocation of a doctrine of remoteness is found in McLachlin J.'s majority decision in *Kindler v. Canada (Justice)*,⁸² a challenge under both sections 7 and 12 of the *Charter* to an attempt to extradite a convicted murderer to the United States where he would face the death penalty. The judgment concluded that section 12 is not brought into play, because any cruel or unusual treatment or punishment would derive from the actions of American, not Canadian, officials:

Any punishment which is imposed will be the result of laws and actions in that [foreign] jurisdiction ... [T]he effect of any Canadian law or government act is too remote from the possible imposition of the penalty complained of to attract the attention of s. 12. To apply s. 12 directly to the act of surrender to a foreign country where a particular penalty may be imposed, is to overshoot the purpose of the guarantee and to cast the net of the *Charter* broadly in extraterritorial waters.⁸³

La Forest J. concurred with this position: "The execution, if it ultimately takes place, will be in the United States, under American law, against an American citizen in respect of an offence that took place in

⁸⁰ *Ibid.* at 206 [emphasis added].

⁸¹ *Ibid.*

⁸² [1991] 2 S.C.R. 779 [hereinafter *Kindler*].

⁸³ *Ibid.* at 846.

the U.S. It does not result from any initiative taken by the Canadian government.”⁸⁴

The remoteness defence did not, however, stop the Court from proceeding to assess the (apparently not unduly remote) risk to the appellant’s *security of the person* under section 7 of the *Charter*.⁸⁵ This tack is difficult to reconcile to a true remoteness doctrine, since the factual basis for the unduly remote section 12 claim and the not unduly remote section 7 claim was the same Canadian act (extradition), leading to the same foreign risk (infliction of capital punishment).⁸⁶ As in *Singh*, the Court was not disposed to sanction a remoteness defence when security of the person was at stake.

International human rights bodies have generally been disinclined to endorse a remoteness doctrine in any context. When the *Kindler*⁸⁷ decision itself was scrutinized by the United Nations Human Rights Committee, remoteness was not accepted as a basis for absolving Canada of responsibility for exposing an individual to the risk of a violation of rights under the *Civil and Political Covenant*.⁸⁸ The jurisprudence of the European Court of Human Rights has also held that extradition and expulsion decisions can implicate the analogous provision of the *European Convention on Human Rights*.⁸⁹

[Extradition] may give rise to an issue under Article 3 and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country Nonetheless, there is no question of adjudicating against that state. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken

⁸⁴ *Ibid.* at 831.

⁸⁵ *Ibid.* at 831, La Forest J. and at 847, McLachlin J.

⁸⁶ J. O’Reilly, “Case Comment: *Ng and Kindler*” (1992) 37 McGill L.J. 873 at 875:

[T]he majority does not explain why the remoteness of the punishment from Canadian conduct results in the inapplicability of section 12 and, simultaneously, the application of section 7. If the surrender order is so distant from the punishment that may be imposed in the requesting state that the order cannot be governed by section 12, how can it be governed by section 7? To put it another way, if the surrender order is remote from the potential punishment, how can it at the same time be proximate to the fugitive’s security of the person?

⁸⁷ *Supra* note 82.

⁸⁸ “HRC *Kindler* Report,” *supra* note 32.

⁸⁹ *European Convention on Human Rights*, *supra* note 29, art. 3: “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.⁹⁰

An affirmation of the Supreme Court of Canada's reluctance to consider remoteness as an answer to a threat to basic security interests would therefore accord with this international consensus. Logically, however, a similar position should be taken with regard to section 12 infringements.

The other possibility, of course, is that the Court may ultimately decide to resolve the present jurisprudential ambiguity by extending its support for a remoteness doctrine, in the context of section 12 cases, to challenges brought under section 7. At the very least, such a shift should be accompanied by clear guidance on how to delineate proximate from remote forms of harm. While the majority extradition decisions of the Court do not canvass this issue, minority opinions suggest that any general remoteness rule that emerges ought to take into account, first, whether the foreign conduct has been effectively "domesticated" by Canada, and second, the extent to which risk to security of the person is an objectively foreseeable consequence of Canadian action.

A. Domestication of Foreign Conduct

A first logical limitation on the remoteness doctrine can be derived from Lamer J.'s (as he then was) dissenting opinion in *United States v. Allard*,⁹¹ in which it was contended that a Canadian citizen's section 7 rights were violated by undue delay on the part of American authorities in requesting his extradition. On the question of whether a *Charter* claim could be grounded in American, rather than Canadian, delay, he was clear:

I do not think that any weight should be given to the fact that it is the American authorities, and not the Canadian authorities, who were responsible for the unexplained and therefore unacceptable delay In a sense, both governments are partners in the undertaking and it could be said that there is a *domestication of the conduct* of the American authorities.⁹²

This reasoning suggests that insofar as Canadian law is effectively implicated in the implementation of foreign standards or

⁹⁰ *Soering Case* (1989), Eur. Ct. H.R., Ser. A, No. 161 at 35-36.

⁹¹ [1987] 1 S.C.R. 564 [hereinafter *Allard*].

⁹² *Ibid.* at 574-75, Lamer, J. (dissenting) [emphasis added]. La Forest J.'s majority decision found there to be no breach of s. 7 because the United States could be relied upon to deliver fundamental justice to Allard.

practices, the doctrine of remoteness should not be relied upon to avoid *Charter* scrutiny. Particularly when Canadian and foreign laws are integrated to further a collectivized process such as refugee deflection, it makes little sense to argue that we bear no responsibility for the results of that shared endeavour.

B. *Objective Foreseeability of Ultimate Consequences*

A second, more fundamental, limitation is implicit in Cory J.'s dissent in *Kindler*.⁹³ He premised his stance on the accepted position that there are at least some circumstances in which the *Charter* may be invoked in response to a situation in which the *locus* of harm is outside Canada: "[t]he *Charter* affords freedom not only from actual punishment but from the threat of punishment When such a likelihood arises, Canada, as the extraditing state, must accept responsibility for the ultimate consequence of the extradition."⁹⁴ Drawing on the jurisprudence under the *European Convention on Human Rights*,⁹⁵ Cory J. determined that where there is an "objective possibility" of harm flowing from the act of surrender by Canada to a foreign state, there is a sufficient causal connection to warrant intervention under the *Charter*. He pointedly concluded: "The ceremonial washing of his hands by Pontius Pilate did not relieve him of responsibility for the death sentence imposed by others and has found little favour over the succeeding centuries."⁹⁶ To conclude otherwise would be, he indicated, "an indefensible abdication of moral responsibility."⁹⁷

Although Cory J.'s analysis was directed to a situation in which the risk existed in the very state to which removal was to be effected by Canada, the logic of foreseeability⁹⁸ which underpins his opinion requires scrutiny of risks consequent to removal by a partner state. A reviewing court in Canada ought to consider whether the risks to security interests are objectively foreseeable at the time of deflection

⁹³ *Supra* note 82.

⁹⁴ *Ibid.* at 819-20, Cory J.

⁹⁵ *Supra* note 29.

⁹⁶ *Kindler, supra* note 82 at 824, Cory J.

⁹⁷ *Ibid.* at 846. The majority opinion of McLachlin J., in contrast, did not embrace this limitation on a remoteness doctrine. She found no s. 12 violation because "[a]ny punishment which is imposed will be the result of laws and actions in [the United States]."

⁹⁸ He referred to an "objective possibility" that the harm will occur: *Kindler, supra* note 82 at 821.

from Canada. Reliance on a foreseeability doctrine would, as in tort law, establish a balance between the importance of enforcing meaningful accountability and the need to constrain *ad infinitum* liability on a principled basis.⁹⁹

In sum, there presently appears to be little enthusiasm in the Supreme Court of Canada to sanction remoteness as a defence to *Charter* challenges based on a risk to security of the person. If remoteness is found to be conceptually relevant to the assessment of a section 7 claim, attention would need to be paid to defining the boundary between remote and proximate harms. In our view, a security risk that may eventuate outside Canada ought not to be considered too remote to attract *Charter* scrutiny if Canadian law or procedures are effectively implicated in the implementation of foreign standards or practices which give rise to the risk, at least where the risk which would ultimately eventuate in the foreign jurisdiction is the reasonably foreseeable consequence of the impugned Canadian law or practice.

The consequences of refugee deflection from Canada should not, therefore, be considered too remote to engage the *Charter*. Canada is responsible for forcing refugee claimants into the foreign determination process, which is all that stands between the refugee and *refoulement* or other risks to security of the person. We have explicitly opted to discharge our international legal obligations to refugees by reliance on those foreign procedures. If there is a foreseeable risk that refugees will be returned to persecution by reason of the process unleashed by deflection, the Canadian action cannot be said to be unduly remote from the ultimate harm. In the next Part, we contend that risks to security of the person are indeed the objectively foreseeable consequences of deflection.

