



Immigration and
Refugee Board

Commission de l'immigration
et du statut de réfugié

**CONSOLIDATED GROUNDS
IN THE *IMMIGRATION AND REFUGEE
PROTECTION ACT***

PERSONS IN NEED OF PROTECTION

DANGER OF TORTURE

Legal Services
Immigration and Refugee Board
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1. INTRODUCTION

The *Immigration and Refugee Protection Act*¹ (“IRPA”) grants the Immigration and Refugee Board (“IRB”) jurisdiction with respect to claims for refugee protection. The Refugee Protection Division (“RPD”) of the IRB assesses claims for protection at first instance and the Refugee Appeal Division (“RAD”) on appeal. Claims for protection may be based on three grounds referred to as the “consolidated grounds”:

1. Well-founded fear of persecution for a *Refugee Convention* ground
2. Danger of torture
3. Risk to life or risk of cruel and unusual treatment or punishment

The Convention refugee ground of protection provided at s. 96 allows a claimant to be determined to be a "Convention refugee". The danger of torture ground at s. 97(1)(a) and the risk to life and risk of cruel and unusual treatment or punishment ground at s. 97(1)(b) allow a claimant to be determined to be a "person in need of protection". A person determined by the Board to be a Convention refugee or a person in need of protection is conferred refugee protection pursuant to s. 95(1)(b).

Protection Ground	IRB Determination	Protection Conferred
Well-founded fear of persecution for a <i>Refugee Convention</i> ground	<i>Convention refugee</i>	<i>Refugee protection</i>
Danger of torture	<i>Person in need of protection</i>	<i>Refugee protection</i>
Risk to life or risk of cruel and unusual treatment or punishment	<i>Person in need of protection</i>	<i>Refugee protection</i>

The RPD (or the RAD on appeal) will, in one proceeding, determine whether a claimant is a Convention refugee or a person in need of protection.

Refugee protection affords the same rights pursuant to the *IRPA* as those granted to Convention refugees pursuant to the *Immigration Act*.² Those rights include the right of *non-refoulement* and the right to apply for permanent residence.

The expanded jurisdiction is an effort to rationalize and streamline a process which under the *Immigration Act* was fragmented into different proceedings and layers of decision making by the IRB and Citizenship and Immigration Canada (“CIC”). Under the *Immigration Act*, the IRB

¹ S.C. 2001, c. 27. The unabridged title of the Act is: *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced or in danger*. S.C. 2001, c. 27. All references in this paper are to sections of the *IRPA* unless otherwise indicated.

² *An Act respecting immigration to Canada*, R.S.C. 1985, c. I-2.

had jurisdiction only with respect to the *1951 Convention relating to the Status of Refugees* and the *1967 Protocol* (the “*Refugee Convention*”) and could not assess other risks of harm not set out in the Convention refugee definition. The Minister assessed these risks under the post-determination refugee claimants in Canada (PDRCC) program and under the Minister's humanitarian and compassionate discretion. This multi-layered approach resulted in delays and inconsistencies.

This paper will deal with the danger of torture ground of protection provided at s. 97(1)(a).

2. CANADIAN LEGISLATION AND INTERNATIONAL INSTRUMENTS

2.1. *The Immigration and Refugee Protection Act (the IRPA)*

The *IRPA* confers refugee protection on a person who has been determined by the IRB to be a Convention refugee or a person in need of protection. Section 95(1)(b) provides the statutory basis for this protection, and s. 95(2) sets out some exceptions:

95. (1) Refugee protection is conferred on a person when

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

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

(c) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

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

Section 96 indicates that the Convention refugee definition must be met in order for a person to be determined to be a Convention refugee. Section 97 sets out the elements to be established in order for a person to be determined to need protection due to a danger of torture or to a risk to life or a risk of cruel and unusual treatment or punishment. Section 97(1) states:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

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

- (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
 - (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
 - (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
 - (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
 - (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Section 97(1)(a) refers to Article 1 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (the “CAT”),³ included in the Schedule to the IRPA:

Article 1(1) For the purposes of this Convention, "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

(2) This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Section 98 renders the exclusion clauses, sections E and F of Article 1 of the *Refugee Convention* applicable to the consolidated grounds:

98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

According to s. 108, the cessation grounds (change of circumstances), including the exception of compelling reasons, are applicable to the consolidated grounds:

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

- (a) the person has voluntarily reavailed themselves of the protection of their country of nationality;

³ *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36; G.A. res. 39/46 [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)].

- (b) the person has voluntarily reacquired their nationality;
- (c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;
- (d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or
- (e) the reasons for which the person sought refugee protection have ceased to exist.

(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).

(3) If the application is allowed, the claim of the person is deemed to be rejected.

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

Finally, decisions based on one or more of the consolidated grounds may be vacated in the circumstances described in s. 109:

109(1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.

(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.

2.2. Other Canadian and International Instruments

While the *IRPA* provides for protection against “refoulement” in cases where a danger of torture has been established, other Canadian and international instruments contain provisions prohibiting or sanctioning torture. The extent to which these provisions may be helpful for purposes of interpretation is discussed in chapter 3.

2.2.1. Canadian Instruments

The *Canadian Charter of Rights and Freedoms*⁴ (the *Charter*) contains two sections which are relevant:

Section 7: 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.

Section 12: Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

The *Canadian Bill of Rights*⁵ contains similar provisions:

Section 1: It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

...

Section 2: Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

...

(b) impose or authorize the imposition of cruel and unusual treatment or punishment;

...

The Canadian *Criminal Code*⁶ sanctions torture:

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Note that torture has been considered to be cruel and unusual treatment or punishment : *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 S.C.C. 1, January 11, 2002, and *Ahani v. Canada (Minister of Citizenship and Immigration)*, 2002 S.C.C. 2, January 11, 2002.

⁵ R.S. 1960, c. 44.

⁶ R.S. 1985, c. C-46.

269.1 (1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) For the purposes of this section,

"official" means

- (a) a peace officer,
- (b) a public officer,
- (c) a member of the Canadian Forces, or
- (d) any person who may exercise powers, pursuant to a law in force in a foreign state, that would, in Canada, be exercised by a person referred to in paragraph (a), (b), or (c), whether the person exercises powers in Canada or outside Canada;

"torture" means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

(a) for a purpose including

- (i) obtaining from the person or from a third person information or a statement,
- (ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and
- (iii) intimidating or coercing the person or a third person, or

(b) for any reason based on discrimination of any kind, but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.

(3) It is no defence to a charge under this section that the accused was ordered by a superior or a public authority to perform the act or omission that forms the subject-matter of the charge or that the act or omission is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.

(4) In any proceedings over which Parliament has jurisdiction, any statement obtained as a result of the commission of an offence under this section is inadmissible in evidence, except as evidence that the statement was so obtained.

2.2.2. International Instruments

A number of international human rights instruments, including the following, contain similar or related provisions. Some explicitly prohibit torture:⁷

1. Universal Declaration of Human Rights 1948⁸

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

2. American Declaration on the Rights and Duties of Man 1948⁹

Article 1: Every human being has the right to life, liberty and the security of his person.

Article 25: No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. No person may be deprived of liberty for non-fulfillment of obligations of a purely civil character. Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

Article 26: Every accused person is presumed to be innocent until proved guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

3. The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950¹⁰

Article 3(1) No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

4. The American Convention on Human Rights 1969¹¹

⁷ This paper highlights the key provisions. When referring to these instruments, the text of the entire instrument should be consulted as required.

⁸ G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

⁹ O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

¹⁰ (ETS No. 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively.

¹¹ O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

Article 5(2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

5. Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1975¹²

Article 1(1) For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

(2) Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

Article 2 Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

Article 3 No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

6. International Covenant on Civil and Political Rights 1976¹³

Article 6(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

(2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

(3) When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed

¹² G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975).

¹³ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

(4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

(5) Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

(6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

7. Universal Islamic Declaration of Human Rights 1981¹⁴

VII Right to Protection Against Torture

No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to an act which is injurious to his interests.

8. African Charter on Human and Peoples' Rights 1982¹⁵

Article 5 : Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

9. Inter-American Convention to Prevent and Punish Torture 1987¹⁶

Article 2 : For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

¹⁴ (1981) 9 *The Muslim World League Journal* 25.

¹⁵ OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

¹⁶ O.A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992).

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

10. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987¹⁷

Article 1(1): For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

(2) This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2(1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

(2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

(3) An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3(1) No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

(2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

11. Convention on the Rights of the Child 1990¹⁸

¹⁷ G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

¹⁸ G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990.

Article 6: State Parties recognize that every child has the inherent right to life.

Article 37: State Parties shall ensure that

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age;

12. Declaration on the Protection of All Persons from Enforced Disappearances 1992¹⁹

Article 1(1) Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.

(2) Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

13. Rome Statute of the International Criminal Court 1998²⁰

Article 7(1) For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

...

(f) Torture;

(2) For the purpose of paragraph 1:

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

¹⁹ G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992).

²⁰ The Statute was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

3. RULES OF INTERPRETATION FOR INTERNATIONAL LAW

Traditionally, Canadian courts tended to adjudicate cases on the basis of domestic law only. With the advent of the *Charter* in 1982, reference to international sources has become commonplace. This is a logical development since most of the rights and freedoms protected in the *Charter* are also contained in international human rights instruments.²¹

The rules of interpretation relating to international law are complex, but generally, there is a common law presumption that Canada's laws are enacted with the intention of giving force to Canada's international obligations. The recognition of Canada's international obligations with respect to persons who need protection because of violations of their human rights is an important feature of the *IRPA*. As stated in the legislation,

3. (3) This Act is to be construed and applied in a manner that ...
- (f) complies with international human rights instruments to which Canada is a signatory.

The role of international instruments and jurisprudence in the interpretation of specific provisions is governed by the following general principles:

- A provision in an international instrument does not have the force of law in Canada unless it is explicitly incorporated in domestic law.²²
- Canadian law should be interpreted, as far as possible, consistently with international law.
- If the meaning of a provision in the domestic law is clear and unambiguous, the provision should be interpreted according to domestic law.
- If the meaning of a provision in the domestic law is ambiguous, Canadian courts and tribunals can have regard to similar provisions in international instruments.
- The interpretation given by foreign jurisdictions or international tribunals to provisions in international instruments or other domestic laws are not binding but are useful and can have persuasive value.
- The values reflected in international human rights law may help inform the contextual approach to statutory interpretation.

The Supreme Court of Canada, in *Baker*,²³ dealt with the role of international law in determining the issue of the best interests of children in the context of the humanitarian and compassionate application made by their mother. The following comments of the majority are instructive with regards to the role of international instruments in interpreting human rights. The

²¹ Bassan, Daniela, "The Canadian Charter and Public International Law: Redefining the State's Power to Deport Aliens", (1996) 34 Osgoode Hall L. J. 583-625.

²² An example of this is the definition of Convention refugee.

²³ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

contextual approach espoused by the Court should be followed by the RPD and the RAD when assessing whether the risk faced by an individual constitutes a risk of persecution, torture, or risk to life or risk of cruel and unusual treatment or punishment:

[69] Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the Convention on the Rights of the Child, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. **International treaties and conventions are not part of Canadian law unless they have been implemented by statute:** *Francis v. The Queen*, [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 R.C.S. 141, at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

[70] Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. [Emphasis added.] As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

[The] legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A), at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India), at p.367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications*, supra; *R. v. Keegstra*, [1990] 3 S.C.R. 697. [Emphasis added]

[71] The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the *Universal Declaration of Human Rights*, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

3.1. Article 1(2) of the CAT

Article 1(2) of the CAT, sometimes referred to the “without prejudice” clause states:

Article 1(2) This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 1(2) safeguards a person’s rights under international instruments and Canadian legislation which may afford wider protection and greater benefits than the CAT. One such right is protection against “refoulement” provided for in s. 115(1) which states:

A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.²⁴

4. ELEMENTS OF S. 97(1)(a)

In order to be granted protection from a danger of torture, the elements of s. 97(1)(a) must be met and the prospective risk of torture must fall within the meaning of Article 1 of the CAT. The elements of s. 97(1)(a) are discussed below. The definition of torture is discussed in chapter 5.

Section 97(1)(a) states:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

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

²⁴ S. 115(2) provides exceptions to the principle of *non-refoulement*:

Subsection (1) does not apply in the case of a person

- (a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or
- (b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

4.1. Country of Reference (Country of Nationality or Former Habitual Residence)

A person must establish that removal to his or her country or countries of nationality or former habitual residence would subject him or her, personally, to a danger of torture. The context of s. 97(1) suggests that nationality refers to citizenship.

The reference to "removal to their country or countries of nationality" indicates that a person with more than one nationality is required to prove that removal to *any* of his or her countries of nationality would expose him or her to a danger of torture within the meaning of Article 1 of the *CAT*.

In cases where a person does not have a country of nationality, the danger of torture will be assessed in reference to the person's country of former habitual residence. Although the singular is used in s. 97(1)(a) to refer to former habitual residence, a person having more than one such residence can reasonably be required to establish a danger of torture in each former habitual residence to which the person is permitted to return.²⁵ Otherwise, a person may be granted international protection even though he or she has a potential refuge in one of his or her former habitual residences. Therefore, if a stateless person has multiple countries of former habitual residence, the claim for protection may be established by reference to any such country. However, if the claimant is able to return to any other country of former habitual residence, the claimant must, in order to establish the claim for protection, also demonstrate that he or she faces a risk there.

Canadian case law in the Convention refugee context dealing with the acquisition of nationality as well as with issues pertaining to former habitual residence may be of assistance given the similar context in which the terms "nationality" and "former habitual residence" are used.

4.2. Removal

Although the term "removal" is not defined in the *IRPA*, the removal order provisions of the *IRPA* indicate that it refers to an order to leave Canada. In the context of s. 97(1)(a), the words "removal ... *would* subject them" indicate that the RPD and the RAD assess whether a person risks being tortured if he or she would be ordered to leave Canada.

4.3. Personal Risk

The phrase "*would subject them personally*" indicates that the danger of torture is assessed prospectively. Although a person may have been in danger, or even a victim, of torture, it is the future danger of torture that is determinative.

