Revue québécoise de droit international
Quebec Journal of International Law
Revista quebequense de derecho internacional

NOTES FOR THE REMARKS CONCERNING CANADA AND THE *UNIVERSAL DECLARATION OF HUMAN RIGHTS*

Nurjehan Mawani

Volume 11, numéro 2, 1998

URI : https://id.erudit.org/iderudit/1100533ar
DOI : https://doi.org/10.7202/1100533ar

Aller au sommaire du numéro

Éditeur(s)

Société québécoise de droit international

ISSN

0828-9999 (imprimé)
2561-6994 (numérique)

Découvrir la revue

Citer cette note

Mawani, N. (1998). NOTES FOR THE REMARKS CONCERNING CANADA AND THE *UNIVERSAL DECLARATION OF HUMAN RIGHTS*. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, *11*(2), 28–38. https://doi.org/10.7202/1100533ar

NOTES FOR THE REMARKS CONCERNING CANADA AND THE *UNIVERSAL DECLARATION OF HUMAN RIGHTS*

By Nurjehan Mawani[*]

Good morning, ladies and gentlemen.

It is a pleasure to address you on this occasion of the 50th anniversary of the *Universal Declaration of Human Rights* (*Declaration*). Rarely has a single document had such profound influence upon the psyche and behaviour of the community of nations. In the 50 years since its inception, the *Declaration* has slowly shaped the way we think, and subsequently, the way we behave. It has done so by introducing the language of human rights into the discourse among nations and into the dialogue within national borders as well.

The core values reflecting international consensus on fundamental human dignity were captured in the *Declaration*. It has been described as the parent document of the human rights movement and has achieved the status of the constitution of that movement. It forms the foundation for the corollary Covenants, *The International Covenant on Civil and Political Rights* (*ICCPR*) and *The International Covenant on Social, Economic, and Cultural Rights* (*ICSECR*), and many subsequent UN conventions such as *The Convention for the Elimination of All Forms of Discrimination Against Women* (*CEDAW*), and *The Convention on the Rights of the Child* (*CRC*). Its impact upon the development of human rights law is irrefutable.

The *Declaration* was never meant to be a legally binding instrument. The plan was to use it as a springboard to treaties that would be subject to state ratification and thereby have legal weight.[1] The adoption of the *Declaration* by the UN General Assembly in 1948 made it a document capable of only exerting moral and political influence on member states.[2] However, the fact that it took 28 years from the date of the adoption of the *Declaration* until the two principal Covenants, the *ICCPR* and *ICSECR* (*Covenants*), became effective, made the *Declaration* the only broad-based human rights instrument available for almost three decades. As a result, it remains the single most invoked human rights instrument.[3]

There is some debate among academics as to whether the *Declaration* remains only a highly persuasive document or has become legally binding. Some writers postulate that the substance of the *Declaration* is to be regarded as customary

---

[*] Chairperson, Immigration and Refugee Board. I would like to acknowledge the assistance of Lori Disenhouse of the IRB's Legal Services in the preparation of these remarks.

1 H.J. Steiner & P. Alston, *International Human Rights in Context: Law, Politics, Morals*, (New York: Oxford University Press, 1996) at 120.

2 *Ibid.* at 119.

3 *Ibid.* at 120.

law in its entirety.[4] Such a view would make it binding upon all nations. Others opine that the *Declaration* in formal terms is not legally binding but possesses only moral and political force.[5] Such force is not to be underestimated. It accounts for the fact that human rights ideals deeply inform both the practice and theory of international politics. International development assistance has become dependent on improved human rights records of beneficiary countries and the very legitimacy of governments is assessed on the basis of their compliance with international human rights norms.[6] National leaders admonish other sovereign states for their poor human rights records and exhort them to improve. What we have witnessed is the ascendancy of a human rights paradigm in the international arena.