V. DOES DEFLECTION COMPLY WITH THE PRINCIPLES OF FUNDAMENTAL JUSTICE?

Even if deflection poses a proximate risk to the security interests of asylum seekers, it can still be reconciled to section 7 if implemented

⁹⁹ Cory J. referred to European Commission jurisprudence on this point. The European Court has now succinctly phrased the test as being “whether substantial grounds have been shown for believing the existence of a real risk”: *Cruz Varas supra* note 30 at 29. Similarly, the United Nations Human Rights Committee, in its opinion on the *Kindler* case, stated that “[i]f a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant”: “HRC *Kindler* Report,” *supra* note 32, para. 313.

via a procedure that conforms to the principles of fundamental justice. Section 7 of the *Charter* does not prohibit all official action that puts security of the person at risk. Rather, section 7 requires only that a process which has an impact on security issues comply with the principles of fundamental justice.¹⁰⁰ So long as fundamental justice is delivered to asylum seekers by the mechanisms of deflection, there is no *Charter* breach.

While an examination of the precise content of the notion of “fundamental justice” is beyond the scope of this essay, it seems clear that *at a minimum* fundamental justice imports the common law duty of procedural fairness.¹⁰¹ In the refugee determination context, it would therefore be difficult to argue that fundamental justice is rendered until the claim to protection is examined on the merits in an unbiased hearing, in which there is a reasonable opportunity to make one’s case. This point was made in *Singh*. Wilson J. stated that protection from the risk of persecution is a matter of such fundamental importance that procedural fairness would invariably require that refugees be afforded an oral hearing. She noted that it would be difficult to conceive of a situation in which fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions. While Wilson J. concluded that fundamental justice might not require an oral hearing in every case, she was clear that refugee claimants must be provided with an adequate opportunity to state their case and know the case that has to be met.¹⁰² As succinctly observed in the concurring opinion of Beetz J. based on the *Bill of Rights*, “nothing will pass muster short of at least one full oral hearing before adjudication on the merits.”¹⁰³

¹⁰⁰ “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”: *Charter*, *supra* note 14, s. 7.

¹⁰¹ J.M. Evans, “The Principles of Fundamental Justice: The Constitution and the Common Law” (1991) 29 *Osgoode Hall L.J.* 51 at 90:

I have argued that, since the principles of fundamental justice are a constitutional entrenchment of the basic tenets of our legal system, they should normally be interpreted to correspond to the common law grounds of review, especially the duty of fairness. However, because of its constitutional status, section 7 allows questions to be raised about the fairness of administrative arrangements that, by virtue of statutory authorization, are beyond the scope of common law scrutiny.

See generally *Reference Re Section 94(2) of the Motor Vehicle Act*, R.S.B.C. 1979 [1985] 2 S.C.R. 486 [hereinafter *B.C. Motor Vehicle Reference*].

¹⁰² *Singh*, *supra* note 15 at 214.

¹⁰³ *Ibid.* at 231.

The deflection process itself clearly does not afford all refugee claimants in Canada an unbiased hearing on the merits of the claim to refugee status in which there is a reasonable opportunity to make his or her case. Indeed, the purpose of deflection is explicitly to deny this opportunity to persons who can be turned away under the “country of first arrival rule.” The presumptive failure of the deflection mechanism to deliver fundamental justice to asylum seekers might, however, be answered by a theory of “subcontracted fundamental justice.”

This is because the immediate result of deflection is not removal to the state in which security interests may be violated. As ineligibility in Canada is conditioned on access to a status determination procedure in the partner state, it might be argued that the partner state’s protective actions should be construed as an integral part of the Canadian response to the asserted need for protection. To determine whether Canada delivers fundamental justice to asylum seekers, one would therefore factor-in the sufficiency of the “subcontracted” status determination procedures and protective mechanisms in the partner states.

This argument is essentially the mirror image of the remoteness defence considered in Part IV, above. Whereas the question there was whether Canada should be held accountable for actions the consequences of which ensue abroad, this Part addresses whether Canada can claim the benefit of whatever protective efforts are made in the foreign states to which refugees will be sent. It is logical, in our view, to answer this question in the affirmative. Just as only a superficial analysis would ignore harms unleashed by Canadian conduct simply because those threats materialize outside our jurisdiction, it would also be excessively formalistic not to take account of whatever protection is afforded deflected asylum seekers once they arrive in the partner state.

The Supreme Court has already accepted the tenability of this kind of “combined effort” thesis in its *Charter* case law dealing with the extradition process.¹⁰⁴ The Court has routinely held that the Canadian guarantee of security of the person may be discharged through the sufficient actions of the foreign partner states to which extradition is effected. It has moreover insisted that a reasonable “margin of appreciation” be applied to scrutiny of the adequacy of the foreign procedures. In effect, therefore, procedural mechanisms that would not be adjudged sufficient to guarantee fundamental justice if implemented in Canada may nonetheless satisfy Canadian obligations if established abroad by a partner state.

¹⁰⁴ See A. LaForest, *LaForest’s Extradition to and from Canada* (Aurora, Ont.: Canada Law Book, 1991) at 22-23.

The dominant view in the extradition cases is that it is not appropriate to demand strict accord between foreign standards and Canadian notions of fundamental justice.¹⁰⁵ Rather, the relevant test is the existence of a generally comparable range of normative and procedural guarantees.¹⁰⁶ The focus is on the general sufficiency of protections, not on the precise comparability of specific modes of implementation: “[t]he judicial process in a foreign country must not be subjected to finicky evaluations against the rules governing the legal process in this country.”¹⁰⁷ The Court has suggested, however, that there is an expectation that the foreign legal system should at least operate within a system of “checks and balances,”¹⁰⁸ ensure reasonable due process, and deliver essential fairness.¹⁰⁹

Reasonable and pragmatic though this general principle is, the Supreme Court has declined to stop removal to a state that fails even this minimalist test of compliance with fundamental justice norms. Instead of focusing on the failure of basic norms, the Court has conditioned judicial intervention on whether removal would generally be seen to be unconscionable: “[t]he test for whether an extradition law or action offends section 7 of the *Charter* ... is whether the imposition of the

¹⁰⁵ *Kindler*, *supra* note 82 at 844-45, McLachlin J.:

[T]he law of extradition must accommodate many factors foreign to our internal criminal law. While our conceptions of what constitutes a fair criminal law are important to the process of extradition, they are necessarily tempered by other considerations ... [W]e require a limited but not absolute degree of similarity between our laws and those of the reciprocating state.

¹⁰⁶ La Forest J. has, for example, found that American standards met the requirements of fundamental justice because the United States is “a country with a criminal justice system that is, in many ways, *similar* to our own, and which provides *substantial* protections to the criminal defendant”: *ibid.* at 836 [emphasis added]. McLachlin J., at 855, referred to the existence of “constitutional provisions *not dissimilar* to ours giving reasonable assurances of a fair trial” [emphasis added].

¹⁰⁷ *Canada v. Schmidt*, [1987] 1 S.C.R. 500 at 522, La Forest J. [hereinafter *Schmidt*]. La Forest J. further notes, at 527, that there is nothing unjust in extraditing even if procedures “may not meet the specific constitutional requirements for trial in this country.”

¹⁰⁸ *Ibid.* at 522:

I see nothing unjust in surrendering to a foreign country a person accused of having committed a crime there for trial in the ordinary way in accordance with the system for the administration of justice prevailing in that country simply because that system is substantially different from ours with different checks and balances.

¹⁰⁹ *Ibid.* at 522-23:

A judicial system is not, for example, fundamentally unjust—indeed it may in its practical workings be as just as ours—because it functions on the basis of an investigatory system without a presumption of innocence or, generally, because its procedural or evidentiary safeguards have none of the rigours of our system.

penalty by the foreign state ‘sufficiently shocks’ the Canadian conscience”¹¹⁰ The decision not to intervene to stop removal from Canada unless the anticipated risks are “outrageous to the values of the Canadian community,”¹¹¹ and, more generally, to eschew a principled approach to the definition of risk to security of the person in favour of a search for “social consensus”¹¹² on the range of tolerable harm, is incongruous and regrettable. As observed in a dissenting opinion by Sopinka J.,

Such circumstances are not limited to situations which “shock the conscience.” To hold otherwise would be to overly restrict the application of s. 7 in the extradition context. Principles of fundamental justice are not limited by public opinion of the day. The protection afforded by s. 7 extends to individuals who face unjust situations which are not recognized as such by the majority.¹¹³

Indeed, it might reasonably be asked why the Court would insist that scrutiny of foreign procedures be circumscribed by a “margin of appreciation” if it did not intend the result of this more limited inquiry to itself define the appropriate moment of judicial intervention.

