Kindly convey to the Acting Chairwoman, Ratna Omidvar, who made the request for a written response, and other member of the Committee, the attached recommendations for amending the Immigration and Protection Act sections on Refugee Protection (95, 96, and 97) and the Principle of Nonrefoulement (115). I would be very happy to meet with senators or their legislative aides to further discuss these suggested amendments.

Bill Frelick

Bill Frelick
Director
Refugee and Migrant Rights Division
Human Rights Watch

Mr. Frelick,

Thank you for your participation yesterday.

During your appearance before the Standing Senate Committee on Human Rights (RIDR), the Chair requested that an answer be provided to the committee.

Please find below an excerpt from the unrevised transcripts (unrevised *Blues* attached) to help you with the Senator's request:

Senator Arnot: This question is directed to Mr. Frelick. I'd like to thank you for your work on investigating human rights abuses. Human Rights Watch is important. There is a lot to be learned from your work. I'm wondering if you're seeing any examples that this committee could use or should consider where the global village is actually affecting some constructive change. What would you describe as working?

A second component of my question would really be this. Given the scope of our study, if you were holding the pen, what would be your key recommendations that this committee could make?

Mr. Frelick: Thank you for sort of an impossible question to answer. At Human Rights Watch, we're sort of the watchdog gadflies, if you will. I'd be hard pressed to really tell you the success stories. They are all about refugee resilience. They are about a lot of refugees helping each other. Remarkable people and the things they do and local communities as well. The international community, sometimes not getting in their way and letting them solve their problems is, not to overstate it, but that's recognizing, I think, as Lloyd Axworthy was saying, listening to the refugees themselves and following their lead in many respects is probably the wisest course of action.

To your broader question — I'll take the opportunity to sort of respond to three or four questions from the previous panel and this one as well in fashioning my answer to you. The question that we just heard from the previous senator about climate change and I think from the chairwoman about the fit to serve question about the Refugee Convention, while I have great admiration and respect for Professor Hathaway and Ambassador Rock, I would differ with them, whether the 1951 Convention and the 1967 Protocol are actually fit to serve the situation that we do see today.

I think we've already seen in regional instruments from the Cartagena Declaration on the Americas to the OAU Convention in Africa an expanded refugee definition that recognizes while the well-founded fear of persecution standard is extremely important, it's very narrow and limited. In those regions, they have expanded it. In the European Union, there's a qualification directive that includes victims of armed violence and victims of inhuman and degrading

treatment, which is also not in the Refugee Convention itself. You do have to go to other instruments. You have to go to the International Covenant on Civil and Political Rights, as has been mentioned, statelessness convention.

Things like the women being listed in the same way that race, religion and political opinion are listed, we try to shoehorn them into membership into a particular social group. What's happening on the ground, if women are seeking asylum in many countries, they are not recognized as being persecuted on the basis of their gender and they're not recognized as being members of a particular social group.

You don't have to take on the whole rewriting the Refugee Convention and putting that up for a vote, but Canada itself can look at its refugee definition and decide that, in addition to the 1951 Convention definition, it might want to expand the refugee definition to include, as refugees, women; to include, as refugees, victims of generalized violence when there is a nexus to a real threat of serious harm. Looking to the International Covenant on Civil and Political Rights as a standard for looking at physical integrity and the right to life. As was mentioned in the context of climate change, when you have rising sea levels and islands that are going to be under water, that's a direct threat to life. Such people should be recognized as refugees, because whether you die at the hands of the torturer or whether you die because you're drowning, your life is being threatened one way or the other.

Canada could lead the way. Canada could provide a model for a refugee definition that actually addresses in a holistic and a real way the threats that the refugees of the world are facing today. In doing so, it works as an expedient as well because rather than spending all this time in convoluted way of trying to fit square pegs into round holes, a wider, expanded refugee definition means you can recognize meritorious cases much more easily, grant them asylum and

find cases that don't qualify and remove people that don't have a need for international protection.

The need for international protection itself, the standard, is completely out of whack with the realities that we're faced with, and you have an opportunity to change that.

The Acting Chair: Mr. Frelick, if you would like to put pen to paper and suggest what Canada's definition of an expanded refugee status would be, we would be happy to receive it.