I. The Adoption of Human Rights Values in Canada

While the *Declaration* may not be technically binding upon Canadian courts and tribunals, the rights articulated within it and within subsequent conventions have formed the basis of much judicial reference and have had a tangible and continued impact on decision-making. In Canada, we find increased references to international human rights in the decisions of all our courts and the use of the jurisprudence of international human rights bodies in the interpretation of domestic human rights norms.[7]

Perhaps nowhere as dramatically as in the field of refugee and immigration matters does one see the profound influence of international human rights on Canadian jurisprudence. To some extent, this is a function of the close connection between human rights and the movement of peoples across national borders. Human rights play a role in almost every stage of a refugee's experience. They are crucial markers for identifying the need for international protection, and can be anticipated to shape the kind of treatment a refugee may expect in the country of asylum.[8] For example, the plight of refugees stems from a breakdown of human rights standards in the country of nationality. Once a refugee is in a country of asylum, that country's perspective on human rights entitlements will affect the refugee's access to refugee status. Similarly, the rights of immigrants to remain in their country of choice and the difficulties surrounding removals of immigrants often raise human rights issues. How we at the Immigration and Refugee Board (Board or IRB) deal with these cases and how we incorporate a human rights perspective into decisions on these matters will be the focus of my remarks.

---

[4] B. Simma & P. Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" in *Human Rights Law*, p. 3.

[5] *Ibid.* at 6.

[6] *Ibid.* at 3.

[7] Rt. Hon. Antonio Lamer, P.C., Chief Justice of Canada, "Enforcing International Human Rights Law: The Treaty System in the 21st Century", Address delivered at Centre for Refugee Studies, York University, Toronto, Ontario, June 22 1997 at 6.

[8] Richard Towle, "Human Rights Standards: A Paradigm for Refugee Protection?", Human Rights and Forced Displacement Conference, Centre for Refugee Studies, York University, Toronto, Ontario, May 7 1998 at 7.

Let me take a moment at this point to briefly tell you about the Canadian Immigration and Refugee Board. The Board is an independent tribunal established by the Parliament of Canada and is comprised of three divisions; the Convention Refugee Determination Division (CRDD), the Immigration Appeal Division (IAD), and the Adjudication Division. Its mission, on behalf of Canadians, is to make well reasoned decisions on immigration and refugee matters, efficiently, fairly and in accordance with the law. The CRDD determines whether eligible claimants in Canada are *Convention* refugees. The IAD hears appeals from persons denied entry to or ordered removed from Canada, and from Canadian citizens and permanent residents whose close family members have been denied permanent residence in Canada. The Adjudication Division conducts independent immigration inquiries in respect of persons who have been found inadmissible to Canada by immigration officials.

Since my remarks will focus on the work of the CRDD and IAD, allow me to go into a little more detail with respect to these two divisions. The CRDD receives approximately 25,000 refugee claims annually, which are decided by about 180 CRDD Board members appointed by the Governor-in-Council for a period of 2 to 5 years. The process before the Board is non-adversarial and in the nature of an inquiry into the person's claim. The primary focus is to evaluate if the claimant has established all the requisite elements of the *Convention* refugee definition; a well-founded fear of persecution, based on a *Convention* ground, where protection is unavailable to the claimant from her country of nationality.

If the decision is positive, the claimant obtains refugee status and can apply for permanent residence status in Canada. If the decision is negative, the claimant can apply to have the decision reviewed by the Federal Court of Canada, with leave. A failed refugee claimant can also apply to the Minister of Citizenship and Immigration to be allowed to remain in Canada on humanitarian and other grounds.

The IAD receives upwards of 4,000 immigration appeals a year. There are approximately 30 IAD Board members who hear these cases and they, as well, are appointed by the Governor-in-Council for a period of 2 to 5 years. The process in front of the IAD is adversarial, with the appellant represented by counsel and the Minister represented by a hearings officer. In deportation appeals, the IAD considers two grounds of appeal. First, the decision is reviewed for evidence of an error of fact or law. Second, if the appellant fails to establish an error in the decision, he or she is entitled to discretionary relief if there are special circumstances for which the person should not be removed from Canada.