This general concern aside, the Supreme Court has qualified the “shock the conscience” threshold for section 7 intervention in a way that is directly relevant to an assessment of the constitutionality of refugee deflection. Whatever the prevailing public opinion, the Court has declared that it is never permissible to remove persons from Canada to face certain kinds of risk: “there are, of course, situations where the punishment imposed following surrender—torture, for example—would

¹¹⁰ *Kindler*, *supra* note 82 at 849, McLachlin J.

¹¹¹ O’Reilly, *supra* note 86 at 873 [footnotes omitted]:

In the companion extradition cases of *Ng* and *Kindler*, the Supreme Court of Canada applies the approach it developed in the trilogy of *Mellino*, *Allard* and *Schmidt* to the review of decisions of the Minister of Justice to surrender persons to requesting states. Those cases showed that the Court would take a hands-off approach in determining the content of section 7 of the *Charter* for purposes of reviewing these decisions, intervening only where the return of a person was “simply unacceptable” or would “shock the conscience” of Canadians.

¹¹² To ascertain the public’s attitude toward the death penalty, the Court referred to the free votes on this subject taken in the House of Commons in 1976 and 1987, each of which rejected the reinstatement of capital punishment. See *Kindler*, *supra* note 82 at 832, La Forest J.: “I should perhaps note that I do not think the courts should determine unacceptability in terms of statistical measurements of approval or disapproval by the public at large, but it is fair to say that they afford some insight into the public values of the community.”

¹¹³ *Ibid.* at 791.

be so outrageous to the values of the Canadian community that the surrender would be unacceptable.”¹¹⁴

There are, therefore, some potential risks consequent to the actions of partner states which are inherently unacceptable, and which will presumptively offend the duty to comply with the principles of fundamental justice.¹¹⁵ Cory J.’s dissent in *Kindler* suggested that exposing an individual to risks inconsistent with basic international obligations, logically including those set by the *Refugee Convention*, may constitute the core of this principled caveat to judicial restraint under section 7.¹¹⁶ La Forest J.’s majority judgment in *Kindler* also noted that “certain types of arbitrary conduct may sufficiently ‘shock the conscience’ as to trigger section 7.”¹¹⁷ Keeping in mind that the predicament of refugee claimants has been acknowledged by the Court to warrant more intense scrutiny than is justified in the review of other removal decisions,¹¹⁸ it would be inappropriate to apply too generous a “margin of appreciation” to the protective efforts of partner countries.¹¹⁹

There are, in any event, strong reasons to confine the “public outrage” standard for section 7 intervention to the extradition context.

¹¹⁴ *Ibid.*

¹¹⁵ *Schmidt*, *supra* note 107 at 522, La Forest J.:

I have no doubt either that in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances. To make the point, I need only refer to a case that arose before the European Commission on Human Rights, *Altun v. Germany* (1983), 5 E.H.R.R. 611, where it was established that prosecution in the requesting country might involve the infliction of torture. Situations falling far short of this may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7.

¹¹⁶ *Kindler*, *supra* note 82 at 824.

¹¹⁷ *Ibid.* at 838.

¹¹⁸ *Ibid.* at 834, La Forest J.:

The Government has the right and duty to keep out and to expel aliens from this country if it considers it advisable to do so. This right, of course, exists independently of extradition I am aware that on humane grounds, provision is now made for the admission of political refugees, but that, of course, has no relevance here.

¹¹⁹ The European Court of Human Rights has clearly recognized this to be the proper approach in the interpretation and application of substantive human rights provisions of the *European Convention on Human Rights* *supra* note 29, in both the extradition and refugee protection contexts. Basic human rights cannot legally be put at jeopardy by an expulsion decision: see generally *supra* notes 8 and 89-90.

The common commitment of states to the prosecution of crime may require that impediments to the removal of those accused of serious offences be kept to an absolute minimum: criminal justice functions best where there is ready access to witnesses, and deterrent and retributive goals are most easily served by trial in the community where the harm is alleged to have occurred.¹²⁰ These arguments clearly have no currency in the context of refugee status determination.

In sum, the Supreme Court's extradition case law provides support for the view that Canada's duty to ensure fundamental justice to persons whose security of the person is at stake can legitimately be subcontracted to other countries. The sufficiency of efforts made by partner countries is not a function of whether they provide precisely the same guarantees available in Canada. A principled margin of appreciation should instead be applied to the justice systems of foreign states, with a focus on whether the claims of persons removed from Canada will be considered within a system of "checks and balances" that ensures reasonable due process and delivers essential fairness. It should, in particular, be clear that the foreign procedures do not expose persons removed from Canada to risks inconsistent with basic international obligations, logically including those set by the *Refugee Convention*

A. Europe

Even applying a reasonable margin of appreciation, it is unlikely that Canada's proposed partner states will be seen dependably to deliver fundamental justice to deflected asylum seekers. Refugee claimants returned to Europe under the proposed *Dublin Parallel Convention*¹²¹ would frequently fail to receive even basic protection.¹²² Over the past decade, Europe has been the laboratory for development of restrictive policies and approaches to refugee protection. This breakdown of the commitment to refugee protection in much of Europe has been attributed to a simplistic desire to deter illegal immigration, even if that

¹²⁰ *United States v. Cotroni*, [1989] 1 S.C.R. 1469 at 1488, La Forest J. [hereinafter *Cotroni*]: "[i]t is often better that a crime be prosecuted where its harmful impact is felt and where the witnesses and the persons most interested in bringing the criminal to justice reside."

¹²¹ *Supra* note 7.

¹²² See generally J. Bhabha & G. Coll, eds., *Asylum Law & Practice in Europe and North America—A Comparative Analysis by Leading Experts* (Washington, D.C.: Federal Publications, 1992); and Danish Refugee Council, *Legal and Social Conditions for Asylum Seekers and Refugees in Selected European Countries* (Copenhagen: Danish Refugee Council, 1993).

means failing to distinguish refugees from migrants in search of economic opportunities.¹²³

Refugees in Europe are now subject to peremptory decision-making, often leading to summary rejection without any expert examination of their claims to protection. Greece, Italy, and Turkey give essentially unfettered discretion to police officials and bureaucrats to reject refugee claimants on the basis of documentary evidence and a summary interview. Admissibility decisions in France are made not by OFPRA, the expert status determination authority, but by officials who report to the Minister of the Interior. In Germany, police officers have the authority to turn asylum seekers away at the border.¹²⁴

As part of their “manifestly unfounded” processes, many Western European states now routinely exclude all asylum seekers who come from so-called “safe countries of origin.”¹²⁵ This kind of *en bloc* negative adjudication of nationally defined groups of refugee claimants is an affront to both the purposes of the *Refugee Convention* and to any meaningful understanding of a subcontracted responsibility to deliver fundamental justice:

[T]he notion of safe country of origin as an automatic bar to access to asylum procedures ... [is] contrary to the necessary individual determination of refugee status under the 1951 Convention. ... It is impossible to exclude, as a matter of law, the possibility that an individual could have a well-founded fear of persecution in any particular country however great its attachment to human rights and the rule of law.¹²⁶

¹²³ L. Doyle, “EU slams the door on fleeing victims” *The Manchester Guardian* (23 March 1996) 14: “EU countries have become less and less willing or able to distinguish between job-seeking illegal immigrants and genuine victims of repression [I]n the rush to deport the economic migrants many genuine refugees are being pushed out as well, some without even getting a hearing.”

¹²⁴ UNHCR Regional Bureau for Europe, *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR* (Geneva: Office of the High Commissioner for Refugees, 1995) at 6-7 [hereinafter *UNHCR Bureau for Europe*]; and European Council on Refugees and Exiles, *Asylum in Europe: Review of Refugee and Asylum Laws and Procedures in Selected European Countries* vol. 2 (London: European Council on Refugees and Exiles, 1994) at 10.

¹²⁵ A 1992 resolution of European Union immigration ministers defined a “safe country of origin” as a state

where it can be clearly shown, in an objective and verifiable way, normally not to generate refugees, or where it can be shown in an objective and verifiable way that circumstances which might in the past have justified recourse have ceased to exist.

See EU, Council, *Report from Immigration Ministers to the European Council Meeting in Maastricht* (1993) Doc. No. WGI 930 at 38.

¹²⁶ *UNHCR Bureau for Europe* *supra* note 124 at 13.

