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Status Anxiety: Complementary Protection
and the Rights of Non-Convention Refugees

Jane McAdam*

*University of New South Wales

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Abstract

The domestic codification in New Zealand, and proposed codification in Australia, of international obligations to protect people substantially at risk of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment is a positive development. It brings these countries into line with international law and State practice in the European Union, Canada and the United States. However, while these new developments extend protection to a wider class of people, New Zealand law is notably silent on the immigration status such people will receive once their protection needs have been recognized. This article draws on comparative practices to argue that a status for protected persons that is equivalent to that of Convention refugees sits more comfortably with international human rights law norms, is procedurally more efficient, and provides a principled and more humane policy response to people who have experienced serious harm and are looking to re-build their lives in a safe environment. It responds in part to Hathaway's criticism that an equivalent status is unjustified as a matter of law.

**Status Anxiety:
Complementary Protection and the Rights of Non-Convention Refugees**

JANE MCADAM*

The domestic codification in New Zealand, and proposed codification in Australia, of international obligations to protect people substantially at risk of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment is a positive development. It brings these countries into line with international law and State practice in the European Union, Canada and the United States. However, while these new developments extend protection to a wider class of people, New Zealand law is notably silent on the immigration status such people will receive once their protection needs have been recognized. This article draws on comparative practices to argue that a status for protected persons that is equivalent to that of Convention refugees sits more comfortably with international human rights law norms, is procedurally more efficient, and provides a principled and more humane policy response to people who have experienced serious harm and are looking to re-build their lives in a safe environment. It responds in part to Hathaway's criticism that an equivalent status is unjustified as a matter of law.

Introduction

A functional national asylum system requires a number of elements, including the assurance that those who seek refugee status and other forms of international protection, such as protected person status, are entitled to due process and all the human rights guaranteed by international instruments without discrimination.¹ This article considers the standard of protection that New Zealand owes to “protected persons”: people who are not refugees under the Convention relating to the Status of Refugees (“the Convention”) but who have an international protection need arising from a human rights treaty.² The Immigration Bill 2007 (No 132-2) extends

* Associate Professor and Director of International Law Programs, Faculty of Law, University of New South Wales, Australia; Research Associate, Refugee Studies Centre, University of Oxford. A version of this article appears as ‘Status Anxiety: The New Zealand Immigration Bill and the Rights of Non-Convention Refugees’ in [2009] *New Zealand Law Review* 239, and it was delivered at the conference “Human Rights at the Frontier: New Zealand’s Immigration Legislation—An International Human Rights Law Perspective”, Auckland, 12 September 2008. The article was finalized before the Immigration Bill 2007 had its third reading and was enacted as the Immigration Act 2009 on 16 November 2009. Unless otherwise noted, references in it to the Immigration Bill are references to the Bill (No 132-2) as it passed its second reading on 5 March 2009.

¹ Andrysek, “Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures” (1997) 9 *International Journal of Refugee Law* 392 at 395–396.

² Under the Immigration Bill 2007 (No 132-2), such protection stems from Art 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (see cl 120) and Arts 6 & 7 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (see cl 121). This, in effect, codifies New Zealand’s international law obligations conceded by the government in *Attorney-General v Zaoui* [2006] 1 NZLR 289 (SC). This protection complements that arising under the Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 and

protection to this wider class of people. However, it is notably silent on the immigration status protected persons will receive once their protection needs have been recognized. Whereas Convention refugees are entitled to apply for permanent residence, the Select Committee reviewing the Immigration Bill made clear that “there is no intention to replicate New Zealand’s refugee obligations for protected persons in the legislation.”³ The rationale for a differentiated status—since presumably some kind of status will be given—has not been articulated.

Situating my views within an international human rights law framework, and drawing on developments in jurisprudence and State practice, I argue that protected persons should receive a status equivalent to that of Convention refugees. This is because such an approach sits more comfortably with international human rights law norms, is procedurally more efficient, and provides a principled and more humane policy response to people who have experienced serious harm and are looking to rebuild their lives in a safe environment. As the 2005 UNHCR Executive Committee Conclusion on complementary protection stated, States must provide protected persons with “the highest degree of stability and certainty ensuring [their] human rights and fundamental freedoms ... without discrimination”.⁴

The article’s theoretical perspective is that the fundamental conceptual connections between international refugee law and human rights law suggest that an identical status for both Convention refugees and protected persons is appropriate. In addition to policy reasons why this should be the case, there are also cogent legal arguments that support the extension of Convention status to protected persons. These arguments are based on a conceptualization of international law as a body of inter-related norms that must be interpreted in relation to, and be informed by, each other. I have articulated this argument more comprehensively elsewhere and will only refer to particular parts of it here.⁵

The extension of protection under the Immigration Bill is based on New Zealand’s obligations under the International Covenant on Civil and Political Rights (“ICCPR”) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”),⁶ and I would argue also under customary international law, although that is not material for present purposes. This type of protection is commonly known as “complementary protection”, denoting the fact that it complements refugee protection arising under the Convention, although in Europe it is more commonly called “subsidiary protection”, in light of its particular manifestation there.