A person must demonstrate that he or she would be subjected *personally* to a danger of torture. It is not sufficient to establish that torture is practised in the country to which the person would be removed. The Committee Against Torture has often expressed this requirement in its communications as follows:

²⁵ A similar question was raised in the Convention refugee definition context in *Thabet v. Canada (Minister of Citizenship and Immigration)*, [1998] 4 F.C. 21 (F.C.A.).

...The Committee must take into account all relevant considerations, pursuant to article 3 paragraph 2 [of the *Convention Against Torture*] including the existence of a pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass human rights violations in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; specific grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.”²⁶

A person may be at risk without necessarily being personally targeted. A person’s risk may be assessed by considering the risk faced by similarly situated persons. For instance, a risk may be considered to be personal if the individual alleging a risk of torture has a certain political profile, is of a particular ethnicity or belongs to a professional or social group which is targeted or is in a situation similar to others who risk torture.²⁷

4.4. Danger of Torture

Although the term “danger” is not defined, it ordinarily refers to an exposure to harm. In *Suresh*²⁸ and *Ahani*²⁹ the Supreme Court equated “danger of torture” with “risk of torture”.

4.5. Burden of Proof

The burden of proving a danger of torture according to the requirements of s. 97(1)(a) rests with the person alleging such a danger. The same position is adopted by the Committee Against Torture in General Comment Number 1³⁰ with respect to the allegations made by virtue of the *CAT*.

²⁶ For instance, see *Kisoki v. Sweden*, CAT Communication No. 41/1996; *K.N. v. Switzerland*, CAT Communication No. 94/1997; *S.M.R. et al v. Sweden*, CAT Communication No. 103/1998; *A.M. v. Switzerland*, CAT Communication No. 144/1999. See also *Salibian v. M.C.I.*, [1990] 3 F.C. 250 (C.A.) for a discussion of similar questions in the context of the Convention refugee definition.

²⁷ *X v. Switzerland*, CAT Communication No. 38/1995. The social group was not specified nor were the criteria that were used to determine whether or not a person is a part of a social group. Another communication (*Arana v. France*, CAT Communication No. 63/1997) refers to “persons detained for terrorist activities” and “other persons in the same circumstances as the author”.

²⁸ *Suresh*, *supra*, note 4.

²⁹ *Ahani*, *supra*, note 4.

³⁰ CAT General Comment No. 1, (General Comments); Implementation of Article 3 of the Convention in the context of Article 22: 21/11/97, at paragraph 7. The text of the Committee Against Torture General Comment No. 1 is found at chapter 10.

General Comment Number 1 also mentions that all pertinent information used to establish the existence of a danger of torture “may be introduced by either party (the author or the state) to bear on this matter”. Since the state will not be a party before the IRB, only the person alleging a danger of torture will be formally required to bring evidence to substantiate the claim. However, the RPD may also provide relevant information on country conditions. In addition, both the RPD and the RAD may also make use of their specialized knowledge.

The following is a non-exhaustive list of issues considered by the Committee Against Torture³¹ to be relevant in assessing a communication alleging a danger of torture which may be helpful in determining claims under s. 97(1)(a):

“(a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see article 3(2))?”

(b) Has the author been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past? If so, was this in the recent past?

(c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?

(d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?

(e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?

(f) Is there any evidence as to the credibility of the author?

(g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?”

4.6. Standard of Proof - Believed on Substantial Grounds to Exist

A person presenting a claim based on s. 97(1)(a) must demonstrate that there exist substantial grounds to believe that he or she would be subjected personally to a danger of torture.

According to the Committee Against Torture General Comment 1:

³¹ *Ibid.*, at par. 8.

[6]...the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.

[7] The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present.³²

In the case of *Mutombo*,³³ the Committee Against Torture framed the standard as “his return to Zaire would have the foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured.” The Committee Against Torture has consistently applied this interpretation, rejecting the point of view that the risk of torture is to be highly likely.³⁴

Some decisions³⁵ from the European Court of Human Rights (“ECHR”) indicate that allegations of *past* torture are to be proven beyond a reasonable doubt. However, the imposition of so high a standard has been criticized³⁶ because of the civil nature of the proceedings before the Court and the difficulty for an applicant to gather evidence of the ill-treatment suffered.

In Canada, allegations of *Charter* violations, including of s. 7 and 12 (under which allegations of torture would likely be considered), must be proven on a balance of probabilities.³⁷

The CIC Guidelines issued for Post-Determination Refugee Claimants in Canada (PDRCC) reviews, which include reviews of allegations of a risk of torture as defined in the *CAT*, were determined to set the standard of proof at “less than a clear probability, or even a balance of probabilities, but greater than a mere possibility”.³⁸

In *Suresh*,³⁹ the Federal Court of Appeal considered the question of the standard of proof set out by the phrase “substantial grounds believed to exist” applicable to a danger of torture within the meaning of Article 1 of the *CAT*. It stated:

³² *Supra*, note 30, at par. 7.

³³ *Mutombo v. Switzerland*, CAT Communication No. 13/1993.

³⁴ *E.A. v. Switzerland*, CAT Communication No. 28/1995.

³⁵ *Ireland v. U.K.*, Series A, no. 25, 18 January 1978; *Selmouni v. France*, Application no. 25803/94, 28 July 1999; *Salman v. Turkey*, Application No. 21986/93, 27 June 2000.

³⁶ *Vezenardoglu v. Turkey*, Application No. 32357/96, 11 April 2000, see the dissenting comments of Mr. Bonello.

³⁷ *R v. R.J.S.*, [1995] 1 S.C.R. 451; *Ahani v. M.C.I.*, [2000] F.C.J No.53 (A-414-99).

³⁸ *Sinnappu v. M.C.I.*, [1997] 2 F.C. 791. See also *Hsit, Sylvérine Aladdin v. M.C.I.* (F.C.T.D., No. IMM-296-97), Richard, December 9, 1997.

³⁹ *Suresh, supra*, note 28. In *Chahal v. United Kingdom*, ECHR, File: 70/1995/576/662, November 15, 1996, the test is stated as follows at paragraph 97 of the decision: “...In determining whether it has been substantiated that there is a real risk that the applicant, if expelled to India, would be subjected to treatment contrary to Article 3...”

[150]... a more basic question must be addressed: what is the requisite degree of risk of torture envisaged by the “substantial grounds” test?

[151] It is generally acknowledged that the risk of torture must be assessed on grounds that go beyond “mere theory” or “suspicion” but something less than “highly probable”. The risk or danger of torture must be “personal and present”. This is the approach adopted by the European Court of Human Rights in *Chahal*, supra, discussed earlier and by the United Nations’ Committee Against Torture: see General Comment on the Implementation of Article 3 in the context of article 22 of the Convention against Torture, UN Doc. CAT/C/XX/Misc.1 (1997), par. 6 and 7.

[152] If we reject the two extreme threshold tests, “mere possibility” and “highly probable”, we are left with the intermediate standard framed in terms of a “balance of probabilities”. That threshold can be conveniently recast by asking whether refoulement will expose a person to a “serious” risk of torture.

In *Ahani*,⁴⁰ the Federal Court of Appeal stated: “In other words, the appellant must establish, on a balance of probabilities, that he would be exposed to torture at the hands of the Iranian authorities, or as set in *Suresh* a ‘serious’ risk of harm.”

According to the Federal Court of Appeal decisions in *Suresh*⁴¹ and *Ahani*,⁴² a serious risk of torture must be established on facts proven on a balance of probabilities. It is not clear however whether “serious risk of torture” requires that the likelihood of torture be proven to be more probable than not (standard of proof referred to as balance of probabilities) or more than mere theory but less than more probable than not (standard of proof applied in Convention refugee claims).

In *Adjei*,⁴³ the Federal Court of Appeal had indicated that the phrase “substantial grounds for thinking” seemed to suggest that the standard of proof was a balance of probabilities, and this could not be used interchangeably with “serious possibility” or “reasonable chance” which suggested a standard of more than a mere possibility but less than a balance of probabilities. However, the meaning of “serious risk” referred to in *Suresh*⁴⁴ does not appear to be significantly different from “serious possibility” or “reasonable chance”.

Contrary to the Federal Court of Appeal’s position in *Adjei*,⁴⁵ the U.K. Immigration Appeal Tribunal in *Kacaj*,⁴⁶ agreed with the position adopted in *Governor of Pentonville Prison ex*

⁴⁰ *Ahani*, supra, note 37, par. 4.

⁴¹ *Suresh*, note 28.

⁴² *Ahani*, note 37.

⁴³ *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (F.C.A.).

⁴⁴ *Suresh*, supra, note 28.

⁴⁵ *Supra*, note 43..

*p. Fernandez*⁴⁷ and *Sivakumaran*,⁴⁸ that “substantial grounds for thinking”, “reasonable chance” and “serious possibility” all conveyed the same meaning. It rejected arguments that facts demonstrating risk of treatment contrary to article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* were to be established beyond a reasonable doubt. Relying on *Soering*,⁴⁹ it concluded that where a prospective breach of article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* is alleged, the applicable standard of proof is the same as that applicable in asylum cases.⁵⁰

In addition, the U.K. Immigration Appeal Tribunal, in *Kacaj*⁵¹ mentioned that applying different standards to asylum and Article 3 claims would be surprising when both conventions are concerned with whether future ill-treatment will amount to a breach of a person’s human rights. The use of different standards of proof was thought to lead to confusion and inconsistent decisions.

The Supreme Court’s decision in *Suresh*⁵² does not directly address the standard of proof nor comment on the Federal Court of Appeal’s findings on the issue. The Court equates “substantial grounds to believe that he would be in danger of being subjected to torture” (Article 3 of the *CAT*), with “substantial risk of torture”.⁵³ However, the Court refers to a “serious risk of torture”⁵⁴ without suggesting a distinction between the two expressions.

The preferred position of Legal Services is that all three grounds of protection should be decided using the same standard of proof, namely the *Adjei* test, “reasonable chance or serious possibility”. Hence, the question to be determined in respect of allegations of a danger of torture can be formulated as follows: Is there a reasonable chance or a serious possibility that the person would be tortured should he or she be removed to the country of reference? The test is premised

⁴⁶ *Secretary of State for the Home Department v. Kacaj*, Immigration Appeal Tribunal, Appeal No. CC-23044-2000, July 19, 2001.

⁴⁷ *R. v. Governor of Pentonville Prison Ex Parte Fernandez*, [1971] 1 W.L.R. 987.

⁴⁸ *R. v. Secretary of State for the Home Department, Ex Parte Sivakumaran*, [1988] 1 All E.R. 193 (H.L.) 196.

⁴⁹ ECHR, *Soering case*, judgment of 7 July 1989, Series A No. 161.

⁵⁰ *Supra*, note 46, at paragraphs 10 to 15.

⁵¹ *Supra*, note 46.

⁵² *Supra*, note 4.

⁵³ For instance at par. 129: “We conclude that generally to deport a refugee, where there are grounds to believe that this would subject the refugee to a **substantial risk of torture**, would unconstitutionally violate the Charter’s s. 7 guarantee of life, liberty and security of the person. This said, we leave open the possibility that in an exceptional case such deportation might be justified either in the balancing approach under ss. 7 or 1 of the Charter.

⁵⁴ Par 78: “Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the *CAT* directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the Charter generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a **serious risk of torture**.”

on the prospective nature of the risk, and that same prospective element is present in all three protection grounds.

4.7. Protection

Contrary to the Convention refugee definition and to the risk to life or risk of cruel and unusual treatment or punishment ground, s. 97(1)(a) and Article 1 of the *CAT* do not indicate that a person must be unable or unwilling to seek the protection of the country of reference. There may be no general requirement to seek protection because, in all claims where a danger of torture is found to exist, the state is either directly or indirectly involved in the abuse.

Committee Against Torture communications, often dealing with cases wherein acts of torture by state security forces are alleged, do not address the issue of protection.

However, the issue of protection may be relevant in claims where the involvement of the state in the ill-treatment is not widespread or does not involve all of the state apparatus and thus state protection is available. Effective protection will reduce the risk of torture and should therefore be considered at the time of the assessment of risk.

In claims where state protection is an issue, the claimant has the burden to demonstrate that there is a serious possibility that he or she would be tortured if returned because of the lack of effective protection. In assessing the issue of protection, evidence that the state has taken effective legislative, administrative, judicial or other measures aimed at preventing acts of torture may be relevant.⁵⁵

The principles set out in *Ward*⁵⁶ concerning protection are therefore relevant to claims based on a danger of torture except that state involvement in torture is required.⁵⁷

For a discussion of the issue of protection in cases where the person requesting international protection is stateless, the principles in *El Khatib*⁵⁸ and *Nizar*⁵⁹ decided in the Convention refugee context may be of assistance.

4.8. Internal Flight Alternative (IFA)

As is the case with the Convention refugee definition, the *CAT* and s. 97(1)(a) do not specifically mention an internal flight alternative (IFA). However, s. 97(1)(a) implicitly requires

⁵⁵ See the State Parties' obligation to this effect found at Article 2(1) of the *CAT*.

⁵⁶ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

⁵⁷ In *Ward*, note 56, p. 720, the Court stated: "Whether the claimant is 'unwilling' or 'unable' to avail him- or herself of the protection of a country of nationality, state complicity in the persecution is irrelevant." See also, *Rajudeen v. M.C.I.* (1984), 55 N.R. 129 (F.C.A.).

⁵⁸ *El Khatib, Naif v. M.C.I.* (F.C.T.D., no. IMM-5182-93), McKeown, September 27, 1994.

⁵⁹ *Nizar v. M.C.I.* (F.C.T.D., no. A-1-92), Reed, January 10, 1996.

proof of the absence of an IFA for protection to be granted. This requirement is based on the wording of s. 97(1) which indicates that removal is effected to “their *country*”. Consequently, a danger of torture must be shown to exist throughout the territory of the country of reference.

The Committee Against Torture considered an argument based on IFA in *Haydin*:⁶⁰

4.8 The State party states that it is aware of the serious human rights problem concerning Turkey, in particular in the south-eastern part of the country... While many [persons of Kurdish origin] live in the south-eastern part of Turkey, others are scattered throughout other parts of the country where they are completely integrated into the Turkish society in general...[...] according to the current practice, if an expulsion order is carried out with respect to a Turkish citizen of Kurdish origin, he or she will not be deported from Sweden to the Kurdish areas against his or her will, but to Istanbul or Ankara.

