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On Dignity and Whether the Universal Declaration of Human Rights Remains a Place of Refuge After 60 Years

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ON DIGNITY AND WHETHER THE UNIVERSAL DECLARATION OF HUMAN RIGHTS REMAINS A PLACE OF REFUGE AFTER 60 YEARS

ADRIENNE ANDERSON*

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INTRODUCTION

The cost in human lives and suffering is so high that we all have to work to end violence and oppression once and for all. We have to proclaim that every human being is equal, in dignity, in freedom—and, as the first article of the Universal Declaration of Human Rights states, we have to live ‘in a spirit of brotherhood’.

~ Federico Mayor Zaragoza

He hath disgraced me. . .scorned my nation. . . and what’s his reason? I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions; fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer as a Christian is? If you prick us do we not bleed? If you tickle us do we not laugh? If you poison us do we not die?

~ Shylock, Merchant of Venice, Act III, Scene I

We live amongst great injustice. In this age, more than any other, knowledge of the plight of those with whom we share this imperfect world is accessible at the click of a button. Non-governmental organizations strive to bring accurate, current reports of conflict, poverty, and human rights abuse. And yet, for many, these predicaments remain remote: a situation happening to *others*. The comprehension that dignity belongs to us all is lacking. As Walt Whitman said, “[A]s if it harm’d me, giving others the same chances and rights as myself—as if it were not indispensable to my own rights that others possess the same.”¹

A typical snapshot of the problems of our global community is provided by the monthly bulletin of the International Crisis Group, which records potential and current conflicts around the world. In January 2009, the conflict situation deteriorated in Israel/Occupied Palestinian Territories, Madagascar, Mali, and Sri Lanka. The situation remained unchanged in Afghanistan, Algeria, Armenia, Azerbaijan, Bahrain, Basque Country, Belarus, Bolivia, Bosnia, Burundi, Cameroon, Central African Republic, Chad, Chechnya, Colombia, Côte d’Ivoire, Cyprus, Ecuador, Egypt, Ethiopia, Georgia, Guinea, Guinea-Bissau, Haiti, Indonesia, Iran, Iraq, Kashmir, Kazakhstan, Kenya, Kosovo, Kyrgyzstan, Lebanon, Liberia, Macedonia, Mauritania, Myanmar/Burma, Nagorno-Karabakh, Nepal, Nicaragua, Niger, Nigeria, North Caucasus, North Korea, Pakistan, Peru, Philippines, Rwanda, Serbia, Somalia, Sudan, Syria, Taiwan Strait, Tajikistan, Thailand, Timor-Leste, Turkey, Turkmenistan, Uganda, Ukraine, Uzbekistan, Venezuela, Western Sahara, and Yemen. The only improved situations were in Bangladesh, the Democratic Republic of Congo, and Zimbabwe.²

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1. WALT WHITMAN, *THOUGHT* (1871), *reprinted in* LEAVES OF GRASS: AUTHORITATIVE TEXTS, PREFACES, WHITMAN ON HIS ART, CRITICISM 277 (Sculley Bradley & Harold W. Blodgett eds., 1973).

2. See International Crisis Group, *CrisisWatch N°66*, 66 CRISISWATCH 1, 1 (2009), http://www.crisisgroup.org/library/documents/crisiswatch/cw_2009/cw66.pdf (summarizing and assessing developments in seventy locations across the globe).

This paints a grim picture, highlighting the continuing need for a robust, respected international human rights framework. The Universal Declaration of Human Rights (“UDHR”)³ served as the foundation of this framework and it continues to serve a fundamental role in the protection of the dignity of human beings. Sixty years have passed since its inception, but its relevance has yet to falter. The UDHR has continued to evolve and inform the international community’s understanding of human rights.

This article is centered on the UDHR, and like that document, has dignity as its thread. It will briefly touch on the UDHR’s formation, with a view to determining its contemporary influence as a living instrument, and introduce the arguments made by certain commentators against its status as a universal and modern document. International refugee law and the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”)⁴ comprise the frame through which the impact of the UDHR will be seen and analyzed. This field of law is demonstrative of the ongoing norm-creating ability of the UDHR. Under what is known as the “human rights approach, international refugee law is shaped by the UDHR, as it plays an indispensable role in determining whether an asylum-seeker will be recognized as a refugee. New Zealand, Canada, and the United Kingdom follow this human rights approach to determining refugee status. The approach will be examined principally through the jurisprudence of the New Zealand Refugee Status Appeals Authority insofar as it is representative of the common approach.

I. FORMATION: SCOPE AND OBJECTIVES

The UDHR is a product of its time. The state of the world following the Second World War and its utter disregard for the sanctity of humankind demanded a document that would record “a common standard of achievement for all peoples and all nations.”⁵ Article 28 of the UDHR best encapsulates this objective, a message

3. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

4. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6260, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

5. UDHR, *supra* note 3, pmbl.

which continues to resonate today: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”⁶

Eleanor Roosevelt and her drafting committee intended the UDHR to articulate an accepted standard of rights that would resonate throughout the entire world.⁷ It was the first international instrument to attempt such a task, and in that respect its value cannot be understated. Roosevelt felt it was important to translate these rights into words, believing the act of articulation to be educational.⁸ She explained that “the conditions of our contemporary world require the enumeration of certain protections which the individual must have if he is to acquire a sense of security and dignity in his own person.”⁹

Despite challenges to the UDHR’s universal relevance and enforceability (which will be elaborated upon below), it is commonly perceived as the underpinning of international human rights and credited as the inspiration of more than two hundred international human rights instruments.¹⁰ Geoffrey Robertson QC has also identified the influence of the UDHR on the bills of rights included in nearly every national constitution adopted after World War II.¹¹ Moreover, the International Covenant on Civil and Political Rights (“ICCPR”)¹² and the International Covenant on Social, Economic and Cultural Rights (“ICESCR”)¹³ expanded on the UDHR and translated most of its rights into legally binding form. These two enforceable international covenants drew on the scope and content of the UDHR.

6. *Id.* art. 28.

7. See Mrs. Franklin D. Roosevelt, *The Promise of Human Rights*, 26 FOREIGN AFF. 470, 471, 475 (1948) (explaining the Human Rights Commission recommended the authoring of a Bill of Human Rights in hopes that it would contribute to peace among nations).

8. See *id.* at 477 (aspiring also to have the UDHR improve all peoples’ education).

9. *Id.*

10. See GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 35 (3d ed. The New Press 2006) (1999) (noting the UDHR’s remarkable “contemporaneity” decades after its creation).

11. *Id.*

12. International Convention and Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S. 171 [hereinafter ICCPR].

13. International Convention on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

The UDHR is held in such regard for its contribution to the international human rights regime that the UDHR and human rights have become almost synonymous concepts. As Jack Donnelly has said, “For the purposes of international action, ‘human rights’ means roughly ‘what is in the Universal Declaration of Human Rights.’”¹⁴ Despite such accolades, the UDHR faces criticism. The following section will pose those arguments that question the UDHR’s fulfillment of its objectives, its relevance, and its endurance.