The 27 countries of the European Union (“EU”), as well as Canada and the United States (“US”), all have systems of complementary protection in place. Australia does

the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (see cl 119 and Immigration Act 1987, Part 6A). The Immigration Bill (No 132-2) is available at http://www.parliament.nz/en-NZ/PB/Legislation/Bills/4/7/d/00DBHOH_BILL8048_1-Immigration-Bill.htm (accessed 31 July 2009).

³ Commentary on the Immigration Bill 2007 (No 132-2) as reported from the Transport and Industrial Relations Committee on 17 July 2008 (“Immigration Bill Select Committee Commentary”) at 14, available at <http://www.legislation.govt.nz/bill/government/2007/0132/latest/DLM1440301.html> (accessed 31 July 2009).

⁴ Executive Committee Conclusion No 103 (LVI), *The Provision of International Protection including through Complementary Forms of Protection* (2005) at para (n).

⁵ See McAdam, *Complementary Protection in International Refugee Law* (2007), ch 6.

⁶ See above note 2.

not yet, although the Migration Amendment (Complementary Protection) Bill 2009 (Cth) to introduce complementary protection grounds into Australian law is currently before Parliament. African and Latin American countries also have complementary protection regimes in operation, with regional refugee treaties extending the principle of *non-refoulement* (non-return to persecution and other forms of serious harm) to people fleeing external aggression, occupation, foreign domination or events seriously disturbing public order in a part or the whole of the country of origin.⁷

State practice now confirms that beneficiaries of complementary protection should generally be accorded some form of domestic legal status, although its nature, duration, and application vary among States. Contrary to Hathaway's view that it is unrealistic to expect governments to grant treatment equivalent to that conferred on Convention refugees,⁸ State practice suggests otherwise. Canada in fact grants an identical status.⁹ So do the Netherlands, Ireland, the Czech Republic, Lithuania, Romania, most Nordic countries, and, by and large, the United Kingdom ("UK"), Greece and Slovenia, and a current proposal by the Commission of the European Communities recommends the amendment of EU law to require a single status for all 'beneficiaries of international protection'.¹⁰ This is also the approach of the Australian government.¹¹

Similarly, regional African and Latin American treaties envisage Convention refugee status applying to their widened refugee categories. Although US and EU law give beneficiaries of subsidiary protection a lesser status than Convention refugees,¹² this has been strongly criticized as arbitrary and stems more from political

⁷ Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, Art 1(2); Cartagena Declaration on Refugees (22 November 1984) in Annual Report of the Inter-American Commission on Human Rights OAS Doc OEA/Ser.L/V/II.66/doc.10, rev.1, 190–93 (1984–85), Art III(3).

⁸ Comments by Professor James Hathaway at the conference "Human Rights at the Frontier: New Zealand's Immigration Legislation—An International Human Rights Law Perspective", Auckland, 12 September 2008 ("Human Rights at the Frontier Conference"). See also Hathaway, "Leveraging Asylum" (2010) 45(3) Texas International Law Journal (forthcoming).

⁹ Immigration and Refugee Protection Act 2001, c 27, ss 95–97.

¹⁰ See, eg, International Association of Refugee Law Judges, *Report of the Convention Refugee Status and Subsidiary Protection Working Party: Implementation of the EU Qualification Directive: Some Features* (IARLJ World Conference, Cape Town, 2009); European Council on Refugees and Exiles ("ECRE") and European Legal Network on Asylum ("ELENA"), *The Impact of the EU Qualification Directive on International Protection* (October 2008); Aliens Act 2000, s 27 (The Netherlands); Norwegian Directorate of Immigration http://www.nyinorge.no/modules/module_123/proxy.asp?C=108&D=1&I=0 (24 April 2009); UK Immigration Rules, rules 339Q, 344A–C; Commission of the European Communities, 'Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted' Brussels, COM(2009) 551, 2009/xxxx (COD) <http://www.statewatch.org/news/2009/oct/eu-com-min-standards-explanatory-com-551.pdf>.

¹¹ See Migration Amendment (Complementary Protection) Bill 2009 (Cth). See also Senate Legal and Constitutional Affairs Committee report and submissions (2009): http://www.aph.gov.au/senate/committee/legcon_ctte/migration_complementary/index.htm.

¹² See 8 CFR §208.17; Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12, Arts 23–34 ("Qualification Directive"). However, see the proposal in the EU to grant an equal status to refugees and beneficiaries of subsidiary protection: Commission of the European Communities, above note 10.

compromises than from a sound empirical, legal or policy basis.¹³ Significantly, a 2008 survey by the European Council on Refugees and Exiles shows that most EU countries are in fact providing identical protection to Convention refugees and beneficiaries of subsidiary protection despite having the discretion to provide a lower level of social rights to the latter.¹⁴

In short, in my view there is no good reason why a person's health care or social welfare entitlements in New Zealand, or in any other country for that matter, should depend on whether they have a well-founded fear of persecution or a well-founded fear of torture.¹⁵ Should a disabled potential victim of torture be denied disability entitlements? If so, on what principled, legal basis?