If the appellant is successful in arguing that the deportation order was not valid in law, the order is quashed. If the appellant fails on that count but succeeds on the discretionary review of the facts, the members may either quash the order or grant a stay of removal. A failure on both grounds results in a valid removal order. Decisions of the IAD are open to judicial review by the Federal Court of Canada with leave.

II. Human Rights and the Canadian Asylum System

It is difficult to over-state the impact of the international human rights movement upon the Canadian refugee determination system. The influence can be seen in the human rights perspective that has been brought to bear upon the development of case law, at the level of both the courts and the Board jurisprudence. It has informed the manner in which the key criteria of the refugee definition have been interpreted, and thus it has also influenced the scope of the definition. In addition, many of the policies and procedures of the Board have been shaped by international human rights treaties and, as a consequence, Canada has been at the forefront of the movement to integrate a human rights approach into legal case analysis. We have also been world leaders in issuing guidelines that promote sensitivity to human rights in our domestic asylum procedures.

The Board was introduced to the concept of incorporating international human rights in its decision-making very early on in its history. The training given to members encouraged referencing to the International Bill of Rights (the IBR refers to the *Declaration* and the *Covenants*) when determining what kinds of acts constitute persecution. This approach was based on the academic work of Professor James Hathaway, who argued that the term persecution in the *Convention* definition must be interpreted from a human rights perspective:

> [P]ersecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. A well-founded fear of persecution exists when one reasonably anticipates that remaining in the country may result in a form of serious harm which the government cannot or will not prevent.[9]

When trying to determine whether a particular individual faces persecution, Board members ask, implicitly or explicitly, whether rights set out in the *ICCPR* and the *ICSECR* or other UN conventions (such as *CEDAW* and *CRC*) have been violated. In other words, the rights set out in international instruments are the yardsticks against which activities are measured to ascertain if they are persecutory. Of course, not every violation of a human right is persecutory. Some civil and political rights, such as the right to freedom from arbitrary deprivation of life, and freedom of thought, conscience and religion are considered non-derogable and any violations of those rights are persecutory. Other civil and political rights, such as freedom of expression and association, or the right to vote in periodic and genuine elections, may be violated when faced by the exigencies of an emergency situation.[10] In those circumstances, a violation of rights would not necessarily lead to a finding of persecution as long as the violation did not go beyond what was strictly required to respond to the emergency or was not applied in a discriminatory fashion to only certain groups of people.[11] Since economic, social and cultural rights require only

---

[9] J.C. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworths, 1991) at pp. 104-05.

[10] *Ibid.* at 110.

[11] *Ibid.*

that the state take steps to the maximum of its available resources to implement them, violations of these rights will only be persecutory if based on discriminatory allocation or implementation and have a repetitive nature or serious consequence.

It is, in fact, sometimes quite challenging to identify at what point a violation of a human right becomes persecutory. For example, the one child policy in China is not inherently persecutory. It is a policy or law of general application aimed at controlling the escalation in population. However, the means used by the state to implement its policy may produce violations of human rights that are persecutory:

> If the punishment or treatment under a law of general application is so Draconian as to be completely disproportionate to the objective of the law, it may be viewed as persecutory. This is so, regardless of whether the intent of the punishment or treatment is persecution. Cloaking persecution with a veneer of legality does not render it less persecutory. Brutality in furtherance of a legitimate end is still brutality.[12]

Forced abortions or forced sterilization clearly violate a person's right to security of the person, set out in the *Declaration* and in the *ICCPR* as a non-derogable right. Were the policy to be enforced by way of fines or economic penalty, and such enforcement applied to all in a non-discriminatory fashion, then we would not have a serious violation of human rights, nor a discriminatory application of a policy.