There is little question that, in practice, these European procedures result in the *refoulement* of genuine refugees.¹²⁷ Switzerland and Germany have declared, *inter alia*, Bulgaria, Ghana, Poland, and Romania to be “safe countries of origin” for all categories of asylum seekers, even though claims from minorities within each of these states have been recognized as valid by Canada.¹²⁸

Even where the European country to which Canada deflects an asylum seeker has a reasonably good protection record, there is no guarantee that the refugee claimant will not be further deflected to another state with a less adequate system. Regional agreements in Europe allow for the secondary deflection of refugees returned by Canada to a “good citizen” state toward a different European country, that may or may not have an adequate protection system. For example, Germany, France, Belgium, the Netherlands, and Luxembourg routinely deflect asylum seekers to Poland under the terms of an interstate agreement.¹²⁹ Poland, however, has yet to adopt any kind of formal refugee status determination procedure.¹³⁰

Secondary deflection may be followed by tertiary and further deflections, with the result that asylum seekers are eventually returned to their country of origin. By way of example, a Somali woman and her five children were recently deflected from Belgium to the Czech Republic. The Czech Republic, in turn, deflected the family to Slovakia. Slovakian authorities then deported these asylum seekers to Ukraine, which is not even a party to the *Refugee Convention* Efforts made to

¹²⁷ *Ibid.* at 14:

Whereas the principle of *non-refoulement* is rarely violated in Western Europe where recognized refugees are concerned, there are growing risks for asylum seekers, especially at airports and other points of entry. Pre-screening and admissibility procedures together with an extensive application of the concepts of first country of asylum and safe country of origin, without the necessary procedural safeguards, have increased the risk of *refoulement* for asylum seekers, mainly following non-admission or rejection at the border.

¹²⁸ In 1995, the Canadian Immigration and Refugee Board recognized 64 per cent of claims from Bulgaria, 30 per cent of claims from Ghana, 63 per cent of claims from Poland, and 32 per cent of claims from Romania: Canada, Immigration and Refugee Board of Canada, *Statistical Summary Fourth Quarter, 1995* (Ottawa: Immigration and Refugee Board, 1996) at 1-4 [hereinafter *IRB Annual Statistics*].

¹²⁹ *Agreement between the Schengen countries and the Republic of Poland concerning the readmission of persons in an irregular situation* 29 March 1991 [hereinafter *Schengen-Poland Agreement*].

¹³⁰ A. Achermann & M. Gattiker, “Safe Third Countries: European Developments” (1995) 7 *Intl. J. Refugee L.* 19 at 24. See also U.S. Committee for Refugees, *1995 World Refugee Survey* (Washington, D.C.: Immigration and Refugee Service of America, 1995) at 153 [hereinafter *World Refugee Survey*].

determine the fate of the Somali woman and her children have not succeeded.¹³¹ There are also generalized patterns of secondary deflection. Kurdish claimants from Turkey, for example, have frequently been removed from Germany to their European “country of first arrival,” Italy, which in turn summarily deported them to Turkey.¹³² It is likely that there will be more such stories; European governments have not been willing to bind themselves to engage in deflection only once the destination state consents to admit the asylum seeker to a status determination procedure in which the refugee claim will be examined on the merits.¹³³

Beyond these fundamental procedural weaknesses, our potential European partner states have also opted for an extraordinarily narrow interpretation of the *Convention* refugee definition on a number of key points.¹³⁴ In their 1995 *Joint Position* statement on interpretation of the refugee definition, for example, EU governments expressed the view that “[p]ersecution is generally the act of a State organ (central State or federal States, regional and local authorities) whatever its status in international law, or of parties or organizations controlling the State.”¹³⁵ This view diverges from the established international practice of recognizing refugee claims where the applicant risks serious harm at the hands of non-official actors that the government is unable or unwilling to control.¹³⁶ In a world in which so much serious human rights abuse stems from power struggles between governments and opposition groups, this one aberrant interpretation of refugee status will deny

¹³¹ *The World's Refugees*, *supra* note 10 at 204.

¹³² *World Refugee Surveys*, *supra* note 130 at 149.

¹³³ *UNHCR Bureau for Europe*, *supra* note 124 at 17. Immigration Rules recently announced in the United Kingdom, for example, provide that “the Secretary of State is under no obligation to consult the authorities of the third country before the removal of an asylum applicant”: U.K. H.C., *Statement of Changes in Immigration Rules* 23 May 1994 (London: H.M.S.O., 1994), para. 345.

¹³⁴ See generally *The World's Refugees*, *supra* note 10 at 200.

¹³⁵ EU, Council, *Joint Position Defined by the Council on the Basis of Article K.3 of the Treaty on European Union on the Harmonized Application of the Definition of the Term ‘Refugee’ in Article 1 of the Geneva Convention of 28 July 1951 relating to the Status of Refugees* (19 December 1995), Part 5.1 [hereinafter *Joint Position*].

¹³⁶ *UNHCR Bureau for Europe*, *supra* note 124 at 27-30. UNHCR has argued that the *Joint Position*'s refusal to recognize that actions by non-state agents may give rise to a fear of persecution “is contrary to the text and to the spirit of the 1951 Convention. Persecution which does not involve state complicity is still persecution. The Convention applies when the state is unable, as well as unwilling, to protect such people”: UNHCR Press Release, “UNHCR Expresses Reservations Over EU Asylum Policy” (15 December 1995). See also *Ward*, *supra* note 68 at 713-17.

protection to large numbers of legitimate refugees deflected by Canada to Europe.¹³⁷

All of this has led the United Nations High Commissioner for Refugees to acknowledge that intergovernmental efforts in Europe have “threatened the fundamental principles of refugee protection.”¹³⁸ Recalling the Supreme Court of Canada’s view that the exposure of an individual to risks inconsistent with basic international obligations should constitute the core of a principled caveat to judicial restraint under section 7,¹³⁹ it is difficult to imagine that deflection to Europe would be deemed an acceptable subcontracting of the Canadian duty to deliver fundamental justice to asylum seekers.

B. *The United States of America*

The more imminent risk is of deflection toward the United States. If the Canada-U.S. *Draft Agreement*¹⁴⁰ comes into force, most asylum seekers who come to Canada via the United States will be deflected to the United States, and *vice versa*.¹⁴¹ Official announcements notwithstanding, this agreement is not a means of denying refugee claimants the ability to make sequential applications for asylum in each of the two countries. It will instead capture refugee claimants who have spent more than brief transit time in the United States before arriving in Canada, whether or not they made a claim for protection in the United States. Nor is this an agreement to stop “asylum shopping,” that is, to deter persons whose decision to apply for refugee status in Canada is motivated by economic or other factors, rather than by a need for protection. To the contrary, the agreement

¹³⁷ France, for example, has received a significant number of asylum claims from Algerians fearful of persecution by armed Islamist groups that Algeria’s government is unable or unwilling to control. OFPRA, the French status determination authority, has (inappropriately) required these asylum seekers to show that the persecution feared was at the hands of the Algerian government, and has refused protection to persons whose fears relate instead to the actions of the armed opposition: *World Refugee Survey*, *supra* note 130 at 140.

¹³⁸ *The World’s Refugee*, *supra* note 10 at 201.

¹³⁹ See *supra* note 115 and accompanying text.

¹⁴⁰ *Supra* note 6.

¹⁴¹ Persons who arrive by air will be granted forty-eight hours transit time in the United States; those who come by sea or land receive a ten day transit allocation before the “country of first arrival rule” is applicable. As well, asylum seekers who have a designated relative in one of the two countries are allowed to have their claim determined in that country, even if it is not their “country of first arrival.” *Ibid.* art. 6(3)(c).

establishes no procedure even to canvass the motives of asylum seekers for not ending their journey in the country of first arrival. This draft treaty proposes, purely and simply, to end the right of most asylum seekers arriving in one of the two countries to decide where they wish to request protection. In our view, the prospect of asylum seekers physically present in Canada being forced back to the United States raises a number of critical concerns from the optic of subcontracted compliance with even a broadly interpreted duty of fundamental justice.

The substantive interpretations of the *Convention* refugee definition in the United States diverge in many respects from international norms. There has been a longstanding concern that refugee determination decisions in the United States have been subject to political distortion. Fewer than 10 per cent of Guatemalan and Salvadoran asylum seekers were recognized as refugees by the United States¹⁴² during an era when, for example, Canada granted status to a majority of these same claimant groups.¹⁴³ More fundamentally, American courts have been unwilling to enunciate a coherent understanding of the “well founded fear of persecution” test for refugee status,¹⁴⁴ much less to link their analysis to human rights principles as is

¹⁴² Between 1991 and 1995, 7.3 per cent of Guatemalan claims and only 5.1 per cent of Salvadoran claims were recognized as refugees by the United States Asylum Corps: U.S. Committee for Refugees, *Refugee Report* (Washington D.C.: Immigration and Refugee Service of America, 1995) at 12-13.