A. TWO CORE CHALLENGES

1. Cultural Relativism

During the emergence of international human rights norms, a debate over the universality of rights also arose.¹⁵ Cultural relativists began to assert that the societal and cultural norms and values of a nation prevail over an individual’s rights.¹⁶ These national or communal traditions may affect the scope or application of any given right.¹⁷

It is often argued that the UDHR is distinctively Western, and therefore not universal.¹⁸ Relativists emphasize that classical “Western” notions of human rights recognize the primacy of individual, political, and civil rights, whereas most non-Western, Third World traditions place greater significance on the community

14. JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 22 (2d ed. 2003).

15. See Rhonda L. Callaway & Julie Harrelson-Stephens, *Are Human Rights Universal?* in EXPLORING INTERNATIONAL HUMAN RIGHTS: ESSENTIAL READINGS 109, 109 (Rhonda L. Callaway & Julie Harrelson-Stephens eds., 2007) (juxtaposing universalists, who believe that human beings are humans first and members of a specific culture second, against cultural relativists).

16. See *id.* (referencing Asian, Islamic, and African cultures as the most prominent locales of support for the primacy of local, societal values).

17. See *id.* (acknowledging that such traditions may modify or even reduce a given right).

18. See DONNELLY, *supra* note 14, at 27 (explaining that Soviet bloc leaders consistently rejected the legitimacy of civil and political rights, while Western philosophers and the United States government denigrated economic and social rights); see also *id.* at 22 & n.2 (calling the contention that UDHR values are Western “problematic,” especially in light of the fact that significant contributors in the drafting process were from Lebanon, China, Chile, and the USSR).

basis of human rights, the duties attached to economic and social rights, and the relative character of human rights.¹⁹

Bonny Ibhawoh, in an excellent and succinct analysis, put forward three characteristics of Western civilizations which may lead to a questioning of the universality of human rights.²⁰ Cultural relativists' argue that these and other such distinctly Western features mean that certain so-called "universal" rights may not fit comfortably within non-Western societies with different world-views and values.²¹ The three characteristics common among Western communities are:

1. The individual is considered the fundamental unit of society, as opposed to the idea of society as founded on a familial or collective basis;
2. "[H]uman existence in society" is secured through the language of rights rather than conceptualized as duty-driven;
3. The principal method used to secure rights is the adversarial legal process, where rights are asserted and adjudicated, rather than the realization of rights through restorative methods such as reconciliation or education.²²

Following on from these characteristics is the argument by some advocates of cultural relativism against the hierarchy of rights—essentially a challenge to the dominance of civil and political rights.²³ Given that the overriding concern in many parts of the world is access to basic social and economic rights, this is a vital issue to

19. See Bonny Ibhawoh, *Defining Persecution and Protection: The Cultural Relativism Debate and the Rights of Refugees*, in PROBLEMS OF PROTÉCTION: THE UNHCR, REFUGEES, AND HUMAN RIGHTS 61, 63, 67 (Niklaus Steiner et al. eds., 2003) (noting that the dispute over the primacy of certain rights has carried over even to the way refugee rights are defined and interpreted).

20. *Id.* at 63.

21. See *id.* (calling such Western values "ill suited" for non-Western societies).

22. See *id.* (observing several commentators' attempts to temper the vigor of cultural relativists by arguing that some rights are not suited for universality or inalienability).

23. See *id.* at 66-67 (describing the debate over whether it is appropriate to prioritize certain rights over others, or whether all rights should be accorded equal weight and stating that several writers have recognized that civil and political rights have taken precedence over social, economic, and cultural rights).

proponents of cultural relativism.²⁴ Therefore, a cultural relativist will advance the argument that the UDHR reflects only Western liberal values, especially in its bias towards civil and political rights.²⁵ In this regard it may be noted that only six of the twenty-five paragraphs dealing with specific rights in the UDHR possess an economic, social, or cultural character.²⁶

The perceived dominance of Western attitudes is often attributed to the drafting process. However, this is arguably refutable upon closer examination. The committee that contributed to the final draft of the UDHR consisted of a group of delegates of very diverse origin.²⁷ As Robertson notes, over half of the fifty-six-state General Assembly members were Asian, African and Latin American.²⁸ The UDHR passed without a dissenting vote, although there were eight abstentions: Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, Ukrainian SSR, USSR, Union of South Africa, and Yugoslavia.²⁹ However, the communist abstaining States had no issue with the substantive provisions on individual rights. Their objection was a politically motivated response to the perceived favoring of democracy in the UDHR.³⁰

Although there is a quantitative imbalance in the UDHR between civil and political rights on the one hand and economic and social rights on the other, it does attempt to incorporate socio-economic rights, including the right to work and to access an adequate standard

24. *See id.* at 67 (highlighting that civil and political rights are of little use to those who are unable first to feed and clothe themselves).

25. *See id.* (pinpointing Western society's orientation toward individualism as explicative of its preference for civil and political rights).

26. UDHR, *supra* note 3, arts. 22-27.

27. *See* ROBERTSON, *supra* note 10, at 37 (explaining that Chinese, Indian, Lebanese, Chilean, Egyptian, and Iranian representatives played significant roles in the drafting process).

28. *Id.* (“[F]ourteen members . . . were Asian, four were African and twenty came from Latin America.”).

29. *See* RHONA K. M. SMITH, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS 36 (3d ed. 2007) (positing that any significance accorded to these abstentions has eroded with the passage of fifty years and the world's increasing trust in the UDHR).

30. *See* ROBERTSON, *supra* note 10, at 37 (noting that the word “democracy” is mentioned only once in the UDHR in an effort to mitigate the fears of the communist abstainers).

of living—aspects of which include health, housing, and education.³¹ Moreover, with the advent of viewpoints asserting the indivisibility of human rights,³² one can regard the UDHR holistically. Its very nature means that “the value of each right is significantly augmented by the presence of many others,” rendering the tallying of rights according to quantity in a particular category an empty exercise.³³

In opposition to cultural relativism is a school of thought that questions whether relativism retains plausibility in the face of atrocity. The argument is that a cruel act is cruel to *any* human being to whom it is done, and the UDHR, in trying to be universal, is propagating the message that “every human being is sacred,” not just those that are white or Christian, for example.³⁴ Article 2 of the UDHR makes the connection that the inviolability of a person does not depend on his or her, “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”³⁵

The following is an account of the recently reignited conflict in the Democratic Republic of the Congo, where most parties to the conflict have utilized sexual violence as a weapon.³⁶ Human Rights Watch recorded a mother describing the treatment of her twenty-year-old daughter:

They went after my daughter, and I knew they would rape her. But she resisted and said she would rather die than have relations with them. They cut off her left breast and put it in her hand. They said, “Are you still resisting us?” She said she would rather die than be with them. They cut off her genital

31. *See id.* (arguing that, for this reason, there is “little merit” to the idea that the UDHR upholds only liberal Western values).