Yet another example of laws which on their face are not persecutory, but whose implementation may lead to persecution, are dress codes in certain countries. Where the punishment for violating a dress code is disproportionately harsh compared to the gravity of the offence, then a fundamental human right has been violated. Article 5 of the *Declaration* establishes the right not to be subjected to cruel, inhuman or degrading punishment, and a lack of proportionality between the offence and the punishment is an indicator of a persecutory violation of the right. Moreover, if the punishment for violation of the dress code is meted out only to one segment of the population, thereby evidencing a discriminatory application of the law, that too may be persecutory.

On the other hand, there are laws or practices that are inherently persecutory. For example, in some countries the law precludes women from gaining custody of their children in the event of a divorce. This is a law that discriminates against women, and the result of deprivation of access to one's children may be persecutory. The practice in some cultures of female genital mutilation (FGM) is on its face persecutory. It violates a young girl's right to security of the person and her physical integrity.

When faced with such cases in the past, the Board took a leadership role in finding these practices to be persecutory, instead of viewing them as internal practices with which one ought not to interfere. For example, a 1994 case involving a Somali mother and her children illustrates the Board's human rights approach to refugee

---

[12] *Cheung* v. *Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 at 323.

determination. The mother feared that upon her return to Somalia her children would be taken away from her by virtue of strict Islamic law granting absolute custodial rights to fathers. The Board found this to be a serious violation of the claimant's internationally protected rights as a parent. Further, her daughters, who faced female genital mutilation, would have their rights to security of the person, under Article 3 of the *Declaration* and Articles 37, 19, and 24 of the *CRC*, violated.[13]

One might look at these examples and ask whether we are engaged in a form of cultural imperialism. It has been argued that we have no business passing judgement on another sovereign state's practices. Yet, this is precisely the pitfall that internationally agreed upon human rights norms help us avoid. The existence of international norms is evidence of a collective agreement on basic standards of behaviour owed to one's citizens. It allows us to get past the notion that we are applying our own value system, as there is clear evidence by way of human rights instruments that we are applying international standards. These standards or norms are what give us the moral and legal authority to make decisions about what constitutes persecutory behaviour.

Despite the integrated human rights approach taken at the Board with respect to refugee determination, it became clear to us that more was required. Marginalized groups, such as women and children, were not served well enough and we recognized that although human rights apply to all individuals, special attention had to be focussed on women and children since the severe discrimination aimed at these groups was often ignored or not understood to be a violation of human rights. The jurisprudence dealing with the meaning of persecution within the context of the definition of a refugee in international law had been developed, by and large, based primarily on the experiences of male refugee claimants, even though the vast majority of the world's refugees are women and children.

We recognized that women often experience persecution differently than men, and there are certain violations of human rights to which they are particularly vulnerable. Moreover, certain human rights violations, when directed against women, were not being recognized as such. With respect to children, we realized that our processing of their claims had to be changed to bring our practices in line with the provisions of the *CRC* and to accommodate the special needs and vulnerabilities of children. Article 3 of the *CRC* sets out the guiding principle that in all actions concerning children the best interests of the child must be the primary consideration. We wanted to incorporate this principle into our hearing procedures so that in all matters of procedure before the Board, the best interests of the child would be the primary consideration.

At the Immigration and Refugee Board, we had an opportunity to address these concerns through my legislative authority, as Chairperson, to issue Guidelines for decision-makers in order to assist them in their work. I have issued three sets of Guidelines which are relevant in the refugee context; the first, *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*, released in 1993, and

---

[13] *B. (P.V.)*, [1994] C.R.D.D. No. 12 (QL).

updated in 1996, the second, *Civilian Non-Combatants Fearing Persecution in Civil War Situations*, released in 1996, and the third, *Guidelines on Child Refugee Claimants*, released in 1996 (*Guidelines*). We were the first refugee determination system to issue guidelines to its decision-makers on these issues. The issuance of these *Guidelines* focused decision-makers on the specific human rights provisions and instruments relevant to women and children. They underscored the reality that the very existence of international human rights instruments is not enough on its own to ensure their application to those in need of protection.