The Committee acknowledged the applicability of the first prong of the IFA test. However, it determined that an IFA was not available in the case before it. It stated:

6.4 The Committee is aware of the serious human rights situation in Turkey. Reports from reliable sources suggest that persons suspected of having links with the PKK are frequently tortured in the course of interrogations by law enforcement officers and that this practice is not limited to particular areas of the country. In this context, the Committee further notes that the Government has stated the view of the UNHCR, i.e. that no place of refuge is available within the country for persons who risk being suspected of being active sympathisers of the PKK.

The second prong of the IFA test set out in *Rasaratnam*⁶¹ was not argued in *Haydin* and *Alan*.⁶² However, given the Canadian Convention refugee definition case law, and in the absence of legislative indication to the contrary, the IFA principles set out *Rasaratnam*,⁶³ *Thirunavukkarasu*⁶⁴ and *Ranganathan*,⁶⁵ regarding the first and second prongs of IFA test are applicable to a claim based on a danger of torture. In many cases, both Convention refugee and danger of torture claims will be based on allegations of harm of a similar nature and it is therefore difficult to support a different IFA approach for the latter ground. Applying the same two-prong IFA test to both grounds allows claimants alleging a risk of similar harm to be treated according to the same rules.

⁶⁰ *Haydin v. Sweden*, CAT Communication No. 101/1997, See also *Alan v. Switzerland*, CAT Communication No. 21/1995.

⁶¹ *Rasaratnum v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (F.C.A.).

⁶² *Supra*, note 60.

⁶³ *Supra*, note 61.

⁶⁴ *Thirunavukkarasu v. Canada (Minister of Citizenship and Immigration)*, [1994] 1 F.C. 589 (F.C.A.).

⁶⁵ *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 164 (F.C.A.).

5. DEFINITION OF TORTURE

There is little doubt that torture has a long history. However, its full purpose and effects - both individually and socially - have only recently come to light:

Pathogenesis

One of the first - and greatest - surprises in the beginning of the 1970s was that torture creates after-effects, physical (which could be expected), as well as mental, which was absolutely new knowledge for us. This was closely connected with the fact that the aim of torture was revealed: the aim was not just to obtain information, but first of all to destroy the personality, to destroy the person mentally, so that he was no longer able to function in his family, in society or politically. Moreover, we found that the torture methods were practically the same all over the world, which meant that the after-effects were also practically the same. The target groups for torture were strong persons; the persons who fought for human rights against injustice, first of all persons like union leaders, politicians, student leaders, leaders of ethnic minorities and journalists. When these persons had been subjected to torture, they could no longer function against the regime.

Conclusively, it must be said that torture is a power tool, used deliberately by states for them to stay in power. Dictatorships versus human rights.⁶⁶

Recently, the Supreme Court indicated the following in *Suresh*:⁶⁷

51 The prospect of torture induces fear and its consequences may be devastating, irreversible, indeed, fatal. Torture may be meted out indiscriminately or arbitrarily for no particular offence. Torture has as its end the denial of a person's humanity; this end is outside the legitimate domain of a criminal justice system. [...] Torture is an instrument of terror and not of justice.

Torture is widely condemned and the absolute prohibition against torture is thought by many to be a peremptory norm in international law.⁶⁸ Torture is prohibited in the principal human rights instruments and some include a definition of torture (such as the *CAT* and the *Inter-American Convention to Prevent and Punish Torture*). In the context of s. 97(1)(a), the meaning of torture is restricted to the definition set out in Article 1 of the *CAT*.

In the Canadian context, torture has been discussed principally under s. 12 of the *Charter* wherein reference is made to Article 1 of the *CAT* as well as other human rights instruments

⁶⁶ Bent Sørensen. *Prevention of Torture* in "Maltreatment and Torture" (M. Oehmichen, ed., Verlag Schmidt-Römhild, publ., Lübeck 1998) in the series *Research in Legal Medicine*, Volume 19.

⁶⁷ *Supra*, note 4.

⁶⁸ See discussion at par 60 to 65 in *Suresh*, *supra*, note 4.

prohibiting torture. In *Suresh*,⁶⁹ the Supreme Court indicated that torture is cruel and unusual treatment or punishment:

51 When Canada adopted the Charter in 1982, it affirmed the opposition of the Canadian people to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12. A punishment is cruel and unusual if it "is so excessive as to outrage standards of decency": see *R. v. Smith*, [1987] 1 S.C.R. 1045, at pp. 1072-73, per Lamer J. (as he then was). It must be so inherently repugnant that it could never be an appropriate punishment, however egregious the offence. Torture falls into this category. [...] As Lamer J. stated in *Smith*, supra, at pp. 1073-74, "some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment". As such, torture is seen in Canada as fundamentally unjust.

In *Burns*,⁷⁰ the Supreme Court indicated that s. 12 of the *Charter* is equivalent to Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which prohibits torture and inhuman or degrading treatment or punishment.

Cruel and unusual treatment or punishment also includes other harm which "shocks the conscience",⁷¹ may be considered inhuman or degrading, and which may vary in severity of pain or suffering.

Although torture is a form of cruel and unusual treatment or punishment and is generally recognized to be persecution, four main factors distinguish it from other forms of ill-treatment.

First, torture is distinguishable on the basis of the severity of the pain or suffering inflicted.

Second, acts of torture must be deliberately or intentionally inflicted.

These two distinctions are mentioned in *CAT*⁷² as well as in the *U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*:⁷³

⁶⁹ *Supra*, note 4, par

⁷⁰ *United States of America v. Burns*, [2001] 1 S.C.R. 283.

⁷¹ *Smith, v. R.*, [1987] 1 S.C.R. 1045.

⁷² The *CAT* mentions the *U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in its preamble and Article 16(1) of the *CAT* states:

16(1) Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

⁷³ *Supra*, note 12. The *Declaration* is considered to be a precursor to the *CAT*.

Article 1 (2) Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

The ECHR adopted a similar view in *Ireland v. U.K.*,⁷⁴ which considered the European Convention for the Protection of Human Rights and Fundamental Freedom.⁷⁵

Third, contrary to the Convention refugee definition and to s. 97(1)(b) concerning the ground of protection based on a risk to life or risk of cruel and unusual treatment or punishment, the definition of torture in the CAT requires that the state be either directly or indirectly involved in the ill-treatment. The CAT was meant to address situations in which the state is involved in the commission of torture and therefore state involvement is also a key element of the definition:

The problem with which the Convention was meant to deal was that of torture in which the authorities of a country were themselves involved and in respect of which the machinery of investigation and prosecution might therefore not function normally.⁷⁶

Fourthly, the definition of torture in the CAT requires that torture be committed for a specific purpose. The ECHR notes this aspect in *Report in the Greek case*:

The word 'torture' is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.⁷⁷

The elements of the definition of torture within the meaning of Article 1 of the CAT are discussed below.

5.1. Severe Physical or Mental Pain or Suffering Intentionally Inflicted

The definition of torture in the CAT does not encompass all forms of mistreatment, but rather only those acts by which severe pain or suffering, whether physical or mental, is

⁷⁴ Series A, no. 25, 18 January 1978. The Court stated:

The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

⁷⁵ The European Convention provides a similar 'dual' approach which distinguishes between torture and inhuman or degrading treatment.

⁷⁶ Burgers and Danelius. *The United Nations Convention against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.* (Martinus Nijhoff Publishers, Dordrecht, 1988), at 120.

⁷⁷ *Report in the Greek case*, adopted November 5, 1969, by the European Commission of Human Rights, at Chapter IV, paragraph 2. As quoted in Burgers and Danelius, *supra*, note 76, at 114.

intentionally inflicted. The definition is restrictive and excludes treatment that might otherwise meet a more generic definition of torture.⁷⁸ Article 1(1) of the *CAT* states:

Article 1(1) For the purposes of this Convention, "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The following elements of the definition will be considered below:

- any act
- by which severe pain or suffering
- whether physical or mental
- is intentionally inflicted

5.1.1. "any act"

The definition of torture requires that there be an identifiable *act* by which severe pain or suffering is inflicted. This implies that more general situations or conditions, although they may cause severe pain or suffering, do not fall within the definition of torture.⁷⁹

In some cases, an omission may also be considered as an "act":

Normally, what constitutes torture is a positive act, and the definition in article 1 only refers to acts and not to omissions. This does not exclude, however, that in special cases an omission should be assimilated to an act. The intentional failure to provide a prisoner with food or drink could be a case in point.⁸⁰

Given that an act demonstrates the external manifestation of the actor's will,⁸¹ an omission may be assimilated to an act of torture if it indicates an intention to inflict severe pain or suffering.

⁷⁸ Some forms of treatment, although not falling within the terms of the definition of torture under s. 97 (1)(a), may nonetheless fall within the "risk" provisions of s. 97(1)(b).

⁷⁹ For instance, the state's economic policy.

⁸⁰ Burgers and Danelius, *supra*, note 76, at 118.

⁸¹ Act: Denotes external manifestation of actor's will. Expression of will or purpose, carrying idea of performance; primarily that which is done or doing; exercise of power, or effect of which power exerted is cause. *Black's Law Dictionary*, 6th ed., s.v. "act".

For instance, in Canada, the failure of a person to provide another under his or her charge with the necessities of life is an "omission" which may be considered to be a criminal act.⁸²

Finally, it is important to note that a single act is sufficient to conclude to a finding of torture. Repeated infliction of severe pain or suffering is not required in order for the definition to be met.

... A proposal that it should be added as a further criterion that the pain was inflicted systematically was not reflected in the final text of the article, which means that even a single, isolated act can be considered to constitute torture.⁸³

Thus, "danger of torture" means a danger of at least one incident where severe pain or suffering may be inflicted.

5.1.2. "by which severe pain or suffering"

The definition of torture requires that the pain or suffering be "severe".

In order to constitute torture, the act must cause *severe* pain. Alternative wordings, such as *extreme* or *extremely severe* pain, were suggested during the *travaux préparatoires*, but the phrase "severe pain" was considered sufficient to convey the idea that only acts of a certain gravity shall be considered to constitute torture.⁸⁴

The ECHR expressed a similar view in the recent case of *Selmouni v. France*.⁸⁵

⁸² Omissions may trigger criminal responsibility pursuant to section 219 of the *Criminal Code* in situations where there is a legal duty (as set out at section 215) to provide the necessities of life:

215. (1) Every one is under a legal duty

...

(c) to provide necessities of life to a person under his charge if that person

(i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and

(ii) is unable to provide himself with necessities of life.

⁸³ Burgers and Danelius, *supra*, note 76, at 117.

⁸⁴ *Ibid.* at 118.

⁸⁵ Application no. 25803/94, July 28, 1999. The Court stated:

In order to determine whether a particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As the European Court has previously found, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering ...

Given the subjective nature of pain and suffering, an objective test is difficult to establish. However, it was hoped that the application *CAT* would lead to the setting of a “uniform level” above which pain or suffering would constitute torture.⁸⁶

The courts have relied on a various criteria to assess the severity of the alleged pain and suffering including subjective elements such as the age, sex and health condition of the victim and the effects of the ill-treatment. Worth noting is the European Court of Human Rights' (ECHR) interpretation of "torture" in the case of *Ireland v. U.K.*⁸⁷

Admittedly the word "torture" included in Article 3 of the Convention is not capable of an exact and comprehensive definition. It is undoubtedly an aggravated form of inhuman treatment causing intense physical and/or mental suffering. Although the degree of intensity and the length of such suffering constitute the basic elements of torture, a lot of other relevant factors had to be taken into account. Such as: the nature of ill-treatment inflicted, the means and methods employed, the repetition and duration of such treatment, the age, sex and health condition of the person exposed to it, the likelihood that such treatment might injure the physical, mental and psychological condition of the person exposed and whether the injuries inflicted caused serious consequences for short or long duration are all relevant matters to be considered together and arrive at a conclusion whether torture has been committed.

5.1.3. "whether physical or mental"

The definition of torture includes both physical and mental forms of severe pain or suffering, or a combination of the two, as a basis for protection. The *Torture Reporting Handbook*⁸⁸ lists many types of physical and mental abuse which might constitute torture.⁸⁹

⁸⁶ Burgers and Danelius, *supra*, note 76, at 123:

It may also be appropriate to point out that, although the definition of torture in article 1 may give the impression of being a very precise and detailed one, one of the basic concepts which it contains, namely "severe pain or suffering", is in fact a rather vague concept, on the application of which to a specific case there may be very different views. It would not be surprising if the opinions of different persons on this matter would be influenced by their legal background and by the role humanitarian considerations play within their own societies. Nevertheless, it was not the intention of those who drafted the *Convention* that the content of the concept of torture should vary from country to country. One of the basic tasks of those who are to apply the *Convention*, and in particular of the Committee against Torture set up under its article 17, should be to determine a uniform level above which pain or suffering becomes so severe that the infliction of it constitutes torture.

⁸⁷ Series A, no. 25, January 18, 1978.

⁸⁸ Camille Giffard. *Torture Reporting Handbook*. (Human Rights Centre, University of Essex, 2000).

⁸⁹ See page 15: "Certain types of treatment appear objectively to fall into the category of torture - for example, electric shocks to the genitals, or the pulling out of fingernails. Torture is not, however, limited to such familiar examples - it encompasses many forms of suffering, both physical and psychological in nature. It is particularly important not to forget about psychological forms of ill-treatment - very often these can have the most long-lasting consequences for victims, who may recover from physical injuries yet continue to suffer

5.1.3.1. Physical Pain or Suffering

Acts causing severe physical pain or suffering are perhaps the most commonly recognized forms of torture. The U.N. Special Rapporteur on Torture, in a report from 1986, provided various examples, including:

- beatings (including, blows to the feet, lashing, etc.)
- burns (from cigarettes, electricity, burning coal, etc.)
- electric shocks
- suspension
- suffocation
- exposure to excessive light or noise
- sexual aggression
- administration of drugs, in detention or psychiatric institutions
- prolonged denial of sleep . . . food . . . hygiene . . . [or] medical assistance.⁹⁰

These are also noted in the *Istanbul Protocol*:⁹¹

186. The following discussion is not meant to be an exhaustive discussion of all forms of torture, but it is intended to describe in more detail the medical aspects of many of the more common forms of torture. . . .

