CHAPTER 4

The Human Rights Bases of Refugee Protection in Canada

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The human rights bases of refugee protection in Canada permeate all aspects of the refugee status determination process (RSD). This contention is demonstrated in the current chapter through its analysis of the legal construction of the principal applicable statute, the 2001 Immigration and Refugee Protection Act (IRPA), and the constitutional jurisprudence of the Supreme Court of Canada (SCC). It will show that this body of case-law, by the highest court of the land, resolves many key challenges inherent within the refugee definition and the RSD process more widely by reference to human rights standards and norms derived from both national and international law. The framework of protection that ensues seeks to realize the full human rights of those who have been involuntarily displaced as refugees and asylum-seekers owing to human and not natural causes.

Refugee Law as a Form of International Human Rights Law

The 1951 Convention relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol were both ratified by Canada in 1969. However, the starting point for this analysis is that the Convention is a human rights instrument intended to protect and to advance the inherent right to seek and to enjoy in other countries asylum from persecution. This line of argument is more fully developed in J.C. Simeon, ‘Ethics and the Exclusion of those who are ‘not deserving’ of Convention Refugee Status,’ in S.S. Juss and C. Harvey (eds), Contemporary Issues in Refugee Law (Edward Elgar 2013) 258–288.

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fundamental human right. Furthermore, among the Refugee Convention's 46 articles, it can be observed that Articles 3 through to 34 deal with the human rights guarantees that must be honoured and respected for all those who are determined to be Convention refugees. In short, 31 of the Convention's 46 articles – i.e., the vast majority (67%) – deal with the human rights guarantees for those who are determined to be Convention refugees.

It is trite, then, to note that Refugee Convention is an international human rights instrument intent on protecting the human dignity and rights of refugees. This has been most cogently expressed by McAdam:

Though a specialist treaty, the Refugee Convention nevertheless forms part of the corpus of human rights law, both informing and informed by it. Accordingly, with respect to the status that it confers on protected persons, 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 it complements and strengthens it.3

Henkin, on the other hand, argues that ‘[i]t is time to bring the international law of refugees and the international law of human rights together,’4 due to the fact that ‘massive flows of refugees result from massive human rights violations’.5 In this regard, he asserts that there has been a ‘failure to assume political responsibility to prevent violations that unleash refugee floods, and collective responsibility to guarantee remedies, including temporary protection or resettlement’.6

Most influentially, Hathaway has argued that:

...refugee status should be the entitlement of any person or community for whom there is no reasonable likelihood of meaningful protection


5 Ibid, 1080.

6 Ibid, 1081.