32. *See, e.g.,* World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993) (“All human rights are universal, indivisible and interdependent and interrelated.”).

33. DONNELLY, *supra* note 14, at 27.

34. *See* MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 59 (1998) (explaining that any alternative conception of human rights would lead to the conclusion that certain peoples are not sacred and not true humans).

35. UDHR, *supra* note 3, art. 2.

36. *See* HUMAN RIGHTS WATCH, *THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO* 23 (2002) (describing the use of sexual violence as a means of gaining and preserving control over people and the property that they owned or lived on).

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labia and showed them to her. She said, "Please kill me." They took a knife and put it to her neck and then made a long vertical incision down her chest and split her body open. She was crying but finally she died. She died with her breast in her hand.³⁷

If we were to choose other parts of the world, there would be similar tales of horror. For example:

The torture techniques in Baghdad were routine and varied in severity. The electric shocks could be everywhere. But sometimes they would burn people on the genitals and go on burning until they were completely burned off. They did the same with toes. . . . I saw one man and they had used an iron on his stomach. They used drills and made holes in bones, arms and legs. . . . There was another torture where they would put sulphuric acid in a tub. They would take a man and start by dissolving his hands.³⁸

These are just a couple of examples of shocking brutality that have been and continue to be enacted in countless other places, times, and situations. In places and times where such unspeakable acts occur, does it matter that the UDHR has a strong focus on individual rights? This author does not believe so. As Professor Rosalyn Higgins eloquently explains:

Human rights are rights held simply by virtue of being a human person. They are part and parcel of the integrity and dignity of the human being. They are thus rights that cannot be given or withdrawn at will by any domestic legal system. . . . It is sometimes suggested that there can be no fully universal concept of human rights, for it is necessary to take into account the diverse cultures and political systems of the world. In my view this is a point advanced mostly by states, and by liberal scholars anxious not to impose the Western view of things on others. It is rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal standards. The non-universal, relativist view of human rights is in fact a very state-centred view and loses sight of the fact that human rights are human rights and

37. *Id.* at 55 (explaining that some "rapists react with extraordinary cruelty" when their victims attempt resistance).

38. ROBERT FISK, *THE GREAT WAR FOR CIVILISATION: THE CONQUEST OF THE MIDDLE EAST* 155-56 (2005).

not dependent on the fact that states, or groupings of states, may behave differently from each other so far as their politics, economic policy, and culture are concerned. I believe, profoundly, in the universality of the human spirit. Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practise their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial. I believe there is nothing in these aspirations that is dependent upon culture, or religion, or stage of development. They are as keenly felt by the African tribesman as by the European city-dweller, by the inhabitant of a Latin American shanty-town as by the resident of a Manhattan apartment.³⁹

However, it is acknowledged that due to the hierarchical classification of rights, and the lesser duties owed by states regarding economic and social rights, an imbalance between the two categories of rights remains. The UDHR's enduring relevance may depend on its ability to adapt to an increasing emphasis on socio-economic rights, to ensure it remains in touch with how best to serve the cause of human dignity. The subject of socio-economic rights is broached in subsequent sections.

2. *Enforceability*

International law binds states only to the extent that they agree to be bound. That states are often unwilling to recognize the authority of international law has proven a key obstacle in attempts to expand its scope.⁴⁰ James Hathaway has identified the fear that "the gap between declared universal law and the practice of states [is] widen[ing]."⁴¹ This criticism of the UDHR is compounded by its status as a U.N. General Assembly Resolution, with no legally binding force.

39. ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 96-97 (1994) (emphasis in original).

40. See JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 31-32 (2005) (hypothesizing that an expansive views of international human rights dissuades states from acknowledging their legitimacy because states will view those rights as mere rhetoric).

41. *Id.* at 31.

However, as noted earlier, the two subsequent Covenants do have this force. The UDHR, the ICCPR, and the ICESCR combine to form the International Bill of Rights, which suffers less vulnerability to challenges based on enforceability. As Hathaway goes on to state:

More than any other gauge, the International Bill of Rights is essential to an understanding of the minimum duty owed by a state to its nationals. Its place derives from the extraordinary consensus achieved on the soundness of its standards, its regular invocation by states, and its role as the progenitor for the many more specific human rights accords.⁴²

The next two sections attempt to use refugee law to evaluate the strength of these criticisms and to test the contemporary normative impact of the UDHR. Specifically, the following sections will ask whether the UDHR has law-making abilities, whether it is enforceable, and whether the imbalance between civil and political rights and economic, social, and cultural rights is being addressed.

II. THE UDHR AND THE REFUGEE CONVENTION

International refugee law is a specialized field of law presenting its own share of challenges. This article cannot traverse the breadth of the law to provide comprehensive coverage of its issues, but does attempt to convey fundamental principles of refugee law where they intersect the UDHR.

There is a unique interrelationship between the UDHR (and the entire International Bill of Rights) and the Refugee Convention. Approximately eighty-six percent of the refugees in the world live in states that have signed or ratified the ICESCR and ICCPR.⁴³ Furthermore, the human rights agreements and the Refugee Convention set overlapping guarantees. Therefore, as James

42. JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 106-07 (Anne Lynas Shah ed., 1991) (emphasis added) (asserting that having an International Bill of Rights is “consistent” with the aims of the UDHR).

43. See HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, *supra* note 40, at 9 (comparing this number to the sixty-eight percent of refugees living in a state party to the Refugee Convention or Protocol, and also observing that, of those states party to the Refugee Convention or Protocol, ninety-eight percent are party to at least one of the component instruments of the International Bill of Rights).

Hathaway recognizes, refugee rights will oftentimes entail a combination of principles stemming from both refugee law and the International Bill of Rights.⁴⁴ Moreover, the dominant approach to determining key aspects of the refugee definition is known as the “human rights approach” and draws extensively on the UDHR.

A person will be recognized as a refugee if they meet the inclusion clause of the Refugee Convention, Article 1A(2), being someone who,

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁴⁵

The “being persecuted” aspect of the definition is undefined in the Refugee Convention. However, in a recent decision, the New Zealand Refugee Status Appeals Authority (“RSAA”) discussed three interpretative approaches that have been identified in various jurisdictions.⁴⁶ The first approach applies the domestic rules and norms of the country of asylum in order to ascertain whether an individual is being persecuted.⁴⁷ However, the RSAA concluded that this was “undesirable in the context of an international human rights treaty which must be interpreted and applied according to international, not domestic standards.”⁴⁸ It would also too easily allow “the intrusion of ideology and also the implication of censure of the state of origin.”⁴⁹ The second approach uses dictionary definitions to aid interpretation.⁵⁰ However, this has rightly been

44. *See id.* (noting that the convergence of refugee law and human rights principles occurs in practice as well as in principle.).