- Beatings and other forms of blunt trauma
 - (a) Skin damage

from deep psychological scarring. Forms of ill-treatment which have been found to amount to torture, either alone or in combination with other forms of treatment, include:

- *Falaka/falanga*: beatings on the soles of the feet
- Palestinian hanging: suspension by the arms while these are tied behind the back
- Severe forms of beatings
- Electric shocks
- Rape
- Mock executions
- Being buried alive
- Mock amputations

There are, however, also many grey areas which do not clearly amount to torture, or about which there is still disagreement, but which are of great concern to the international community. Examples include:

- Corporal punishment imposed as a judicial penalty
- Some forms of capital punishment and the death-row phenomenon
- Solitary confinement
- Certain aspects of poor prison conditions, particularly if combined
- Disappearances, including their effect on the close relatives of the disappeared person
- Treatment inflicted on a child which might not be considered torture if inflicted on an adult

⁹⁰ As quoted in Anker. *Law of Asylum in the United States*. (Refugee Law Centre Inc., 1999), at chapter 7.

⁹¹ *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Submitted to the United Nations High Commissioner for Human Rights, August 9, 1999.

- (b) Fractures
- (c) Head trauma
- (d) Chest and abdominal trauma
- Beatings of the feet
- Suspension
- Other positional torture
- Electric shock torture
- Sexual torture including rape

5.1.3.2. Mental Pain or Suffering

Commentators describe acts likely to result in severe mental pain or suffering:

The acts inflicting severe *mental* pain or suffering can be of very different kinds. One category consists of acts which imply threats or which create fear in the victim. Examples are that the victim is made to believe that he will be killed or that reprisals will be taken against his wife or his children if he does not co-operate. Another category is where the victim is forced to witness events such as the execution or the torture of other detainees or of his own family members. The fact of not satisfying certain basic needs of a person could also, in some circumstances, constitute torture. Examples of this are deprivation of food or water or of sleep, prolonged isolation, perhaps even in darkness, etc. In all of these cases, however, the act concerned can only be described as torture if the pain or suffering inflicted is severe.⁹²

In the 2001 report to the U.N. General Assembly,⁹³ the Special Rapporteur of the Commission on Human Rights considers some aspects of mental torture:

7. ... The Special Rapporteur also referred in several of his mission reports to the fact that the absence of marks on the body that would be consistent with allegation of torture should not necessarily be treated by prosecutors and judges as proof that such allegations are false.³ In that respect, he called for the judiciary to be made more aware of other forms of torture, such as intimidation and other threats.

8. It is the Special Rapporteur's opinion that serious and credible threats, including death threats, to the physical integrity of the victim or a third person can amount to cruel, inhuman or degrading treatment or even to torture, especially when the victim remains in the hands of law enforcement officials. He remains alert to the problems posed in respect of securing evidence of non-physical forms of torture.

...

14. The Special Rapporteur notes that, according to both Committees, the rationale of duration has often been considered one of the principal elements in determining the severity of ill-treatment.¹² While reaffirming that enforced disappearances are unlawful under international law and

⁹² Burgers and Danelius, *supra*, note 76, at 118.

⁹³ A/56/156. Dated July 3, 2001.

cause much anguish, whatever their duration, the Special Rapporteur believes that to make someone disappear is a form of prohibited torture or ill-treatment, clearly as regards the relatives of the disappeared person and arguably in respect of the disappeared person or him/herself.¹³ He further believes that prolonged incommunicado detention in a secret place may amount to torture as described in article 1 of the Convention against Torture. The suffering endured by the disappeared persons, who are isolated from the outside world and denied any recourse to the protection of the law, and by their relatives doubtless increases as time goes by.

Others provide more specific interpretations of mental pain and suffering.⁹⁴

5.1.3.3. Specific Cases

As noted in *The Torture Reporting Handbook* there are "many 'grey areas' which do not clearly amount to torture, or about which there is still disagreement, but which are of great concern to the international community."⁹⁵

5.1.3.3.1. Sexual Violence

Sexual violence has been recognized to constitute torture in some situations. The U.N. Special Rapporteur on violence against women notes in the 1998 Report to the Economic and Social Council:

Although neither common article 3 [of the 1949 Geneva Conventions] nor grave breaches enumerated in article 147 include sexual violence per se, recent indictments before the International Criminal Tribunal for the Former Yugoslavia (ICTY) have defined sexual violence as torture, inhuman punishment, great suffering or serious injury. In addition, the International Committee of the Red Cross, in its aide-mémoire 3 of December 1992, declared that the article 147 provisions on grave breaches included rape. This expansive interpretation has allowed for the prosecution of individuals for sexual violence as a grave breach of international humanitarian law also under common article 3.

⁹⁴ U.S. Department of State Initial Report of the United States of America to the UN Committee Against Torture Submitted by the United States of America to the Committee Against Torture, October 15, 1999:

To provide the requisite clarity for purposes of domestic law, the United States therefore conditioned its ratification upon an understanding that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality.

⁹⁵ Giffard, *supra*, note 88.

...

Although rape has not always been clearly defined as torture, increasingly it is being recognized as such. As early as 1992, the Special Rapporteur on torture clearly defined rape as a form of torture. The prosecutors at both the ICTY in The Hague and the International Criminal Tribunal on Rwanda (ICTR) in Arusha have indicted individuals for rape as a form of torture. Furthermore, a recent decision by the European Court of Human Rights in the case of *Aydin v. Turkey* of 25 September 1997 found that the:

"[r]ape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victims which do not respond to the passage of time as quickly as other forms of physical and mental violence ... the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of article 3 of the Convention".⁹⁶

5.1.3.3.2. Capital Punishment

There is considerable debate as to whether capital punishment and the "death row phenomenon" constitute torture as defined in the *CAT*. The question may arise when determining whether, in the given circumstances, capital punishment constitutes a lawful sanction or whether it falls outside the scope of the exception and can therefore be considered to be torture.

In the case of *Soering*,⁹⁷ the ECHR considered whether the death penalty and the death row phenomenon constituted torture or inhuman or degrading treatment or punishment, in violation of Article 3⁹⁸ of the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950*. On the facts of that case, the Court found that the death row phenomenon was in violation of Article 3, but that the death penalty itself was not. It mentioned factors to consider in determining whether capital punishment constitutes torture or inhuman or degrading treatment or punishment. The Court stated:

103. ... In these conditions, notwithstanding the special character of the Convention ..., Article 3 cannot be interpreted as generally prohibiting the death penalty.

104. That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3. The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime

⁹⁶ *Report of the Special Rapporteur on violence against women, its causes and consequences*. E/CN.4/1998/54. January 26, 1998.

⁹⁷ *Supra*, note 41.

⁹⁸ Article 3(1): No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3. Present-day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded.

...

111. ... However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.

The *Soering*⁹⁹ case was cited with approval by the Supreme Court of Canada in *Burns*,¹⁰⁰ where the Court concluded that Canada could not extradite the respondent without assurances that the death penalty would not be imposed. Although the *Burns* case deals more closely with the possibility of wrongful conviction, the conclusion is also based on a consideration of the "psychological trauma" associated with the lengthy period on death row.

5.1.3.3.3. Corporal Punishment and Solitary Confinement

There is some debate as to whether corporal punishment or solitary confinement constitute torture as defined in the *CAT*. As with cases involving the issue of capital punishment, the decision maker may be required to determine whether, given the facts of the case, corporal punishment and solitary confinement constitute a lawful sanction or torture.

Although not determinative, the *Standard Minimum Rules for the Treatment of Prisoners*¹⁰¹ provide some guidance. The *Rules* prohibit corporal punishment, but allow "close confinement" and other forms of punishment if a medical officer has certified that the prisoner is fit to sustain them.

31. Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.

⁹⁹ *Supra*, note 49.

¹⁰⁰ *United States of America v. Burns*, [2001] 1 S.C.R. 283.

¹⁰¹ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of May 13, 1977.

32 (1) Punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.

(2) The same shall apply to any other punishment that may be prejudicial to the physical or mental health of a prisoner. In no case may such punishment be contrary to or depart from the principle stated in rule 31.

5.1.3.3.4. Poor Prison Conditions

Although the tribunal is not precluded from determining that poor conditions in prisons or detention facilities, due, for instance, to overcrowding or lack of sanitation, meet the definition of torture, such conditions have typically been considered to be inhuman and degrading treatment.

The CPT [the Committee for the Prevention of Torture] report on its 1990 visit to England dealt in particular with the severely inadequate conditions in British prisons. The Committee designated the combination of overcrowding, lack of hygiene and poor regime as inhuman and degrading treatment.¹⁰²

5.1.3.3.5. Forced Disappearance

The U.N. Commission on Human Rights considers that forced disappearance and *incommunicado* detention may amount to torture:

10. As stated in article 1 of the *Declaration on the Protection of all Persons from Enforced Disappearance*, any act of enforced disappearance “constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.” Similarly, the Working Group of the Commission on Human Rights on Enforced or Involuntary Disappearances acknowledged, in its third report to the Commission, that enforced disappearance itself constitutes

¹⁰² Report from the Committee for the Prevention of Torture, UK (CPT/Inf (91)15), para. 57, in Roland Bank. "International Efforts to Combat Torture and Inhuman Treatment: Have the New Mechanisms Improved Protection?" In *European Journal of International Law*, 1999. (Part of *Academy of European Law online*, <http://www.iue.it/AEL/AELonline.htm>). The report also states:

Other practices, such as the handcuffing of pregnant prisoners to their beds in a civil hospital prior to delivery and the lack of provision of activities for prisoners held for 23 hours a day in an overcrowded cell, were designated as 'inhuman treatment'. In addition, the CPT noted a constant threat of inhuman treatment in one psychiatric institution, where therapeutic initiatives and safeguards for the application of physical restraints were missing.

ipso facto torture and other prohibited ill-treatment. It stated that: “the very fact of being detained as a disappeared person, isolated from one’s family for a long period is certainly a violation of the right to humane conditions of detention and has been represented to the Group as torture.”¹⁰³

5.1.3.3.6. Treatment Inflicted on a Child which might not be considered Torture if Inflicted on an Adult

Although the same definition of torture applies to both adults and to children, its application should take into account the particular situation of children, as recognized in the *Convention on the Rights of the Child*.¹⁰⁴ The U.N. Committee on the Rights of the Child has

¹⁰³ In its 2001 report to the U.N. General Assembly .A/56/156. Dated July 3, 2001. The report also states:

12. The Special Rapporteur also notes that, in article 1, the Declaration states that any act of enforced disappearance inflicts severe suffering on the victims and their families and in the fifth preambular paragraph refers to the anguish and sorrows caused by those disappearances. The Special Rapporteur would like to emphasize that the working definition of “disappearance” refers also to the refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty. This is an intentional act directly affecting close family members. Being fully aware they are hurling family members into a turmoil of uncertainty, fear and anguish regarding the fate of their loved one(s), public officials are said to maliciously lie to the family, with a view to punishing or intimidating them and others.

...

14. The Special Rapporteur notes that, according to both Committees, the rationale of duration has often been considered one of the principal elements in determining the severity of ill-treatment. While reaffirming that enforced disappearances are unlawful under international law and cause much anguish, whatever their duration, the Special Rapporteur believes that to make someone disappear is a form of prohibited torture or ill-treatment, clearly as regards the relatives of the disappeared person and arguably in respect of the disappeared person or him/herself. He further believes that prolonged incommunicado detention in a secret place may amount to torture as described in article 1 of the Convention against Torture. The suffering endured by the disappeared persons, who are isolated from the outside world and denied any recourse to the protection of the law, and by their relatives doubtless increases as time goes by.

¹⁰⁴ *Supra*, note 15. The preamble to the *Convention* states:

Bearing in mind that the need to extend particular care to the child has been stated in the *Geneva Declaration of the Rights of the Child* of 1924 and in the *Declaration of the Rights of the Child* adopted by the General Assembly on 20 November 1959 and recognized in the *Universal Declaration of Human Rights*, in the *International Covenant on Civil and Political Rights* (in particular in articles 23 and 24), in the *International Covenant on Economic, Social and Cultural Rights* (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

recently presented the following recommendations with respect to the treatment of children. These deal in particular with the issues of discipline, detention, and punishment:¹⁰⁵

Review of legislation

(6) The Committee urges States parties to repeal, as a matter of urgency, any legislation that allows the imposition of unacceptable sentences (death or life imprisonment) for offences committed before the age of eighteen, contrary to the provisions of the Article 37(a) of the Convention.

(7) The Committee recommends that States parties review all provisions of criminal legislation, including on criminal procedure, dealing with children under eighteen (including any special legislation applying to armed forces) so as to ensure that it reflects appropriately the provisions of the *Convention on the Right of the Child* (articles 37 and 40). It also recommends that States parties consider incorporating into all relevant domestic laws and regulations (including, where appropriate, those dealing with children in care) the provisions of the *UN Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules, adopted by GA resolution 40/33 of 29 November 1985), of the *UN Guidelines for the Prevention of Juvenile Delinquency* (the Riyadh Guidelines, adopted by GA resolution 45/112 of 14 December 1990), of the *UN Rules for the Protection of Juveniles Deprived of their Liberty* (adopted by GA resolution 45/113 of 14 December 1990), and of the *UN Guidelines for Action on Children in the Criminal Justice System* (the Vienna Guidelines, adopted by ECOSOC resolution 1997/30). In particular, the Committee recommends that penal legislation applicable to juveniles be reviewed so as to ensure that courts are not restricted to custodial sentences disproportionate to the offence.

(8) The Committee recommends that States parties review all relevant legislation to ensure that all forms of violence against children, however light, are prohibited, including the use of torture, or cruel, inhuman or degrading treatment (such as flogging, corporal punishment or other violent measures) for punishment or disciplining within the child justice system, or in any other context. The Committee recommends that such legislation incorporate appropriate sanctions for violations and the provision of rehabilitation for victims.

Bearing in mind that, as indicated in the *Declaration of the Rights of the Child*, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"

¹⁰⁵ *State Violence Against Children: Report and General Recommendations*. September 22, 2000. Committee on the Rights of the Child. Found online at <http://www.unhchr.ch/html/menu2/6/crcdod.htm> .