¹⁴³ Canada, Immigration and Refugee Board, *IRB Decisions and Acceptance Rates, 1989-May 1993* (Ottawa: Immigration and Refugee Board, 1993). This disparity continues. Recent statistics reveal acceptance rates for Guatemalans, for example, of 57 per cent in Canada and 5.7 per cent in the United States: B. Frelick, “Canada, U.S. Resort to Refugee Dumping,” *The [Ottawa] Citizen*, (10 January 1996) A9.

¹⁴⁴ See, for example, *Fishery. INS*, 79 F. 3d 955 at 961 (9th Cir. 1996), Wallace J.:

In interpreting the Act, the Board is bound by our earlier decisions, which define “persecution” generally as “the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive” Persecution is an extreme concept, which ordinarily does not include “discrimination on the basis of race or religion, as morally reprehensible as it may be.”

This unwillingness to commit to an interpretive framework to define the key concept of “fear of persecution” means that there can be no assurance that the United States will accurately identify genuine *Convention* refugees. As noted by D. Anker, *The Law of Asylum in the United States* (Washington, D.C.: American Immigration Law Foundation, 1996) vol. 1 [forthcoming]:

[M]any courts—and even more so the Board [of Immigration Appeals]—have not separated the issue of persecution from the grounds, and have failed to grapple with a conception of persecution *per se*. They have treaded gingerly in conceptualizing persecution, careful to underscore that it requires extreme conduct, almost by definition not imposed on a large group of the population, thereby not only misstating doctrine, but confusing the persecution definitional problem with that of targetting, an issue that relates to the reasonableness of the applicant’s fear.

the usual practice elsewhere.¹⁴⁵ Perhaps most incredibly, the United States Supreme Court determined in *INS v. Elias Zacarias*¹⁴⁶ that a claim to *Convention* refugee status will be recognized only if the asylum seeker is somehow able to show that it was the subjective intention of his or her persecutor to inflict harm on account of the asylum seeker's civil or political status, often a near-impossible task.¹⁴⁷ These definitional distortions raise the prospect of claimants being rejected by the United States—and returned to their country of origin—simply because the United States has adopted a watered down understanding of *Convention* refugee status.

Second, the standard of proof applied in the United States is not in keeping with international law. Asylum seekers are required only to meet the internationally sanctioned standard of showing a “well founded” fear of persecution, that is, that there is a “reasonable possibility” of persecution taking place in the home country.¹⁴⁸ If the claimant meets this standard, however, he or she is not *entitled* to remain in the United States, but is only eligible to benefit from a *discretionary* grant of asylum.¹⁴⁹ In order to acquire the internationally mandated *right* not to be returned to the country of origin, the asylum seeker must successfully advance a claim before the Immigration Court for “withholding of deportation.” To succeed on such a claim, however, the standard of proof is elevated beyond that authorized by international

¹⁴⁵ See, for example, *Ward*, *supra* note 68 at 733-34. See also *Joint Position*, *supra* note 135, Part 4:

The term “persecution” ... is not defined in the Convention However, it is generally agreed that, in order to constitute “persecution” within the meaning of Article 1A, acts suffered or feared must ... be sufficiently serious, by their nature or their repetition; they must either constitute a basic attack on human rights, for example, life, freedom or physical integrity, or, in the light of all the facts of the case, manifestly preclude the person who has suffered them from continuing to live in his country of origin.

¹⁴⁶ 502 U.S. 478 (1992) [hereinafter *Zacarias*].

¹⁴⁷ This difficulty is illustrated by the case of *Natacha Angouchevav*. *INS*, B.I.A. Decision No. 95-2370 (pending before the 7th Circuit Court of Appeals), involving an Albanian of Macedonian ethnicity who had been active in promoting minority rights for her people. She fled to the United States after having been summoned to the office of the Albanian state security service, where an official attempted to rape her. Applying the perverse logic of the Supreme Court's decision in *Zacarias*, *ibid.*, the United States government opposed her claim to refugee status on the ground that there was no “compelling evidence” to establish that the attempted rape was motivated by either her political opinion or ethnicity: “rather, the evidence supports the inference that the major found the petitioner sexually attractive.”

¹⁴⁸ *INS v. Cardoza-Fonseca*, 480 U.S. 421 at 440 (1987) [hereinafter *Cardoza-Fonseca*].

¹⁴⁹ *Asylum Procedure* 8 U.S.C. § 1158 (1996). In *Doherty v. United States*, 502 U.S. 314 (1992), the Supreme Court acknowledged that the Attorney General can refuse to grant asylum to a refugee on discretionary grounds.

law. To acquire a *right* to remain in the United States, the claimant must show not just a “well founded” fear of persecution; there must instead be a “clear probability” of persecution.¹⁵⁰ This higher standard imposes an unrealistic evidentiary burden on asylum seekers. It is moreover inconsistent with the interpretation of international law adopted by Canada.¹⁵¹

Third and most fundamentally, the United States has regularly proved unwilling to honour the most basic of all internationally mandated refugee rights, namely the entitlement of refugees not to be returned to the risk of persecution (*non-refoulement*). To cite only a few recent examples, in July 1993 the United States forcibly diverted three boatloads of Chinese asylum seekers away from its own territory and toward Mexico, a country that has not even agreed to abide by international refugee law.¹⁵² In the wake of the exodus of boat people fleeing the murderous Cedrés regime in Haiti, the United States ordered its Coast Guard to interdict Haitian asylum seekers in international waters, destroy their boats, and forcibly repatriate the asylum seekers to Haiti. While the United States Supreme Court upheld this action as legal,¹⁵³ it was protested by the United Nations High Commissioner for Refugees¹⁵⁴ and is currently the subject of a complaint deemed admissible by the Inter-American Commission on Human Rights.¹⁵⁵ Most recently, the United States signed an agreement with Cuba’s Fidel Castro under which Cuban asylum seekers will also be intercepted and handed over to Cuban officials. President Clinton “directed the Coast Guard to continue its expanded effort to stop any boat illegally

¹⁵⁰ *INS v. Stevic*, 467 U.S. 407 at 430 (1984).

¹⁵¹ *Adjei v. Canada (Employment and Immigration)* [1989] 2 F.C. 680 at 682-83 (C.A.), MacGuigan J.A.: “the objective test is not so stringent as to require a *probability* of persecution The parties were agreed that one accurate way of describing the requisite test is in terms of ‘reasonable chance’” [emphasis in original].

¹⁵² “Most of an estimated 650 Chinese migrants aboard three ships ended their three-month journey by being deported to China by Chartered jets from Tijuana, Mexico. The three ships had been interdicted in international waters by the U.S. Coast Guard.” U.S. Committee for Refugees, *Refugee Report* (Washington, D.C.: Immigration and Refugee Service of America, 30 July 1993) at 12.

¹⁵³ *Sale v. Haitian Centers Council Inc.*, 509 U.S. 155 (1993). For a discussion of this decision, see *Refugee Rights Report* *supra* note 20 at 10-12.

¹⁵⁴ “Brief *amicus curiae* of the Office of the United Nations High Commissioner for Refugees” reprinted in (1994) 6 Int’l. J. Refugee L. 85.

¹⁵⁵ *Case 11.675 (United States)* (1993), Inter-Am. Comm. H.R. Res. No. 28/93.

attempting to bring Cubans to the United States.”¹⁵⁶ Incredibly, the U.S.-Cuba Joint Communiqué of 9 September 1994 actually *requires* Cuba to stop the departure of asylum seekers: “The Republic of Cuba will take effective measures *in every way it possibly can* to prevent unsafe departures *using mainly persuasive measures*.”¹⁵⁷

Beyond these key concerns, the American asylum system is problematic in terms of its reliance on internationally condemned detention practices,¹⁵⁸ and its denial to claimants of either a meaningful right to counsel¹⁵⁹ or competent interpreters at asylum hearings.¹⁶⁰ Perhaps the most draconian step of all was the adoption in 1996 of a summary exclusion procedure applicable against any asylum seeker forced to rely on false documentation in order to escape his or her country of origin or to avoid American overseas deterrence efforts.¹⁶¹

¹⁵⁶ M. Nash Leich, “Contemporary Practice of the United States Relating to International Law” (1995) 89 A.J.I.L. 96 at 100 [hereinafter “Contemporary Practice”], citing Statement by William J. Clinton, President of the United States (19 August 1994) [unpublished].