The Convention relating to the Status of Refugees as a Human Rights Treaty

Presumably, the basis of the objection to providing the same status to refugees from torture as to Convention refugees is that States have agreed to the latter but not to the former. Thus, the argument goes, there is a risk that their overall commitment to Convention refugees may be diluted if standards of treatment are extended beyond the strictly defined Convention class.

I cannot help but take issue with this overly academic and essentially technical stance. It seeks to safeguard the Convention at all costs, like a relic that needs to be preserved, rather than as the dynamic, "living" human rights instrument it is, as the House of Lords has described it.¹⁶ The argument that Convention status is "textually reserved"¹⁷ for Convention refugees is an excessively literal approach which does not take into account the prevailing view that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."¹⁸ Law is not devoid of context, and when the Convention's object and purpose are understood in light of contemporary jurisprudence and law's social function, granting Convention status to beneficiaries of complementary protection can be seen as a natural extension of that instrument's protective aims rather than as something inimical to them (or a "leveraging of rights", as Hathaway puts it).¹⁹ The House of Lords has recognized the Convention as a living

¹³ See McAdam, above note 5 at 56–58 and 92–93.

¹⁴ ECRE & ELENA, above note 10 at 7.

¹⁵ This analysis does not necessarily apply to cases where human rights-based *non-refoulement* precludes removal, but the individual would otherwise be covered by article 1F of the Refugee Convention. For a discussion of what rights should then accrue, see McAdam, above note 5 from 228. For State practice, see ECRE & ELENA, above note 10 at 225–228.

¹⁶ *R v Immigration Officer at Prague Airport; ex parte Roma Rights Centre* [2005] 2 AC 1 (HL) at para 43 per Lord Bingham; see also *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 (HL) at para 4 per Lord Bingham; and in the Canadian context, *Canada (Attorney-General) v Ward* [1993] 2 SCR 689 at 733.

¹⁷ Comments by Professor James Hathaway at the Human Rights at the Frontier Conference, above note 8.

¹⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, (1971) ICJ Reports 16 at para 53. See also Judge Weeramantry: "Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A Court cannot endorse actions which are a violation of human rights by the standards of the time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights": *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, (1997) ICJ Reports 7 at 114.

¹⁹ Hathaway, above note 8.

instrument, “in the sense that while its meaning does not change over time its application will.”²⁰ States’ legal obligations do not operate in a vacuum.

Though a specialist treaty, the Convention nevertheless forms part of the corpus of human rights law, both informing it, and being informed by it. Many of its substantive provisions were based on principles of the Universal Declaration of Human Rights (“UDHR”)²¹ and the then embryonic ICCPR and International Covenant on Economic, Social and Cultural Rights (“ICESCR”).²² As the Office of the United Nations High Commissioner for Refugees (“UNHCR”) has stated, the Convention’s human rights base “roots it quite directly in the broader framework of human rights instruments of which it is an integral part, albeit with a very particular focus.”²³

Superior courts around the world have acknowledged the Convention as a human rights treaty, and have noted that it accordingly falls to be interpreted within that context. They have understood its provisions in light of other international law obligations arising under the CAT,²⁴ the ICCPR,²⁵ the UDHR,²⁶ the Convention on the Elimination of All Forms of Discrimination against Women,²⁷ the draft Programme of Action of the United Nations International Conference on Population and Development,²⁸ and customary international law.²⁹ The *non-refoulement* obligation in Art 33 of the Convention has been read subject to the broader obligation in Art 3 of the CAT not to return *any person* to State-sponsored torture. The Supreme Court of Canada has stressed that the Convention’s protection of refugee rights must

²⁰ *Sepe and Bulbul v Secretary of State for the Home Department* [2003] 1 WLR 856 (HL) at para 6 per Lord Bingham. See also *R v Secretary of State for the Home Department, ex parte Adan* [1999] 3 WLR 1274 (CA) at para 72; *R v Uxbridge Magistrates’ Court, ex parte Adimi* [2001] QB 667 at 688 per Newman J; *R v Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah* [1997] Imm AR 145 at 152 per Sedley J; *R v Immigration Officer at Prague Airport; ex parte Roma Rights Centre* [2005] 2 AC 1 (HL) at para 43 per Lord Bingham.