5.1.4. "is intentionally"¹⁰⁶ inflicted"

The definition of torture requires the deliberate¹⁰⁷ or intentional infliction of severe pain or suffering. This does not require malevolent intent. Severe pain or suffering is considered to be intentionally inflicted if:

- it is a desired consequence; or
- it is known to be a likely consequence.

If severe pain or suffering is the result only of an accident or negligence, it is not intentional. However, where the perpetrator commits an act which is objectively harmful, the tribunal may presume that pain or suffering was intended.¹⁰⁸

5.2. State Involvement

The definition of torture requires the involvement of a "public official" or "other person acting in an official capacity."¹⁰⁹

Article 1(1) For the purposes of this Convention, "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, **when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.** It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The state agent includes a:

- public official or
- other person acting in an official capacity.

The state is involved when severe pain and suffering are:

- inflicted by

¹⁰⁶ Intentionally: To do something purposely, and not accidentally. Person acts "intentionally" if he desires to cause consequences of his act or he believes consequences are substantially certain to result. *Black's Law Dictionary*, 6th ed., s.v. "intentionally".

¹⁰⁷ Torture is distinguishable from cruel, inhuman or degrading treatment or punishment on the basis of the severity of the pain or suffering and the deliberate manner in which it is inflicted. See Article 1(2) of the *U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and *Ireland v. U.K.*, Series A, no. 25, 18 January 1978.

¹⁰⁸ *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551.

¹⁰⁹ For ease of reference, the term "state agent" will be used throughout to refer to all agents of the state who are described within the definition of torture. Note that if there is no state involvement, other grounds of protection may apply.

- at the instigation of
- with the consent, or
- with the acquiescence of
a state agent.

Thus, state involvement may manifest itself through a variety of acts. At one end of the spectrum are acts which are actually committed by a state agent. At the other end, are acts which are committed by non-state agents but which are in some way tolerated, either explicitly or implicitly, by state agents.

5.2.1. "public official"

First, state involvement is established where a public official inflicts or instigates, or consents or acquiesces to, acts resulting in severe pain or suffering.

Although neither the *IRPA* nor the *CAT* define "public official", the definition provided in the *Interpretation Act*¹¹⁰ may serve as a guide:

"public officer" includes any person in the public service of Canada who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or on whom a duty is imposed by or under an enactment.

This definition is not exhaustive, given its use of the term "includes." Thus, the term public officer may be interpreted broadly.

A more general definition provides further guidance for interpretation of the term "public officer" : a person who has been legally elected or appointed to office and who exercises governmental functions.¹¹¹

Although Canadian norms may be useful in determining who is a public official, it is relevant to also consider the norms used in the country of reference.

The requirement of state involvement is met if a public official is either directly or indirectly involved in acts resulting in severe pain or suffering. However, where a public official commits acts for purely private reasons and completely outside the context of his or her position of authority, it may be concluded that he or she is not committing the acts as a public official, but merely as a private individual. However, it may still be possible to find state consent or acquiescence of such "unofficial" acts and therefore conclude there is state involvement.

5.2.2. "other person acting in an official capacity"

Second, the definition of torture is met if there is some involvement of an "other person acting in an official capacity."

¹¹⁰ R.S.C. 1985, c. I-21.

¹¹¹ *Miriam Webster's Collegiate Dictionary*, 10th ed., s.v. "public officer".

There is no statutory definition for an "other person acting in an official capacity." This provision should be interpreted according to its plain meaning, though in a manner consistent with the context of the *CAT*, the aim of which is to prevent torture by state actors. Keeping this in mind, the definition should be interpreted to include only those who are acting in an official capacity *for the state*.¹¹² The term "official" is commonly defined as follows:

Official: derived from, or having the sanction of, persons in office; authorized or supported by the government, etc.; hence, authorized, authoritative.¹¹³

The scope of this phrase is, potentially, very wide. Clearly it covers more than those individuals who are named to a specific office within the state apparatus, because these individuals are already covered under the "public official" category.

Canadian courts have developed a "control" test¹¹⁴ for determining whether a person is a state agent. Simply, those who are under the legal control of the state are considered to be agents of the state. In *Eldorado*,¹¹⁵ the Supreme Court reaffirmed the "control" test for state agent but set a standard of *legal* control as opposed to *factual* control :

One rule that has become established, and that is useful, is that control means *de jure* control, not *de facto* control. It is the degree of control that the minister is legally entitled to exercise that is relevant, not the degree of control that is in fact exercised.¹¹⁶

An alternate and less restrictive test for state agent is found in the dissenting opinion of Justice Wilson in *McKinney*.¹¹⁷ This formulation combines a test for both *legal* and *functional* control:

¹¹² Other individuals may act officially (*i.e.*, within the mandate of their office) without having any connection to the state. For instance, the president of a corporation may officially open a corporate meeting.

¹¹³ *Oxford English Dictionary*, 2nd ed., *s.v.* "official".

¹¹⁴ *Westeel-Rosco Limited v. South Saskatchewan Hospital Centre*, [1977] 2 S.C.R. 238.

Whether or not a particular body is an agent of the Crown depends upon the nature and degree of control which the Crown exercises over it.

¹¹⁵ *R. v. Eldorado Nuclear Limited*, [1983] 2 S.C.R. 551.

At common law the question whether a person is an agent or servant of the Crown depends on the degree of control which the Crown, through its ministers, can exercise over the performance of his or its duties. The greater the control, the more likely it is that the person will be recognized as a Crown agent. Where a person, human or corporate, exercises substantial discretion, independent of ministerial control, the common law denies Crown agency status. The question is not how much independence the person has in fact, but how much he can assert by reason of the terms of appointment and nature of the official.

¹¹⁶ Peter Hogg, *Constitutional Law of Canada*. 3rd Ed. (Toronto: Carswell, 1992), at page 261.

¹¹⁷ *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at paragraphs 243-244.

As a result, I would favour an approach that asks the following questions about entities that are not self-evidently part of the legislative, executive or administrative branches of government:

1. Does the legislative, executive or administrative branch of government exercise general control over the entity in question?
2. Does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state?
3. Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?

Although this broader approach has been rejected as a test for the scope of application of the Canadian *Charter*, it is more consistent with the general language of the definition of torture, which refers simply to a "other person acting in an official capacity." This expression does not suggest a requirement that the person be acting under strict legal authority. Moreover, an important purpose of the *CAT* is to prevent acts of torture in which the state is involved. It would be contrary to this purpose to restrict the definition to include only those officials who were under the legal control, as opposed to the factual control, of state agents. Therefore, this broader test is recommended.¹¹⁸

5.2.3. "inflicted by"

First, where severe pain or suffering is inflicted directly by a state agent, the state is involved. However, as noted above,¹¹⁹ where a state agent commits acts for purely private reasons and completely outside the context of his or her position of authority, it may be concluded that he or she is not committing the acts as a public official. However, it may still be possible to find state consent or acquiescence of such "unofficial" acts of torture.

5.2.4. "at the instigation of"¹²⁰

Second, state involvement exists when a state agent incites or encourages other state actors or non-state actors to inflict severe pain or suffering.¹²¹

¹¹⁸ Note that, even if a person under the factual control of a public official were not considered to be acting in an official capacity, his or her conduct would nevertheless be at the instigation of, or have the consent or acquiescence of, a public official. For example, abuse by wardens in a private prison would not be committed by a 'public official' under the restrictive "legal control" test. However, it is likely the tribunal could find tacit approval by state authorities.

¹¹⁹ *Supra*, at s. 5.2.1.

¹²⁰ Instigation: Incitation; urging; solicitation. The act by which one incites another to do something, as to commit some crime or to commence a suit. *Black's Law Dictionary*, 6th ed., s.v. "instigation".

¹²¹ This may occur, for example, where the state government encourages the public to attack a particular ethnic or religious minority.

5.2.5. "with the consent"¹²²

Third, state involvement exists when a state agent provides express consent or approval for acts of torture.

5.2.6. "or with the acquiescence"¹²³

Fourth, state involvement exists when a state official acts in such a way that state approval of acts of torture may be inferred. Approval may be inferred in various situations, including the state's failure to fulfil the following obligations: (i) intervene when there are reasonable grounds to believe that an act of torture will be, or is being, committed; (ii) investigate when there are reasonable grounds to believe that an act of torture has been committed; or (iii) prosecute those responsible for such acts.

Such obligations are formally assumed by all states which have ratified the *CAT*, pursuant to Articles 2 and 12 to 14:

Article 2(1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

Article 12: Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13: Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14(1): Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

Even where a state has not formally adopted these obligations through ratification of the *CAT*, the failure to follow these standards provides a factual basis for concluding that the state consents to the abuse. Federal Court jurisprudence in the Convention refugee context may be helpful to determine whether the state's conduct amounts to acquiescence.

¹²² Consent: A concurrence of wills. Agreement; approval; permission; the act or result of coming into harmony or accord. *Black's Law Dictionary*, 6th ed., s.v. "consent".

¹²³ Acquiescence: Conduct from which assent may be reasonably inferred. Equivalent to assent inferred from silence with knowledge or from encouragement and presupposes knowledge and assent. Imports tacit consent, concurrence, acceptance or assent. A silent appearance of consent. Failure to make any objections. *Black's Law Dictionary*, 6th ed., s.v. "acquiescence".

In *Rajudeen*,¹²⁴ the Court relied on evidence that police took no active steps to respond to violence and that their indifference aggravated the situation in concluding that the claimant would be at risk of persecution by non-state agents:

The remaining requirement of the definition of Convention Refugee is his unwillingness to avail himself of the protection of Sri Lanka. The evidence clearly establishes that the mistreatment of the applicant was carried out by "thugs" of the Sri Lanka majority and not by Government authorities or by the police. The evidence is equally clear however that the police took no active steps to stop the violence, always managing to arrive on the scene after the violence had occurred. The applicant said that the police aggravated the situation by being indifferent. He also said that because the police were of the Sinhalese majority, he had no confidence that they would protect him. In his view, to ask for police protection would work against his interests since, in his experience "...the reportee gets arrested rather than the assaulted person." On the basis of this evidence, the applicant has established ample justification for being unwilling to avail himself of the protection of Sri Lanka.

In *Surujpal*,¹²⁵ the Federal Court of Appeal, referring to *Rajudeen*,¹²⁶ found "state complicity" where the state failed to provide redress after it had been informed of acts of persecution:

In our view it is not material whether the police directly participated in the assaults or not. What is relevant is whether there was police complicity in a broader sense. In this respect the decision of this Court in *Rajudeen v. Minister of Employment and Immigration* (1984), 55 N.R. 129, is directly in point.

...

If you change the country, and if you change the reasons for persecution from race and religion to political opinion, you have very much the present case. If there is a difference, the facts here more strongly indicate State complicity in the persecution, since the applicants and their families did go to the police but did not obtain redress. It is not required that State participation in persecution be direct; it is sufficient that it is indirect, provided that there is proof of State complicity.

In a recent report to the U.N. Commission on Human Rights, the Special Rapporteur for questions of torture equates the state's failure to respond to violence with encouragement of further acts of violence, implying state responsibility:

Due prevention and diligence by law enforcement officials are also often lacking when such groups are under threat or attack from private citizens. Victims of racial assaults by private citizens are often denied access to complaint procedures. Clashes between different racial or ethnic groups

¹²⁴ *Rajudeen v. Canada (Minister of Employment and Immigration.)*, (1984), 55 N.R. 129 (F.C.A.).

¹²⁵ *Surujpal v. Canada (Minister of Employment and Immigration.)*, (1985), 60 N.R. 73 (F.C.A.).

¹²⁶ *Supra*, note 124.

have taken place with the acquiescence, or even the condoning, of public authorities. This lack of reaction from public officials further encourages such private violence.¹²⁷ [emphasis added]

However, it is doubtful that a state can be found to acquiesce or be complicit in the infliction of severe pain or suffering where it opposes and attempts, in good faith, to prevent and protect against such acts, but is unsuccessful.

5.3. Purpose

The definition of torture requires that acts resulting in severe pain or suffering be inflicted for a purpose.

Article 1(1) For the purposes of this Convention, "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person **for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind**, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

By use of the expression *for such purposes as*, the definition of torture creates a non-exhaustive list of purposes. The existence of one of the purposes listed - or some other purpose of a similar nature - is sufficient to meet the requirement that there be a purpose.

The following elements of the definition will be considered below:

- such purposes as
- obtaining from him or a third person information or a confession
- punishing him for an act he or a third person has committed or is suspected of having committed
- intimidating or coercing him or a third person
- for any reason based on discrimination of any kind

5.3.1. "such purposes as"

This phrase indicates that the purposes are not limited to those specifically listed, though additional purposes must be of a similar nature. However, there is no clear indication of the common element which must exist in order for a separate purpose to be considered similar.

It may be noted that the purposes are not necessarily illegitimate.¹²⁸ One commentator has also suggested that the purposes relate to the exercise and maintenance of power by the State: "In

¹²⁷ Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to the U.N. Commission on Human Rights Resolution 2000/43. "Civil and Political Rights Including the Questions of Torture and Detention".

principle, the common element of the purposes referred to in the definition should rather be understood to be the existence of some - even remote - connection with the interests or policies of the State and its organs."¹²⁹ Although this interpretation may be consistent with the underlying ideals of the CAT, it is difficult to reconcile with the other purposes, which are not explicitly concerned with the maintenance and exercise of *state power*, but merely with the exercise of *power* or *control* over the victim. It is the separate element of state involvement - which is provided elsewhere in the definition of torture - which establishes the link to the state. Where the panel has already concluded that a state agent is involved, whether directly or indirectly, a further requirement and analysis of some "remote link" to state interests would appear unnecessary.

It is therefore recommended that the phrase "such purposes as" be interpreted broadly, without the restrictive element of a state interest requirement in the purpose.

5.3.2. "obtaining from him or a third person information or a confession"¹³⁰

This purpose refers to acts inflicted to obtain information or a confession from the victim or a third person. However, there is no requirement that the person or third person actually possess the desired information or be in any way guilty of the act for which a confession is sought.

5.3.3. "punishing him for an act he or a third person has committed or is suspected of having committed"

Infliction of severe pain or suffering may be considered torture where its purpose is to punish the person or third person, except where the punishment is *lawful*.¹³¹ The lawful sanction exception is discussed in section 5.4.