Mr. Frelick: I would be delighted to do that.

To: The Standing Committee on Human Rights Committee, Senate of Canada
From: Bill Frelick, Refugee and Migrant Rights Director, Human Rights Watch

Date: November 16, 2023

RE: Suggested Amendments to the Immigration and Protection Act sections on Refugee Protection (95, 96, and 97) and the Principle of Nonrefoulement (115)

Refugee Protection

~~**DIVISION 1**Refugee Protection, Convention Refugees and Persons in Need of Protection~~

Marginal note: ~~Conferral~~ Recognition of the need for refugee protection

- **95 (1)** The need for refugee ~~Refugee~~ protection is recognized ~~conferred on a person~~ when
    - **(a)** the person has been recognized as ~~determined to be~~ a ~~Convention~~ refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;
    - **(b)** the Board recognizes ~~determines~~ the person to be a ~~Convention~~ refugee or a person in need of protection; or
    - **(c)** except in the case of a person described in subsection 112(3), the Minister allows an application for protection.
- **Marginal note: Protected person**

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

- 2001, c. 27, s. 95
- 2010, c. 8, s. 10(F)

[Frelick (HRW) Annotation: The amendment ends bifurcated categories of people in need of international protection and differential treatment of such categories. It is also not tied specifically to the 1951 Refugee Convention definition, though that remains foundational, and nothing is taken away from that definition in these amendments. The amendment also strikes language about refugee protection being "conferred." As stated in the opening paragraph of UNHCR's Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. **Recognition of his refugee status does not therefore make him a refugee but declares him to be one.** He does not become a refugee because of recognition, but is recognized because he is a refugee.[1]]

Previous Version[2]

Marginal note: ~~Convention refugee~~ Refugee
96 A ~~Convention~~ refugee is a person who, by reason of a well-founded fear of ~~persecution~~ being persecuted

[Frelick (HRW) Annotation: The refugee definition in the 1951 Refugee Convention does not define a refugee as someone who faces a well-founded fear of "persecution" but rather of "being persecuted."[3] As international refugee law scholar Michelle Foster has observed, "[W]hile frequently described as the short-hand 'persecution', in fact the definition speaks of a refugee's well-founded fear of 'being persecuted'. The fact that the test is framed in the passive voice is significant, as it again underlines the focus on the predicament of the applicant, rather than on an assessment of the situation from the perspective of the persecutor."[4]]

for reasons of race, religion, ethnicity or nationality,

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[1] UN High Commissioner for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, https://www.refworld.org/docid/5cb474b27.html, para. 28 (accessed November 9, 2023).

[2] Justice Laws Website, Immigration and Refugee Protection Act, Version of section 95 from 2003-01-01 to 2012-12-14, "Conferral of refugee protection," https://laws.justice.gc.ca/eng/acts/i-2.5/section-95-20030101.html (accessed November 15, 2023).

[3] UNHCR, the 1951 Convention Relating to the Status of Refugees, September 2011, https://www.refworld.org/docid/4ec4a7f02.html, article 1.A.(2) (accessed November 9, 2023).

[4] Michelle Foster, International Refugee Law and Socio-Economic Rights: Refuge from Deprivation, Cambridge University Press, 2007, p. 273.

[Frelick (HRW) Annotation: The amendment provides a more accurate and straightforward meaning of "nationality" in the context of the need for refugee protection by clarifying that ethnicity, even for those groups who have been denied a nationality, are deserving of protection. As international refugee law scholar Guy S. Goodwin-Gill has observed, "The reference to persecution for reasons of *nationality* is somewhat odd, given the absurdity of a State persecuting its own nationals on account of their membership of the body politic… However, nationality in article 1A(2) of the 1951 Convention is usually interpreted broadly, to include origins and membership of particular ethnic, religious, cultural, and linguistic communities."[5]]

gender or sexual orientation, membership in a particular social group or political opinion,