45. Refugee Convention, *supra* note 4, art. 1(A)(2).

46. Refugee Appeal No. 74665/03, ¶¶ 37-42 (July 7, 2004) (N.Z. Refugee Status App. Auth.), available at http://www.nzrefugeeappeals.govt.nz/PDFs/REF_20040707_74665.pdf.

47. *Id.* ¶ 38.

48. *Id.*

49. *Id.*

50. *Id.* ¶ 39.

rejected as it exposes the problems that arise with the various meanings of individual words, and fails to contextualize the meaning given to a phrase.⁵¹ The third approach is the “human rights approach,” and although not universally accepted, it is the dominant approach.⁵²

“Being persecuted” involves two key elements: a “risk of serious harm *and* a failure of state protection.”⁵³ An assessment of possible breaches of human rights may inform either the existence of serious harm or the existence of state protection. This is the “human rights approach.” Hathaway thus described the human rights approach: “refugee law ought to concern itself with actions which deny human dignity in any key way, and . . . the sustained or systemic denial of core human rights is the appropriate standard.”⁵⁴ Moreover, in another paper Hathaway wrote regarding the role of the judiciary, he argues that relying on core norms of international human rights law to define the serious harm aspect of being persecuted is both legally compelling and pragmatic.⁵⁵ He states:

[I]nternational human rights law provides refugee law judges with an automatic means—within the framework of legal positivism and continuing accountability—to contextualize and update standards in order to take new problems into account. Because international human rights law is constantly being authoritatively interpreted through a combination of general comments, decisions on individual petitions, and declarations of UN plenary bodies, there is a wealth of wisdom upon which refugee decision makers can draw to keep the Convention refugee definition alive in changing circumstances. This malleability or flexibility of international human rights law makes it possible for you to address new

51. *See id.* (pointing out that because language is not precise, different judges may understand the so-called “plain meaning” of a word differently).

52. *See id.* ¶ 41 (explaining that this approach is rooted in established rules of treaty interpretation).

53. *Id.* ¶ 53 (emphasis in original).

54. HATHAWAY, *THE LAW OF REFUGEE STATUS*, *supra* note 42, at 108.

55. *See* James C. Hathaway, *The Relationship Between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute*, in *THE REALITIES OF REFUGEE DETERMINATION ON THE EVE OF A NEW MILLENNIUM: THE ROLE OF THE JUDICIARY* 80, 86 (Jordan, Nesbitt & Assocs. Ltd. ed., 1999) (believing the International Bill of Rights to be a foundational, though not absolute, basis for informing the evaluation of what constitutes persecution).

threats to human dignity through refugee law, but to do so without asserting either subjective or legally ungrounded perceptions of “what’s right, and what’s wrong.”⁵⁶

The courts in Canada and the United Kingdom, as well as the New Zealand RSAA have accepted this approach. In Canada, the Supreme Court recognized Hathaway’s description of the approach in *Canada v. Ward*,⁵⁷ with the United Kingdom House of Lords following suit in *Horvath v. Secretary of State for the Home Department*.⁵⁸

Refugee Appeal No. 74665 asked the immediate follow-up question posed by the human rights approach, when the RSAA stated: “Recognising that ‘being persecuted’ may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection, the question which arises is how one identifies ‘basic human rights.’”⁵⁹ The RSAA immediately established that customary international law would be of little assistance, given the notoriously difficult task of identifying sufficient state practice and *opinio juris*.⁶⁰ As such, the RSAA confirmed that “treaty law provides a more solid and compelling legal foundation.”⁶¹ The RSAA, many other national superior courts and adjudicative bodies, and leading refugee academic Hathaway overwhelmingly consider the UDHR, the ICCPR and the ICESCR to be the treaty sources that provide the most solid authority.⁶²

56. *Id.* at 85-86 (listing two other reasons justifying the reliance on the International Bill of Rights, including first, the idea that because states determine what international law is, it makes sense to enforce states’ own definition; and second, the notion that by relying on *internationally* agreed-upon standards, “refugee decision makers . . . are not combating the views of [individual] governments”).

57. *See* *Canada v. Ward*, [1993] 2 S.C.R. 689, 733-34 (Can.) (citing Hathaway’s words as a succinct explanation of how the underlying commitment to human rights shapes refugee law).

58. *See* *Horvath v. Sec’y of State for the Home Dep’t*, (2001) 1 A.C. 489, 495 (H.L.) (U.K.) (invoking Hathaway’s ideas in attempting to define the limits of “persecution” in the context of the Refugee Convention).

59. *Refugee Appeal No. 74665/03*, ¶ 62 (July 7, 2004), available at http://www.nzrefugeeappeals.govt.nz/PDFs/REF_20040707_74665.pdf.

60. *See id.* ¶ 63 (expressing doubt over the usefulness of custom in ascertaining fundamental human rights).

61. *Id.*

62. *See id.* ¶ 65 (emphasizing that the UDHR, ICCPR, and ICESCR are meant to be read together).

In addition to its reputation, the rationale behind the UDHR's status as the first port of call is the ordinary principles of treaty interpretation encapsulated by the Vienna Convention on the Law of Treaties ("VCLT").⁶³ Article 31(1) of the VCLT mandates that, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁶⁴

A treaty's "context" as defined in Article 31(2) of the VCLT includes the preamble.⁶⁵ The preamble is expressly designated a principal source of a treaty's objects and purposes.⁶⁶ The first two paragraphs of the Refugee Convention's preamble disclose the human rights purpose of the treaty, and specifically refer to the UDHR.⁶⁷

As the RSAA recognized in *Refugee Appeal No. 74665*, the preamble to the Refugee Convention is referred to in two important United Nations High Commissioner for Refugees ("UNHCR") documents.⁶⁸ It can be found in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*⁶⁹ and in UNHCR's *Interpreting Article 1 of the 1951 Convention Relating to*

63. Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, S. TREATY DOC. NO. 92-12, 1155 U.N.T.S. 331.

64. *Id.*

65. *See id.* art. 31(2) ("The context for the purpose of the interpretation of a treaty shall comprise . . . the text, including its preamble and annexes . . .").

66. *See id.*; *see also* Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, 196 (Aug. 27) (using the Madrid Convention's preamble in determining that Convention's objects and purposes); Asylum (Colom. v. Peru) 1950 I.C.J. 266, 282 (Nov. 20) (using the Havana Convention's preamble in determining that Convention's objects and purposes).

67. *See* Refugee Convention, *supra* note 4, pmbl. ("Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination . . .").

68. *See* Refugee Appeal No. 74665/03, ¶ 57 (July 7, 2004) (emphasizing that both documents acknowledge the preamble's significance).