Through these *Guidelines*, we have achieved our goal of sensitizing decision-makers to the reality of both women's and children's experiences, which often differ from the male paradigm. In addition, it prompted us to identify documentation needs for these claims, and embark upon cultural training and gender-specific training for our decision-makers. We felt it was incumbent upon us to develop guidelines that would clearly place human rights violations of women within an international human rights framework, as well as guidelines which would promote the principle of the best interests of the child, which is so fundamental to children's rights.

The combination of a human rights perspective in our approach to refugee determination and the issuance of the *Guidelines* have given rise to Board jurisprudence which integrates human rights law with refugee determination. This integration is evident in the Board's analysis of the claim of a Zimbabwean woman who was forced into an arranged marriage by her parents and suffered physical, sexual and mental abuse at the hands of her husband. Such arranged marriages were traditional in Zimbabwe and documentary evidence indicated she had very little chance of gaining assistance from the state. The Board looked to the *Guidelines on Women*, which direct that "the social, cultural, traditional and religious norms and the laws affecting women in the claimant's country of origin ought to be assessed by reference to human rights instruments which provide a framework of international standards for recognizing the protection needs of women." The Board then referred to Article 16 of the *Declaration* and Article 16.1 of *CEDAW*, which set out the right to freely choose a spouse and enter a marriage with full consent, and found that forcing a woman to marry against her will was a violation of her human rights and constituted persecution where no state protection was available to the woman.[14]

In the case of a Bulgarian mother and her daughter, the mother testified to being the victim of spousal abuse throughout her marriage and was unable to access state protection. The child had also been abused by her father. The Board referred to the UNITR, the UN *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment*, the IRB *Guidelines on Women* and the report of the United Nations Committee on the Elimination of Discrimination Against Women. It held that the mother had an internationally protected right to protection from domestic violence and failure to give that protection is a form of gender-based discrimination. With respect to the child, the Board referred to the *CRC* and held that

[14] CRDD U96 056686 Simeon, September 29, 1997.

the state had failed to protect her from the physical and psychological duress occasioned by her father's violence.[15]

The Board has found both encouragement and validation for its human rights approach to refugee determination in the decisions of our Federal Courts and the Supreme Court of Canada. The Supreme Court of Canada, in its decision in the *Ward* case clearly set a standard for the interpretation of refugee law through the framework of human rights. In that decision the Court stated:

> Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination. [...] This theme sets the boundaries for many of the elements of the definition of "Convention refugee".

The Court also addressed the *Convention* refugee ground of "particular social group" and indicated that the meaning ascribed to the term "should take into account the general underlying themes of the defence of human rights and anti-discrimination that forms the basis for the international refugee protection initiative." In other words, a systemic failure to protect the human rights of a particular group of people may place them into a "particular social group". At the Board, we have applied the concept of "particular social group" in situations where the group was defined by its marginalized status with respect to its ability to exercise fundamental human rights.

Two recent examples illustrate the development in the Board's thinking in this area. In a decision involving Somali children, the Board members noted that, for children who are vulnerable and unable to care for themselves, a higher level of protection must be provided than would be necessary for adults.[16] Similarly, Somali children without the protection of family have been held to be a particular social group because of their acute vulnerability.[17]

While years ago the Board would likely not have recognized vulnerable women or children as a "particular social group", as a result of our guidelines, reinforced by the Supreme Court decision in *Ward*, we have gained greater insight into the connection between discrimination against a segment of society and the *Convention* ground of particular social group.[18] The decision clearly linked the marginalization of groups due to their possession of an innate or unchangeable characteristic, such as gender, linguistic background or sexual orientation, to the *Convention* grounds.[19]

---

[15] *B. (T. D.)*, [1994] C.R.D.D. No. 391 (QL).