¹⁵⁷ *Ibid.* at 99, citing *U.S.-Cuba Joint Communiqué on Migration of September 4, 1994* [emphasis added; unpublished].

¹⁵⁸ Americas Watch Committee, *Brutality Unchecked: Human Rights Abuses Along the U.S. Border with Mexico* (New York, Americas Watch, 1992) at 51:

Many of those detained pose no risk to the safety or property of others and are not flight risks. They are detained because the INS believes—though it has not demonstrated—that detaining undocumented migrants facing immigration proceedings deters others from entering the country unlawfully. Conditions in detention facilities used by the INS are dreary and often abusive. Due process and other legal rights often are ignored ... Under these conditions, the INS’s expanded use of detention as a means to discourage immigration raises serious human rights concerns.

¹⁵⁹ United States, Immigration and Naturalization Service, *Procedures Manual* (Washington, D.C.: Immigration and Naturalization Service, 1993) at 17-18 [hereinafter *INS Manual*]: while counsel may be present to “put the applicant at ease,” he or she may not play any role in the examination of the applicant on the substance of the claim to asylum. Counsel may make submissions on the case, but the asylum officer “in his or her discretion, may limit the length of such statement or comment and may require their submission in writing”: 8 C.F.R. § 208.9(d) (1995). Oral submissions, if allowed, are to take no more than five minutes: *INS Manual* at 18. While there is a more credible right to counsel in the formally adversarial procedure before the immigration court, there is no provision for legal aid of any kind: 8 C.F.R. § 242(b)(2) (1995).

¹⁶⁰ Under 1995 amendments to the regulations, applicants for asylum who cannot communicate adequately in English are now required to bring a qualified interpreter with them to their hearing. The interpreter must be engaged at no cost to the United States government. The applicant’s counsel is prohibited from providing interpretation. If the applicant cannot show “good cause” for a failure to hire and make available a competent interpreter, the asylum officer has the discretion to deem such conduct a “failure without good cause to appear for the interview”: 8 C.F.R. § 208.9(g) (1995).

¹⁶¹ Indeed, the language of the statutes leaves open the possibility that any misrepresentation by an asylum seeker at the time of requesting a visa or upon arrival in the United States may result in subjection to the summary exclusion procedure: *Illegal Immigration Reform and Immigrant*

All such refugee claimants will be forced to present their case to an immigration official *immediately upon arrival* in the United States. They will have no right of appeal, but only to “review” by an immigration judge, likely conducted by telephone. Nor is there any provision for a right to counsel at either the hearing or review. Indeed, even the right of claimants to seek advice is conditional on there being no cost to the government and no prospect of unreasonable delay in processing the claim. Given that the review “shall be concluded as expeditiously as possible, to the maximum extent practicable *within 24 hours, but in no case later than 7 days after the date of the determination*” there is little chance that claimants subject to summary exclusion, all of whom must be detained, will be able to secure meaningful guidance on how to present their case.¹⁶²

In sum, refugee determination systems in the most likely partner states fail to meet basic protection standards not simply in regard to the details of implementation, but often in ways which undercut critical and basic protections. Even with the benefit of a principled margin of appreciation, deflection to Europe or the United States should not be deemed an acceptable subcontracting of the Canadian duty to comply with the principles of fundamental justice. Absent harmonization of the substantive and procedural dimensions of refugee protection with its partner states—which is not planned, much less guaranteed—Canada simply cannot deflect refugees away from its territory without thereby failing to ensure that their security interests are protected by a process that complies with the principles of fundamental justice.

VI. IS DEFLECTION A REASONABLE LIMITATION ON RIGHTS IN A FREE AND DEMOCRATIC SOCIETY?

The *Charter* provides in section 1 that rights may be subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. While there is authority for the view that the failure to deliver fundamental justice when basic security interests are at stake can never be justified in a free and democratic

Responsibility Act of 1996 Pub. L. No. 102-208, 110 Stat. 309 (codified as amended in various sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C.) (1996).

¹⁶² *Ibid.* See generally A. Lewis, “Abroad at Home: Covering Up Cruelty,” *New York Times* (27 September 1996) A33, column 2 [emphasis added].

society,¹⁶³ the Supreme Court of Canada has, in fact, canvassed the issue of justification on a routine basis.¹⁶⁴

As Sopinka J. pointed out in his dissent in *Kindler*, however, the situations in which a breach of section 7 protections can be justified under section 1 must be extremely rare, as respect for fundamental justice is itself an essential component of the definition of a free and democratic society.¹⁶⁵ Lamer C.J.'s perspective was equally clear: only in truly exceptional conditions "such as natural disasters, the outbreak of war, epidemics, and the like," can section 1 be relied upon to validate a failure to conform to the principles of fundamental justice.¹⁶⁶ It is clear, therefore, that the courts ought to countenance the denial to refugee claimants of a procedure that delivers fundamental justice in only truly extenuating circumstances.

Additionally, while the courts have given a broad reading to section 1 when the question requires the balancing of conflicting *Charter* rights between or among individuals or groups, courts have acted otherwise when section 1 is raised in order simply to advance public order objectives or administrative efficiency.¹⁶⁷ As Peter Hogg observes,

¹⁶³ *B.C. Motor Vehicle Reference* *supra* note 101 at 523, Wilson J.: "I do not believe that a limit on a s. 7 right which has been imposed in violation of the principles of fundamental justice can be either 'reasonable' or 'demonstrably justified in a free and democratic society.'"

¹⁶⁴ P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 1024:

Could a law that did not conform to the principles of fundamental justice be upheld under section 1? Could a violation of fundamental justice ever be a reasonable limit that can be demonstrably justified in a free and democratic country? Wilson J. has several times expressed the view that the answer to this question is no: a violation of fundamental justice could never be justified under section 1. However, for the most part, the Court has routinely moved on to the issue of section 1 justification before finding a breach of section 7, and some judges (though never a majority) have held that a particular breach of section 7 was justified under section 1.

¹⁶⁵ *Kindler*, *supra* note 82 at 793.

¹⁶⁶ *B.C. Motor Vehicle Reference* *supra* note 101 at 518, Lamer J.

¹⁶⁷ *Singh*, *supra* note 15 at 218-19, Wilson J.:

Seen in this light I have considerable doubt that the type of utilitarian consideration brought forward by Mr. Bowie can constitute a justification for a limitation on the rights set out in the *Charter*. Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. Whatever standard of review eventually emerges under s. 1, it seems to me that the basis of the justification for the limitation of rights under s. 7 must be more compelling than

It should not be possible to take away a right just because, on balance, the benefits to others will outweigh the cost to the right-holder Section 1 of the *Charter* would undermine everything that follows if it were interpreted as permitting the Court to uphold a limit on a guaranteed right whenever the benefits of the law imposing the limit outweighed the costs.¹⁶⁸

The onus on the government to prove demonstrable justification is therefore to be interpreted particularly strictly where, as in the case of refugee deflection, compliance with the principles of fundamental justice would not compromise the rights of others. Drawing on the criteria articulated by the Supreme Court in *R. v. Oakes*,¹⁶⁹ the government should be required to present particularly cogent evidence that important objectives are advanced by deflection, that the summary eligibility procedure is a rational means to secure those ends, that refugee rights are minimally impaired in pursuit of the posited social imperatives, and that the abrogation of refugee claimants' rights to security of the person does not exact a disproportionately high civil liberties cost relative to the benefits pursued.¹⁷⁰

Finally, any exercise in justification under section 1 should ultimately advance the goals of a free and democratic society. Section 1 does not authorize a government to run roughshod over essential guarantees of human dignity, but is rather an integral part of the *Charter*, as Kerans J.A. emphasized in *Black v. Law Society of Alberta*.¹⁷¹

The debate about the meaning of section 1 ... should ... always be in the context of what is and what is not supportive and creative of a free and democratic society The only "test" is this: would affirmation of the limitation (both as to ends and means) better maintain and enhance a free society in Canada than would affirmation of the right?¹⁷²

In the context of refugee deflection, it may therefore be apt to recall Bruce Ackerman's argument that the adequacy of our response to the needs of necessitous "outsiders" for admission to our community is, in a

any advanced in these appeals.

¹⁶⁸ Hogg, *supra* note 164 at 854.

¹⁶⁹ [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

¹⁷⁰ Hogg, *supra* note 164 at 867:

[T]here are four criteria to be satisfied [in order to meet the *Oakes* test]: 1. Sufficiently important objective: the law must pursue an objective that is sufficiently important to justify limiting a *Charter* right. 2. Rational connection: the law must be rationally connected to the objective. 3. Least drastic means: the law must impair the right no more than is necessary to accomplish the objective. 4. Proportionate effect: the law must not have a disproportionately severe effect on the person to whom it applies.