69. *See* U.N. High Comm'r for Refugees [UNHCR], *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, ¶ 25, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992) (noting that the granting of asylum is not elaborated upon in the Refugee Convention, though it is referenced in the preamble).

the Status of Refugees.⁷⁰ The RSAA notes that the second of these two documents “accepts that human rights principles should inform the interpretation of the refugee definition, as should the ongoing development of international human rights law.”⁷¹

There are four types of rights within the International Bill of Rights which form a hierarchy of rights for the purposes of determining the presence of persecution in refugee law.⁷² These rights clarify the extent of the obligation of protection which the state will owe its citizen. First are those rights in the UDHR which are non-derogable.⁷³ Examples of such rights include freedom from being “arbitrarily deprived of . . . life,”⁷⁴ and protection from “torture or . . . cruel, inhuman or degrading treatment or punishment.”⁷⁵ Because of the importance of these rights, the failure to guarantee them constitutes persecution.⁷⁶ Second are the rights in the UDHR and ICCPR from which states may derogate in a public emergency.⁷⁷ Some examples are “freedom from arbitrary arrest or detention” and “the protection of personal and family privacy.”⁷⁸ Failure to guarantee such rights will usually breach a state’s duty to protect, except in case of emergency.⁷⁹ Third are the economic, social, and

70. See UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, ¶ 4 (Apr. 1, 2001), available at <http://www.unhcr.org/refworld/docid/3b20a3914.html> (pointing out that the Refugee Convention’s preamble utilizes language strongly supporting human rights ideals).

71. Refugee Appeal No. 74665/03, ¶ 57 (July 7, 2004).

72. See HATHAWAY, *THE LAW OF REFUGEE STATUS*, *supra* note 42, at 108 (implying that these four categories help determine which rights “are appropriately considered to be basic and inalienable”).

73. See *id.* at 109 (commenting that these rights gained binding force upon inclusion in the ICCPR).

74. ICCPR, *supra* note 12, art. 6.

75. *Id.* art. 7; see also HATHAWAY, *THE LAW OF REFUGEE STATUS*, *supra* note 42, at 109 (listing other such non-derogable rights found in the UDHR).

76. See HATHAWAY, *THE LAW OF REFUGEE STATUS*, *supra* note 42, at 109 (stressing that even compelling national emergencies will not justify derogation from these rights).

77. See ICCPR, *supra* note 12, art. 4(1) (specifying that such a public emergency must be “officially proclaimed” and “threaten[] the life of the nation” before derogation is permitted).

78. HATHAWAY, *THE LAW OF REFUGEE STATUS*, *supra* note 42, at 109 (internal citations omitted); ICCPR, *supra* note 12, arts. 9-10, 17, 23.

79. See HATHAWAY, *THE LAW OF REFUGEE STATUS*, *supra* note 42, at 110 (stipulating that the government’s actions also must be strictly necessary, not inconsistent with other mandates of international law, and not discriminatorily

cultural rights of the UDHR and the ICESCR, including, *inter alia*, “the right to work, . . . entitlement to food, clothing, housing, medical care, . . . and basic education.”⁸⁰ At a certain point, depriving an individual of particularly important socio-economic rights will be the functional equivalent of depriving that individual of life or subjecting that individual to cruel, inhuman, or degrading treatment.⁸¹ As a result, such deprivation of rights would be considered persecution.⁸² Fourth in the hierarchy are certain rights in the UDHR that were not carried over to the ICCPR or ICESCR, meaning that they may fall beyond the ambit of the state’s obligation to protect its citizens.⁸³ This category contains “[t]he right to own and be free from arbitrary deprivation of property.”⁸⁴

The RSAA has applied the human rights approach to persecution in different contexts including sexual orientation,⁸⁵ and gender based persecution.⁸⁶ In *Refugee Appeal No. 1312/93 Re GJ*, the appellant was a homosexual Iranian man.⁸⁷ A principal issue was whether sexual orientation could be the basis for finding persecution related to membership of a particular social group (fear of persecution due to group membership being one of the five reasons for refugee status

executed).

80. *Id.* at 110-11 (internal citations omitted); ICESCR, *supra* note 13, arts. 6, 11(1), 13-14.

81. See HATHAWAY, THE LAW OF REFUGEE STATUS, *supra* note 42, at 111 (providing as examples of such key socio-economic rights, “the ability to earn a living, or the entitlement to food, shelter, or health care. . .”).

82. *Id.*

83. See *id.* at 111 (concluding that, standing alone, violations of these rights will not amount to persecution).

84. *Id.*; UDHR, *supra* note 3, art. 17.

85. See *Refugee Appeal No. 1312/93*, at 61 (Aug. 30, 1995) (N.Z. Refugee Status App. Auth.), available at http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_19950830_1312.pdf (granting refugee status based on discrimination the appellant faced as a homosexual man in Iran).

86. See, e.g., *Refugee Appeal No. 71427/99*, ¶¶ 104-08 (Aug. 16, 2000) (N.Z. Refugee Status App. Auth.), available at http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_20000816_71427.pdf (elaborating that women are “fundamentally disenfranchised and marginalised” by the Iranian government); *Refugee Appeal No. 2039/93*, ¶ 144 (Feb. 12, 1996) (N.Z. Refugee App. Auth.), available at http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_19960212_2039.pdf (holding that an Iranian woman met the requirements for refugee status in part because of the oppression she faced from her male relatives).

87. *Refugee Appeal No. 1312/93*, at 4 (Aug. 30, 1995).

according to the Inclusion Clause of the Refugee Convention).⁸⁸ To qualify as a “particular social group,” there must exist “an internal defining characteristic shared by members of the particular social group.”⁸⁹ This occurs when “there is a shared defining characteristic that is either innate or unchangeable, or if voluntary association is involved, where that association is for reasons so fundamental to the human dignity of members of the group that they should not be forced to forsake the association.”⁹⁰ The RSAA acknowledged the application of the human rights approach in this interpretation of “particular social group” when it stated:

In this way, recognition is given to the principle that refugee law ought to concern itself with actions which deny human dignity in any key way On this interpretation, the issue of sexual orientation presents little difficulty. As we have earlier remarked, sexual orientation is a characteristic which is either innate or unchangeable or so fundamental to identity or to human dignity that the individual should not be forced to forsake or change the characteristic.⁹¹

Although neither the UDHR nor the ICCPR make any provision for the freedom to choose sexual orientation, the anti-discrimination provisions of these two agreements are sufficiently broad to embrace this choice.⁹² Article 2 of each instrument articulates that all parties are equal before the law and are entitled—without any discrimination—to the equal protection of the law.⁹³ As a result, “the

88. *See id.* (commenting that the Authority delayed handing down its decision in the case in part because the appellant failed to provide adequate information regarding the social group classification at issue); *see also* Refugee Convention, *supra* note 4, art. 1(A)(2) (granting refugee status to those with a “well-founded fear of being persecuted for reasons for race, religion, nationality, membership of a particular social group or political opinion”).

89. Refugee Appeal No. 1312/93, at 61 (Aug. 30, 1995).

90. *Id.*

91. *Id.* (citations omitted).