²¹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III) (“UDHR”); see *Comments on the Draft Convention and Protocol: General Observations*, Annex II to Ad Hoc Committee on Statelessness and Related Problems, *Draft Report of the Ad Hoc Committee on Statelessness and Related Problems* (16 January–16 February 1950) UN doc E/AC.32/L.38 (15 February 1950) at 36 (Art 3 of the Convention on non-discrimination, affirming a fundamental principle of the UDHR); at 46 (Art 17 of the Convention on education, referring to Art 26 of the UDHR); Ad Hoc Committee on Statelessness and Related Problems, *Refugees and Stateless Persons: Compilation of the Comments of Governments and Specialized Agencies on the Report of the Ad Hoc Committee on Statelessness and Related Problems* (Document E/1618) UN doc E/AC.32/L.40 (10 August 1950) at 31 (France, on Art 29(1) of the UDHR).

²² ICESCR (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3. See *Comments on the Draft Convention and Protocol: General Observations*, above note 21 at 58; UN doc E/1572 at 12 (Art 32—then Art 27—on expulsion).

²³ UNHCR, *Note on International Protection*, UN doc A/AC.96/951 (13 September 2001) at para 4.

²⁴ *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 from para 72.

²⁵ *Ibid.*; *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593 at 646 per La Forest, L’Heureux-Dubé & Gonthier JJ.

²⁶ *R v Immigration Officer at Prague Airport; ex parte Roma Rights Centre* [2005] 2 AC 1 (HL) at paras 13–17 per Lord Bingham.

²⁷ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; see *R v Special Adjudicator, ex parte Hoxha* [2005] 4 All ER 580 (HL) at para 38 per Baroness Hale; *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593 at 646 per La Forest, L’Heureux-Dubé & Gonthier JJ.

²⁸ *Ibid.*

²⁹ *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 from para 72.

not be used to deny rights which other human rights instruments extend universally, drawing on the preamble in support.³⁰

Accordingly, I would argue that with respect to the status it confers, the Convention acts as a type of *lex specialis*. It does not seek to displace the *lex generalis* of international human rights law, but rather complements and strengthens its application. I do not suggest that human rights law has formally amended the Convention—plainly any formal amendment would require a Protocol—but rather that its scope of application has expanded, much as the European Court of Human Rights has recognized the progressively widening ambit of the European Convention on Human Rights (“ECHR”)³¹ through dynamic interpretation (in the same way that human rights law has been used to understand Art 1A(2) of the Convention).

To insist upon a strict divide between the Convention and the expanded principle of *non-refoulement* under human rights law is to overlook the place of refugee law within the wider human rights framework. Furthermore, it is inaccurate, from both historical and contemporary perspectives, to suggest that the Convention embodies a static concept of protection needs. It is interesting that as early as 1956, European States willingly extended Convention refugee status to people who had fled Hungary, even though they were not technically refugees under the Convention definition.³² This seemed to follow the sentiments expressed by the Convention’s drafters who, in the Final Act of the Conference of Plenipotentiaries, appended to the Convention, expressed

the hope that the Convention ... will have value as an example *exceeding its contractual scope* and that all nations will be guided by it in *granting* so far as possible to persons in their territory *as refugees* and who would not be covered by the terms of the Convention, *the treatment for which it provides*.³³

Here is tacit recognition that the source of the harm causing flight is irrelevant for the purposes of status.

Of course, I am not trying to overstate the value of the Final Act—the fact that this statement ended up here was because States were unwilling at that time to include a provision *within* the Convention permitting the expansion of the refugee definition (and indeed I am not arguing that such an expansion has occurred). But what this statement in the Final Act helps to do is to counter arguments premised on the sanctity of the Convention as a static text, as an instrument whose rights should be safeguarded for only the very few.

Whereas Hathaway sees it as appropriate to read the Convention in light of human rights law to the extent that this expands the rights of *Convention refugees*,³⁴ he is simultaneously resistant to recognizing the broader impact that human rights law has had on protection. 146 States are now party to the CAT, 164 to the ICCPR and 160 to the ICESCR.³⁵ 147 States are party to the Convention and/or the Protocol relating to

³⁰ Ibid at para 72.

³¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950) ETS No 5.

³² See discussion in McAdam, above note 5 at 38–40.

³³ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Texts of the Draft Convention and the Draft Protocol to be Considered by the Conference*. UN doc A/CONF.2/1 (12 March 1951) at 5 (emphasis added).

³⁴ Hathaway, *The Rights of Refugees under International Law* (2005) at 9.

³⁵ UNTS database (21 April 2009).

the Status of Refugees (“the Protocol”).³⁶ From a human rights law perspective, it is anomalous to safeguard staunchly the rights of one group of protected people at the expense of others. In my view, this undermines the very protection principles on which the Convention is based. By way of analogy, it is a little like granting women the right to vote, but then not allowing them access to other citizenship rights lest that have the effect of diluting rights for men.

The Totality of Protection

Developments in human rights law have not only shaped interpretations of “persecution” within the Convention,³⁷ but have also independently come to form grounds for non-removal. Art 3 of the CAT, Art 7 of the ICCPR and Art 3 of the ECHR are recognized sources of human rights *non-refoulement* (or complementary protection) which prohibit removal in circumstances additional to (and sometimes overlapping with) Art 1A(2) of the Convention.