[16] *W. M. I.*, [1997] C.R.D.D. No. 113 (QL).

[17] *T. D. T.*, [1997] C.R.D.D. No. 254 (QL).

[18] *Canada (A.G.)* v. *Ward*, [1993] 2 R.C.S. 689 at p. 734.

[19] *Ibid.* at p. 739; the Court enumerated categories of persons who would fall under the three categories of particular social group. The first category included individuals fearing persecution on such basis as gender, linguistic background, and sexual orientation. The second category of "groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association" included human rights activists.

Women who face harm but do not have access to state protection because of discriminatory protection practices in their country also have been recognized as *Convention* refugees. An illiterate and uneducated woman from Egypt, who was abused by her spouse, was found to be a *Convention* refugee due to a lack of state protection.[20] The Board stopped short of finding that state protection does not exist for abused women in Egypt; women with medical proof could take legal action in Egyptian courts, according to documentary evidence. However, documentary evidence also established that the response of the police would be influenced by a woman's social status. The lower her social class, the more acceptable the violence toward her will be, and the less likely the judge will grant her a divorce to escape the violent situation. Given that the claimant was from one of the poorer social classes, the Board found that, had she gone to the police, protection might not reasonably have been forthcoming. From decisions such as this, one sees that the Board recognizes that it is not just entitlement to rights that all persons should enjoy equally, but that everyone is entitled to protection on a non-discriminatory basis.

The Federal Court in several decisions has encouraged a human rights approach to refugee determination. In fact, in the judicial review of a decision involving a 17-year-old male Sikh, the Federal Court specifically directed the Board to consider the provisions in the *CRC* when deciding whether it was reasonable to expect the minor claimant to live away from his family and home in order to be safe from harm.[21]

In another Federal Court decision, a child denied access to education on a discriminatory basis was found to be a *Convention* refugee. In this case, a 9-year-old Afghani girl would have been denied basic education because of her gender if she would be returned to Afghanistan. The Court specifically found the right to education to be a basic human right and went on to find that the denial of the right to education was persecution. This approach of the court clearly illustrates how closely our decision-makers, whether judicial or quasi-judicial, connect a denial of fundamental human rights to persecution.[22]

These decisions of both the Board and the courts underscores Canada's commitment to the application of international human rights norms to our domestic decision-making. Therefore, it is not just in the interpretation of the term "persecution" in the *Convention* refugee definition that we at the Board have made recourse to human rights principles, but in the interpretation of the grounds, such as particular social group, and access to state protection as well.

As you can see, the path set toward the utilization of a human rights paradigm in refugee determination at the Board was by design, not happenstance. Beginning with the training given to members, which emphasizes a human rights perspective, and culminating with the issuance of guidelines, efforts to bring a universal, principled position consistent with the spirit of the *Convention* have been

---

[20] *U. I. M.*, [1995] C.R.D.D. No. 132 (QL).

[21] *Sahota* v. *Canada ((Minister of Employment and Immigration)*, [1994] F.C.J. No. 869 (QL).

[22] *Ali* v. *Canada (Minister of Employment and Immigration)*, [1996] F.C.J. No. 1392 (QL).

constant. We have always believed that there are certain fundamental human rights, embodied in international agreements and instruments, which when breached, can amount to persecution. Decision-makers have been using this analytical approach to refugee determination from the outset. The Board has been a world leader in the area of reconciling a human rights perspective with refugee determination. I believe this is a leadership position that must continue if we are to maintain the integrity of refugee determination systems internationally. International human rights instruments are the logical place to find the standards against which a nation's treatment of its citizens ought to be measured. It provides a coherent, principled and universal framework in which to interpret persecutory activities and sets an internationally accepted marker for behaviour that crosses the line from tolerable to persecutory. Increased reliance on internationally ratified human rights instruments would result in a decrease in disparities between countries in acceptance rates on identical countries and would limit the internal inconsistencies within a country when dealing with similar claims.