¹⁷¹ (1986), 68 A.R. 259 (C.A.) [hereinafter *Black*].

¹⁷² *Ibid.* at 278-88.

very direct sense, the litmus test of just how strongly we practise our basic values.¹⁷³

Taken together, these judicial caveats suggest, first, that section 1 can sanction a section 7 breach only in circumstances which evince a critical threat to Canadian society. Second, the extent of permissible derogation should be strictly construed where the countervailing concern is public order, rather than the rights of other individuals or groups. And finally, departure from compliance with the principles of fundamental justice ought to secure a net advance over adherence to section 7 in promoting the values of a free and democratic society.

This three-part test should inform the acceptability of a section 1 argument to justify the deflection of refugee claimants. We now turn to an examination of the three purposes the government is most likely to advance in seeking to make the section 1 case, namely that refugee deflection is required to maintain the integrity of the refugee determination system, to safeguard national security, or to promote international comity.

A. *Deterring Abuse of the Refugee Determination System*

Deflection might be defended by the government as integral to its efforts to curb abuse and fraud within the refugee determination system. By circumscribing the control an individual has over the country in which his or her refugee claim will be heard, deflection is said to reduce the potential for the refugee system to be used as a “back door” to immigration.

There is, however, no empirical evidence that the viability of the Canadian refugee protection system is threatened by abuse. To the contrary, the majority of those who seek protection from Canada have traditionally been found to be genuine refugees. Our overall acceptance rate has consistently been over 50 per cent, and has even reached into the 70 per cent range.¹⁷⁴ This is the highest recognition rate recorded by any industrialized country, suggesting that, at least judged by Canadian

¹⁷³ B.A. Ackerman, *Social Justice in the Liberal State* (New Haven, Conn.: Yale University Press, 1980) at 93 and 95 [emphasis in original]:

We can make sense of citizenship only by rooting it in more fundamental ideas of political community Quite unthinkingly, we have come to accept the idea that we have the right to exclude non-residents from our midst The *only* reason for restricting immigration is to protect the ongoing process of liberal conversation itself. Can our present immigration practices be rationalized on this ground?

¹⁷⁴ *IRB Annual Statistics*, *supra* note 128 at 5.

standards, there is not a significant problem of abusive claims. It is difficult to conceive how, in such circumstances, there could reasonably be said to be a “pressing and substantial” need to take extraordinary measures in order to fend off unfounded applications.

Nor is there evidence that most, or even many, of the minority that is refused refugee status have abused or defrauded the system. Some have, but there are other explanations as well for negative decisions. Many claims have been turned down because human rights conditions in the home country have improved during the time spent awaiting a decision in Canada, to the point that safe return is possible. Other applicants have been refused because of a failure to satisfy all technical requirements of the *Convention* refugee definition, even though they may truly have a compelling fear of return. Still other claims have been rejected in error, with the Federal Court subsequently intervening and returning the case to the Immigration and Refugee Board for redetermination. There is therefore insufficient evidence of a pattern of abuse that might allow section 1 to override the duty to deliver fundamental justice.

Nor does deflection intrude minimally on the rights of legitimate refugees. Because it is an extraordinarily blunt instrument, deflection excludes not only abusers, but persons genuinely at risk of persecution as well.¹⁷⁵ To the extent that abuse is a problem in the Canadian refugee system, it can be countered by less sweeping measures that are more closely targetted at the essence of the problem. The Immigration Department could, for example, choose to increase its interventions before the Immigration and Refugee Board to oppose recognition of dubious claims; the Board itself could draw more extensively on community and other resources to position itself more accurately to detect abuse; and the government could commit itself systematically to remove rejected asylum seekers from Canada, thereby sending a clear message that the refugee determination system is not an alternative

¹⁷⁵ Overbreadth was found to offend the fundamental principles of justice by the majority in *R. v. Heywood*, [1994] 3 S.C.R. 761 at 792-93, Cory J.:

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

immigration route.¹⁷⁶ These measures would deter abuse, yet would not disadvantage persons who wish to advance legitimate asylum claims.

B. *National Security*

Two kinds of national security argument might be made to justify resort to deflection under section 1 of the *Charter*. First, the Supreme Court's recent extradition case law suggests that the security interests of particular persons may be trumped by the national interest in ensuring that dangerous foreigners are not allowed to remain in Canada. The majority in *Kindler*¹⁷⁷ determined that the need to avoid "Canada becoming a more attractive destination for American fugitives in the future"¹⁷⁸ was a sufficiently important state purpose to defeat the existence of a protected interest in security of the person.¹⁷⁹ While this concern would have been more appropriately addressed under the rubric of section 1 justification than treated as a basis for ignoring security interests altogether,¹⁸⁰ Cory J.'s dissenting opinion cautions against any reliance on this kind of "*in terrorem* argument": "[t]he respondent's position cannot be said to rest on principle. The notion that certain individuals will arbitrarily be subjected to cruel and unusual punishment solely to serve as an apparent deterrent to American murderers contemplating flight to Canada cannot be accepted."¹⁸¹

In the refugee context, of course, the illogic of such an argument is magnified. Whatever the reality of the risk to Canadian security posed by American fugitives, there is no empirical support for the proposition that more than a miniscule proportion of refugee claimants presents any danger to the safety and security of Canada. Deflection cannot,

¹⁷⁶ See J.C. Hathaway, *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (Ottawa: Immigration and Refugee Board, 1993) at 28-32.

¹⁷⁷ *Supra* note 82.

¹⁷⁸ *Ibid.* at 836, La Forest J.

¹⁷⁹ *Ibid.* at 837:

[T]he decision to extradite the appellant without restrictions, which was taken with the view to deterring fugitives from seeking a safe haven in Canada to avoid the death penalty, was made in pursuit of a legitimate and indeed compelling social goal ... [T]he social goal addressed is an important consideration in section 7 balancing.

¹⁸⁰ See, for example, *Rodriguez supra* note 35 at 622, McLachlin J.: "it is not generally appropriate that the complainant be obliged to negate societal interests at the s. 7 stage, where the burden lies upon her, but that the matter be left for s. 1, where the burden lies on the state."

¹⁸¹ *Kindler, supra* note 82 at 825-26.

therefore, be justified as a proportionate response to the risk that dangerous foreigners might enter Canada.

An alternative national security concern might be that the sheer volume of the refugee flow into Canada (rather than any kind of specific risk) poses an unacceptable risk to the well-being of Canada. In fact the *per capita* ratio of refugee claimants to population in Canada is already among the lowest in the industrialized world, and cannot even begin to compare with the reception rates in many extraordinarily poor, less developed countries.¹⁸² In any event, concerns over the fair allocation of refugees among states could more rationally and less intrusively be pursued by the negotiation of burden sharing arrangements among governments, than by brute deflection.

The only concrete risk of a mass influx explicitly argued by the Canadian government relates to the 450,000 claims pending in the American refugee processing backlog. It has been suggested that many or most of these individuals will make claims in Canada if and when they are rejected in the United States.¹⁸³ Yet this situation illustrates precisely why mass deflection is a disproportionate response to any perceived national security concern. The hypothetical prospect of the Canadian refugee determination system being overwhelmed by 450,000 persons if and when their asylum claims are rejected by the United States could be readily answered by legislation to constrain duplicate claims. An asylum seeker who opted first to claim status in the United States might, for example, be required to demonstrate compelling circumstances to justify a new hearing in Canada, absent which return to the United States would ensue. In contrast to deflection, a particularized process of this sort would allow Canada to safeguard the integrity of its asylum process without breaching the principles of fundamental justice.

It is therefore difficult to argue that deflection is needed in order to avoid a national security risk engendered by the arrival of large numbers of asylum seekers. Moreover, as La Forest J. observed (dissenting) in the *Chan* case, it may be that the primary purpose of section 1 of the *Charter*—maintenance and enhancement of our commitment to a free and democratic society—may actually be advanced by refusal to take cognizance of this kind of “floodgates argument”:

¹⁸² *The World's Refugees*, *supra* note 10 at 248-50.

¹⁸³ G. Campbell, Director General, International Region, Department of Citizenship and Immigration, Letter to the Editor, *The [Toronto] Globe and Mail* (8 December 1995) A20.