But protection is about more than *non-refoulement* alone.³⁸ This is why comments by the Select Committee on New Zealand’s Immigration Bill are particularly worrisome. The Committee stated:

The Refugee Convention requires New Zealand to meet minimum standards for the treatment of refugees, such as non-discrimination, and access to employment, housing, education, and the courts. The CAT and the ICCPR do not include any such requirements for the treatment of protected persons once they are in New Zealand, and there is no intention to replicate New Zealand’s refugee obligations for protected persons in the legislation. New Zealand’s fundamental immigration-related obligation arising from the CAT and the ICCPR is not to return a person to a country where he or she would be in danger of particular human rights abuses.

We therefore recommend that the bill be amended to make it clear that protection status only prevents a non-citizen from being returned to a country where he or she would be in danger of torture, arbitrary deprivation of life, or cruel treatment; and it does not bestow a particular immigration status or prevent deportation to other countries where the non-citizen would not face that danger.³⁹

International law requires more than *non-refoulement* alone. Protection is not only about non-return to the risk of harm; it is also about solutions in the medium and long term, as well as human dignity, worth and equality. It is also important to bear in mind the legal reality that States have not only agreed to prevent and protect against torture, but also to protect everyone’s human rights. At least since the adoption of the Protocol in 1967, most States have accepted that arbitrary limitations, such as

³⁶ Ibid.

³⁷ See Hathaway, *The Law of Refugee Status* (1991) at 112, approved in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 (HL) at 495 per Lord Hope; *Sepet and Bulbul v Secretary of State for the Home Department* [2003] 1 WLR 856 (HL) at para 7 per Lord Bingham; *Ullah v Secretary of State for the Home Department* [2004] 2 AC 323 (HL) at para 32 per Lord Steyn; International Association of Refugee Law Judges Human Rights Nexus Working Party, *Rapporteur’s Report* (1998 Annual Conference, Ottawa, 12–17 October 1998) at 8. See, for example, gender-related persecution.

³⁸ See *HLR v France* (1998) 26 EHRR 29.

³⁹ Immigration Bill Select Committee Commentary, above note 3 at 14–15.



restrictions of time and place, cannot be placed on the refugee definition. Likewise, they have not provided any persuasive substantive justification for arbitrary distinctions between protected classes (which may amount to discrimination under human rights law). It would therefore be anomalous if human rights-based protection amounted only to respect for the principle of *non-refoulement*, detached from other rights.

Although, unlike the Convention, neither the CAT nor the ICCPR sets out a resultant status for those who benefit from human rights-based *non-refoulement*, this does not mean that those instruments are silent on the treatment that protected persons should receive.⁴⁰ They provide a body of rights to which all people are entitled, irrespective of their status. At the bare minimum, they mandate that treatment in the host State not be “inhuman or degrading”. Indeed, as early as 1985, the Australian Human Rights Commission indicated that the Immigration Department must ensure that “persons within Australia are not put into a situation where they are, in effect, subject to inhuman or degrading treatment by virtue of their status as PNCs [prohibited non-citizens]”.⁴¹

The consequences of not providing people with an immigration status have been well documented. Prior to the harmonization of the European asylum system, a number of countries had a practice of merely tolerating the presence of certain aliens. In other words, they would not be deported, but nor were they granted a residence permit or attendant rights. The case of *Ahmed v Austria* highlights the social impacts of being in limbo, primarily on the individual but also on the broader social fabric.⁴² Ahmed was a refugee whose status was revoked by the Austrian government after he committed a minor criminal offence. After “years of ... subsisting in constant threat of deportation and a state of complete uncertainty”,⁴³ and being denied access to social security, medical care and the labour market, Ahmed committed suicide. A lawyer from that case made the following observations:

Left to their own devices and relegated to charitable institutions, it is not surprising that many asylum seekers are criminalized simply because they have retained sufficient will to survive. Surviving without permits and the necessary paper work in sophisticated societies, however, entails either entering the black market or attempting an illegal border crossing in search of more equitable treatment elsewhere (and perhaps changing one’s identity in the process). As many social workers and NGOs would attest, it is common that the legal limbo is not only a trap, but also leads to absurd situations when individuals find work and pay taxes but have no right to social security because they reside in the host country illegally and undocumented. Such situations are traumatic and can have very severe consequences. Desperation often leads to aberrations of character, severe stress and to the disruption of normal human functions.⁴⁴

⁴⁰ Indeed, it can be argued that it is precisely because the Convention establishes a status for refugees that no additional human rights-based status needed to be developed.

⁴¹ Human Rights Commission, *Human Rights and the Migration Act 1958: Report No 13* (1985) at para 55.

⁴² *Ahmed v Austria* (1996) 24 EHRR 278.

⁴³ Andrysek, above note 1 at 412.

⁴⁴ *Ibid* at 411.