5.3.4. "intimidating¹³² or coercing¹³³ him or a third person"

Acts resulting in severe pain or suffering may be considered torture where the purpose is to intimidate or coerce the person or a third person.

¹²⁸ For example, obtaining a confession from a suspect, or proceeding with his judicially sanctioned punishment for a criminal offence, are legitimate ends, subject to the legitimacy of the means used.

¹²⁹ Burgers, J. and Danelius, H., *supra*, note 76, at 119.

¹³⁰ Confession: A voluntary statement made by a person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act or the share and participation which he had in it. *Black's Law Dictionary*, 6th ed., s.v. "confession".

¹³¹ As provided in Article 1 of the CAT:

[Torture] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

¹³² Intimidation: unlawful coercion; extortion; duress; putting in fear. *Black's Law Dictionary*, 6th ed., s.v. "intimidation".

¹³³ Coercion: Compulsion, constraint, compelling by force or arms or threat. *Black's Law Dictionary*, 6th ed., s.v. "coercion".

5.3.5. "for any reason based on discrimination of any kind"

The term "any reason based on discrimination of any kind" completes the list of enumerated purposes within the definition of torture. Severe pain or suffering may be considered torture where it is inflicted for any reason based on discrimination of any kind. For some direction as to the meaning of "discrimination", the Supreme Court of Canada's decision in *Andrews*¹³⁴ is useful:

... I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

According to the description of discrimination provided in *Andrews*,¹³⁵ a distinction need not be intentional in order to be found discriminatory. Thus, although pain or suffering must be inflicted intentionally in order to meet the definition of torture, the distinction by which the person is treated differently need not be intentional.

Hence, within the context of the definition of torture, discrimination can be stated as being:

A distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual or group, due to which severe pain or suffering is intentionally inflicted.

5.3.6. Specific Case: Medical Procedures

Although numerous forms of medical intervention cause severe pain or suffering, it is necessary to examine whether the purpose of such treatment is of the same *nature* as the enumerated purposes in the definition of torture. Medically justified treatment is generally for the purpose of healing, or at least ameliorating, the symptoms of injury or disease. Thus, it is unlikely to fall within the scope of purposes under the definition of torture.

However, where medical experimentation or treatment are imposed in the furtherance of state policy and are without the consent of the patient, they may fall within the definition of torture. Under Canadian law, informed consent is required for all medical treatment:

The right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law. This right underlies the doctrine of informed consent. With very limited exceptions, every person's body is

¹³⁴ *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143, at paragraph 37.

¹³⁵ *Ibid.*

considered inviolate, and, accordingly, every competent adult has the right to be free from unwanted medical treatment.¹³⁶

5.4. The “Lawful Sanction” Exception

The second sentence of the definition of torture at Article 1 of the *CAT* states:

Article 1(1) For the purposes of this Convention, "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. **It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.**

Hence, acts resulting in pain or suffering which otherwise meet the criteria in the first sentence of the definition of torture will nevertheless not be considered to be torture if they are inflicted in connection with a lawful sanction. A person who risks pain or suffering resulting only from the imposition of a lawful sanction will not qualify as a person in need of protection by virtue of s. 97(1)(a).

It should be noted that a person alleging a danger of torture due to the imposition of a lawful sanction might be excluded from claiming protection by virtue of s. 98 if Article 1F of the *Refugee Convention* is applicable.

5.4.1. Determination of Whether Sanctions are Lawful

5.4.1.1. Legal Norms of the Country of Reference

The *CAT* and the *IRPA* do not define the term “lawful sanctions”.¹³⁷ A “sanction” refers generally to a penalty or punishment as well as to a judgement or decision rendered by a court or other adjudicative body. Normally, a “lawful” sanction is one that is authorized by law. The term “lawful sanction” is not qualified in the definition of torture and may therefore be said to refer to a sanction imposed in the context of civil and penal transgressions.

¹³⁶ *Fleming v. Reid* (1991), 82 D.L.R. (4th) 298 (Ont. C.A.). Cited with approval in *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119.

The requirement for consent is also found in the *International Covenant on Civil and Political Rights*:

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

¹³⁷ Section 269.1 of the *Criminal Code*, which incorporates part of the definition of torture found at Article 1 of the *CAT*, also does not provide a definition.

In order to determine whether a sanction is lawful for the purposes of s. 97(1)(a), the legality of the sanction in the country of reference should be assessed. If a sanction is found to be illegal according to the standards in the country of reference, it will not be considered a lawful sanction.

A country's legislation and other norms forming part of its legal system are usually relied upon to determine the legality of the sanctions imposed on its territory.

The criteria which may be considered in determining whether a sanction is legally valid are : whether the decision maker has the authority to impose the sanction, whether the sanction is applicable in cases of the alleged transgression and whether substantive and procedural rules are respected in imposing and carrying out the sanction (for instance, substantive and procedural rules pertaining to the right to counsel, to an interpreter, to a full defence, to the presumption of innocence and the right to have a case adjudicated by an independent decision maker).

Where a sanction is not imposed or carried out in accordance with the laws of the country of reference, it will not be considered "lawful". Consequently, it is not necessary to assess whether the sanction is considered lawful according to international standards. Severe pain or suffering resulting from such illegal sanctions may be assessed under the definition of torture.

In addition, in cases where the pain or suffering results from a combination of acts, some which are connected to the imposition and carrying out of a lawful sanction and others which are not, the pain or suffering will not be said to be arising "*only* from, inherent in or incidental to" a lawful sanction. Consequently, such acts may also be considered under the definition of torture. It should be noted that the French version of the definition of torture found in the Schedule to the *IRPA* does not include the term "uniquement" ("only") although the definition at Article 1 of the *CAT* does.

5.4.1.2. Canadian Case Law and International Instruments

A sanction which is valid according to the legal norms of the country of reference may nevertheless not be considered to be lawful according to international standards.

Contrary to s. 97(1)(b), s. 97(1)(a) and Article 1 of the *CAT* do not expressly require an assessment as to whether or not the sanction imposed respects accepted international standards. The absence of a reference to international standards or uniform criteria for determining the meaning of lawful sanctions reflects the disagreement on this subject among the members of the Working Group and the States involved in the drafting of the *CAT*. In fact, the reference to the *Standard Minimum Rules for the Treatment of Prisoners*¹³⁸ included in the *Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*,¹³⁹ in connection with lawful sanctions is not found in *CAT*.

¹³⁸ *Supra*, note 101.

¹³⁹ *Supra*, note 12.

Burgers and Danelius¹⁴⁰ state:

The second sentence of paragraph 1 of article 1 is probably the most controversial element of the whole article. It provides that torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. It has often been said that this is a too far-reaching exception, since it might be interpreted so as to allow a State to practise methods which would normally be regarded as torture, by making them lawful sanctions under its own legal system. On the other hand, it has been argued that while the Convention was intended to strengthen already existing prohibition of torture in international law, it was not intended to lead to a reform of the system of penal sanctions in different states and that, if that had been the intention, the Convention would have been unacceptable to a number of countries... There was a certain divergence of opinion between those who thought that the Convention should exclusively deal with acts of torture which were also illegal under national law and those who considered that there must be a limit beyond which sanctions provided for by national law are so cruel as to constitute torture.

The second sentence of paragraph 1 of article 1 does not resolve this controversy in an unequivocal manner. It is true that it makes a general exception for lawful sanctions, but it does not make it clear whether, in order to be lawful, a sanction must also be consistent with international law under which cruel, inhuman or degrading treatment or punishment is prohibited. It may therefore be argued that various forms of corporal punishment, including those involving mutilation, are not covered by the exception in the second sentence, but this is undoubtedly a view which is not shared by everyone.

The lack of a reference to international standards has been criticized by other authors and said to permit states to “legalize” tortuous acts by incorporating them in legal sanctions and thereby contravening the intent and spirit of the *CAT* with impunity.¹⁴¹

In the context of the *IRPA*, various factors militate towards considering international standards in evaluating the lawfulness of a sanction. First, s. 97(1)(a) does not prohibit the evaluation of the sanction in accordance with international standards. This approach would be

¹⁴⁰ *Supra*, note 76 at 121 and 122.

¹⁴¹ Debra Anker, *Law of Asylum in the United States*, (Refugee Law Center, Inc., 1999), excerpt from chapter 7 entitled “Protection from Return to Torture: International Legal Protections and Domestic Law”; Ahcene Boulesbaa, “Analysis and Proposals for the Rectification of the Ambiguities Inherent in Article 1 of the U.N. Convention on Torture”, *Florida International L.J.*, vol. 5, summer 1990, 293-326; Matthew Lippman, “The Developments and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” *Boston International and Comparative L.R.*, Summer 1994, 17n2, 275-335. See also Pnina Baruh Sharvit, “The Definition of Torture in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” *Israel Yearbook on Human Rights*, I74 23, (1993) 147-175 for a differing view. The author states that judging lawfulness in the light of international law would lead to a tautological result since the exception would refer to the rule as part of its definition.

similar to that provided at s. 97(1)(b)¹⁴² for ill-treatment which is often similar if not the same in severity as torture. Second, given that Article 2(2) of the *CAT*, often referred to as setting out an absolute prohibition against torture, states that exceptional circumstances, including a state of war, political instability or other emergency, cannot be invoked to justify torture, it may be argued that torture cannot be justified in circumstances less threatening to the state's stability.¹⁴³

Section 3(3)(f)¹⁴⁴ may be relied upon to interpret "lawful sanctions" in relation to the human rights instruments to which Canada is a signatory, such as the *CAT*,¹⁴⁵ the *International Covenant on Civil and Political Rights*,¹⁴⁶ the *Convention on the Rights of the Child*,¹⁴⁷ and the *Convention on the Elimination of all Forms of Discrimination*.¹⁴⁸ A sanction contravening basic human rights and, where applicable international standards concerning forms of punishment, may be considered unlawful.

In addition to those mentioned above, other human rights instruments may be relevant in the evaluating the lawfulness of a sanction, for instance, the *Universal Declaration of Human Rights*,¹⁴⁹ the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*,¹⁵⁰ the *Standard Minimum Rules for the Treatment of Prisoners*,¹⁵¹ the *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*,¹⁵² the *U.N. Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)*,¹⁵³ the *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the*

¹⁴² Note that s. 97(1)(b) refers to "accepted" international standards. The term "accepted" is not mentioned in the French version of the provision.

¹⁴³ In *Suresh*, *supra*, note 4, the Supreme the Court stated:

[65] Although this Court is not being asked to pronounce on the status of the prohibition on torture in international law, the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from.

¹⁴⁴ *Baker*, *supra*, note 23 is also relevant.

¹⁴⁵ *Supra*, note 17.

¹⁴⁶ *Supra*, note 13.

¹⁴⁷ *Supra*, note 18.

¹⁴⁸ *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, entered into force Jan. 4, 1969.

¹⁴⁹ *Supra*, note 8.

¹⁵⁰ *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

¹⁵¹ *Supra*, note 101.

¹⁵² *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, E.S.C. res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984).

¹⁵³ *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*, G.A. res. 45/110, annex, 45 U.N. GAOR Supp. (No. 49A) at 197, U.N. Doc. A/45/49 (1990).

*Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*¹⁵⁴ and the *Basic Principles on the Independence of the Judiciary*.¹⁵⁵

It has also been suggested that a sanction which is grossly disproportionate to the offence is not covered by the lawful sanction exception.¹⁵⁶ The question of disproportionate punishment was examined in the Convention refugee context in *Cheung*,¹⁵⁷ a case dealing with the question of forced sterilisation practised in connection with China's one-child policy. The Federal Court of Appeal indicated that where punishment is so draconian as to be completely disproportionate to the objective of the law, it might be viewed as persecutory, regardless of whether the intent of the punishment is persecution. Given that torture may be considered as a form of persecution, it is reasonable to adopt a similar approach in dealing with punishment which is excessive in regard to the objective of the law. Consequently, a sanction which is so draconian as to be completely disproportionate to the objective of the law may be considered to be torture even though the intent of the punishment is not to "torture" the offender.

The approach taken under s. 12 of the *Charter* in *Smith*¹⁵⁸ and more recently in *Latimer*¹⁵⁹ is also relevant, and the factors considered by the Court may be taken into account in assessing the lawfulness of a sanction. In order to determine whether a punishment was cruel and unusual (which can be said to include a sanction which amounts to torture), the Supreme Court relied on the test established in *Miller and Cockriell*,¹⁶⁰ namely whether "the punishment is so excessive as to outrage the standards of decency". It also applied the elements of a "gross disproportionality" analysis which included consideration of the following: the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine the range of sentences that would have been appropriate to punish, rehabilitate or deter the particular offender or protect the public.

5.4.2. Burden of Proof

In cases where the lawful sanction exception is in issue, the person alleging a danger of torture will have to demonstrate that the danger of being subjected to pain or suffering does not

¹⁵⁴ *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 37/194, annex, 37 U.N. GAOR Supp. (No. 51) at 211, U.N. Doc. A/37/51 (1982).

¹⁵⁵ *Basic Principles on the Independence of the Judiciary*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

¹⁵⁶ See Anker and Lippman, *supra*, note 141.

¹⁵⁷ *Cheung v. M.C.I.*, [1993] 2 F.C. 314 (C.A.); See also *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593; *Valentin v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 390; *Canada (Minister of Employment and Immigration) v. Satiacum*, (1989) 99 N.R. 171 (F.C.A.); *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540.

¹⁵⁸ *R. v. Smith*, [1987] 1 S.C.R. 1045.

¹⁵⁹ *Latimer v. R.*, [2001] 1 S.C.R. 3.

¹⁶⁰ *Miller and Cockriell v. R.*, [1977] 2 S.C.R. 690.

“arise” from a lawful sanction and is not “inherent to or incidental to a lawful sanction”. Even though the second sentence of Article 1 of the *CAT* may be considered to be an exception, it forms part of the definition of torture and the burden to show that all aspects of the definition have been met rests with the person seeking protection.

Once the issue is raised, the person seeking protection will be best placed to advance evidence (at least personal evidence, if not general documentary evidence) to prove that the sanction is unlawful and that the pain or suffering does not arise only from the imposition or carrying out of a lawful sanction. However, the RPD should inform the claimant when the lawful sanction exception becomes an issue in the claim and it has not been addressed by the claimant.