92. *See, e.g., id.* at 39 (explaining that the Tasmanian government acknowledged sexual orientation is within the meaning of “other status” in Article 2(1) of the ICCPR).

93. *See* UDHR, *supra* note 3, art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without discrimination of any kind”); ICCPR, *supra* note 12, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals . . . the rights recognized in the present Covenant, without distinction of any kind”).

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law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁹⁴ Refugee decision-makers have interpreted the anti-discrimination provisions to include homosexuality, as it is acknowledged “that [lesbian, gay, bisexual, and transgender] persons are entitled to all human rights on an equal basis with others.”⁹⁵ Moreover, as the RSAA has accepted, the prohibition by law of private, consensual homosexual acts violates the right to privacy articulated by Article 17 of the ICCPR.⁹⁶ Therefore, in such cases, core human rights would be violated.

*Refugee Appeal No. 2039/93*⁹⁷ confronted gender-based persecution where the appellant claimed that, as an Arab woman, she suffered oppression within her family, and from society as a whole.⁹⁸ The RSAA summarized her case as one that relied on the following four grounds:

- (a) Her race and religion.
- (b) Her family background and the political activities of family members.
- (c) The oppression of female members of her family by male family members.
- (d) The oppression of women in Iranian society.⁹⁹

The appellant’s principal claims were ordered according to the hierarchy of rights in the ICCPR. She feared violation of the following rights:

94. ICCPR, *supra* note 12, art. 26.

95. UNHCR, Protection Policy and Legal Advice Section, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 6 (Nov. 21, 2008).

96. *See id.* at 10 (elaborating upon the notion that “[t]he very existence of such laws,” even where those laws are only narrowly enforced and/or carry limited penalties could greatly impede “LGBT persons’ enjoyment of their fundamental human rights”).

97. *Refugee Appeal No. 2039/93* (Feb. 12, 1996) (N.Z. Refugee Status App. Auth.).

98. *Id.* ¶ 3.

99. *See id.* ¶¶ 3-4 (adding that the appellant argued alternatively that the Authority should consider the cumulative effect of the claims to determine whether her fear of persecution was well-founded).

First Level Rights

Article 6: "The arbitrary deprivation of her life" by her male relatives.

Article 7: "Torture or cruel, inhuman or degrading treatment or punishment" at the hands of male family members.

Article 18: "The right to freedom of thought and conscience."

Second Level Rights

Article 19: "The right to freedom of opinion and expression."

Article 17: "Right to privacy."

Article 23: "No marriage without free and full consent; equality of rights."¹⁰⁰

The RSAA agreed that, "the concept of persecution is broad enough to include governmental measures that compel [conduct] . . . abhorrent to that individual's deepest beliefs."¹⁰¹ In assessing whether a female claimant faces persecution, proper weight must be given to the significance of her "being required to comply with codes and requirements fundamentally at odds with [her] own conscience and beliefs or deeply held convictions, or to engage in conduct that is abhorrent to [her] own beliefs," even where those beliefs are not necessarily religious beliefs.¹⁰²

In coming to this conclusion, the RSAA emphasized the ICCPR's Article 18 right to freedom of opinion and expression, stating:

This Article is directly relevant to the appellant's deeply held views of her right to function as an autonomous and independent individual, to her passionate opposition, both to the patriarchal society comprising her extended Arab family, and to the male domination of women in Iranian society at large. Additionally, . . . the right under ICCPR Article 18 of spiritual and moral existence is closely associated with the

100. *Id.* ¶¶ 81-86.

101. *Id.* ¶ 97 (quoting *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993)). The RSAA further noted that

[W]hen a person with religious views different from those espoused by a religious regime is required to conform to, or is punished for failing to comply with, laws that are fundamentally abhorrent to that person's deeply held religious convictions, the resulting anguish should be considered in determining whether the authorities have engaged in persecutorial conduct.

Id.

102. *Id.* ¶ 99.

right to privacy in ICCPR Article 17, as well as (private) freedom of opinion in ICCPR Article 19(1). But the right to freedom of thought and conscience under Article 18 means the right to develop autonomously thoughts and a conscience free from impermissible external influence.¹⁰³

In addition to the preceding cases involving civil and political rights, refugee law and the UDHR can combine to vindicate the social and economic elements of those universal rights that are essential to human dignity.¹⁰⁴ This connection to dignity is often understated. Therefore, socio-economic rights may represent a worthy channel for the law-making abilities of the UDHR. Judge de Visscher of the International Court of Justice has classified lawmaking treaties as “treaties the object of which is the laying down of common rules of conduct (*normes de conduite communes*).”¹⁰⁵ This avenue will be explored in the remainder of this article.

III. EVOLUTION IN TRAIN: SOCIO-ECONOMIC RIGHTS IN REFUGEE STATUS DETERMINATION

As indicated previously, social and economic rights rank third on the hierarchy of rights, indicating serious harm and a lack of state protection such as to engage the refugee protection regime. There are significant qualifications attached to a finding of refugee status related to breaches of this group of rights. Protection may only be engaged where there is a *discriminatory* denial of available resources or a failure to provide the *most basic* of necessities despite the state’s fiscal ability to do so.¹⁰⁶ This is because the ICCPR and the ICESCR differ significantly in certain conceptual ways; the duty of the state party under the ICESCR is not to “respect and ensure” the realization

103. *Id.* ¶ 81 (citation omitted).

104. See HATHAWAY, *THE LAW OF REFUGEE STATUS*, *supra* note 42, at 111 (noting that the denial of fundamental socio-economic rights, such as the right to food or shelter, can rise to the level of persecution).

105. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, *supra* note 40, at 72 n.218.

106. See HATHAWAY, *THE LAW OF REFUGEE STATUS*, *supra* note 42, at 110-11 (highlighting that the ICESCR requires only that states “take steps to the maximum of their available resources to progressively realize rights,” rather than a pronouncing an absolute standard that states must meet).

of rights, as is the standard demanded under the ICCPR.¹⁰⁷ Rather, the ICESCR requires only that a state party work actively and earnestly toward recognition of the enumerated rights to the maximum extent that available resources allow.¹⁰⁸ As the RSAA has explained, economic and social rights are limited in that “the scarcity of resources which any human community has to reckon with” qualifies the extent of the state’s duty to its citizens.¹⁰⁹

However, the human rights approach to refugee law (made possible through the reference to the UDHR in the Refugee Convention’s Preamble) may enable the broadening of the scope of applicability of socio-economic rights. As Michelle Foster has articulated it:

Given that [the UDHR] sets out both civil and political rights, and economic and social rights, and in light of the general position in international law regarding the indivisibility of the two sets of rights, this development [the human rights approach] holds considerable potential for extending the application of the Refugee Convention to claims based on deprivations of economic and social rights.¹¹⁰

The traditional, conservative position has meant that successful refugee claims were mainly limited to cases involving “economic proscription,” that is, an almost complete denial of the ability to earn a living.