It took Europe some time to recognize the protection implications of human rights, and that humanitarian refuge was a matter of obligation, not just policy. Yet, most European States still have not absorbed what is required by the underlying values of the ECHR which are repeatedly emphasized by the European Court of Human Rights. If one views protection in its dynamic sense, then status must follow from recognition of the obligation not to surrender. *Non-refoulement* through time, confined and structured in its daily operation by human rights, is incompatible with limbo.

The highest appellate courts of France, Germany, Belgium, the UK and South Africa have acknowledged that even people without any formal immigration status—in other words, those in a very different situation from protected persons whose protection needs have been recognized—are entitled to minimum health and other social services. They have noted that no individual can be denied minimum dignity whatever his or her immigration status.⁴⁵ Thus, international human rights law requires, at an absolute minimum, that States ensure they do not expose people to treatment that is itself inhuman or degrading.

Suffering can be caused by deprivation of resources as well as positive acts of harm.⁴⁶ Following a long series of cases in the lower courts, the House of Lords in 2005 held that the State's failure to provide adequately for asylum seekers could itself amount to inhuman or degrading treatment in breach of human rights law. This would be the case where an asylum seeker "with no means and no alternative sources of support, unable to support himself, [was], by the deliberate action of the state, denied shelter, food or the most basic necessities of life."⁴⁷ An assessment of when the State's action (or inaction) amounts to such treatment would depend on a holistic assessment of the individual concerned, including "age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation."⁴⁸ Accordingly, the House of Lords said that it is necessary to ask "whether the treatment to which the asylum-seeker is being subjected by the entire package of restrictions and deprivations that surround him is so severe that it can properly be described as inhuman or degrading treatment".⁴⁹ In the case before the House of Lords, that threshold was met by asylum seekers who had been denied State support and the right to work, and had had to sleep outdoors.

⁴⁵ France: Conseil constitutionnel DC 93-325 (13 August 1993), DC 97-39 (22 April 1997), DC 79-109 of 9 January 1980); Belgium: Judgment of the Court of Arbitration (22 April 1998), Judgment of Labour Tribunal of Liège 2nd Chamber (24 October 1997) RG 24.764/96; Germany: Federal Constitutional Court Judgment (8 January 1959) BVerfGE 9, 89, Judgment (21 June 1987) BVerfGE 45, 187; Judgment (17 January 1979) BVerfGE 50; Judgment (24 April 1986) BVerfGE 172, cited in Bouteillet-Paquet, "Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union" in Bouteillet-Paquet (ed), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (2002) at 240, note 98. In South Africa, the Supreme Court of Appeal held that denying employment to asylum seekers, who had no entitlement to social security support, constituted a breach of their right to human dignity under the Bill of Rights (Chapter 2 of the Constitution of the Republic of South Africa, 1996). It noted that although the State did not have a positive obligation to provide employment, deprivation of the opportunity to work attains a different dimension "when it threatens positively to degrade rather than merely to inhibit the realization of the potential for self-fulfilment": *Minister of Home Affairs v Watchenuka* (2004) 4 SA 326 at para 32.

⁴⁶ Blake & Husain, *Immigration, Asylum and Human Rights* (2003) at para 2.104.

⁴⁷ *R v Secretary of State for the Home Department, ex parte Adam* [2006] 1 AC 396 (HL) at para 7 per Lord Bingham.

⁴⁸ *Ibid* at para 8 per Lord Bingham.

⁴⁹ *Ibid* at para 58 per Lord Hope (emphasis added).

Factors that contributed to this finding were “the physical discomfort of sleeping rough, with a gradual but inexorable deterioration in their cleanliness, their appearance and their health”, “the prospect of that state of affairs continuing indefinitely”, their “[g]rowing despair and a loss of self-respect”, and the fact that they had ‘no money of their own, no ability to seek state support and [were] barred from providing for themselves by their own labour’.⁵⁰

Similarly, while not ruling directly on the matter, the European Court of Human Rights has acknowledged that poor living conditions could raise an issue under Art 3 of the ECHR if they reached a minimum level of severity,⁵¹ which may include living without any social protection. The court has noted that an alien barred from work or social support “is in a situation which fails to meet the requirements of Art 8 of the Convention”.⁵² The right to respect for private life under Art 8 may include “a positive duty on a state to regularize an immigrant’s status with no prospect of removal within a reasonable timescale, where the result of limbo status is destitution through an inability to access the labour market together with a denial of access to the mainstream benefits regime”.⁵³ The longer a person remains in a country, the greater his or her personal, social and economic ties, and the greater his or her claim on the State’s resources.⁵⁴

So, if people without any protection claim on the State are entitled to respect for their basic human rights, what level of rights should protected persons receive?