[Frelick (HRW) Annotation: In the landmark *Ward* case, the Canadian Supreme Court squarely positioned "individuals fearing persecution on such bases as gender, linguistic background and sexual orientation," as falling within the "embrace" of membership in a particular social group.[6] So, why should that not be sufficient? There is not an international consensus on various facets of interpreting "membership in a particular social group." Among other problems, there has been a preoccupation with the particularity of the group, so that women, for example, are generally not able to establish asylum claims for being persecuted on the basis of their gender, comparable to the protected grounds of race and religion, but rather are compelled to particularize their social group to absurdly small extremes. As international law scholars James C. Hathaway and Michelle Foster have noted, "[T]here is an unfortunate tendency to formulate overly complicated and unnecessarily detailed social groups, rather than simply recognize that in most cases it is women *qua* women that constitutes the relevant social group." In an extreme example of this phenomenon, the Canadian Federal Court held in one case that the relevant group was defined as: "[w]omen who have recently immigrated to Israel from the former Soviet Union and who, despite generous support by that host government, fail to integrate, are subsequently lured into prostitution, and are confronted with indifference by the front line supervisors responsible for their safety."[7]

In the United States, the landmark *Fauziya Kasinga* case granted asylum to a woman fleeing genital mutilation, not based on her right not to be persecuted on the basis of her gender, but rather as a member of a particular social group defined as "young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital

[5] Guy S. Goodwin-Gill, The Refugee in International Law, second edition, Clarendon Press, Oxford, 1996, p 45.

[6] Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, Canada: Supreme Court, June 30, 1993, https://scc-csc.lexum.com/scc-csc/scc-csc/en/1023/1/document.do, p. 739 (accessed November 9, 2023).

[7] James C. Hathaway and Michelle Foster, The Law of Refugee Status, second edition, Cambridge University Press, 2014, citing Litvinov v. Canada (Secretary of State), [1994] FCJ 1061 (Can. FCTD, June 30, 1994), p. 439.

mutilation, as practiced by that tribe, and who oppose the practice."[8] It would be hard to construct a narrower category for protection. In responding to efforts by attorneys general in the administration of President Donald Trump to further narrow qualification for women as members of a particular social group,[9] US immigration law scholar Stephen Legomsky wrote, "What arguments could possibly be made for protecting people from racial or religious persecution but not from gender persecution? … it is only because gender is not on Congress's list of specifically protected grounds that women and girls have had to fit their claims into 'particular social group' …[and] the artificial constraints that the board [of immigration appeals] has imposed for all claims based on 'particular social group' are both harmful and irrational."[10]

Similar artificial constraints superimposed on interpreting "membership in a particular social group" threaten to disqualify lesbian, gay, bisexual, and transgender (LGBT) people from refugee protection. For example, some jurisdictions, such as in the United States with Board of Immigration Appeals rulings in *C-A-*[11] and *A-M-E-,*[12] are requiring the applicant to establish their "social visibility" as a particular social group member. This test, according to refugee law scholar Fatma E. Marouf, "may have a profound, negative impact on asylum cases related to sexual orientation and gender, where not only the harm is hidden in the private sphere, but the group members themselves may be veiled from sight. With respect to sexual orientation, the United States and international authorities have rejected the notion that gays and lesbians who remain 'discreet' – and therefore 'invisible' – are not protected by the refugee definition. Under the 'social visibility' test, however, their claims may well be denied. Indeed, even claims brought by 'out' gays and lesbians may be rejected if they come from societies that do not recognize homosexuals as a group or homosexuality as a social identity."[13]

Of course, being a woman or an LGBT person per se is not a ground for asylum any more than being a member of a race, nationality or a religion, but gender and sexual orientation should be recognized comparably as a ground deserving protection if it is the basis for being persecuted.]

- **(a)** is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

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[8] In re Fauziya Kasinga, 3278, United States Board of Immigration Appeals, June 13, 1996, https://www.refworld.org/cases,USA_BIA,47bb00782.html (accessed November 9, 2023).

[9] See 27 I&N Dec. 316 (A.G. 2018) Interim Decision #3929 316 Matter of A-B-, Respondent Decided by Attorney General, June 11, 2018.

[10] Stephen Legomsky, "Gender-related violence should be grounds for asylum: Congress must fix this for women," USA Today, January 2, 2019, https://www.usatoday.com/story/opinion/2019/01/02/gender-related-violence-grounds-asylum-refugee-women-congress-column/2415093002/ (accessed November 9, 2023).

[11] Matter of C-A-, 23 I&N Dec. 951 (BIA 2006).