6. EXCLUSION

Section 98 establishes Articles 1E and 1F of the *Refugee Convention* as grounds of exclusion for persons claiming to be Convention refugees as well as for those claiming to be persons in need of protection. It states:

98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

Given that the reference to sections E and F of Article 1 of the *Refugee Convention* is the same as currently exists within the context of Convention refugee protection, the principles and case law set out in the IRB Legal Services Paper, *Interpretation of the Convention Refugee Definition in the Case Law*, December 31, 1999 and addendum dated December 31, 2001 may be applied within the consolidated grounds context. Where special considerations apply, they are noted below.

6.1. Article 1E

Article 1E states:

This Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

The existing case law suggests that the CRDD should consider whether the claimant has a well-founded fear of persecution for a Convention refugee definition reason in the Article 1E country.¹⁶¹ This approach can be expanded to include a consideration of whether *any* of the consolidated grounds of protection apply within the putative Article 1E country.

6.2. Article 1F

Article 1F states:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

¹⁶¹ *Kroon, Victor v. M.E.I.* (F.C.T.D., no. IMM-3161-93), MacKay, January 6, 1995.

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

The same criteria as are currently applied in the Convention refugee context may be applied within the consolidated grounds context. In the context of Article 1F exclusion, the Federal Court has ruled *against* a balancing between the seriousness of the risk and the seriousness of the crime committed. Thus, even in cases where the claimant faces a danger of torture, the exclusion grounds will operate.

Given the conclusion in *Suresh*,¹⁶² a question arises as to whether the RPD and RAD can exclude a claimant from refugee protection in cases where the tribunal concludes that the person would face a serious possibility of torture upon removal to his or her country of origin.

However, it is unlikely that the RPD and the RAD will be prevented from applying the exclusion clause. Although the Supreme Court in *Suresh* found that deportation to torture would be unconstitutional, it did not specifically address the constitutionality of exclusion from refugee protection. Given that exclusion does not raise an *immediate* threat to the life, liberty or security¹⁶³ of the claimant, it would not result in a violation of the constitution. The potential violation only arises at the deportation stage, which is within the Minister's authority rather than that of the RPD or RAD. This approach was adopted in *Arica*,¹⁶⁴ where the Federal Court of Appeal concluded that s. 7 was not triggered solely by application of an exclusion clause:

[14] The appellant now argues that section 7 of the *Charter* ... requires the Board to determine whether a claimant would have been declared a convention refugee but for the exclusion clause and, if so, to balance the seriousness of the crimes in question against the quality of persecution faced by the claimant if returned to the country which he or she fled. In my opinion, section 7 of the *Charter* does not alter the extant law. The argument that the appellant's section 7 *Charter* rights have been infringed is at best premature since there was no evidence before the Board that the appellant would be deported from Canada to Peru. It is

¹⁶² *Supra*, note 4. The Supreme Court of Canada concluded that, in general, Canada may not deport a person to a country where he or she faces a substantial risk of torture.

¹⁶³ The language used at s. 7 of the *Charter*.

¹⁶⁴ *Arica v. Canada (Minister of Employment and Immigration)* (1995), 182 N.R. 392 (F.C.A.). (Court File No. A-153-92, Stone, Robertson and McDonald JJ. 1995 May 3). Application for leave to appeal to the Supreme Court of Canada dismissed on November 16, 1995. See also *Atef v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 86. (Court File No. IMM-4014-94, Wetston J. May 29, 1995).

trite to note that we are not dealing with the execution of a deportation order but rather with an appeal from a decision in which it was found that the appellant is not entitled to claim refugee status. The exclusion of an individual from claiming such status does not by itself imply or lead to any positive act which may affect the life, liberty or security of the person [...].

6.3. Extradition

Under s. 105(3), if a person is ordered surrendered by virtue of the *Extradition Act* for a serious offence (an offence punishable by a term of imprisonment of ten or more years), the order of surrender will be deemed to be a rejection of a claim for refugee protection based on Article 1F(b) of the *Refugee Convention*.

7. CHANGE OF CIRCUMSTANCES (CESSATION) AND COMPELLING REASONS

Section 108 provides that cessation grounds and compelling reasons will apply to the consolidated protection grounds:

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

- (a) the person has voluntarily reavailed themselves of the protection of their country of nationality;
- (b) the person has voluntarily reacquired their nationality;
- (c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;
- (d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or
- (e) the reasons for which the person sought refugee protection have ceased to exist.

(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).

(3) If the application is allowed, the claim of the person is deemed to be rejected.

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

The differences between the existing cessation and compelling reasons provisions¹⁶⁵ and the new provisions¹⁶⁶ simply reflect their application in the consolidated grounds context. Given the substantially similar language used, no substantial change to the interpretation of the provisions is envisaged. Thus, the principles and jurisprudence set out in the IRB Legal Services paper, *Interpretation of the Convention Refugee Definition in the Case Law* and addendum dated December 31, 2001 may be applied within the consolidated grounds context. Where special considerations apply, they are noted below.

7.1. Compelling Reasons and Past Incidents of Torture or Other Ill-Treatment

In *Obstoj*,¹⁶⁷ Mr. Justice Hugessen held that s. 2(3) of the *Immigration Act* should be read:

as requiring Canadian authorities to give recognition of refugee status on humanitarian grounds to this special and limited category of persons, i.e. those who have suffered such appalling persecution that their experience alone is compelling reason not to return them, even though they may no longer have any reason to fear further persecution.

In cases where the tribunal determines that the claimant has already been a victim of torture,¹⁶⁸ it is possible, indeed likely, that the tribunal will be asked by the claimant to then determine that torture is automatically a compelling reason not to be returned. The issue may be presented as follows: is torture, *by its very nature*, a compelling reason? There may be more compelling reasons for a torture victim, as opposed to a victim of less serious violations of human rights, to refuse to avail himself or herself of the protection of his or her country. However, Parliament has not made such a conclusion mandatory. Thus, it is recommended that decision makers continue to apply the provision according to the interpretation set out in existing jurisprudence.

Finally, compelling reasons may arise out of abuse that falls under a different "ground" of protection than the ground under which the claim is based. For instance, a claimant may have suffered torture at the hands of state officials in the past, but alleges a fear of persecution at the hands of non-state agents. Given that there is no legislative requirement that past and future grounds be the same, such claims are within the jurisdiction of the tribunal. Thus, a claimant may allege a prospective risk or danger (based on one or more of the three grounds of protection) and be granted protection due to compelling reasons arising out of past abuse which may fall under one or more separate grounds.

¹⁶⁵ *Supra*, note 2, s. 2(2), and 2(3).

¹⁶⁶ S. 108 of the *IRPA*.

¹⁶⁷ *Canada (Minister of Employment and Immigration) v. Obstoj*, [1992] 2 F.C. 739 (C.A.), at 748.

¹⁶⁸ As opposed to situations where the claimant alleges a danger of torture prospectively but does not allege to have been a victim of torture in the past.

8. SUGGESTED FRAMEWORK OF ANALYSIS¹⁶⁹

The following is a suggested **framework of analysis** for s. 97(1)(a).

(i) **Country of Reference**

Determine the country or countries of reference (citizenship or former habitual residence).

(ii) **Harm**

Determine whether the harm faced by the claimant is of torture within the meaning of Article 1 of the *CAT*. The harm must be:

- caused by an act (including an omission),
- severe physical or mental pain or suffering and
- intentionally inflicted.

(iii) **Lawful Sanction Exception**

Assess whether the danger of torture is arising only from, inherent in or incidental to, lawful sanctions. The first part of the assessment is based on an examination of the laws of the country of reference. The second part of the assessment is based on an examination of relevant international human rights instruments and norms. If the harm is only arising from, inherent in, or incidental to lawful sanctions and the sanctions are not imposed in disregard of international norms, the claimant is not a person in need of protection.

(iv) **Agent of Harm**

Determine the agent of harm. The harm must be:

- inflicted or
- instigated, or
- consented or
- acquiesced to,

by a public official or other person acting in an official capacity.

(v) **Reason for Harm**

Determine the purpose of the harm. The harm must be inflicted for such purposes as:

- to obtain information or a confession from the claimant or a third person,
- to punish the claimant for an act he or a third person has committed or is suspected of having committed,
- to intimidate or coerce the claimant or a third person, or

¹⁶⁹ This framework is strictly for the issues raised in s. 97(1)(a), not for the entire range of issues that will need to be determined in the consolidated hearing.

- for any reason based on discrimination of any kind.

(vi) Risk of Harm

Determine whether the claimant would be personally subjected to a danger of torture.
Determine whether the claimant would face a serious possibility or a reasonable chance of torture.

(vii) Internal Flight Alternative (IFA)

Assess whether the danger is faced in every part of the country. If faced in only part of the country, determine if the claimant has an internal flight alternative.

9. JURISPRUDENCE OF THE COMMITTEE AGAINST TORTURE

The Committee Against Torture,¹⁷⁰ within the Office of the United Nations High Commissioner for Human Rights, is mandated to oversee the implementation of the CAT. One of the primary functions of the Committee is to inquire into allegations of torture as set out in individual complaints. The Committee conducts a hearing into the substance of the complaint and, applying the definition of torture set out at Article 1 and the standard of proof set out at Article 3(1)¹⁷¹ of the CAT, determines whether the allegations are founded. The Committee Against Torture decisions, referred to as “communications,” may be useful in interpreting the definition of torture within IRPA and the standard of proof set out in Article 3(1) of CAT.¹⁷² However, the Committee Against Torture does not take into account questions such as exclusion or compelling reasons and the communications should be consulted with this in mind.

9.1. Selected Positive Decisions of the Committee Against Torture

Country & Agent of Torture	Alleged Treatment	Decision and Reference
Pakistan ▪ Inter-Service Intelligence (ISI)	▪ First Detention: hung from ceiling by hands with rope and badly beaten ▪ Second Detention: subjected to a week of cold showers, sleep deprivation, being placed on ice-blocks	No 15 (1994) ▪ The Committee noted that some claims / evidence were submitted only after the refugee claim had been refused by the IRB but "this behavior is not uncommon for victims of torture." ▪ "Evidence exists that torture is widely practised in Pakistan."

¹⁷⁰ The Committee maintains an internet site at <http://www.unhchr.ch/html/menu2/6/cat.htm> which provides background information and access to its decisions in English, French, and Spanish.

¹⁷¹ Article 3
1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

¹⁷² *Ibid.*

		<p>Conclusion: Substantial grounds exist for believing that a political activist like the author would be in danger of being subjected to torture.</p>
<p>Zaire</p> <ul style="list-style-type: none"> ▪ Security forces 	<ul style="list-style-type: none"> ▪ Raped in the presence of her children ▪ Shared a cell 3 by 6 metres, with no sanitary provisions, with seven inmates ▪ Raped more than 10 times in prison ▪ Regularly beaten ▪ Burnt with cigarettes 	<p>No 41 (1996)</p> <ul style="list-style-type: none"> ▪ "[The] Committee considers that complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims." ▪ "Deportees who are discovered to have sought asylum abroad undergo interrogation upon arrival at Kinshasa airport, following which those who are believed to have a political profile are at risk of detention and consequently ill-treatment. The Committee also notes that, according to the information available, members of UDPS continue to be targeted for political persecution in Zaire." <p>Conclusion: Substantial grounds exist for believing that the author would be in danger of being subjected to torture if returned to Zaire.</p>
<p>Iran</p> <ul style="list-style-type: none"> ▪ Iranian Revolutionary Guard (Pasdaran) 	<ul style="list-style-type: none"> ▪ Beaten and kicked ▪ Imprisoned for three and a half months ▪ Interrogated, maltreated and tortured about 25 times ▪ On one occasion, told to lie down and then felt a hot metal object against his thighs before he passed out ▪ His wounds became infected 	<p>No 43 (1996)</p> <ul style="list-style-type: none"> ▪ "The author's political affiliation with the People's Mujahedin Organization and activities, his history of detention and torture should be taken into account." ▪ "The Committee considers that complete accuracy is seldom to be expected by victims of torture and that the inconsistencies that exist in the author's presentation of the facts do not raise doubts about the general veracity of his claims, especially since it has been demonstrated that the author suffers from post-traumatic stress disorder." ▪ The Committee noted from the medical evidence that the scars on the author's thighs could only have been caused by a burn and that this burn could only have been inflicted intentionally by a person other than the author himself. ▪ The Committee was aware of the serious human rights situation in Iran. ▪ The Committee noted the high number of executions, instances of torture and cruel, inhuman or degrading treatment or punishment in Iran. <p>Conclusion: Substantial grounds exist for believing that the author would be in danger of being subjected to torture if returned to Iran.</p>
<p>Spain</p> <ul style="list-style-type: none"> ▪ Spanish Civil Guard 	<ul style="list-style-type: none"> ▪ "Incommunicado" detention 	<p>No 63 (1997)</p> <ul style="list-style-type: none"> ▪ The Committee had advised Spain of complaints of acts of

	<ul style="list-style-type: none"> ▪ Threats of torture and execution ▪ Severe beatings, extended period of physical constraint, and asphyxiation 	<p>torture and ill-treatment which it frequently received.</p> <ul style="list-style-type: none"> ▪ The European Committee for the Prevention of Torture reported complaints of torture received during its visits to Spain in 1991 and 1994, in particular from persons detained for terrorist activities. ▪ "There had also been suspicions, expressed in particular by some non-governmental organizations, that other persons in the same circumstances as the author had been subjected to torture on being returned to Spain and during their incommunicado detention." <p>Conclusion: Expulsion to Spain is a violation of the <i>Convention Against Torture</i></p>
<p>Iraq</p> <ul style="list-style-type: none"> ▪ Iraqi intelligence services 	<ul style="list-style-type: none"> ▪ Interrogated by Iraqi intelligence services after deserting the Iraqi army following the Kuwaiti war ▪ Released on bail and ordered to report daily 	<p>No 88 (1997)</p> <ul style="list-style-type: none"> ▪ The Committee was aware of the serious human rights situation in Iraq. ▪ The author's history of detention in Iraq as well as the possibility of his being held responsible for his son's defection from the army should be taken into account when determining whether he would be in danger of being subjected to torture upon his return. ▪ Credibility was not in issue. <p>Conclusion: Substantial grounds exist for believing that the author would be in danger of being subjected to torture if returned to Iraq.</p>
<p>Iran</p> <ul style="list-style-type: none"> ▪ Iranian Revolutionary Guard (Pasdaran) 	<ul style="list-style-type: none"> ▪ Severely beaten ▪ Kept in a one square metre cell ▪ Ribs were broken, back was hurt, and a fingernail was pulled out ▪ Fake execution: two other prisoners were executed, while only fake bullets were used on the author 	<p>No 89 (1997)</p> <ul style="list-style-type: none"> ▪ "The Committee considers that the author's family background, his political affiliation with the Freedom Movement and activities, his history of detention and torture, should be taken into account." ▪ "The Committee especially refers to the existence of medical evidence demonstrating that the author suffers from post-traumatic stress disorder and supporting the author's claim that he has previously been tortured while in detention." ▪ The Committee was aware of the serious human rights situation in Iran. ▪ The Committee noted the high number of executions, instances of torture and cruel, inhuman or degrading treatment or punishment in Iran. <p>Conclusion: Substantial grounds exist for believing that the author would be in danger of being subjected to torture if</p>

		returned to Iran.
<p>Turkey</p> <ul style="list-style-type: none"> ▪ Military police 	<ul style="list-style-type: none"> ▪ Arrested three times by the military police and interrogated ▪ Blindfolded, beaten, hung by arms, hit on the soles of the feet, hosed with high-pressure ice-cold water, deprived of food and pushed down stairs 	<p>No 97 (1997)</p> <ul style="list-style-type: none"> ▪ "The Committee is aware of the serious human rights situation in Turkey. Reports from reliable sources suggest that persons suspected of having links with the PKK are frequently tortured in the course of interrogations by law enforcement officers and that this practice is not limited to particular areas of the country." <p>Conclusion: "The Committee considers that, given the human rights situation in Turkey, the author's political affiliation and activities with the PKK as well as his history of detention and torture constitute substantial grounds for believing that he would be at risk of being arrested and subjected to torture if returned to Turkey."</p>
<p>Iran</p> <ul style="list-style-type: none"> ▪ Iranian Revolutionary Guard (Pasdaran) 	<ul style="list-style-type: none"> ▪ Forced marriage, then severe beating ▪ Sentenced to death by stoning for adultery 	<p>No 149 (1999)</p> <ul style="list-style-type: none"> ▪ Author has submitted sufficient evidence regarding her forced marriage and alleged arrest. ▪ "Little progress is being made with regard to remaining systematic barriers to equality" and for "the removal of patriarchal attitudes in society." ▪ Various reports confirm that married women have recently been sentenced to death by stoning for adultery ▪ Author's account of events is consistent with the Committee's knowledge about the present human rights situation in Iran. <p>Conclusion: Expulsion to Iran is a violation of the <i>Convention Against Torture</i>.</p>

9.2. Selected Negative Decisions of the Committee Against Torture

Country & Agent of Torture	Alleged Treatment	Decision and Reference
<p>Turkey</p> <ul style="list-style-type: none"> ▪ state 	<ul style="list-style-type: none"> ▪ "At the end of 1980, he was arrested by the Turkish authorities and kept in police detention for one and a half months, during which he was tortured." 	<p>No 28 (1995)</p> <ul style="list-style-type: none"> ▪ "The Committee has noted that the State party's argument that the danger to an individual must be serious ("substantial") in the sense of being highly likely to occur. The Committee does not accept this interpretation and is of the view that 'substantial grounds' in article 3 require more than a mere possibility of torture but do not need to be highly likely to occur to satisfy that provision's conditions."

		<ul style="list-style-type: none"> ▪ " The author's political activities date back to the beginning of the eighties, at which time he was arrested, tortured, prosecuted and acquitted. The author himself states that he did not resume his activities ..." ▪ "There is no indication that the police are looking for him at present." ▪ "The Committee is aware of the serious human rights situation in Turkey, but recalls that, for the purposes of article 3 of the Convention, a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned." <p>Conclusion: "On the basis of the considerations above, the Committee is of the opinion that such risk has not been established."</p>
Zaire ▪ state	<ul style="list-style-type: none"> ▪ "In 1992 he was arrested with many others during a mass demonstration and kept in detention for several days. The author states that he was beaten with a wire filled rope. In 1993, the author was again arrested and kept in detention for a few days." 	<p>No 36 (1995)</p> <ul style="list-style-type: none"> ▪ "Although not explicitly corroborated by the medical note submitted by the author, the Committee is prepared to find that X was maltreated during his first detention in Zaire." ▪ "The Committee also notes that the author has not claimed that he was tortured during his second detention. Finally, the Committee notes that the periods of the author's detention have been short, that the author has not claimed that he was an active political opponent and that there is no indication that the author is being sought by the authorities in his country." <p>Conclusion: "Therefore, the Committee considers that the author has not substantiated his claim that he will be personally at risk of being subjected to torture if he is returned to Zaire."</p>
Sudan ▪ state	<ul style="list-style-type: none"> ▪ "In March 1992, the author was arrested and held for questioning until the next day." 	<p>No 38 (1995)</p> <ul style="list-style-type: none"> ▪ " The author does not claim that he has been tortured by the police or security forces in Sudan, and that no medical evidence exists that he suffers from the consequences of torture, either physically or mentally. The Committee therefore concludes that the inconsistencies in the author's story cannot be explained by the effects of a post-traumatic stress disorder, as in the case of many torture victims." ▪ "The author has not participated in political activities, nor worked as a journalist, nor was a member of the Ba'ath Party." ▪ "The Committee further notes that the author has been kept in detention only once, for 24 hours, in March 1992."

		<p>On the basis of the information before it, the Committee finds that the author does not belong to a political, professional or social group targeted by the authorities for repression and torture."</p> <p>Conclusion: "The Committee is aware of the serious human rights situation in Sudan but, on the basis of the above, considers that the author has not substantiated his claim that he will be personally at risk of being subjected to torture if he is returned to Sudan."</p>
<p>China</p> <ul style="list-style-type: none"> ▪ Chinese authorities 	<ul style="list-style-type: none"> ▪ "Has been convicted three times for robbery and sentenced to terms of three months, six months, and, finally, three years imprisonment" (in Canada) ▪ Crime outside China is punishable even if already tried in the foreign country ▪ Robbery is punished by disproportionate sentences such as 10 years or life imprisonment and even death 	<p>No 57 (1996)</p> <ul style="list-style-type: none"> ▪ "... he does not claim that he has participated in political activities in China, nor that he belongs to a political, professional or social group targeted by the authorities for repression or torture." ▪ "The Committee adds that, according to the information in its possession, there is no indication that the Chinese authorities intend to imprison the author because of his Canadian convictions." ▪ "The Committee is aware of the seriousness of the human rights situation in China." ▪ "... even if it were certain that the author would be arrested on his return to China because of his prior convictions, the mere fact that he would be arrested and retried would not constitute substantial grounds for believing that he would be in danger of being subjected to torture." <p>Conclusion: "The author has not substantiated his claim that he will be personally at risk of being subject to torture if he is returned to China."</p>
<p>Djibouti</p> <ul style="list-style-type: none"> ▪ Security forces 	<ul style="list-style-type: none"> ▪ "Subjected to electrical shocks and beatings with a nail-studded stick" ▪ "Forced to sit on a glass bottle with a broken bottle neck, having a wire inserted into his penis, having heavy weights hung from his penis and scrotum, being burned with cigarettes and cigars, being cut with a razor, and being forced to lay in a bathtub with water dripping at a fixed point on his head." 	<p>No 65 (1997)</p> <ul style="list-style-type: none"> ▪ "The Committee has noted the medical evidence provided by the author, and on this basis is of the opinion that there is firm reason to believe that the author has been tortured in the past" ▪ "The author suffers from a post-traumatic stress disorder, and that this has to be taken into account when assessing the author's presentation of the facts. The Committee is therefore of the opinion that the inconsistencies as exist in the author's story do not raise doubts as to the general veracity of his claim that he was detained and tortured." ▪ "The Committee is aware of reported human rights violations in Djibouti, but has no information which would allow it to conclude that a consistent pattern of gross, flagrant or mass violations of human rights exists"

	<ul style="list-style-type: none"> ▪ "Kept for a period of time in a cell flooded with sewage water" ▪ "Interrogated and beaten frequently" 	<p>in Djibouti."</p> <ul style="list-style-type: none"> ▪ "According to the information available to the Committee, although journalists are occasionally jailed or intimidated by police, they do not appear to be among the groups that are targeted for repression and opposition periodicals circulate freely and openly criticize the Government." ▪ "The Committee also notes that no reports of torture exist with regard to the FRUD officials who were detained in September 1997. " <p>Conclusion: On the basis of the considerations above, the Committee is of the opinion that such risk has not been established. In this connection, the Committee notes that a risk of being detained as such is not sufficient to trigger the protection of article 3 of the Convention.</p>
<p>Peru</p> <ul style="list-style-type: none"> ▪ Sendero Luminoso 	<ul style="list-style-type: none"> ▪ "According to the author, the bus was stopped on the way by two men belonging to the Sendero Luminoso. They forced the author off the bus and she was raped and held as a prisoner for one or two nights before she managed to escape." 	<p>No 83 (1997)</p> <ul style="list-style-type: none"> ▪ "The Committee further notes that the author has never been subjected to torture or ill-treatment by the Peruvian authorities and that she has not been politically active since 1985 when she left Peru to study abroad. According to unchallenged information, the author has been able to visit Peru on two occasions without encountering difficulties with the national authorities." ▪ "The Committee considers that the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention." ▪ "The Committee notes with concern the numerous reports of torture in Peru, but recalls that, for the purposes of article 3 of the Convention, a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned." <p>Conclusion: "On the basis of the considerations above, the Committee is of the opinion that such risk has not been established."</p>
<p>Turkey</p> <ul style="list-style-type: none"> ▪ Security forces 	<ul style="list-style-type: none"> ▪ "During his detention, he was ill-treated and tortured." 	<p>No 126 (2000)</p> <ul style="list-style-type: none"> ▪ "The Committee does not doubt the allegations of ill-treatment to which the author was subjected during his 28-day detention after his arrest in 1985, even though the medical reports do not substantiate the author's description of acts of torture or their effects. " ▪ "However, in view of the time that has elapsed between the events described by the author, the establishment of

		<p>the veracity of his claims and the present day (15 years have passed), the current risk for the author of being subjected to torture or 'deliberate persecution' on being returned to Turkey does not appear to have been sufficiently well-established."</p> <p>Conclusion: "The decision of the State party to return the author to Turkey would not constitute a breach of article 3 of the Convention."</p>
<p>Vietnam</p> <ul style="list-style-type: none"> ▪ Government 	<ul style="list-style-type: none"> ▪ Author #1: "severely tortured on a daily basis during the first two months" ▪ "Beatings with weapons and batons to his head, back and chest while his hands were tied behind his back" ▪ "The police threatened to execute him." ▪ "Kept in solitary confinement and was allegedly forced to lie locked up in his own urine and feces." ▪ Author #2: "Beatings with rifles on his chest until he lost consciousness..." ▪ "Rifle barrels were put into his mouth and he was threatened with death." 	<p>No 130 (1999)</p> <ul style="list-style-type: none"> ▪ "The Committee considers that some doubts as to the authors' credibility remain." ▪ "Notwithstanding the above, the Committee is aware of the human rights situation in Vietnam, but considers that given, inter alia, the considerable time which has elapsed since the escape of the authors and the fact that the illegal departure from Vietnam in the middle of the 1980s is no longer considered an offence by the Vietnamese authorities, the authors have not substantiated their claims that they will personally be at risk of being subjected to torture if returned to Vietnam at present." ▪ "The Committee notes that a risk of being imprisoned upon return as such is not sufficient to trigger the protection of article 3 of the Convention." <p>Conclusion: "The facts as found by the Committee do not reveal a breach of article 3 of the Convention."</p>

10. SCHEDULE A: COMMITTEE AGAINST TORTURE: GENERAL COMMENT NUMBER 1

Implementation of article 3 of the Convention in the context of article 22
21/11/97. CAT General Comment 1. (General Comments)

GENERAL COMMENT No. 1

Implementation of article 3 of the Convention in the context of article 22

In view of the requirements of article 22, paragraph 4, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that the Committee against Torture "shall consider communications received under article 22 in the light of all information made available to it by or on behalf of the individual and by the State party concerned",

In view of the need arising as a consequence of the application of rule 111, paragraph 3, of the rules of procedure of the Committee (CAT/C/3/Rev.2), and

In view of the need for guidelines for the implementation of article 3 under the procedure foreseen in article 22 of the Convention,

The Committee against Torture, at its nineteenth session, 317th meeting, held on 21 November 1997, adopted the following general comment for the guidance of States parties and authors of communications:

1. Article 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention.
2. The Committee is of the view that the phrase "another State" in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited.
3. Pursuant to article 1, the criterion, mentioned in article 3, paragraph 2, of "a consistent pattern of gross, flagrant or mass violations of human rights" refers only to violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Admissibility

4. The Committee is of the opinion that it is the responsibility of the author to establish a prima facie case for the purpose of admissibility of his or her communication under article 22 of the Convention by fulfilling each of the requirements of rule 107 of the rules of procedure of the Committee.

Merits

5. With respect to the application of article 3 of the Convention to the merits of a case, the burden is upon the author to present an arguable case. This means that

there must be a factual basis for the author's position sufficient to require a response from the State party.

6. Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.
7. The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present. All pertinent information may be introduced by either party to bear on this matter.
8. The following information, while not exhaustive, would be pertinent:
 - (a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see art. 3, para. 2)?
 - (b) Has the author been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?
 - (c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?
 - (d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?
 - (e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?
 - (f) Is there any evidence as to the credibility of the author?
 - (g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?
9. Bearing in mind that the Committee against Torture is not an appellate, a quasi-judicial or an administrative body, but rather a monitoring body created by the States parties themselves with declaratory powers only, it follows that:

(a) Considerable weight will be given, in exercising the Committee's jurisdiction pursuant to article 3 of the Convention, to findings of fact that are made by organs of the State party concerned; but

(b) The Committee is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.