The UNHCR has stated that rights and benefits should be based on need rather than the grounds on which a person has been granted protection, and that there is accordingly no valid reason to treat protected persons differently from Convention refugees.⁵⁵ The UK Home Office has similarly acknowledged that “[a]n individual’s needs are the same regardless of the status granted; it would help limit the number of appeals by those refused refugee status but granted subsidiary protection”.⁵⁶ The House of Lords Select Committee on the European Union has also stated that:

We urge the Government to push for the extension of the same rights to everybody entitled to international protection. Not only would this remove an apparently unjustified discrimination between Geneva Convention refugees and beneficiaries of subsidiary protection, it would also, as the Government itself recognises, have practical advantages. It would help limit the number of appeals by those refused refugee status but granted subsidiary protection.⁵⁷

⁵⁰ Ibid at para 71 Lord Scott.

⁵¹ *Pancenko v Latvia* App No 40772/98 (28 October 1999); *BB v France* App No 30930/96 (Commission, 9 March 1998) (Cabral Barreto).

⁵² *HLR v France* (1998) 26 EHRR 29.

⁵³ Blake & Husain, above note 46 at para 4.64.

⁵⁴ *Nasri v France* (1995) 21 EHRR 458 at paras 3–4 per Judge Morenilla.

⁵⁵ UNHCR’s Observations on the European Commission’s Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection 14109/01 ASILE 54 (16 November 2001) at para 46.

⁵⁶ Explanatory Memorandum Submitted by the Home Office on “Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection (2001/0207 (CNS))” in House of Lords Select Committee on the European Union, *Defining Refugee Status and Those in Need of International Protection* (2002), Minutes of Evidence, para 22 at 63.

⁵⁷ House of Lords Select Committee on the European Union, above note 56, para 111 at 27.

Although a differentiated status ultimately found its way into the Qualification Directive in Europe through the notion of “subsidiary protection”,⁵⁸ it is necessary to understand that it was the result of highly political negotiations. Many of the main distinctions arose not because Member States were unanimously determined to see them through, but because of Germany’s standoff on an entirely different point: the issue of non-State actors of persecution. Germany’s 11th-hour capitulation on this point came at a price: a considerable watering down of the rights accorded to beneficiaries of subsidiary protection with respect to social assistance, health care, and access to employment. Thus, subsidiary protection in the EU is a political compromise rather than a principled legal position.

Legally, there is no reason why the source of protection should require differentiation in the rights and status accorded to a beneficiary, and no reasons were ever put forward by any of the EU Member States involved in the drafting of the Qualification Directive. Similarly, no empirical evidence was provided to justify such an approach. The suggestion that harm based on torture or inhuman or degrading treatment is inherently of a lesser duration than persecution, and therefore justifies a more temporary status, has never been supported by evidence, and is “a poor reason for a lesser standard of treatment”.⁵⁹ Fear of opening the floodgates, an issue that was raised in debate, is not born out in countries that do extend a single status.

International law permits distinctions between aliens who are in materially different circumstances, but prohibits unequal treatment of those similarly placed. In general, differential treatment between non-citizens will not amount to discrimination where the distinction pursues a legitimate aim, has an objective justification,⁶⁰ and there is reasonable proportionality between the means used and the aims sought to be realized.⁶¹ To justify the creation of different regimes for different types of non-removable people, States must be able to point to materially different circumstances justifying the distinctions. In the UNHCR’s view, “it is doubtful that international law would permit selective provision of international protection according to category”.⁶²

The European Parliament, in its Explanatory Statement to its amendments to the Commission’s proposal, noted that differences between the rights accorded to refugees vis-à-vis beneficiaries of subsidiary protection were arbitrary, particularly as the status granted to the latter group was supposed to be “complementary rather than hierarchical”.⁶³ The House of Lords Select Committee on the European Union also stated that providing different statuses would be “an apparently unjustified discrimination”.⁶⁴

⁵⁸ See above note 12.

⁵⁹ Memorandum by Goodwin-Gill and Hurwitz, in House of Lords Select Committee on the European Union, above note 56, para 19 at 3.

⁶⁰ Committee on the Elimination of Racial Discrimination, *General Recommendation XIV: Definition of Discrimination* (22 March 1993) at para 2; Human Rights Committee, *General Comment 18: Non-Discrimination* (10 November 1989) at para 13; *Abdulaziz v United Kingdom* (1985) 7 EHRR 471 at para 78.

⁶¹ Human Rights Committee, above note 60 at para 13; ECOSOC Commission on Human Rights, “Prevention of Discrimination: The Rights of Non-Citizens” UN doc E/CN.4/Sub.2/2003/23 (26 May 2003); *Belilos v Switzerland* (1988) 10 EHRR 466.

⁶² UNHCR, “Towards a Common European Asylum System” in de Sousa and de Bruycker (eds), *The Emergence of a European Asylum Policy* (2004) at 248–49.

⁶³ European Parliament, *Report on the Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection* (8 October 2002) Final A5–0333/2002, PE 319.971 at 54.

⁶⁴ House of Lords Select Committee, above note 56 at para 111.