[12] Matter of A-M-E- & J-G-U-, 24 I. & N. Dec. 69. (BIA 2007).

[13] Fatma E. Marouf, "The Emerging Importance of 'Social Visibility' in Defining a 'Particular Social Group' and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender," Yale Law & Policy Review, Vol. 27, No. 1 (Fall, 2008), https://openyls.law.yale.edu/bitstream/handle/20.500.13051/17091/04_27YaleL_PolyRev47_2008_2009_.pdf?sequence=2&isAllowed=y, p. 50 (accessed November 9, 2023).

- **(b)** not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

~~**Marginal note: Person in need of protection**~~

- **97 (1)** A refugee is also a person ~~in need of protection is a person~~ in Canada or under the effective power or control of Canada

[Frelick (HRW) Annotation: This amendment is intended to extend refugee protection to refugees outside the territory of Canada but who may be within the effective power or control of Canada, for example, in the case of Canadian military or coast guard rescue or interdiction of vessels on the high seas that might be carrying asylum seekers or in the event Canada would try at some future point to externalize migration controls by instituting offshore processing, as has been attempted by Australia (Nauru and Manus Island, PNG) and the United States (Guantánamo). This would prevent offshore detention and processing as a means of evading the protective reach of the Immigration and Refugee Protection Act.]

whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

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

[Frelick (HRW) Annotation: The "real risk" amendment borrows from the EU's Qualification Directive, articles 2(f) and 15, which provides "subsidiary protection" for persons "who would face a *real risk* of suffering serious harm," which include, among others, risks to life and a risk of cruel and unusual treatment or punishment.[14]]

- **(b) to** a real risk to their life or security of person according to Articles 6 and 9 of the International Covenant on Civil and Political Rights

[Frelick (HRW) Annotation: In addition to threats to life, which are recognized under the current statute, this amendment would add threats to "security of person," which is guaranteed under the International Covenant on Civil and Political Rights (ICCPR) article 9. Another option would be the term "physical integrity" from Article 5(1) of the American Convention on Human Rights, which guarantees the right to "physical, mental, and moral integrity."[15] The Human Rights Committee's General Comment 35 on ICCPR article 9 says that "Security of person concerns

[14] European Union: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of December 13, 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), December 20, 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, https://www.refworld.org/docid/4f197df02.html, arts. 2(f) and 15 (accessed November 9, 2023).

[15] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose," Costa Rica, 22 November 1969, https://www.refworld.org/docid/3ae6b36510.html, art. 5(1) (accessed November 9, 2023).

freedom from injury to the body and the mind, or bodily and mental integrity,"[16] which indicates that "physical integrity" is seen as a key component of "security of person."
General Comment 35 also states that the right to security of person obliges States parties to take appropriate measures "to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors,"[17] The notion that people have a right to be protected from "foreseeable threats" to life or bodily integrity is particularly relevant to the nonrefoulement principle. Comment 35 makes a reference to the principle of nonrefoulement in this context, saying, "Returning an individual to a country where there are substantial grounds for believing that the individual faces a real risk of a severe violation of liberty or security of person such as prolonged arbitrary detention may amount to inhuman treatment prohibited by article 7 of the Covenant."[18]

General Comment 35 also discusses the relationship between the right to life and the right to security of person: "The right to life guaranteed by article 6 of the Covenant, including the right to protection of life under article 6, paragraph 1, may overlap with the right to security of person guaranteed by article 9, paragraph 1. The right to personal security may be considered broader to the extent that it also addresses injuries that are not life-threatening."[19]]

- because of
  - (i) violence,

[Frelick (HRW) Annotation: Although the EU's criteria for subsidiary protection provides protection for people who would face a "serious and individual threat to a civilian's life or person by reason of *indiscriminate violence in situations of international or internal armed conflict*,"[20] and temporary protected status in the United States is provided to members of a nationality group when "there is an *ongoing armed conflict* within the state…that…would pose a serious threat to their personal safety,"[21] this amendment would not further qualify the type of violence, but focus rather on the intensity or gravity of that violence and the likelihood of it occurring. To quality as a ground of refugee protection, it would need to be established that there was a real risk of the violence occurring and that it would seriously threaten life or security of person/physical integrity. It could arise from armed conflict but is not linked to international

[16] UN Human Rights Committee (HRC), General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, https://www.refworld.org/docid/553e0f984.html, para. 3 (accessed November 9, 2023).