I am mindful that the possibility of a flood of refugees may be a legitimate political concern, but it is not an appropriate legal consideration. To incorporate such concerns implicitly within the Convention refugee determination process, however well meaning, unduly distorts the judicial-political relationship. To alter the focus of refugee law away from its paramount concern with basic human rights frustrates the possibility that foreign persecution may be eventually halted by international pressure. To accept at the judicial level that fundamental human rights violations do not serve to grant Convention refugee status minimizes one of the principal incentives the international community has to denounce foreign persecution and attempt to effect change abroad: to avoid a flood of refugee claimants.¹⁸⁴

C. *International Comity*

A final approach to section 1 justification is grounded in the appropriateness of judicial deference to executive decisions made in pursuit of international comity.¹⁸⁵ The principle of comity as developed in the extradition context mandates restraint by courts, since it is said that the executive branch is best placed to assess the international ramifications of particular forms of interstate cooperation. As articulated by McLachlin J. for the majority in *Kindler*,

The superior placement of the executive to assess and consider the competing interests involved in particular extradition cases suggests that courts should be especially careful before striking down provisions conferring discretion on the executive The importance of maintaining effective extradition arrangements with other countries in a world where law enforcement is increasingly international in scope ... supports the Ministerial discretion [A]n effective extradition process is founded on respect for sovereignty and differences in the judicial systems among various nations. Canada displays confidence in the fairness of other nations by entering into treaties with them.¹⁸⁶

Should the courts similarly entertain a section 1 justification founded on international comity when assessing the propriety of refugee deflection arrangements entered into by Canada? Would this deference be the kind of respect for executive expertise in conducting international relations which may arguably be reasonable in a free and democratic society?¹⁸⁷ A negative answer is warranted in view of the two key

¹⁸⁴ *Chan*, *supra* note 57 at 389.

¹⁸⁵ *Argentina (Republic) v. Mellina*, [1987] 1 S.C.R. 536 at 551, La Forest J.: “the assumption by a Canadian court of responsibility for supervising the conduct of the diplomatic and prosecutorial officials of a foreign state strikes me as being in fundamental conflict with the principle of comity on which extradition is based.”

¹⁸⁶ *Supra* note 82 at 852-53.

¹⁸⁷ *Cotroni*, *supra* note 120 at 1489-90, La Forest J.: “[w]hile the rights guaranteed by the *Charter* must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by

reasons which have been said to justify application of the comity doctrine to extradition proceedings: reciprocity and transnationalism.

The first, and most frequently cited, reason to validate a rights breach in the name of international comity is concern for reciprocity. As McLachlin J. observed, "If Canada is to be assured of cooperation when it seeks extradition from states whose laws may not conform exactly to ours, it must be prepared to reciprocate."¹⁸⁸ This justification is explicitly utilitarian. It suggests that the "cost" of securing the greater good of access to persons wanted on criminal charges in Canada may be the sacrifice of some protections for persons in Canada who are sought by law enforcement officials from other states. While this rationale clearly fails the "truly exceptional emergency" test for resort to section 1, at least it serves more than a simple public order purpose, as the apprehension of suspected criminals serves a balancing function by its contribution to vindication of the rights of victims. Moreover, it might be argued that the process of extradition is, in and of itself, important to the affirmation of the basic values of a free and democratic society, including the social interest in safeguarding the right to personal security.¹⁸⁹

It is difficult, however, to conceive of a similar concern for reciprocity in the realm of refugee protection, as no state (including Canada) is actively seeking to attract refugee claimants. Indeed, deflection from Canada will, if anything, decrease our contribution to the sharing of common responsibilities with other states, as our geographical position and limited direct transportation corridors from refugee-producing regions mean that Canada will less frequently than at present be deemed the state responsible to hear the refugee claim. In truth, it is deflection's redirection of refugees toward other, relatively overburdened, states that ought to be seen as intrusive on a sensible interpretation of reciprocity.

The alternative possibility of a section 1 justification based on international comity consists of a simple appeal to the importance of

the legislature."

¹⁸⁸ *Kindler*, *supra* note 82 at 853.

¹⁸⁹ But see *Cotroni*, *supra* note 120 at 1510 and 1516, Wilson J. (dissenting) [citation omitted]: I would respectfully adopt the words of Jacques J.A. in *Re El Zein and the Queen*.. "Mere courtesy, or co-operation in combating crime, among various countries, does not justify this extradition because the end sought through this co-operation can be attained while still respecting the right of a citizen to remain in his country." ... It is not necessary in order that the appellants in this case be brought to justice that they be extradited to the United States. They can be brought to justice right here.

promoting transnationalism.¹⁹⁰ The argument would be that because refugee protection can most effectively be accomplished by cooperation among states, it is demonstrably reasonable that Canada should join with other industrialized countries in apportioning the responsibility to provide asylum. As La Forest J. stated in *Cotroni*, “I do not think that the free and democratic society that is Canada, any more than any other modern society, should today confine itself to parochial and nationalistic concepts of community. Canadians today form part of an emerging world community from which not only benefits but responsibilities flow.”¹⁹¹

If in fact the interstate agreements were premised on a genuine attempt to share responsibility within a system of states committed to permitting claimants to enter a procedurally and substantively fair determination process, this argument would be compelling. It is certainly the case that a nation like Canada, which this year will admit only a fraction of 1 per cent of the world’s refugees, cannot independently protect all involuntary migrants. The problem, however, is that the regimes in which we are contemplating participation are premised not on recognition of the rights of refugees, but rather on deterrence.¹⁹² Canada would thus find itself in cahoots with partners intent on the unconscionable suppression of the international human right to seek asylum.

Moreover, the proposed partnership agreements with Europe and the United States make no commitment to the procedural or substantive harmonization of refugee law among the participating states, much less to the establishment of a common set of policies which meets international standards of acceptable treatment. Instead, the regimes in

¹⁹⁰ The importance of transnational cooperation is clear, for example, in the judgment of La Forest J. writing for the majority, *ibid.* at 1485:

The objectives sought by the legislation, the parties agree, relate to concerns that are pressing and substantial The pursuit of that goal cannot realistically be confined within national boundaries The trafficking in drugs, with which we are here concerned, is an international enterprise and requires effective tools of international cooperation for its investigation, prosecution and suppression. Extradition is an important and well-established tool for effecting this cooperation.

¹⁹¹ *Ibid.* at 1486.

¹⁹² In the European context, for example, only states which agree to impose mandatory visa control and carrier sanction regimes (which repel all persons of a particular nationality, without distinction based on need for protection) can be admitted to the primary interstate system for processing refugee claims. The United States has recently asserted, over formal protest by the United Nations, that international law allows its military to intercept asylum seekers in international waters, destroy their boats, and immediately return them to the state in which they fear persecution. See Parts V(A) and V(B), above.

which we are considering membership are intended specifically to constrain and detract from the formal commitments of states under the *Refugee Convention*

International comity grounded in transnationalism ought not to be seen to be a good thing *per se*. Rather, in keeping with the fourth leg of the *Oakes* test,¹⁹³ account should be taken of the values furthered by specific forms of transnationalism. As affirmed by the Alberta Court of Appeal in *Black*,¹⁹⁴ invocation of section 1 should ultimately serve the essential purpose of promoting the values of freedom and democracy. It should not, as in the case of refugee deflection agreements, be invoked to legitimate the shifting of common responsibilities on an unprincipled basis. It is one thing to base an interpretation of section 1 on an international commitment, the purpose of which is to advance human dignity. It is, however, quite another thing to attempt to undermine *Charter* rights by reference to forms of transnationalism which are themselves at odds with critical human rights commitments.

VII. CONCLUSIONS

The legal arguments mustered in this discussion to demonstrate the incompatibility of refugee deflection schemes with the *Charter* are ultimately no more than applications of the two fundamental convictions so clearly stated by the Supreme Court of Canada in *Singh*. First, it is simply wrong to apply the force of Canadian law to anyone without simultaneously granting the benefit of protections we believe necessary to achieve fairness. Second, Canadians remain committed as a matter of national conscience to the protection of genuine refugees who manage to reach us. Deflection runs afoul of both these principles by mechanistically and summarily excluding asylum seekers without any inquiry into their need for protection.

Perhaps the major difference between Canada and many other Northern states is that the *Charter* establishes a legal vehicle through which to ensure that these critical issues of principle are taken into account. Rather than either lamenting our situation as cruel irony or wishing away inconvenient legal facts, Canada should accept the responsibilities toward refugees dictated by our core values. This does not mean that we cannot aspire to mitigate the inefficiencies of the international system of state-by-state, individuated refugee

¹⁹³ See *supra* notes 169-170 and accompanying text.

¹⁹⁴ *Supra* note 171.

determination. To the contrary, enhanced cooperation among states to share burdens and responsibilities is precisely the kind of transnationalism that can, and should, be accommodated by our constitutional culture. Deflection, in contrast, is no more than an unconscionable attempt to shift duties away.