In the first review of the Qualification Directive, it is significant to note that the European Commission identifies the hierarchical status of Convention refugees and other protected persons as an issue requiring redress, recommending that a single, uniform status be implemented.⁶⁵ The rationale behind this is “to enhance their access to social and economic entitlements which are crucial for their successful integration, whilst ensuring respect for the principle of family unity across the EU.”⁶⁶ Equivalent treatment would not only reduce fragmentation of the international protection regime but might also minimize the number of appeals against the refusal of Convention-equivalent status by persons seeking to obtain the full set of rights which that encompasses.⁶⁷

To argue for equal rights for all protection beneficiaries is not radical. After all, New Zealand’s own Refugee Status Appeals Authority (“RSAA”) has observed that the Refugee Convention sets out only a “minimum standard of human rights”.⁶⁸ It is not a panacea. Indeed, the RSAA has gone so far as to say that New Zealand will recognize a person as a Convention refugee even if he or she could in theory relocate to another part of his or her own country, unless the same minimum standard of treatment as under the Convention is met in the place to which relocation is contemplated.⁶⁹ That is a very revealing statement. New Zealand has refused to remove people to countries where they cannot be guaranteed this minimum level of treatment. Yet, if New Zealand were to implement a differentiated status (as the Select Committee has suggested), then it would be indicating a willingness to allow protected persons to remain in New Zealand without those rights and entitlements. In any event, the Convention is really just a rudimentary human rights instrument, which guarantees rights that on the whole are more fully articulated in the human rights treaties. Asking countries to ensure that protected persons have access to those rights is not asking for some great favour. Rather, it is asking them to implement domestically their international human rights treaty obligations in order to give effect to the rights they espouse.

Perhaps those who object to my argument are in part objecting to the terminology I am using: the language of Convention status. I use it merely as shorthand to denote equivalent protection based on a recognized domestic status. But maybe I should simply say that protected persons should be granted residence permits from which flow identical rights to those enjoyed by Convention refugees. That is the position in Canada, the Netherlands, Lithuania, Romanian, and previously also Spain. It is, by and large, the position in Nordic countries and in the UK, and, as the European Council on Refugees and Exiles indicates, the de facto position of most EU Member States (which may soon become a legal requirement if the Qualification Directive is

⁶⁵ Commission of the European Communities, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Policy Plan on Asylum: An Integrated Approach to Protection across the EU* (June 2008) at 3; see also Commission of the European Communities, above note 10.

⁶⁶ *Ibid* at 6.

⁶⁷ UNHCR, *Some Additional Observations and Recommendations on the European Commission “Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection” COM (2001) 510 final, 2001/0207 (CNS) of 12 September 2001* (Geneva, July 2002) at 8.

⁶⁸ *Refugee Appeal No 71684/99* [2000] INLR 165 at para 61.

⁶⁹ *Ibid*. In contrast, the House of Lords has dismissed this approach in its analysis of the Convention in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426.

revised as proposed).⁷⁰ It is also the position adopted in draft Australian law. Refugee status, in domestic terms, is really just the grant of some form of long-term legal status equivalent to permanent residence. And that is what I suggest all protected persons are entitled to, whether their protection from *refoulement* arises under the Convention, CAT, or the ICCPR.

Conclusion

By retaining the political discretion to determine to whom, and when, protection will be granted, States have complicated the protection regime. Diverging statuses may create incentives for protected persons to forum shop and appeal decisions on status. By according a single legal status based on the Convention to all people in need of international protection, States would not only avoid cumbersome bureaucratic processes but would also acknowledge complementary protection as the natural response to their commitment to uphold and promote respect for human rights. This fits with my argument that in order to provide maximum protection, international human rights treaties must not be viewed as discrete, unrelated documents,⁷¹ but as interconnected instruments that together constitute the international obligations to which States have agreed. Viewing the Convention as a discrete instrument implies that refugee law “possesse[s] its own special purposes and principles which [are] determined essentially by its own constituent instruments and which [are] thus independent of those of human rights law.”⁷² But human rights law contains principles that are explicitly or implicitly applicable to the refugee context,⁷³ having both influenced it and been influenced by it. Human rights law not only provides an additional source of protection for persons with an international protection need, but also strengthens the status accorded to all refugees through its universal application. Accordingly, while human rights law widens threshold eligibility for protection, the Convention remains the blueprint for rights and legal status.

⁷⁰ ECRE & ELENA, above note 10 at 7. See Commission of the European Communities, above note 10, and its earlier proposal for a formal reconsideration of “the level of rights and benefits to be secured for beneficiaries of subsidiary protection [under the Qualification Directive], in order to enhance their access to social and economic entitlements which are crucial for their successful integration, whilst ensuring respect for the principle of family unity across the EU”: Commission of the European Communities, above note 65 at 6.

⁷¹ On the fragmentation of international law, see International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, UN doc A/CN.4/L.682 (13 April 2006).

⁷² Coles, “Refugees and Human Rights” (1992) 91 *Bulletin of Human Rights* 63 at 63.

⁷³ *Ibid.*