[17] UN Human Rights Committee (HRC), General comment no. 35, Article 9 (Liberty and security of person), para. 9.

[18] Ibid., para. 57.

[19] Ibid., para. 55.

[20] European Union: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), December 20, 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, https://www.refworld.org/docid/4f197df02.html, art. 15(c) (accessed November 9, 2023).

[21] Immigration and Nationality Act §244(b)(1)(A).

humanitarian law criteria. The violence could also be generalized in nature or arising from situations such as domestic violence.]

or

- (ii) exceptional situations

[Frelick (HRW) Annotation: The phrase "exceptional situations" is comparable to events or circumstances "seriously disturbing public order" as found in the Americas (via the Cartagena Declaration[22]—a nonbinding instrument that many key regional states have incorporated into their domestic law provisions on refugee status) and Africa (via the OAU Refugee Convention[23]). Both frameworks embrace a definition of refugee that is more expansive than the 1951 Refugee Convention in that it affords protection to people who are fleeing not only persecution, but also a serious risk to life or physical integrity caused by situations that "seriously disturb public order." This last phrase does not have an authoritative legal interpretation, but it is the key limiting principle under the Cartagena and OAU frameworks' expanded refugee definitions. This amendment does not include "seriously disturbing public order" as a limiting principle, but rather offers "exceptional situations" as the limiting principle that draws a line to exclude from refugee protection people who seek from protection from "normal" situations, such as poverty. While extreme poverty can give rise to circumstances that threaten a person's life or physical integrity, this refugee definition would apply only to prevent the return of people to situations of extreme poverty in exceptional situations, such as severe food insecurity or the collapse of government institutions and services. Such exceptional situations would often be accompanied by other factors, such as environmental disaster or generalized violence, that would make return likely to directly threaten an individual's life or physical integrity.]

such as extreme weather events or rising sea-level disasters,

[Frelick (HRW) Annotation: In January 2020, the U.N. Human Rights Committee (HRC) handed down a decision which recognized that threats to life posed by rising sea levels and other effects of climate change necessitate a broadening of the cornerstone of refugee law: specifically, the principle of non-refoulement, which prohibits countries from returning refugees to places where their lives or freedom are threatened. Citing ICCPR article 6's provision on the right to life, the HRC held, "The obligation not to extradite, deport or otherwise transfer may be broader than the scope of non-refoulement under international refugee law, since it may also require the protection of aliens not entitled to refugee status."[24]

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[22] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, November 22, 1984, https://www.refworld.org/docid/3ae6b36ec.html (accessed November 9, 2023).

[23] Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), September 10, 1969, 1001 U.N.T.S. 45, https://www.refworld.org/docid/3ae6b36018.html (accessed November 9, 2023).

[24] Ioane Teitiota v. New Zealand (advance unedited version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), January 7, 2020, https://www.refworld.org/cases,HRC,5e26f7134.html, art. 9.3 (accessed November 9, 2023).

The case involved the Teitiota family who sought asylum in New Zealand after fleeing the Pacific island of Tarawa in the Republic of Kiribati. The family maintained that crops were dying and the land was overcrowded, leading to conflicts and spread of disease. Holding out hope that Kiribati still had time to protect its citizens through relocation and other measures, the HRC denied the family's asylum claim. But it noted that both sudden onset events, such as storms, and slow-onset processes, such as salinization and land degradation, "can propel cross-border movement of individuals seeking protection from climate-change related harm…thereby triggering the non-refoulement obligations of sending states."[25]

While it might be debatable whether sea-level rise is an "exceptional situation," we would argue that it would be exceptional for those countries where sea-level rise would present an existential threat, such as Kiribati and other low-elevation Pacific Island states, as opposed to littoral states where coastal inhabitants would have internal relocation options.]

for which there is no adequate domestic remedy,

[Frelick (HRW) Annotation: This specifies that the exceptional situations that give rise to serious threats to life and physical integrity are beyond the capacity or willingness of the person's home state to manage or that another domestic remedy (such as an international humanitarian intervention into the country of origin or an internal flight alternative) is otherwise unavailable.]