III. Influence of Human Rights on Removals

The influence of international human rights instruments in the immigration field can be seen most clearly in decisions dealing with immigrant appeals from deportation orders. For example, we are sometimes faced with situations where parents of Canadian-born children face deportation. The issue before us is whether the children have the right to argue that the deportation of their parents violates their own rights under the *CRC*. Under the *CRC* all actions concerning children must take into account the best interests of the child. Two Federal Court cases[23], in which Canadian-born children were affected by their parents' deportation order, found that the *CRC* has no application in these circumstances. The Courts reasoned that since the children are not parties to the deportation proceedings and the *CRC* is not part of the domestic laws of Canada, the court was under no obligation to consider the matter from the perspective of the best interests of the child. In one case, leave to appeal to the Supreme Court of Canada was denied, but in the other case, *Baker*, the Supreme Court has just heard the arguments on appeal and we await its decision.

A completely different result was reached by the Ontario Court of Justice, General Division, in a case with similar facts.[24] In that case the Court found that children were clearly affected by the deportation proceedings of their parents and the Court directed the Federal Court to consider the best interests principle set out in the *CRC* when reviewing deportation decisions involving children. The appeal from this case is scheduled to be heard by the Ontario Court of Appeal in January 1999.

An unresolved issue for the IAD is whether, when considering appeals from removal orders, it may take into account human rights instruments which proscribe the return of any individual to a place where he or she may face cruel, unusual or

---

[23] *Langner* v. *Canada (Minister of Employment and Immigration)*, (1995) 184 N.R. 230 and *Baker* v. *Canada (Minister of Employment and Immigration)*, [1997] 2 F.C. 127 (C.A).

[24] *Francis* v. *Canada (Minister of Employment and Immigration)*, (1998) 40 O.R. (3d) 74.

degrading treatment or punishment. In the course of an appeal, the IAD considers the technical legality of a removal order and also has the jurisdiction to have regard to all the circumstances of the case. This latter assessment is essentially a humanitarian review of the appeal, but it is not clear whether this jurisdiction includes the authority to consider potentially harmful consequences to the individual upon return to his or her country of nationality.[25]

In a recent decision of the Federal Court, the applicability of the *Convention Against Torture* was addressed.[26] The case involved the deportation of a refugee claimant who had been landed in 1991 and subsequently had been convicted of drug trafficking. A danger opinion was issued by the Minister and a deportation order made. Upon review of the danger opinion and the deportation order, the Court held that the applicant is entitled to a risk assessment at which time he could establish whether he faces torture upon his return. The Court noted that although the *Convention Against Torture* is not incorporated into domestic law, it informs sections 7 and 12 of the *Canadian Charter of Rights and Freedoms.*[27] This case may be an indication of movement in the direction of addressing international human rights instruments in decisions involving deportation. The treatment that awaits an individual in the country to which he or she is removed seems an appropriate consideration for our Board, and we await clarification from the Federal Court of Appeal in this important area.

Thus, at the Board, we have fully adopted an approach which has at its core the concept that in order to carry out our statutory obligations we must understand human rights entitlements. Human rights are the logical place to find the standards against which a nation's treatment of its citizens are measured and the way our own obligations to those in our country are assessed. International human rights instruments provide a coherent, principled and universal language that stems from a neutral and highly respected source. We at the IRB are very proud of the leadership role we have played in integrating a human rights approach to our very important work in the areas of asylum and immigration determinations.

---

[25] *Al Sagban* v. *Canada (Minister of Employment and Immigration)*, [1997] F.C.J. No. 632 (QL) and *Chieu* v. *Canada (Minister of Employment and Immigration)*, [1996] F.C.J. No. 1680 (QL).

[26] *Rarhadi* v. *Canada (Minister of Employment and Immigration)*, [1998] 3 F.C. 315.

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