107. See Refugee Appeal No. 74665/03, ¶ 87 (July 7, 2004) (N.Z. Refugee Status App. Auth.) (characterizing the rights guaranteed by the ICESCR as more “context-dependent” than those secured by the ICCPR).

108. Compare ICESCR, *supra* note 13, art. 2(1) (“Each State Party to the present Covenant undertakes to take steps, . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . .”), with ICCPR, *supra* note 12, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . .”).

109. Refugee Appeal No. 74665/03, ¶ 87 (July 7, 2004) (citing CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 39 (2003)) (acknowledging that, for this reason, the duties state parties owe to citizens can never be stated absolutely).

110. MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 16-17 (2007).

Early RSAA jurisprudence displays this conservative position. In *Refugee Appeal No. 70863/98*,¹¹¹ an Iranian woman appellant was directed by the *Komiteh* (revolutionary guards) to stop working as a hairdresser.¹¹² The RSAA identified Article 23 of the UDHR and Article 6(1) of the ICESCR as the relevant rights and explained that the two Articles “conceptualise work as being integral to the attainment of a decent living.”¹¹³ The effect of this classification meant that the RSAA had a relatively narrow view of exclusion from employment.

That narrow view was that it is possible to establish persecution only where individuals were “prevented from securing *any* employment or where the only work which [can be attained] is, for example[,] of an extremely dangerous nature or grossly out of keeping with [an individual’s] qualifications and experience.”¹¹⁴ In the instant case, the economic consequences on the whole were deemed not to be “so detrimental as to amount to persecution,” as there was “no blanket exclusion from pursuing alternative employment.”¹¹⁵

The RSAA did recognize that, aside from being the means of funding an acceptable standard of living, work “has a personal and social dimension which is closely related to the realisation of self worth and dignity.”¹¹⁶ The RSAA acknowledged that the appellant had been forced out of the career she had chosen for herself. However, as socio-economic rights are concerned with minimum standards, it went on to explain that “[n]ot every breach of a

111. *Refugee Appeal No. 70863/98* (Aug.13, 1998) (N.Z. Refugee Status App. Auth.) available at http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_19980813_70863.pdf.

112. *See generally id.* (denying refugee status to the appellant despite her claims that she was forced to abandon her profession).

113. *See id.* at 8 (recognizing, additionally, that ICESCR Article 11 protects the right to an “adequate standard of living”); *see also* UDHR, *supra* note 3, art. 23 (right to work); ICESCR, *supra* note 13, art. 6(1) (same).

114. *Refugee Appeal No. 70863/98*, at 8 (Aug.13, 1998) (citing HATHAWAY, *THE LAW OF REFUGEE STATUS*, *supra* note 42, at 133) (emphasis added).

115. *Id.* (concluding that the appellant had not worked in the beginning of her marriage and therefore the income must not be essential to enjoying an acceptable standard of living).

116. *Id.* at 9 (concluding that the appellant’s efforts in training and establishing her own business reflected a level of personal enjoyment above and beyond the simple satisfaction of receiving compensation).

claimant's human rights constitutes persecution."¹¹⁷ The RSAA believed that the appellant had not invested sufficient time in her occupation such that "any proscription on following [her chosen] profession [would be] particularly onerous."¹¹⁸ Therefore, there was no real chance of serious harm.

Michelle Foster has stated that until recently, "the jurisprudence remained fairly undeveloped . . . particularly in respect of aspects of economic and social rights other than the right to work."¹¹⁹ She believes that national and international adjudicative bodies are now "displaying an increasing willingness to hold governments responsible for practices that involve a breach of those rights."¹²⁰

These developments have led to socio-economic claims commonly being successful where several less severe violations accrue in such a way as to amount to persecution.¹²¹ In *Refugee Appeal No. 71193/98*,¹²² the RSAA granted refugee status to a Roma family from the Czech Republic who had experienced severe discrimination in employment, provision of health care and housing, and the education of their children, and would face the same upon return.¹²³ Again, the RSAA acknowledged the dignity aspect of these types of claims. Significant weight was given to the effect on the appellants of their "long experience of involuntary abasement."¹²⁴

117. *Id.* (referencing Hathaway, who argues that persecution results only from the denial of the "minimally accepted standards" of economic, social, and cultural rights).

118. *Id.* (finding the fact that the appellant had worked in this profession for only eighteen months and had trained for only three months particularly relevant).

119. FOSTER, *supra* note 110, at 91.

120. *Id.* at 18-19.

121. *See id.* at 104-05 (observing that this amalgamative tactic clouds the ability to distinguish the violation of any single right, standing alone, as sufficient to constitute persecution).

122. Refugee Appeal No. 71193/98 (Sept. 9, 1999) (N.Z. Refugee Status App. Auth.) available at http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_19990909_71193.pdf.

123. *See id.* at 14-15 (concluding that the cumulative effect of the discrimination the appellant had experienced as a result of his race rose to the level of persecution, and would continue were he and his family to return to the Czech Republic).

124. *Id.* at 14.

An oft-criticized RSAA case¹²⁵ concerned a Dalit couple from India who also presented an account of past systemic discrimination.¹²⁶ The RSAA determined that they would likely encounter employment-related difficulties and occasional discrimination in accessing health care, and that they would return to live in basic housing conditions. However, because India had “taken steps to address the *de jure* and *de facto* discrimination against Dalits and [was] taking steps to progressively realise their rights under the ICESCR,” there was no failure of state protection.¹²⁷ This was despite the fact that the RSAA recognized that Dalits “remained discriminated against in every aspect of their lives and remain the victims of violence.”¹²⁸ It was also acknowledged that between 1961 and 1991, the gap in the literacy rate between Dalits and non-Dalits narrowed only slightly.¹²⁹ Additionally, there had been “selective installation in many villages of electricity, sanitation and safe drinking water which bypass[ed] Dalit areas.”¹³⁰

The RSAA emphasized other such small improvements in their socio-economic condition. For example:

[W]hile the number of Dalits in poverty increased by 5 per cent as a result of the economic policies of the government between 1987 and 1993, this reversed a declining trend of the previous 15 years. This 15 year reduction in Dalit poverty suggests economic and social policies designed to benefit Dalits were having some positive effect.¹³¹

125. See, e.g., FOSTER, *supra* note 110, at 108 n.87 (criticizing the RSAA for evaluating the “wrong question” when it failed to focus on whether the state was able to shield the parties from the fear of being persecuted).

126. See generally Refugee Appeal No. 75221 (Sept. 23, 2005) (N.Z. Refugee Status App. Auth.), available at http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_20050923_75221.pdf (holding that the appellants were not refugees within the meaning of the Refugee Convention).

127. *Id.* ¶¶ 121, 141.

128. *Id.* ¶ 119.

129. *Id.* ¶ 120.

130. *Id.*

131. *Id.* ¶ 122 (recognizing that there is no indication that recent poverty increases were the result of a state’s “deliberately retrogressive measures”).

In contrast is another RSAA decision¹³² that appears to focus on the correct question: whether the state's ability to protect is such that it *eliminates* the "well-founded fear of being persecuted."¹³³ The appellants were a Roma family from Hungary. The RSAA acknowledged various government reforms intended to improve the situation of the Roma and combat the discrimination directed at them,¹³⁴ but recognized that instances of discrimination, as well as negative stereotypes, remained prevalent in various dimensions of the group's social life.¹³⁵ A report of the European Centre for Minority Issues ("ECMI") records the overall discrimination that the Roma face:

One of the primary problems the Roma have to face is prejudice. The Roma are generally considered by others to be a dirty, lazy and stupid people who are prone to crime. That they are often active in the black market and prostitution and are disproportionately involved in recorded crimes perpetuates the stereotype. However, the poor economic status of the Roma, which is at least partially due to these prejudices, is to a great extent responsible for this level of engagement in crime. The Roma have all the characteristics of an economic underclass. They tend to have high levels of unemployment, sometimes reaching 80 to 90 per cent. They usually live in poor housing, often dwelling in a ghetto-like environment. They tend to be uneducated, having high levels of illiteracy.¹³⁶

132. See Refugee Appeal No. 75498-75501 (June 16, 2006) (N.Z. Refugee Status App. Auth.), available at http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_20060616_75498.pdf (rejecting four appellants' claims that they had faced sufficient discrimination to constitute persecution and warrant refugee status).

133. See FOSTER, *supra* note 110, at 108 n.87 (contending that Refugee Appeal No. 75221, for example, incorrectly disregarded the question of state protection).

134. See Refugee Appeal No. 75498-75501, ¶¶ 108-09 (June 16, 2006) (citing a European Commission against Racism and Intolerance report that indicates that the Hungarian government made positive efforts at multiple levels of society, but that problems remained in many areas).

135. See *id.* ¶ 140 (specifying the existence of police ill-treatment, unequal justice, and socio-economic discrimination against the Roma).

136. Jonathan Fox, *Patterns of Discrimination, Grievances and Political Activity Among Europe's Roma: A Cross-Sectional Analysis* J. ETHNOPOLITICS & MINORITY ISSUES EUROPE, Winter 2001/2002, at 3.

Ultimately, the appellants' claim was unsuccessful, as the consequences of the discrimination, even considered cumulatively, did not reach the level of seriousness required to constitute "being persecuted."¹³⁷ This shows the high threshold that must be overcome in social and economic cases, given the degradation that the Roma face, as demonstrated by country information similar to the ECMI report above. However, the methodology of the RSAA in this case was sounder in principle than that of *Refugee Appeal No. 75221*, which appeared to apply what Michelle Foster terms a "due diligence" approach.¹³⁸ This means that the court focuses on the effort the state has expended, "rather than an ability to remove the well founded fear altogether."¹³⁹ This latter case is also consistent with the emerging trend noted by Michelle Foster, namely that states are showing an increasing willingness to view critically state attempts to fulfil core obligations, even in cases "where the state has *failed to provide* a basic right (as opposed to having actively withdrawn it)."¹⁴⁰

Internationally speaking, recent claims have been founded on discrimination in education and healthcare, which represents a developing jurisprudence of considerable significance. Another area where reform is desirable, and may be possible through the UDHR and its accompanying human rights approach, must be mentioned as a final act before concluding this article.

It may be recalled that within the hierarchy of rights there are certain UDHR rights commonly held to fall outside the ambit of a state's duties, therefore not constituting a basis for the existence of persecution.¹⁴¹ One such right is Article 17(2) of the UDHR, the right

137. See *Refugee Appeal No. 75498-75501*, ¶¶ 180 (June 16, 2006) (recognizing, however, an expectation of some risk of discrimination and racism upon return to Hungary).

138. FOSTER, *supra* note 110, at 108 n.87.

139. *Id.* (conceding that this may occasionally lead to courts denying refugee claims on the basis that the state is "doing its best" to eradicate the discrimination).

140. *Id.* at 203 (underscoring that the court need not evaluate "whether the state has 'done enough'" in these instances) (emphasis added).

141. See *Refugee Appeal No. 72558/01*, ¶ 143 (Nov. 19, 2002) (N.Z. Refugee Status App. Auth.), available at http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_20021119_72558.pdf (adopting Hathaway's characterization of the right to own private property as among those rights that are beyond a state's duty to protect).

not to be arbitrarily deprived of property.¹⁴² Michelle Foster has questioned the rigid application of the human rights hierarchy in this context, as it may be inappropriate in the case of an applicant dispossessed of his or her home, or facing such potential dispossession.¹⁴³ Such an individual is in fact being denied the manifestation of an important right: the right to an adequate standard of living.¹⁴⁴

CONCLUDING REMARKS

This article has sought to elucidate the role of the UDHR in the service of human dignity. To that end, the UDHR's objectives were explained and its formation critically examined. Subsequent sections were arranged with a view to evaluate both praise and past criticism of the UDHR. This was done through an examination of the UDHR in a concrete sense, namely the way it plays out in an area of practical application: refugee status determination.

Today, 60 years after the launch of the UDHR, it continues to have a real impact in the protection of vulnerable asylum-seekers. The rights enshrined in the UDHR operate as guiding principles for refugee decision-makers in many states around the world every day through their application of the human rights approach to determining the existence of persecution.¹⁴⁵

The UDHR will retain international legal relevance for many years to come because it has the proven ability to continue to develop real accessible rights. The amazing expansion of social, economic and cultural rights in the last decade is a testament to this. Refugee decision-makers, using the principles of the UDHR, have become increasingly bold in holding states accountable to their obligations under the UDHR and its companion agreements, the ICCPR and the ICESCR. In this sense, the UDHR is a living instrument. The UDHR's ability to develop the realization of economic and social

142. UDHR, *supra* note 4, art. 17(2).

143. See FOSTER, *supra* note 110, at 147 (explaining that such a rigid approach fails to take into consideration the specific circumstances faced by the applicant at issue).

144. See *id.* at 147-48 (warning that this situation is especially detrimental to women, who may continue to face discrimination in inheritance and ownership laws, ultimately resulting in "severe economic deprivation").

145. See Refugee Convention, *supra* note 4, pmb1. (invoking the UDHR).

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rights allows it to meet the priority of Third World societies: basic economic and social needs. This also allows the UDHR to meet the criticisms of those who advocate cultural relativism.

The UDHR has the potential to enhance its already significant ability to create norms and thus shape the practical protection of the world's peoples. There is a category of rights within the UDHR that is as yet unenforceable, but with the potential to protect those who have been denied the ultimate dignity of shelter and the subsequent ability to maintain an adequate standard of living. If basic rights such as these can be accessed in a real and substantive way, such as to avoid labels like 'rhetoric' or 'aspirational,' then there can be no other result than the augmentation and the intensification of the sum dignity of humankind.