or
to a real risk of cruel and unusual, or inhuman or degrading treatment or punishment

[Frelick (HRW) Annotation: While protection from "cruel and unusual treatment or punishment" is guaranteed in the Canadian Charter of Rights and Freedoms,[26] Canada as party to the International Covenant on Civil and Political Rights (ICCPR) is also bound under article 7 not to expose anyone to inhuman or degrading treatment or punishment.[27] In its General Comment 20 on article 7, the UN Human Rights Committee, the expert body that interprets and assesses state compliance with the ICCPR, said, "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."[28]

if

[25] Ibid., art. 9.11.

[26] Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 a., p. 12.

[27] Canada ratified the ICCPR on May 19, 1976, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=31&Lang=en (accessed November 9, 2023).

[28] UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), March 10, 1992, https://www.refworld.org/docid/453883fb0.html, para. 9 (accessed November 9, 2023).

- **(i)** the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
- ~~**(ii)** the risk would be faced by the person in every part of that country~~

[Frelick (HRW) Annotation: The current language of the statute overstates the 1951 Convention's refugee definition by requiring that the fear of being persecuted must be "in every part" of the applicant's country. As UNHCR has stated in its guidance on the 1951 Convention: "The 1951 Convention does not require or even suggest that the fear of being persecuted need always extend to the whole territory of the refugee's country of origin."[29] It is also noteworthy that in the expanded refugee definition in the 1969 OAU Refugee Convention specifically includes "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order *in either part or the whole* of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."[30]

- ~~and is not faced generally by other individuals in or from that country,~~

[Frelick (HRW) Annotation: The requirement that the threat is not generally faced by other individuals from or in that country should be deleted because it is not relevant to serious harms to life and physical integrity. Whether a person is individually targeted or would be seriously harmed because of a more generalized threat, the real risk of serious harm is the same. To deny protection because the threat to the individual also represents a threat faced generally by others is perverse and defeats the object and purpose of the Refugee Convention of providing protection to refugees. Further, this exception is problematic because the courts have treated s 97(1)(b)(ii) as creating two distinct, conjunctive elements. For instance in *Prophète*, the Canadian Federal Court of Appeal said: "To be a person in need of protection, the appellant had to show the Board, on a balance of probabilities, that his removal to Haiti would subject him **personally**, in every part of that country, to a risk to his life or to a risk of cruel and unusual treatment that is **not faced generally** by other individuals in or from Haiti."[31]]

- **(iii)** the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
- **(iv)** the risk is not caused by the inability of that country to provide adequate health or medical care unless Canada is able to provide such care.

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[29] UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, July 23, 2003, HCR/GIP/03/04, https://www.refworld.org/docid/3f2791a44.html (accessed November 9, 2023).

[30] Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), September 10, 1969, 1001 U.N.T.S. 45, https://www.refworld.org/docid/3ae6b36018.html, art. 1(2) (accessed November 9, 2023).

[31] Ralph Prophète v. Canada (Minister of Citizenship and Immigration), 2009 FCA 31, para 3.

[Frelick (HRW) Annotation: In *Covarrubias*, the Canadian Federal Court of Appeal rightly held that a person may qualify for refugee protection if their country would deliberately deny or limit the treatment for their illness or disability "as has happened in some countries with patients suffering from HIV/AIDS," but we think that by distinguishing as grounds for protection "refusal to provide the care and not the ability to do so,"[32] the Court, guided by 95(1)(iv), would deny protection to people whose lives or physical integrity would be seriously threatened if returned. As in the discussion, above, which notes that the 1951 Refugee Convention uses the passive voice "being persecuted," rather than persecution, the fundamental purpose of refugee law is not to assign blame to persecutors but rather to protect refugees from serious harm. From a human rights perspective, we contend that the key question is not the particular driver of forced migration (persecution, war, generalized violence, natural disaster, etc.), but rather whether the return of a person to such a situation would violate their fundamental rights by exposing them to serious harm and whether that person's own government is able or willing to exercise its responsibility to protect them. Our amendment includes the phrase "for which there is no adequate domestic remedy," to indicate that the exceptional situations that give rise to serious threats to life or physical integrity are either beyond the capacity of the state to manage or that the state is unwilling to manage, and that a domestic remedy is otherwise unavailable. In terms of the harm suffered, whether the failure to provide life-saving treatment is because of intentional denial or inability, in either case the person will die. If Canada is able to save a person who otherwise would die by being returned, that person should be protected.)

- ~~**Marginal note: Person in need of protection**~~
  ~~**(2)** A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.~~

[Frelick (HRW) Annotation: Since the amendment eliminates the distinction between refugees and other persons in need of protection, this note is deleted.]

Principle of Non-refoulement

Marginal note: Protection
115 (1) A ~~protected person or a person who is recognized as a Convention~~ refugee ~~by another country to which the person may be returned~~ shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, ethnicity or nationality, gender or sexual orientation, membership in a particular social group or political opinion or at risk of torture or cruel and unusual or inhuman or degrading treatment or punishment or to a real risk to their life or security of person because of violence or exceptional situations for which there is no domestic remedy.

[32] Covarrubias v. Canada (Minister of Citizenship and Immigration), 2006 FCA 365; [2007] 3 F.C.R. 169, Canada: Federal Court of Appeal, November 10, 2006, https://www.refworld.org/cases,CAN_FCA,47161468d.html (accessed November 9, 2023).

[Frelick (HRW) Annotation: The reasons for these amendments are explained in the annotations to the amendments to sections 95 and 96 above.]

- **Marginal note: Exceptions**

(a) Except for persons who are at risk of torture, subsection ~~Subsection~~ (1) does not apply in the case of a person

[Frelick (HRW) Annotation: The Convention Against Torture, article 3, is an absolute and non-derogable prohibition on the return of any person for whom there are substantial grounds for believing the person would be in danger of being subjected to torture. We believe the Supreme Court of Canada erred in its *Suresh* judgment, the result of which is that Canada is not compliant with its treaty obligations as a party to the Convention Against Torture or to the principle of nonrefoulement to torture as a peremptory norm of customary international law. In *Suresh*, the Court held that the Canadian Charter of Rights and Freedoms allows a balancing test of national security interests against those of the individual who would face torture if deported.[33] International refugee law scholar Jane McAdam observes, "The effect of *Suresh* is to render the principle of *non-refoulement* to torture non-absolute in Canada. As a matter of international law, the decision is incorrect and sets a dangerous precedent, necessarily weakening torture-based human rights protection in Canada."[34]

- **(b)** who ~~is inadmissible on grounds of serious criminality and who~~ has been convicted by a final judgment of a particularly serious crime and ~~constitutes~~, in the opinion of the Minister, is a danger to the public in Canada;

[Frelick (HRW) Annotation: This amendment adopts but also amends article 33(2) of the 1951 Refugee Convention for a refugee who is not protected by the principle of nonrefoulement because the refugee "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." International refugee law scholar James C. Hathaway says: "[The criminality branch of Art. 33(2) requires conviction by a final judgment of a particularly serious crime. Beyond this, Art. 33(2) requires an additional determination that the offender 'constitutes a danger to the community.'"[35] To clarify that this is a two pronged-test, the amendment deletes "constitutes" and substitutes "and." To take the extraordinary step of excluding a refugee from the protection of principle of nonrefoulement because of that refugee's criminality and their ongoing danger to the community, the amendment would set a threshold that the refugee must have been convicted by a final judgement of a particularly serious crime, but also that the refugee is a danger to the public. The amendment also brings Canadian law into conformity with the 1951 Refugee Convention by replacing "serious

[33] Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1, Canada: Supreme Court, January 11, 2002, https://www.refworld.org/cases,CAN_SC,3c42bdfa0.html (accessed November 9, 2023).

[34] Jane McAdam, Complementary Protection in International Refugee Law, Oxford University Press, 2007, p. 130.

[35] James C. Hathaway, The Rights of Refugees under International Law, second edition, Cambridge University Press, 2021, pp. 402-403.

criminality" with "convicted by a final judgment of a particularly serious crime." The absolute bar in 115(1)(a) on returning a refugee to the danger of being tortured would remain in place regardless of 115(1)(b).]

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

- **Marginal note: Removal of refugee**

(3) A person, after a determination under paragraph 101(1)(e) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection.