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Political Refugees, Nonrefoulement and State Practice: A Comparative Study

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POLITICAL REFUGEES, NONREFOULEMENT AND STATE PRACTICE: A COMPARATIVE STUDY

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I. Introduction

Countless numbers of persons over the centuries have emigrated against their will because of persecution by oppressive governments or majority groups. In the politically, economically, and socially unstable climate of the latter half of the twentieth century, political refugee emigration has reached almost epidemic proportions. Consequently, nations must today articulate a coherent policy regarding political refugees consistent with the humanitarian goals they have set for themselves. For most countries, the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol amending and updating that Convention embody these aspirations.

Signatories originally envisioned the Convention as an attempt to continue the work of the Constitution of the United Nations International Refugee Organization (IRO), an organization of limited duration established to deal with the massive displacement of persons immediately following World War II. As the IRO's existence drew to a close, the United Nations Economic and Social Council exhorted all nations to continue to provide necessary le-

gal protection for refugees.[1] The Council realized that displacement was not as temporary a problem as originally thought. In addition, in 1949 the Council charged an Ad Hoc Committee with the task of drafting a revised convention that would address the international status of refugees and stateless persons.[2] The history of the Convention's drafting and accompanying *travaux préparatoires*[3] make clear that the Committee's intent was to define the class of refugees to which the Convention would apply as globally as possible without becoming politically unacceptable.[4]

The Convention definition of "refugee" extends to persons who, because of a "well-founded fear" of persecution on grounds of race, religion, nationality, political opinion, or membership in a social group, are unwilling or unable to return to their home countries.[5] It is beyond the scope of this Article to analyze the history of the Convention's provisions or to provide a detailed account of the *travaux* and other materials elucidating its scope. The work already done on that subject reveals that the significance of the Convention's definition of refugee in the realm of international refugee law consists of its substantial, if not predominant, reliance on *subjective* elements. The Convention definition does not merely require that the person claiming such refugee status adduce objective evidence, when available, but that his or her reasons for fearing persecution are justified.[6] The Conven-

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1. Cox, *"Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status*, 10 BROOKLYN J. INT'L L. 333, 342 (1984).

2. E.S.C. Res. 248, 4 U.N. ESCOR Supp. (No. 1) at 60, U.N. Doc. E/1517 (1949), *cited in* Cox, *supra* note 1, at 342.

3. This term denotes the "preparatory work" in the drafting of a treaty. Under customary international law, tribunals may interpret ambiguous provisions of a treaty by referring to the *travaux*, which include negotiations accompanying the drafting, minutes of plenary and committee meetings, and previous drafts of the treaty. *See* 3 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, 386-89 (2d ed. 1973); 1 L. OPPENHEIM, INTERNATIONAL LAW § 554(a), at 957 (H. Lauterpacht 8th ed. 1955); *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 147 (1965); Cox, *supra* note 1, at 336.

4. Cox, *supra* note 1, at 343.

5. *See infra* text accompanying notes 16-18.

6. *See generally* Cox, *supra* note 1, at 342-52. Mr. Cox has conducted a thorough, painstaking analysis of the Convention *travaux* and of prior refugee agreements and has made the following thoughtful and well supported conclusions regarding the Convention refugee definition: (1) the core of the refugee definition is an individual's fear of persecution; (2) the fear is well-founded if it is based on reasonable grounds; (3) these grounds are established if a person can give a plausible account of the reasons why he or she fears persecution, and this

tion, thus, contemplates that states will give substantial, if not primary, weight to a claimant's own assessment of his or her situation when deciding whether that person is a refugee within the meaning of the Convention.

This Article will survey and assess the attempts of five of the major refugee receiving countries of the West, the United States, Canada, Great Britain, France, and Italy, to comply with the mandates of the Convention and Protocol. Specifically, inquiry will focus on the two issues most applicable to the admission and exclusion of political refugees: (1) domestic interpretation of the Convention definition of "refugee;"and (2) adherence to the principle of nonrefoulement, which is the Convention's proscription on returning persons falling within its refugee definition to countries of alleged persecution.

Section II explores the precise substantive provisions of the Convention and Protocol on these matters. Section III briefly surveys implementing municipal legislation and regulation of refugee admission and exclusion and the interrelationship of these with international treaty law. Section IV presents a detailed analysis of domestic administrative procedures because the breadth or narrowness of a state's construction of the Convention definition of "refugee" and the consequent binding or nonbinding nature of the nonrefoulement provision may be largely a function of the peculiar strengths or weaknesses of its administrative refugee determination processes.

Finally, Section V reveals that local interpretation of the Convention definition of refugee varies considerably among the contracting states. This results in the application of conflicting standards, so that a person recognized as meeting the criteria for refugee status in one country may be denied refugee status in another country.[7] The major stumbling blocks to a more uniform set

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account is supported to the extent reasonably possible; (4) an additional objective basis underlying the person's fear can be required only if the State assists the person in providing this basis; (5) an individual must be accorded the benefit of the doubt; (6) the well-founded fear criterion is to be applied in a nondiscriminatory manner; and (7) the well-founded fear standard is to be applied as liberally as possible. *Id.* at 351-52.

7. G. MELANDER, PROBLEMS EMANATING FROM DIFFERENCES IN ELIGIBILITY PRACTICE IN EUROPE 2 (1976). Note, however, that this variation is mitigated slightly by the practice, common among the contracting states, of accepting the eligibility determination of another state. *See* Melander, *Refugee Recognition in Western European States*, 6 ISRAEL Y.B. HUM. RTS. 159, 174 (1976) [hereinafter

of international standards are the divergent interpretations accorded the term "well-founded fear." Other factors, including whether the reasons for the refugee's persecution fit within one of the five grounds specified in the refugee definition, significantly burden the refugee determination decision. These extra-legal motivations often result in flagrant discrimination against bona fide and otherwise qualified refugees and, aside from constituting actual or potential violations of its provisions, considerably impair the Convention's efficacy as a tool for the standardization of refugee law and practice.

II. The International Stratum: Principal Treaties Relating to Refugees

The establishment of the 1951 United Nations Convention Relating to the Status of Refugees[8] represented a milestone in the field of international refugee law. The Convention consolidated and clarified prior refugee instruments.[9] The Convention sets forth a definition of "refugee" which is more comprehensive than those of prior instruments although subject to temporal and geographical limits.[10] It accords to those falling within this definition

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cited as Melander, *Refugee Recognition*]. *See generally* Udina, *L'Asilo Territoriale nell'Ambito delle Comunita Europee*, 14 Rivista di Diritto Europeo 5 (1974).

8. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 150 [hereinafter cited as Convention].

9. Article 1(A)(1) of the Convention lists these instruments, most of which were concluded under League of Nations auspices. They include the Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, May 12, 1926, 89 L.N.T.S. 47 (supplementing and amending previous Arrangements of July 5, 1922 and May 31, 1924); Arrangement Concerning the Extension to Other Categories of Refugees of Certain Measures Taken in Favour of Russian and Armenian Refugees, June 30, 1928, 89 L.N.T.S. 63; Convention Relating to the International Status of Refugees, Oct. 28, 1933, 159 L.N.T.S. 199; Convention Concerning the Status of Refugees Coming from Germany, Feb. 10, 1938, 192 L.N.T.S. 59; Additional Protocol Concerning the Status of Refugees Coming from Germany, Sept. 14, 1939, 198 L.N.T.S. 141; Constitution of the International Refugee Organization, *opened for signature* Dec. 15, 1946, 62 Stat. 3037, T.I.A.S. No. 1846, 18 U.N.T.S. 3.

10. Under Article 1(A)(2), refugee status must have arisen "[a]s a result of events occurring before 1 January, 1951. . . ." Convention, art. 1(A)(2). Article 1(B)(1) further permits contracting states to choose whether they will construe the words "events occurring before 1 January, 1951" to mean "events occurring in Europe" or "events occurring in Europe or elsewhere" before January 1, 1951.

a vast array of substantive rights within the territories of the Contracting States. Grounded in the United Nations General Assembly's affirmance of the principle "that human beings shall enjoy fundamental rights and freedoms without discrimination,"[11] the Convention was an overt sequel, in the refugee area, to the 1948 Universal Declaration of Human Rights.

The 1967 Protocol[12] to the Convention was a result of the desire of states to acknowledge the constant emergence of new refugee groups. Accordingly, the protocol states that "equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January, 1951."[13] Article I(2) of the Protocol adopted the Convention refugee definition but deleted the Convention's time limitation. Article I(3) abolished any geographical limitations on the application of the definition, except, however, for those declared under the terms of Convention article I(B)(1)(a).[14] Last, the Protocol incorporates the substantive provisions of the Convention in their entirety. This allows states who were not parties to the Convention to become bound by it through accession to the Protocol.[15]

The definition of "refugee" contained in article I(A) of the Convention, as amended by the Protocol, subsumes those of earlier instruments and extends to any person who

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of [sic] 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 . . . is unable or, owing to such fear, is unwilling to return to it.[16]

Italy is the only country of those treated in this paper to apply the narrower construction. *See infra* text accompanying note 98.

11. Convention, *supra* note 8, preamble, para. 1.

12. Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268 [hereinafter cited as Protocol].

13. Protocol, *supra* note 12, preamble, para. 3.

14. This meant that a contracting state's declaration, at the time of accession to the Convention, to the extent that it understood the words "events occurring before 1 January, 1951" to mean events occurring only in Europe, would be effective to limit its construction of the new Protocol definition of refugee similarly. *See supra* note 10.

15. Protocol, *supra* note 12, art. I(1).

16. Convention, *supra* note 8, art. 1(A)(2).

Under the so-called "cessation clauses" of the same article, a person ceases to qualify as a refugee if he, *inter alia*, voluntarily repatriates himself or avails himself of the protection and nationality of a third country. A person will also cease to qualify as a refugee if the circumstances giving rise to his recognition as a refugee have ceased to exist.[17] Additionally, persons committing crimes against humanity, serious nonpolitical crimes, or acts contrary to the principles and purposes of the United Nations Charter are not entitled to refugee status.[18]

The determination of refugee status rests solely with the authorities of the state of refuge.[19] Although the Convention prescribes no particular procedure for this determination, it must be made in good faith in accordance with the Convention criteria. Both the United Nations High Commissioner for Refugees (UNHCR) and other Contracting States may challenge this determination. If either of these parties exercises this option, the matter may be referred to the International Court of Justice.[20]

The Convention does not address the granting of asylum.[21] The reasons for this appear to be two-fold. First, because states are the proper subjects of public international law, individuals have neither rights under nor access to it.[22] More importantly, the right to grant asylum remains within the unfettered discretion of

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17. *Id.* art. 1(C).

18. *Id.* art. 1(F).

19. L. HOLBORN, REFUGEES: A PROBLEM OF OUR TIME: THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 1951-1972 154 (1975). Note, however, that the UNHCR does have some influence in the eligibility procedures of a number of countries. *See* G. MELANDER, PROBLEMS EMANATING FROM DIFFERENCES IN ELIGIBILITY PRACTICE IN EUROPE, *supra* note 7, at 9; REPORT OF THE COMM. ON THE INT'L LEGAL PROTECTION OF REFUGEES OF THE WORLD PEACE THROUGH LAW CENTER, TOWARDS THE SECOND QUARTER CENTURY OF REFUGEE LAW 8-9 (1976) [hereinafter cited as SECOND QUARTER CENTURY].

20. 2 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 239 (1972).

21. Asylum is generally understood as the protection a state may afford to an individual by letting him or her enter the territory of the state and allowing him or her to remain. *See generally* Vierdag, *"Asylum" and "Refugee" in International Law*, 24 NETHERLANDS INT'L L. REV. 287 (1977).

22. S. PRAKASH SINHA, ASYLUM AND INTERNATIONAL LAW 61 (1971). "The current international activity of states provides evidence of a much greater international concern today for the well-being of the individual than ever before, particularly in the human rights area. However, individuals find protection under the system of international law only through membership in the state. It is the state which is the identifiable social fact of the international system." *Id.*

a state as an incident of its sovereignty; in the absence of a contrary treaty obligation, a state is not bound to grant or deny political asylum to any person.[23]

Despite the absence of a refugee's general right of asylum, an intimate relationship exists between the status of refugee under the Convention and the grant of asylum by the Contracting States. In most countries, persons who are recognized as Convention refugees will also be entitled to asylum.[24] One commentator has noted:

> [A]lthough the convention does not expressly regulate the admission of refugees, the definition of refugee in the Convention is taken in countries (that are parties) to the Convention to an increasing degree as a yardstick for determining what persons are entitled to receive asylum.[25]

The provisions on expulsion and nonrefoulement, articles 32 and 33 respectively, are perhaps the only oblique references in the Convention to the question of asylum.[26] Article 32 proscribes the expulsion of a refugee who is lawfully in the territory of a Contracting State except when the refugee's presence in the state threatens national security or public order. Even then, the state's expulsion of the refugee must be in accordance with due process of law. Article 33 codifies the customary principle of nonrefoulement: "No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of [sic] a particular social group or political opinion." Subsection 2 of article 33 exempts a Contracting State from the strictures of nonrefoulement if the

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23. *Id.* at 50; *see* L. HOLBORN, *supra* note 19, at 162; 3 G.H. HACKWORTH, DIGEST OF INTERNATIONAL LAW, §§ 291, 293 (1942). A number of states, particularly France and Italy, have granted the right to asylum in their municipal laws or constitutions. *See infra* text accompanying notes 81 & 95; *see also* Weis, *Recent Developments in the Law of Territorial Asylum*, 1 HUM. RTS. J. 378, 391 (1968); Shimada, *The Concept of the Political Refugee in International Law*, 1975 JAPANESE ANN. INT'L L. 24.

24. Melander, REFUGEE RECOGNITION, *supra* note 7, at 161. The converse is not true, however. Indeed, in highlighting this lack of complete overlap, one writer has observed a marked shift from the question of whether an individual is a "refugee" under the Convention to whether the individual should be granted "asylum." *See* Vierdag, *supra* note 21, at 290.

25. Weis, *supra* note 23, at 386.

26. 2 A. GRAHL-MADSEN, *supra* note 20, at 24.

refugee poses a danger to the state's security or to the community or if the refugee is convicted of a serious crime.[27]

The right of nonrefoulement represents the key right of a refugee under the Convention,[28] and technically accrues only after the refugee determination is made. Thus, the Convention does not by its terms protect the entrant from refoulement at the border or at any time in the interim between entry and formal determination of refugee status. However, the policy of most states is that nonrefoulement forbids rejection at the border as well.[29] Because it is a customary principle of international law,[30] nonrefoulement does not presuppose formal recognition of refugee status. This would render the principle inoperable and violate the spirit of the Convention.[31] Taken together with article 31, which prohibits Contracting States from imposing penalties on refugees unlawfully in their territory who promptly present themselves before the authorities,[32] the principle of nonrefoulement would seem effectively to guarantee at least temporary haven or asylum even

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27. Article 33(2) states:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is located, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Convention, *supra* note 8, art. 33(2).

28. Article 33 is one of the few substantive provisions of the Convention from which no derogation is permitted. *See* Convention, *supra* note 8, art. 42(1).

29. EUROPEAN CONSULTATION ON REFUGEES AND EXILES, ASYLUM IN EUROPE: A HANDBOOK FOR AGENCIES ASSISTING REFUGEES ¶ 46, at 17 (3d ed. 1983) [hereinafter cited as ASYLUM IN EUROPE]. This also appears to be the practice in the United States. *See* Haitian Refugee Center v. Smith, 676 F.2d 1023, 1038 (5th Cir. 1982) (holding that the federal regulatory asylum procedure and the United States commitment to the refugee problem as expressed in its accession to the Protocol manifest an intent to grant aliens the due process rights of submission and substantiation of their claims for asylum).

30. ASYLUM IN EUROPE, *supra* note 29, ¶ 45.

31. *Id.* ¶ 46.

32. Article 31(1) of the Convention states:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Convention, *supra* note 8, art. 31(1).

for those merely *seeking* refugee status under the Convention. Thus, both widespread state practice and the sense of article 31 arguably protect a person seeking Convention refugee status from refoulement before the state makes its formal refugee determination. Moreover, the qualification of a person as a refugee under the Convention bestows upon that person the right to seek asylum in a Contracting State and the right to nonrefoulement during this process.

III. The Municipal Stratum: Refugee-Related Legislation, Administrative Regulations, and Their Relationship to Conventional International Law

A. United States

1. *Statutes and Other Legal Pronouncements*

In the United States, the Immigration and Nationality Act of 1952 (INA),[33] as amended, sets forth the framework for the admission and expulsion of refugees and the granting of asylum. Prior to the passage of the Refugee Act of 1980,[34] which is the most important of the amendments to the INA, the United States legal approach to the refugee issue was, at best, a disorganized and inconsistent maze of ad hoc provisions. These provisions fell far short of the humanitarian goals to which the United States had committed itself by acceding to the Protocol in 1968. A 1965 amendment[35] added to the INA a definition of refugee that was severely limited in both geographic and numerical scope and for which the permissible grounds for persecution were narrower than those contained in the Protocol definition. To qualify for refugee status under the INA before 1980 a person had to flee persecution or fear of persecution (1) because of race, religion, or political opinion, (2) from either a Communist-dominated country or a country in the general area of the Middle East.[36] A numerical

33. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 463 (1952) (codified as amended at 8 U.S.C. §§ 1101-1503 (1982)) [hereinafter cited as INA].

34. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C. (1982)).

35. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. § 1153(a)(7) (1982)).

36. 79 Stat. at 912, *repealed by* Refugee Act of 1980, § 203(c)(3), 94 Stat. 102.

ceiling of 10,200 was imposed upon admissions of these refugees.[37]

For refugees not falling within the narrow pre-1980 INA refugee standard, the statute's alternative methods for granting admission were both piecemeal and inadequate. These were essentially limited to (1) parole, (2) withholding of deportation, and (3) temporary asylum. The Attorney General was empowered to parole an alien into the United States temporarily "for emergent reasons."[38] Congress intended, however, that the Attorney General use the parole power sparingly and on an individual basis. Thus, apart from being a temporary measure it was inapplicable to large classes of displaced persons.[39] In addition, the Attorney General could withhold deportation for as long as he deemed necessary of an alien who, in his opinion, would be subject to persecution for any of the reasons enumerated in the refugee definition.[40] This section afforded the alien an unreliable measure of relief because both the withholding of deportation and the probability of the alien's being persecuted upon return were determinations that rested within the sole and unfettered discretion of the Attorney General. Even a finding of probable persecution in no way guaranteed immunity from being returned. Finally, after 1974, administrative regulations provided for the granting of temporary asylum to an alien who would likely be subject to persecution in his or her country of origin.[41] The temporary nature of this remedy made it inherently unsuitable for refugees likely to remain in the United States on a permanent basis,[42] particularly those refugees fleeing from regimes with longstanding histories of repression.

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37. 8 U.S.C. § 1153(a)(7) (1970).

38. INA, *supra* note 33, § 212(d)(5).

39. *See Refugee Act of 1979: Hearings Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 23 (1979) (statement of Griffin Bell). *See also* Recent Development, *Immigration Law: Treatment of Refugees - Refugee Act of 1980*, 21 HARV. INT'L L.J. 742 (1981).

40. Section 243(h) of the INA provided:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

INA, § 243(h).

41. 8 C.F.R. § 108 (1980).

42. Recent Development, *supra* note 39, at 746.

The Refugee Act of 1980, ostensibly enacted to provide a long needed "permanent and systematic procedure for admission to this country of refugees of special humanitarian concern to the United States,"[43] was in essence a congressional attempt to align United States immigration and asylum policy with its international obligations under the Protocol. Section 201(a) abolished the discriminatory provision of existing law[44] by incorporating into the INA a new, broader definition of refugee, the wording of which substantially parallels that of the Convention definition.[45] Moreover, although retaining a numerical ceiling on admissible refugees, section 201(b) raised the ceiling to 50,000 for fiscal years 1980, 1981, and 1982, and eliminated it entirely for fiscal years after 1982.[46] Further, section 208 of the Act mandates the establishment of definitive and coherent asylum procedures for all aliens physically present in the United States, regardless of their status.[47] That same provision authorizes the grant of asylum to those falling within the Act's definition of refugee, but notably, stresses its *discretionary* nature.[48] Thus, this section manifests

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43. Refugee Act of 1980, *supra* note 34, § 101(b).

44. *See supra* text accompanying note 36.

45. Section 201(a) provides in pertinent part:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . . The term "refugee" does not include any person who ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

Refugee Act of 1980, § 201(a), 8 U.S.C. § 1101(a)(42) (1982).

46. Refugee Act of 1980 § 201(b), 8 U.S.C. § 1157(a)(1), (1982).

47. *Id.* § 208(a), 8 U.S.C. § 1158(a) (1982). These asylum procedures are currently found at 8 C.F.R. §§ 208.1-208.16 (1985).

48. Section 208(a) states:

> [T]he Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien *may* be granted asylum *in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee* within the meaning of section 1101(a)(42)(A) of this title.

Refugee Act of 1980, § 208(a), 8 U.S.C. § 1158(a) (1982) (emphasis added). For

the United States adherence to customary international law by refusing to qualify the government's sovereign power to grant or refuse asylum.

Aside from the expanded refugee definition, perhaps the most important change wrought by the Act was in the withholding of deportation provisions. This change reflected the United States efforts to integrate the principle of nonrefoulement, as embodied in article 33 of the Convention, into domestic law.[49] Section 203(e) provides that "the Attorney General *shall not deport* or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[50] This provision changes prior law in two important ways. First, it adds two grounds for persecution and, consequently, for withholding of deportation: nationality and membership in a particular social group.[51] Second, by making withholding of deportation of such refugees mandatory and not discretionary, it effectively guarantees the right of nonrefoulement to those whom the Attorney General classifies as refugees.[52] Although the language of this provision does continue to afford the Attorney General the discretion initially to assess whether the alien's life or freedom is in fact threatened on one of the five enumerated grounds, most United States courts that have addressed the issue have considered withholding of deportation *mandatory* if the alien proves a clear probability of persecution.[53] Last, this expansion of withholding of deportation rights to refugees caused Congress to effect a concomitant reduction in the parole power regarding refugees. The Attorney General may parole refugees into the United States only

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text of § 201(a), see *supra* note 45.

49. By basing the language of this provision directly on that of the Protocol, Congress intended that it be construed consistently with the Protocol. *See* Joint Explanatory Statement of the Committee of Conference, H.R. CONF. REP. No. 781, 96th Cong., 2d Sess. 20, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 160, 161. *See infra* note 267 and accompanying text.

50. Refugee Act of 1980, § 203(e), 8 U.S.C. § 1253(h)(1) (1982) (emphasis added).

51. Comment, *Non-Refoulement of Refugees: United States Compliance with International Obligations*, 23 HARV. INT'L L.J. 357, 369 (1983).

52. *See id.; cf. supra* note 40.

53. *See, e.g.*, Bolanos-Hernandez v. INS, 749 F.2d 1316 (9th Cir. 1984); Sarkis v. Nelson, 585 F. Supp. 235 (E.D.N.Y. 1984).

for "compelling reasons in the public interest."[54]

2. *International Treaty Law and Domestic Law*

The United States has acceded to the Protocol and thus, by incorporation, to the Convention. The Senate ratified the Protocol on October 4, 1968, and it entered into force for the United States on November 1, 1968.[55] According to the United States Constitution, treaties ratified with the advice and consent of the Senate constitute the supreme law of the land and abrogate prior inconsistent municipal laws.[56] Only when Congress enacts subsequent statutes whose terms are inconsistent with a prior binding treaty will United States courts disregard such treaty obligations.[57]

B. Canada

1. *Statutes and Other Legal Pronouncements*

The law on admission and exclusion of refugees in Canada is contained in the Immigration Act of 1976.[58] The Immigration Act essentially represents a precisely articulated codification of administrative practices developed under the prior law, rather than a dramatic departure from it. The law prior to the Immigration Act made only oblique reference to the Convention's refugee definition and its substantive terms.[59] Nevertheless, one of the declared objectives of the Immigration Act was "to fulfill Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and

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54. Refugee Act of 1980, *supra* note 34, § 203(f)(3), 8 U.S.C. § 1182(d)(5)(A) (1982).

55. Protocol, *supra* note 12.

56. U.S. CONST. art. VI, cl. 2.

57. The inconsistency must, however, be express and irreconcilable. The United States Supreme Court has held that "[r]epeals by implication are never favored." Johnson v. Browne, 205 U.S. 309, 321 (1907); *see also* Cook v. U.S., 288 U.S. 102, 118 (1933); 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 107 (1963). For a more detailed discussion of this doctrine, see *infra* note 272.

58. Immigration Act, ch. 52, 1976-77 Can. Stat. 1193 [hereinafter cited as Immigration Act (Can.)].

59. *See* Wydrzynski, *Refugees and the Immigration Act*, 25 MCGILL L.J. 154 (1981). For a treatment of the gradual incorporation of the Convention and Protocol refugee definition and other standards into Canadian legislation and administrative practice before 1976, see generally Gottlieb, *Canada and the Refugee Question in International Law*, 1975 CAN. Y.B. INT'L L. 3.

persecuted."[60]

The Immigration Act adopts the Convention definition of refugee almost verbatim,[61] but the rights pertaining to that status under the Act exceed those which the Convention requires. Section 47(3) of the Immigration Act entitles a Convention refugee to mandatory protection against refoulement and uniquely accords him or her the affirmative right to remain in Canada, provided that the newly adjudged Convention refugee successfully withstands a final inquiry on admissibility.[62] Also, although the Immigration Act subjects entering refugees to the same selection standards regarding potential successful establishment in Canada as ordinary immigrants, the Act provides for waiver of these requirements by special regulations of the Governor in Council when admission "would be in accordance with Canada's humanitarian tradition with respect to the displaced and the persecuted."[63] Last, the Immigration Act sets out a clear and specific compilation of heretofore piecemeal administrative procedures for both the determination of refugee status[64] and the appeals process.[65] Administrative regulations enacted pursuant to the Immigration Act include the Immigration Appeal Board Rules[66] and the Immigration Regulations,[67] both promulgated in 1978. The Immigration Act empowers the Governor in Council to exclude Convention refugees from the ambit of these Regulations.[68]

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60. Immigration Act (Can.), *supra* note 58, § 3(g).

61. *See id.* § 2(1).

62. *Id.* § 47(3). *But see id.* § 55 which allows the Minister to return to countries of alleged persecution certain Convention refugees who pose a threat to Canadian security or have been convicted of serious crimes for which the sentence under Canadian law would be ten years or more. *See also id.* §§ (2)(c) 4, 19(1)(c)-(g), 27(1)(c)-(d).

63. *Id.* § 6(2).

64. *Id.* §§ 45-58.

65. *Id.* §§ 59-85.

66. Immigration Appeal Board Rules, 1978, 112 Can. Gaz., pt. II, No. 5, CAN. STAT. O. & REGS. 78-172 (1978), *amended by* 112 Can. Gaz., pt. II, No. 8, CAN. STAT. O. & REGS. 78-311 (1978) [hereinafter cited as Immigration Appeal Board Rules (Can.)].

67. Immigration Regulations, 1978, 112 Can. Gaz. pt. II, No. 8, CAN. STAT. O. & REGS. 78-311 (1978) [hereinafter cited as Immigration Regulations (Can.)].

68. Immigration Act (Can.), *supra* note 58, § 115(1)(e).

2. *International Treaty Law and Domestic Law*

Canada acceded to both the Convention and the Protocol in 1969. As in Great Britain, however, international treaties are not considered part of Canadian domestic law unless the Canadian Parliament enacts federal legislation designed specifically and unambiguously to implement the obligations arising under them.[69] This doctrine is a Commonwealth inheritance from the British rule that "the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action."[70] Thus, Canada has acceded to the substantive provisions of the Convention and Protocol only to the extent manifested by the Immigration Act of 1976.[71]

C. Great Britain

1. *Statutes and Other Legal Pronouncements*

The primary Parliamentary enactment regulating the flow of aliens into the United Kingdom is the Immigration Act of October 28, 1971.[72] Unlike certain earlier British immigration legislation,[73] however, the Immigration Act contains no provision or

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69. *See* The Labour Conventions Case, [1937] 1 D.L.R. 673, [1937] 1 W.W.R. 299 (P.C.); MacDonald v. Vapour Canada, Ltd., 66 D.L.R.3d 1, 27 (Can. 1976).

70. Att'y Gen. for Canada v. Att'y Gen. for Ontario, 1937 A.C. 326, 347 (P.C.). *See generally* MacDonald, *The Relationship Between International Law and Domestic Law in Canada*, in R. MACDONALD, G. MORRIS & D. JOHNSTON, CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION 88 (1974).

71. Wydrzynski, *supra* note 59, at 156. Ambiguities in the Immigration Act are subject to the well-established canon of construction that Canadian domestic courts, in the absence of a clearly expressed legislative intent to the contrary, should interpret domestic legislation in a manner that conforms to Canada's international treaty obligations and the general principles of international law. *See* Daniels v. White and The Queen, 1968 S.C.R. 517, 541 ("Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law.").

72. Immigration Act of Oct. 28, 1971, ch. 77 [hereinafter cited as Immigration Act (G.B.)].

73. The Aliens Act of 1905, section 1(e), exempted political and religious refugees from the substantive requirements of immigration control. Subsequent Alien Restriction Acts of 1914 and 1919, designed to stem the tide of immigration during and after the war years, contained no such exemptions. *See* R. PLENDER, INTERNATIONAL MIGRATION LAW 231-32 (1972); G. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 97-99 (1978).

even reference to refugees. Thus, refugees are excepted from the mainstream of immigration control. The sole mention of refugees is made in the Immigration Rules,[74] originally enacted in 1972 by the Home Secretary pursuant to the Immigration Act.[75] The Rules indirectly, though not explicitly, compel nonrefoulement of those refugees meeting the Convention criteria. Paragraph 53 requires that a passenger who does not otherwise qualify for admission not be rejected if the rejection would force his or her return to a country where he or she fears persecution on grounds of race, religion, nationality, membership of a particular social group, or political opinion.[76]

Not until February 20, 1980, when the Statement of Changes in Immigration Rules[77] was laid before Parliament, did British law make explicit reference to the Convention and Protocol and their criteria for refugee status determination. On the subject of immediate rejection at the border, section 64 of the Statement provides:

> Special considerations arise where the only country to which a person could be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any case in which it appears to the Immigration Officer as a result of a claim or information given by the person seeking entry at a port that he might fall within the terms of this provision is to be referred to the Home Office for decision regardless of any grounds set out in any provision of these rules which may appear to justify refusal of leave to enter. Leave to enter will not be refused if removal would be contrary to the provisions of the Convention and Protocol relating to the Status of Refugees.[78]

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74. The Immigration Rules [hereinafter cited as Immigration Rules (G.B.)] consist of various sets of bills laid before Parliament at different times beginning in 1972. *See, e.g.*, Statement of Immigration Rules for Control on Entry (Commonwealth Citizens), 1973 House of Commons Paper ("H.C.") No. 79; (E.E.C. and other Non-Commonwealth Nationals), 1973 H.C. No. 81; Statement of Immigration Rules for Control After Entry (Commonwealth Citizens), 1973 H.C. No. 80; (E.E.C. and other Non-Commonwealth Nationals) 197 H.C. No. 82, all submitted on January 25, 1973.

75. Immigration Act (G.B.), *supra* note 72, § 4(3).

76. Immigration Rules (G.B.), *supra* note 74, ¶ 53; *see also* R. PLENDER, *supra* note 73, § 232.

77. Statement of Changes in Immigration Rules, 1980 H.C. No. 394.

78. *Id.* ¶ 64.

2. *International Treaty Law and Domestic Law*

Great Britain has acceded to both the Convention and the Protocol. Nevertheless, international conventions are not self-executing in Britain but require implementing municipal legislation to ensure their applicability in the domestic arena.[79] The aforementioned provision of the Statement of Changes in Immigration Rules alludes to the Convention refugee criteria and explicitly incorporates the article 33 proscription on refoulement with respect to persons meeting those criteria. Given the lack of broad incorporating legislation, the Convention and Protocol have been technically implemented in Britain only to a limited extent.[80]

D. France

1. *Constitutional Provisions*

The Preamble to the Constitution of the Fourth Republic, adopted September 28, 1946, proclaims "as most vital in our time," the individual's right of territorial asylum. "Anyone persecuted because of his activities in the cause of freedom has the right to asylum within the territories of the Republic."[81] Although this Constitution has now been superseded by that of September 28, 1958,[82] the provisions of its preamble, including the right of asylum, have been explicitly incorporated into the preamble of the new Constitution.[83]

The principle of asylum because of persecution for "activities in the cause of freedom" may be distinguished from the Convention definition of refugee because asylum requires *actual* persecution and not merely a well-founded fear of persecution. French law does not elaborate further on the principle of asylum. However, a refugee arriving in France directly from the country of persecution is usually granted asylum under the instructions of circulars distributed by the Minister of the Interior.[84]

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79. *See* ASYLUM IN EUROPE, *supra* note 29, ¶ 1, at 365.

80. This limited domestic incorporation of the Convention and Protocol parallels Canada's treatment of these instruments. *See supra* text accompanying notes 69-71.

81. Constitution of France preamble, para. 4 (Fr. 1946, amended 1958) translated in 2/A. PEASLEE, CONSTITUTIONS OF NATIONS 6 (2d ed. 1956).

82. This is the Constitution of the Fifth Republic.

83. Constitution of France (1958) preamble, para. 1, *translated in* 5 A. BLAUSTEIN & G. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 3 (1985).

84. ASYLUM IN EUROPE, *supra* note 29, ¶ 11, at 122.

2. *Statutes and Other Legal Pronouncements*

France has long enjoyed the reputation as a haven for the persecuted. The seminal statute relating specifically to refugee admission and protection in the post-war era is Law No. 52-893 of July 25, 1952, which created the French Office for the Protection of Refugees and Stateless Persons,[85] or "OFPRA" the French acronym.[86] Article 2 of the law charges OFPRA, acting with the advice and suggestions of the UNHCR branch office for France, with responsibility for the initial determination of Convention refugee status. This article further entrusts OFPRA with the "judicial and administrative protection of refugees and stateless persons" and with ensuring "the execution of international conventions, accords or arrangements concerning the protection of refugees in France, particularly [the 1951 Convention relating to the Status of Refugees]."[87]

Law No. 81-973 of October 29, 1981,[88] establishes significant safeguards against refoulement of prospective refugees who are at France's border. When a refugee is refused entrance into France, this law guarantees the alien's right to, *inter alia*, (1) a written decision by the border official, with full explanation for the rejection, (2) contact the person whom he or she intended to visit, his or her counsel, or an attorney, and (3) a mandatory one-day delay in his or her repatriation. If, for various reasons, the alien is not

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85. Loi No. 52-893 du 25 juillet 1952 portant création d'un Office Français de protection des réfugiés et apatrides, 1952 Journal Officiel de la République Française [J.O.] 7642, (1952 Dalloz, *Législation* [D.L.] 284, 27 juillet [hereinafter cited as Loi No. 52-893 du 25 juillet 1952]).

86. Office Français de la Protection des Réfugiés et Apatrides.

87. Loi No. 52-893 du 25 juillet 1952, *supra* note 85, art. 2 (author's translation). The French original reads as follows:

> L'office exerce la protection juridique et administrative des réfugiés et assure, en liaison avec les divers départements ministériels intéressé, l'éxecution des conventions, accords ou arrangements internationaux interessant la protection des réfugiés en France, et notamment de la convention de Gèneve du 28 juillet 1951.
>
> L'office reconnaît la qualité de réfugié a toute personne que . . . répond aux définitions de l'article ler de la convention de Genève du 28 juillet 1951 relative au statut des réfugiés.

Loi No. 52-893 du 25 juillet 1952.

88. Loi No. 81-973 du 29 octobre 1981 relative aux conditions d'entrée et de séjour des étrangers en France, 1981 J.O. 2970, 1981 Dalloy-Sirey, *Législation* 361 [D.S.L.], 30 octobre [hereinafter cited as Loi No. 81-973 du 29 octobre 1981].

able to leave, he or she may be kept in a nonpenal detention area for up to seven days until departure can be arranged. In accordance with the principle of nonrefoulement, even a rejected alien may not be returned to the country from which he or she has fled.[89]

Decree No. 82-442 of May 27, 1982,[90] superimposes a further requirement on the 1981 Law when *asylum seeking* aliens are rejected at the border. The Decree makes clear that only the Minister of the Interior, after consultation with the Minister of External Relations, may make a decision refusing admission and asylum to this category of aliens.[91]

3. *International Treaty Law and Domestic Law*

France is a signatory to both the Convention[92] and the Protocol. Article 55 of the French Constitution of 1958 expressly gives duly ratified international treaties prevalence over municipal law, provided that France's treaty partners also observe the provisions of the treaty.[93] Superiority of treaties is generally held to exist over subsequent statutes. When treaties and subsequent statutes conflict, French courts have ignored the maxim of construction *lex posterior derogat lege priori.*[94]

E. Italy

1. *Constitutional Provisions*

Article X of the Italian Constitution of December 22, 1947, guarantees the following right of asylum: "A foreigner to whom

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89. *See* ASYLUM IN EUROPE, *supra* note 29, ¶¶ 34, 56 & 130, at 126.

90. Décret No. 82-442 du 27 mai 1982 pris pour l'application de l'article 5 de l'ordonnance No. 45-2658 du 2 novembre 1945 modifiée relative aux conditions d'éntree et de séjour en France des étrangers en ce qui concerne l'admission sur le territoire français, 1982 J.O. 1712, 1982 D.S.L. 254, 29 mai [hereinafter cited as Décret No. 82-442 du 27 mai 1982].

91. *Id. See also* ASYLUM IN EUROPE, *supra* note 29, ¶ 35, at 126.

92. At the time of accession to the Convention on September 11, 1952, France declared that for the purpose of its obligations under that instrument, the refugee definition's phrase "events occuring before 1 January 1951" would mean events occuring in Europe. This restrictive interpretation of the refugee definition was discontinued upon France's accession to the Protocol.

93. *See* Berman, *French Treaties and French Courts: Two Problems in Supremacy*, 28 INT'L & COMP. L.Q. 458 (1979).

94. "A subsequent law derogates from a prior law." For recent problems of construction in the French courts, see generally Berman, *supra* note 93.

the practical exercise in his own country of democratic freedoms, guaranteed by the Italian Constitution, is precluded, is entitled to the right of asylum within the territory of the Republic under conditions laid down by law."[95] Two attributes of this provision must be mentioned in relation to the Convention definition of refugee. First, unlike the French Constitution's right of asylum, which is limited to refugees who suffer actual persecution, a well-founded *fear* of persecution would entitle a foreigner to the protection of Article X. If a foreigner experiences a well-founded fear of exercising certain freedoms, he or she is effectively precluded from the "practical exercise" of those freedoms. Second, the infringement upon the foreigner's freedom must fall within one of the liberties the Italian Constitution specifically guarantees. By contrast, the Convention definition more broadly contemplates infringements of racial, religious, social, political, and national liberties.

Interestingly, although the Constitution secures the right of asylum "under conditions laid down by law," the Italian Parliament has heretofore failed to enact any implementing legislation.[96] Judicial decisions, however, have refused to allow this legislative inertia to vitiate a constitutionally protected right and, thus, routinely entitle asylum claimants to appeal negative asylum decisions.[97]

2. *International Treaty Law and Domestic Law*

Italy has acceded to both the Convention and the Protocol, but applies them only to persons who have become refugees as a result of events occurring in Europe.[98] Recently, the Italian government has announced its intention to withdraw this restriction.[99]

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95. Constitution of Italy, December 27, 1947, art. X(3) (Italy), *translated in* 8 A. BLAUSTEIN & G. FRANZ, *supra* note 83, at 3.

96. 2 A. GRAHL-MADSEN, *supra* note 20, at 116; Avery, *Refugee Status Decision-Making: The Systems of Ten Countries*, 19 STAN. J. INT'L L. 235, 298 (1983).

97. *See, e.g.*, Judgment of Nov. 27, 1964, Corte app., Milano, 1964 Sentenza No. 1566/64; 2 A. GRAHL-MADSEN, *supra* note 20, at 116-17.

98. *See* Convention, *supra* note 8, art. 1(B)(1)(a) (permitting an optional geographic limitation on the definition of refugee, discussed *supra* at note 10); *see also* ASYLUM IN EUROPE, *supra* note 29, ¶ 3, at 217.

99. In the summer of 1982 the Italian Foreign Minister informed the UNHCR that Italy would soon abolish the geographic limitation. Avery, *supra* note 96, at 298-99; *see also* ASYLUM IN EUROPE, *supra* note 29, ¶ 3, at 216.

In the interim, however, non-European refugees may be referred to the UNHCR branch office in Rome, where their only recourse is to avail themselves of UNHCR mandate recognition and consequent resettlement in a third country.[100]

In traditional Italian jurisprudence, international treaties, even if validly entered into by the Italian government, are not applicable within Italy in the absence of a law or other ad hoc domestic instrument implementing them.[101] The Convention and Protocol have been expressly incorporated into Italian legislation by Law No. 722 of July 24, 1954,[102] and Law No. 95 of February 14, 1970,[103] respectively.

IV. Overview of Domestic Administrative Procedures Regarding the Admission and Exclusion of Refugees

A. United States

United States refugee and asylum administrative practice is bifurcated according to the refugee claimant's status in the country at the time of application. The claims of both refugees and asylum seekers who want to enter the United States at a port of entry and those legally or illegally in the United States are adjudicated by the relevant district director of the Immigration and Naturalization Service (INS) after an initial interview by an INS officer. Those aliens lodging an asylum application based on their alleged status as Convention refugees appear before an immigration judge after the commencement of exclusion or deportation proceedings against them or after a negative determination by the district director.[104] In these latter cases, asylum is akin to a counterclaim asserted against the government in the midst of the pro-

100. The class of refugees which falls within the mandate of the UNHCR is broader than that encompassed by the Convention. Mandate refugees must show only a well founded fear of persecution on *any* grounds. The disadvantage of qualifying for mandate but not Convention refugee status, however, is that the host country is not obligated to afford the mandate refugee the extensive protections of the Convention. *See generally* Maynard, *The Legal Competence of the United Nations High Commissioner for Refugees*, 31 Int'l & Comp. L.Q. 415 (1982).

101. Judgment of March 22, 1972, Corte cass., Italy, Sentenza No. 867 *reprinted in* 1975 Italian Y.B. Int'l L. 287.

102. Legge n. 722, 24 luglio 1954, Gazetta Ufficiale della Repubblica Italiana [Gaz. Uff.] 27 agosto 1954; Legislazione Italiana, Parte I [Leg. Ital. I] 422.

103. Legge n. 95, 14 febbraio 1970, Gaz. Uff. 28 marzo 1970, Leg. Ital. I 748.

104. 8 C.F.R. § 208.3 (1985).

ceeding. The alien bears the burden of proving refugee status in both cases.[105]

The INS officers who first interview refugee applicants are almost never attorneys. They attend a two-week training course that provides them with a general survey of immigration law. The consensus is that these officers are largely ignorant of the sociopolitical conditions and human rights practices in countries of origin.[106] The officer's primary function is to arrange and to clarify the asylum application, biography and supporting documentation. Studies have shown, however, that officers are often derelict in their duties. They frequently do not bother to delve into the questions perhaps most pertinent to the applicant's claim and, on occasion, have even misrepresented an applicant's responses.[107]

The district director's determination to grant or deny refugee status and asylum is based on the applicant's request and documentation, the interview examiner's notes and recommendations, and other information sources.[108] Under administrative regulations, the district director must deny asylum to an alien who does not meet the 1980 Act definition of refugee[109] which is equivalent to that of the Convention. In the case of an alien who *is* found to be a refugee, the district director must deny asylum if the alien

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105. *Id.* § 208.5.

106. Telephone interview with Michael Heilman, Assistant General Counsel, INS, Washington, D.C. (Dec. 1, 1982), *cited in* Avery, *supra* note 96, at 329 [hereinafter cited as Heilman Interview; STAFF OF HOUSE SUBCOMM. ON IMMIGRATION, CITIZENSHIP AND INTERNATIONAL LAW OF THE HOUSE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., HAITIAN EMIGRATION 15 (Comm. Print 1976) [hereinafter cited as HAITIAN EMIGRATION]; Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 NOTRE DAME LAW. 618, 628 (1981) [hereinafter cited as Scanlan, *Regulating Refugee Flow*]. *See generally* Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 527-28 (S.D. Fla. 1980), *appeal dismissed* 614 F.2d 92 (5th Cir. 1980), *modified sub nom.* Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

107. Scanlan, "*Asylum Procedures*," "*Asylum Board*," and "*Refugee Procedure*," *in* SECOND FINAL REPORT SUBMITTED TO THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY (Oct. 8, 1980) (available from Center for Civil and Human Rights, Notre Dame Law School, Notre Dame, Ind. 46556) [hereinafter cited as Scanlan, Second Final Report]; M. Posner, *Refugees and Asylum: An Assessment of U.S. Policy and Practice*, testimony before the Select Commission on Immigration and Refugee Policy 15-16 (Jan. 21, 1980) (available from Lawyers' Committee for International Human Rights, 36 W. 44th Street, New York, N.Y. 10036); *see also* Avery, *supra* note 96, at 329.

108. *See* Avery, *supra* note 96, at 329.

109. 8 C.F.R. § 208.8(f)(i) (1985).

has been "firmly resettled" in a third country or has participated in persecution, committed a serious nonpolitical crime or reasonably constitutes a threat to United States security.[110] Denial of asylum in these circumstances is mandatory.

Although the applicant may present evidence of adverse political and social conditions in the country of origin, administrative regulations mandate a district director's request of a Bureau of Human Rights and Humanitarian Affairs (BHRHA) advisory opinion.[111] A BHRHA opinion is not binding, but is usually given substantial weight because of its source.[112] Indeed, almost without exception the INS has regarded these BHRHA opinions as controlling in the disposition of an asylum claim.[113] In cases of appeal from the district director's negative asylum decisions the advisory opinion remains part of the record if it formed at least a partial basis for the decision.[114] The Immigration judge is required to procure a new BHRHA advisory opinion both in these cases, and in cases in which changed circumstances render a prior advisory opinion obsolete.[115]

Immigration judges are usually former INS trial attorneys. Nevertheless, they generally have no special expertise or training in international refugee law, and the majority possess an unsophisticated knowledge of world affairs. Most judges invite counsel

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110. *Id.* § 208.8(f)(ii)-(iv). These latter three exceptions appear to parallel the Convention's own exceptions to its definition of refugee. *See* Convention, *supra* note 8, art. 1(F).

111. 8 C.F.R. § 208.7, .10(b) (1985). Under previous administrative regulations, the district director could rule on a claim "clearly meritorious or clearly lacking in substance" without seeking an advisory opinion. *See* 8 C.F.R. § 108.1 (1979).

112. *See, e.g.*, Zamora v. INS, 534 F.2d 1055, 1062 (2d Cir. 1976) ("The obvious source of information on general conditions in the foreign country is the Department of State which has diplomatic and consular representatives throughout the world. . . . [I]t is usually the best available source of information. . . ."); Comment, *Non-Refoulement of Refugees: United States Compliance with International Obligations*, *supra* note 51, at 367.

113. *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 80, 123 (1981) (prepared statements of Dale M. Schwartz, attorney, Atlanta, Ga. and John Scanlan, Center for Civil and Human Rights, Notre Dame Law School) [hereinafter cited as Schwartz, Senate Subcomm. testimony and Scanlan, Senate Subcomm. testimony]; *see also* Kurzban, *Restructuring the Asylum Process*, 19 SAN DIEGO L. REV. 91, 98 (1981); Avery, *supra* note 96, at 333.

114. 8 C.F.R. § 208.8(d), .10(b) (1985).

115. *Id.* § 208.10(b).

to provide them with the human rights information necessary to render their decisions.[116] In January 1983, Immigration judges were removed from the aegis of the INS in an attempt to assuage critics who had asserted that the judges were tainted by lack of independence from the INS enforcement divisions. The judges were placed under a new division of the Justice Department entitled the Executive Office for Immigration Review.[117] BHRHA advisory opinions have been the subject of unceasing criticism for several reasons. First, the reports are issued under less than ideal procedural conditions. A small group of asylum officers, none of whom is an attorney or receives any prior training in refugee law or asylum procedure, are expected to review a staggering number of asylum claims yearly.[118] Second, officials draft opinions without the benefit of a personal appearance by the applicant. Third, investigations of an applicant's claim are based solely on his or her case file.[119] Last, the BHRHA has set no general guidelines for the asylum officer's interpretation of the Refugee Act's definition of refugee and the application of this definition to specific claims.[120]

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116. Interview with authority on United States asylum determination system, (name withheld by request) (1982), *cited in* Avery, *supra* note 96, at 332 [hereinafter cited as Interview with authority no. 1 on U.S. System.]

117. 28 C.F.R. § 0.19, .105, .115-0.117 (1985); 8 C.F.R. §§ 1.1, 2.1, 3.1, 3.3, 3.8, 100.2 (1985); *see also* Kroll, *Needed Now: A Truly Independent Immigration Court*, IMMIGRATION J. 4 (Jan. - Feb. 1982).

118. Telephone interview with Laura Dietrich, Deputy Assistant Secretary, Bureau of Human Rights and Humanitarian Affairs, United States Department of State (August 20, 1985). The United States received 24,295 asylum claims in fiscal year 1984 and 26,091 claims in fiscal year 1983. From October 1, 1984, through July 31, 1985, the number of asylum claims has, on a projected basis for fiscal 1985, fallen slightly to 13,936. In addition, the backlog of unprocessed asylum claims had been as high as 171,402 at the beginning of fiscal year 1983. This figure was 131,402 at the beginning of fiscal year 1984 and 131,058 as of July 31, 1985. Figures taken from Official Statistics of the INS, Department of Justice; UNITED STATES DEPARTMENT OF JUSTICE, INS 1983 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 77 (1983); telephone interview with Ilva Bland, Program Assistant, Refugee, Asylum and Parole Division, Office of Examinations, INS, United States Department of Justice (Aug. 21, 1985) [hereinafter cited as Bland Interview].

119. Interview with Lawrence Arthur, Chief Asylum Officer, BHRHA, United States Department of State (Mar. 17, 1982), *cited in* Avery, *supra* note 96, at 333-34 [hereinafter cited as Arthur Interview].

120. *Id* at 334. The alien must show that because of his or her activities and involvement in organizations and because of conditions in the country of origin,

Substantively, BHRHA opinions have been accused of being heavily politicized in their appraisal of the human rights situations of countries of origin. Although the BHRHA has access to information from the claimant and from nongovernmental human rights organizations, it relies primarily on the State Department's own *Country Reports on Human Rights Practices*.[121] The problem with this source is that diplomatic concerns become inextricably intertwined in the assessment process. These diplomatic concerns mar the accuracy of its content to the extent that, as one report stated, although no outright overstatement or understatement of human rights abuses in countries hostile or friendly to the United States exists, "distortions in the reporting seemed to reflect efforts to further political ends relating to particular countries."[122] The content of the advisory opinions reflects this political and ideological bias. Thus, as one commentator summarizes:

> [I]n the past, asylum has been authorized because of the United States' political differences with the country of refugee origin, even though particular claimants have had no colorable fear of persecution. Likewise, even after passage of the 1980 Act, asylum has been recommended against in blanket fashion because of the State Department's desire not to undermine governments perceived as friendly.[123]

In addition to virtually exclusive reliance on the *Country Reports*, BHRHA opinions contain information from the State Department desk officer for the country in question. Again, chances of receiving biased information regarding human rights violations are overwhelming. A desk officer ordinarily will be reticent to concede the existence of persecution in his or her assigned country because his job is to maintain the best possible bilateral relationship with that country.[124] Granting asylum to a refugee from a government on friendly terms with the United States may lead that country to believe that United States value judgments on its

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persecution would likely result. *Id.*

121. *See* Avery, *supra* note 96, at 335.

122. AMERICAS WATCH, HELSINKI WATCH AND LAWYERS' COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, A CRITIQUE OF THE DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1981 ii (April 1982) (available from Helsinki Watch, 36 W. 44th St. New York, N.Y. 10036).

123. Scanlan, *Regulating Refugee Flow*, *supra* note 106, at 628-29.

124. *See* Hanson, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.U. REV. L. & SOC. CHANGE 107, 134 (1978).

internal conditions have maligned its reputation.[125] If the country is an ally, the consequences could be disastrous for diplomacy. In short, "the greater the diplomatic importance of any given country, the greater the likelihood that the State Department will deny asylum in order to avoid antagonizing that country even at the expense of humanitarian interests."[126]

Apart from the questionable validity of their factual content and the possible taint of political concerns, BHRHA opinions arguably are of declining utility for other reasons. Because the State Department has extensive resources for gathering information regarding political conditions in foreign countries, the concept of the advisory opinion originally contemplated a thorough and meaningful inquiry into the probability of persecution of *each* applicant from a given country. However, the volume of applications and the practical limitations on the ability of consular officers in the country in question, who comprise the heart of the State Department's information gathering network, to clarify the persecution claim of every single applicant force the determination of asylum applications to be left to the "vicissitudes of either the desk officer in the State Department or the State Department's general policy toward a particular country."[127] These blanket countrywide determinations often result in mass-produced form letters issued from Washington without any embassy contact.[128] Because conclusory opinions are required to be made part of the record,[129] they make an applicant's appeal from a negative decision difficult, if not impossible.[130]

The multifarious flaws in the advisory opinion process have led one United States Court of Appeals to doubt both the probative value and the objectivity of these opinions.

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125. *Id.* at 134-35.

126. *Id.* at 135.

127. Kurzban, *supra* note 113, at 98-99.

128. HAITIAN EMIGRATION, *supra* note 106, at 8; Scanlan, Senate Subcom. testimony, *supra* note 113, at 123.

129. 8 C.F.R. §§ 208.8(d), .10(b) (1985); *see supra* note 114 and accompanying text.

130. The State Department's immunity under the political question doctrine from judicial orders to disclose the reasons or sources for its decision compounds this problem. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 100-11 (1978); *see also* Hosseinmardi v. INS, 405 F.2d 25, 27 (9th Cir. 1968); Namkung v. Boyd, 226 F.2d 385, 389 (9th Cir. 1955); United States ex. rel. Dolenz v. Shaughnessy, 206 F.2d 392, 394-95 (2d Cir. 1953).

> Such letters from the State Department do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world. The traditional foundation required of expert testimony is lacking, nor can official position be said to supply an acceptable substitute. No hearing officer or court has the means to know the diplomatic necessities of the moment, in the light of which the statements must be weighed.[131]

Another circuit court has upheld the admissibility of BHRHA advisory opinions to the extent that they purport to convey evidence of persecution, or lack thereof, in the country at issue. According to the court, the opinion must reveal, insofar as feasible, the basis for the view it expresses.[132] However, the court roundly criticized the practice of admitting opinions that do "too little" by giving "little or nothing in the way of useful information about conditions in the foreign country," or those that do "too much" by making a negative recommendation based on the application of given information to resolve adjudicative facts.[133] The court noted that these decisions are the function of the INS and expressed its fear that the opinions would be accorded a "weight they do not deserve."[134]

Negative asylum determinations by an immigration judge entitle an alien to both administrative and judicial review. The Board of Immigration Appeals (BIA) is the alien's first resort after an unfavorable decision below.[135] It is composed of five members who are usually INS attorneys experienced in immigration law although not necessarily in refugee or asylum affairs. In a case before the BIA the applicant may make an oral argument, but the BIA's determination is generally limited to information contained

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131. Kasravi v. INS, 400 F.2d 675, 677 n.1 (9th Cir. 1968). *Accord* Berdo v. INS, 432 F.2d 824, 844 (6th Cir. 1970). Conversely, one court has noted that State Department letters that describe oppressive conditions in countries *friendly* to the United States should be accorded greater weight. *See* Zavala-Bonilla v. INS, 730 F.2d 562, 567 n.6 (9th Cir. 1984).

132. Zamora v. INS, 534 F.2d 1055, 1062 (2d Cir. 1976).

133. *Id.* at 1063.

134. *Id.*

135. Heilman Interview, *supra* note 106, *cited in* Avery, *supra* note 96, at 341-42; *see also* 8 C.F.R. § 3.1(b) (1985).

in the record below and to the appellate briefs for both sides.[136] The BIA's placement in the Justice Department has rendered it subject to criticism that it is vulnerable to executive intervention and lacks the appearance of an independent decision-making body.[137]

The alien may appeal a decision of the BIA to the United States Court of Appeals for the judicial circuit in which administrative proceedings were held or in which the alien resides.[138] Aliens in custody awaiting deportation appeal by habeas corpus proceedings in the United States District Court.[139] Judicial review at the federal court level is basically limited to either errors of law or procedure or a finding that substantial evidence did not support the INS determination.[140]

Thus, on a general level, the grant of asylum in the United States is available only to those who meet the domestic statutory version of the Convention refugee definition. Moreover, asylum is unavailable to refugees if they have been firmly resettled elsewhere.[141] Further, asylum is both reviewable annually and revocable on grounds of changed circumstances, as when the alien ceases to be a refugee or threatens national security.[142] In the event of contemplated termination of asylum, the regulations do afford the alien various safeguards, including notice and an opportunity to present evidence of actual refugee status.[143]

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136. NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE § 9.2(d), at 9-7 to 9-8 (2d ed. 1982).

137. SELECT COMM. ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 246 (March 1, 1981).

138. 8 U.S.C. § 1105a(a)(2) (1982).

139. *Id.* § 1105a(a)(9).

140. *See* 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, § 8.12, at 8-105 to 8-118 (1983); IMMIGRATION LAW AND DEFENSE, *supra* note 136, § 10.1(g), at 10-7; *see also* Avery, *supra* note 96, at 342.

141. Firm resettlement is defined in 8 C.F.R. § 208.14 (1985):

> An alien is considered to be "firmly resettled" if he was offered resident status, citizenship, or some other type of permanent resettlement by another nation and travelled to and entered that nation as a consequence of his flight from persecution, unless the refugee establishes, to the satisfaction of the United States Government officer reviewing the case, that the conditions of his residence in that nation were so substantially and consciously restricted by the authority of the country of asylum/refuge that he was not in fact resettled.

142. 8 C.F.R. § 208.15 (1985).

143. *Id.* § 208.15(b).

B. Canada

A documented or undocumented alien's assertion of a claim for protection as a Convention refugee, either from within Canada or at a port of entry, initiates the statutory immigration inquiry. If the inquiry results in an order for deportation, it is then adjourned and a refugee hearing must begin immediately.[144] One commentator has criticized the process of requiring a person fleeing persecution to endure a hearing that determines that he or she has no legal right to remain in Canada as "psychologically intimidating."[145] Reports from refugee claimants of alleged intimidation, hostile interrogation, and threatened immediate deportation have exacerbated the problem.[146]

At the hearing, a senior immigration officer examines the alien. He or she has a right to be represented by counsel and may procure an interpreter to attend the hearing.[147] The mode of presenting evidence is not at all standardized. For example, the officer may allow counsel to examine the alien at the outset, or the officer may question the claimant first and only then allow counsel to examine. In no case may the examining officer attempt to cross-examine the claimant by asking questions designed solely to test, rather than merely to clarify, evidence already given. The officer's questioning of the claimant in a hostile, incredulous or badgering manner constitutes a legitimate ground for objection.[148]

As a matter of practice, the existence of certain factors on the interview transcript may tend to cast doubt upon the merits of the alien's claim to refugee status and may affect the ultimate decision unfavorably. These factors include: (a) whether the alien approached a Canadian embassy abroad to inquire about refugee status; (b) whether the alien was able to leave the country of origin unimpeded and with proper documentation; (c) whether the

144. Immigration Act (Can.), *supra* note 58, § 45(1).

145. LAW UNION OF ONTARIO, THE IMMIGRANT'S HANDBOOK: A CRITICAL GUIDE 151 (1981) [hereinafter cited as IMMIGRANT'S HANDBOOK]. The procedure is a futile exercise at best. *See* Grey, *The New Immigration Law: A Technical Analysis*, 10 OTTAWA L. R. 103, 106 (1978).

146. MINISTER OF EMPLOYMENT AND IMMIGRATION, GOVERNMENT OF CANADA, THE REFUGEE STATUS DETERMINATION PROCESS: A REPORT OF THE TASK FORCE ON IMMIGRATION PRACTICES AND PROCEDURES 21 (Nov. 1981) [hereinafter cited as TASK FORCE REPORT].

147. Immigration Act (Can.), *supra* note 58, §§ 45(1), (6); IMMIGRANT'S HANDBOOK, *supra* note 145, at 156.

148. IMMIGRANT'S HANDBOOK, *supra* note 145, at 157.

alien failed to attempt to claim refugee status in a country of temporary haven en route to Canada; (d) whether the alien delayed unduly in asserting a refugee status claim in Canada; and (e) whether the alien had subsequent contacts with the Canadian Immigration authorities without mentioning fear of persecution in the country of origin.[149] The alien's success in averting the possibility of any of these indicia of credibility jeopardizing the refugee claim will depend on his or her ability to explain adequately at the initial interview the reason for their existence. The examining officer, however, does not make any recommendation on either the merits of the claim or the credibility of the applicant. He merely forwards the transcript to the decision-recommending body, the Refugee Status Advisory Committee (RSAC).[150]

One of the problems with the refugee claimant interviewing process is the lack of qualifications of senior immigration officers. Most of their duties entail administrative matters unrelated to refugees, and their general level of expertise in refugee affairs is deficient.[151] As a result, interview transcripts are often disorganized and lacking in very pertinent, perhaps crucial, information that the officer neglected to elicit.[152] In an attempt to eliminate these deficiencies, the UNHCR representative and the Canadian Government have been providing formalized training programs for interviewing officers, in which the officers are urged, *inter alia*, both to seek background information on the country in question from the RSAC or UNHCR and to request clarification of the Convention definition of refugee.[153]

The RSAC in Ottawa adjudicates the merits of the alien's claim based upon a transcript of the senior immigration officer's examination of the alien under oath. By long-standing practice, the

149. *Id.* at 159.

150. TASK FORCE REPORT, *supra* note 146, at 26, 34. Ut Nan Lam v. Minister of Manpower and Immigration (M.M.I.) [1978] 2 F.C. 3, 6 (T.D.).

151. *See generally* Howard, *Contemporary Canadian Refugee Policy: A Critical Assessment*, 6 CAN. PUB. POL'Y 366 (1980).

152. Delegation of Concerned Church, Legal, Medical and Humanitarian Organizations, *The Refugee Determination Process: A Brief to the Honorable Lloyd Axworthy, Minister of Employment and Immigration* D9 (May 9, 1980), *cited in* Avery, *supra* note 96, at 259 [hereinafter cited as Concerned Delegation Brief].

153. Telephone interview with R. Stainsby, Acting Chief of Research, RSAC, Hull, Quebec, Can. (Aug. 1, 1982), *cited in* Avery, *supra* note 96, at 259 [hereinafter cited as Stainsby Interview].

claimant's counsel may make corrections or written addenda in the four-week period immediately following submission of the transcript to RSAC, although there is no clear legal authority for such action.[154] The RSAC is composed of both government officials from the Department of External Affairs and the Employment and Immigration Commission and of nongovernmental persons who serve for shorter, renewable terms.[155] The UNHCR representative in Canada attends the deliberations to advise and observe.[156] The Minister of Employment and Immigration makes all appointments.[157]

RSAC does not examine fully all transcripts sent to it. A special officer screens claims which are manifestly unfounded, with the result that approximately one-half of all initial interview transcripts never reach the Committee.[158] Administrative guidelines interpret as "manifestly unfounded" claims of aliens from "freely elected parliamentary-style democracies," claims originating from civil wars or natural disasters not related to persecution, and claims involving an alien who states no participation in political activity against the home government and has not been persecuted.[159] Two theoretical qualifications on the preliminary screening process exist, however. First, the officer decides each case on its merits. Therefore, RSAC may fully review some claims from "parliamentary-style democracies." Secondly, the RSAC members always receive a summary of the transcript of a claim discarded as "manifestly unfounded," and any member may request the full transcript of any of these claims.[160] By granting full review, the RSAC effectively may ignore a questionable "manifestly unfounded" determination.

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154. IMMIGRANT'S HANDBOOK, *supra* note 145, at 159.

155. TASK FORCE REPORT, *supra* note 146, at 37.

156. United Nations High Commissioner for Refugees, Note on the Procedures for the Determination of Refugee Status Under International Instruments, U.N. Doc. A/AC .96/INF .152/Rev. 3 ¶ 35, at 6 (Sept. 7, 1981) (describing the procedures in 35 countries), *cited in* Avery, *supra* note 96, at 260 [hereinafter cited as UNHCR, Note on Refugee Status Procedures].

157. Immigration Act (Can.), *supra* note 58, § 48(2).

158. TASK FORCE REPORT, *supra* note 146, at xv.

159. *Id.* at 118, ap. C (Manifestly Unfounded Claim Guidelines, Aug. 1980).

160. Telephone interview with Joseph Stern, Chairman, RSAC, Hull, Quebec, Can. (Jan. 7, 1983) *cited in* Avery, *supra* note 96, at 264 [hereinafter cited as Stern Interview]; TASK FORCE REPORT, *supra* note 146, at 40. *See generally* Avery, *supra* note 96, at 264.

Although the process of screening originally was intended to prevent clearly frivolous claims from overburdening the system, a Canadian governmental commission has recommended that it be abandoned. Reputedly, the major flaw is that the manifestly unfounded guidelines "may not have been drawn with sufficient regard for the refugee definition," and thus, the screening process does not comport with Canada's international legal obligations.[161] Indeed, the guidelines appear to promote blanket countrywide categorizations of the relative merits of refugee status claims which create a dichotomy between claims from refugee-producing countries and nonrefugee-producing countries. Because the refugee status determination process demands a "very high standard of fairness," *all* transcripts should be eligible for full review by the RSAC.[162]

Another major problem at the RSAC level is its exclusive reliance on the interview transcript as the evidentiary basis for its recommendation. To avoid the crippling delays endemic to the systems of certain other Western countries, the RSAC was envisioned as an efficient advisory body and not as an adversarial forum.[163] Therefore, the RSAC deliberations are closed, and the refugee claimant has no opportunity to appear and present oral argument.[164] Although the RSAC may request a supplementary examination of the alien by the senior immigration officer, reliance on written materials creates obvious impediments to the accurate assessment of the applicant's credibility. As the aforementioned government commission has noted, "ideally, the person who makes the decision should also assess demeanour."[165]

In an attempt to alleviate this situation and to improve the qualifications of RSAC members and allay widespread fears of alleged bias on the part of the governmental members, the Minister issued RSAC Guidelines on the Refugee Definition and Assess-

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161. TASK FORCE REPORT, *supra* note 146, at xv.

162. *Id.*

163. Telephone interview with J.B. Bisset, Asst. Under-Secretary, Bureau of Immigration Affairs, Department of External Affairs, Ottawa, Ontario, Can. (July 26, 1982), *cited in* Avery, *supra* note 96, at 265 [hereinafter cited as Bissett Interview].

164. This practice is inferred from the language of section 45(4) of the Immigration Act, which suggests that the Minister forward only the transcript to the RSAC. No reference is made to an oral appearance by the claimant. *See supra* note 58; *see also* TASK FORCE REPORT, *supra* note 146, at xiii.

165. TASK FORCE REPORT, *supra* note 146, at xiv.

ment of Credibility in 1982.[166] The following are now to be considered in determining the legitimacy of a Convention refugee claim:

> [T]he claimant will receive the benefit of the doubt; an individual may be a refugee even if there is no evidence of past persecution but there are reasonable grounds to fear persecution in the future; persecution may take forms other than interference with personal freedom, including arbitrary interference with a person's family, home, correspondence, job, education, etc.; persecution may be periodic; persecution may take the form of indiscriminate terror; immigration considerations (e.g., fear if one person is granted refugee status, many others similarly situated might claim status) are irrelevant to the assessment of a claim; highly-visible political activity is not a prerequisite for status as a political refugee; a well-founded fear of persecution need not have arisen before the claimant left his country; a person may be a refugee even if he was able to leave his country without difficulty.[167]

These criteria represent the Canadian Government's attempts to accord a remarkably liberal construction to the Convention refugee definition.

RSAC members rely on a broad array of information sources in making their decision. Human rights information from Amnesty International and the Canadian Council of Churches, United States State Department *Country Reports*, reports from Canadian embassies, and country-specific information from the Department of External Affairs are available in a new documentation center in RSAC headquarters.[168] As with State Department *Country Reports* in the United States refugee determination process, the accuracy of Department of External Affairs information is suspected of being tainted by political motivation. To ensure accuracy and completeness, a governmental commission has recommended that information given to the RSAC also be made public.[169]

The RSAC Chairman reviews refugee status recommendations.

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166. New Refugee Status Advisory Committee Guidelines on Refugee Definition and Assessment of Credibility (Feb. 20, 1982), *reprinted in* REFUGE: CANADA'S NEWSLETTER ON REFUGEES, Mar.-Apr. 1982, at 6-7, *cited in* Avery, *supra* note 96, at 266 [hereinafter cited as RSAC Guidelines].

167. *See* Avery, *supra* note 96, at 266 (summarizing RSAC Guidelines 3-14).

168. TASK FORCE REPORT, *supra* note 146, at 44; Stainsby Interview, *supra* note 153, *cited in* Avery, *supra* note 96, at 267.

169. TASK FORCE REPORT, *supra* note 146, at xvi, 44-45.

The Chairman is empowered by regulation to remand any recommendation to the decision-making panel for reconsideration.[170] The refugee is always afforded the benefit of the doubt. Therefore, a positive recommendation is issued in case of an evenly split panel.[171] Recommendations are then forwarded to the Minister or his delegate for ultimate decision.[172] Although the Minister or his delegate may send a claim back to the RSAC, they follow the RSAC recommendation in almost all cases.[173] A positive Convention refugee decision by the Minister will usually entitle the claimant to permanent residence in Canada.[174]

Judicial review of unfavorable decisions is available in the form of redeterminations by the newly created Immigration Appeal Board (IAB). The IAB is a court of record having the power to swear and examine witnesses, take other evidence and issue process.[175] As is true with interview transcripts at the RSAC level, not all negative decisions are entitled to automatic redetermination. The IAB is allowed to consider only applications for which "there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established."[176] If this standard is met, then the IAB allows an oral hearing. This is the first occasion in the entire process that the claimant appears in person before those who decide whether he or she is a refugee.[177] At the request of the Minister or the applicant, the IAB must give reasons for its redetermination.[178]

Two major problems exist with the redetermination process. First, critics allege that the IAB applies a stringent standard of review that denies many potentially valid claims to Convention refugee status. One report states that:

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170. *Id.* at 37.

171. Telephone interview with Kalmen Kaplansky, nongovernmental member of RSAC, Ottawa, Ontario, Can. (Aug. 29, 1982), *cited in* Avery, *supra* note 96, at 265 [hereinafter cited as Kaplansky Interview].

172. *Id.*; *see* Immigration Act (Can.), *supra* note 58, § 45(2), (4).

173. Stern Interview, *supra* note 160, *cited in* Avery, *supra* note 96, at 265-66.

174. Only if, after final inquiry, the Convention refugee falls into one of the inadmissible classes listed in section 55 of the Immigration Act and the Minister consents to removal will the refuee not be allowed to remain. *See supra* note 62 and accompanying text.

175. Immigration Act (Can.), *supra* note 58, §§ 59, 65(1), (2).

176. *Id.* § 71(1).

177. IMMIGRANT'S HANDBOOK, *supra* note 145, at 162.

178. Immigration Act (Can.), *supra* note 58, §§ 65(3), 71(4).

> [t]he standard established by the [IAB] is so high that legitimate refugees are often denied the opportunity to present their case in person before the [IAB]. Because of the attitude which the [IAB] has adopted, both the examination under oath and the sworn declaration in support of the application for a redetermination must be very carefully prepared. . . . The [IAB] takes the view that it can determine whether refugee claimants are telling the truth even before seeing them in person at a hearing. The [IAB] searches for contradictions between the evidence in the declaration under oath and the transcript of the examination under oath.[179]

Second, IAB written opinions, which comprise the substantive law in Canada relating to interpretation of the refugee definition, have been criticized as poorly reasoned and inconsistent. One report claims that "[i]t is difficult to extract from the jurisprudence of the [IAB] any consistent standards of the interpretation and application of the Convention definition."[180] Another report alleges that a survey of the IAB decisions on refugee cases frequently indicates a use of erroneous assumptions when refusing a claim. For example, the IAB may determine that a person able to obtain a passport legally in the country of origin cannot be a *bona fide* Convention refugee.[181] Other flaws in the reasoning of the IAB have resulted from the general unavailability until recently of accurate and up-to-date background country information.[182] As a result of these problems, Canadian case law does not define clearly the precise legal parameters of the Convention refugee definition.

An alien may make very limited appeal from a negative IAB redetermination in the Federal Court of Canada on the basis of errors of law.[183] When the appeal raises a question of public importance, the alien may appeal to the Supreme Court of

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179. IMMIGRANT'S HANDBOOK, *supra* note 145, at 160. For a similar argument, see Concerned Delegation brief, *supra* note 152, at A15, *quoted in* Avery, *supra* note 96, at 268-69.

180. Concerned Delegation Brief, *supra* note 152, at D21, *quoted in* Avery, *supra* note 96, at 269.

181. IMMIGRANT'S HANDBOOK, *supra* note 145, at 161.

182. TASK FORCE REPORT, *supra* note 146, at 73. *See generally* Avery, *supra* note 96, at 269.

183. *See, e.g.*, Darwich v. M.M.I., [1978] 1. F.C. 365, 25 N.R. 462 (C.A.). The Immigration Act does not provide for judicial review of IAB redeterminations. An alien may have review only under the Federal Court Act. Some Canadian legal scholars have questioned whether even this is possible. *See, e.g.*, Wydrzynski, *supra* note 59, at 167 n.72.

Canada.[184]

C. Great Britain

Formal refugee eligibility and decision-making procedures do not exist in Great Britain in either the Immigration Act or the Immigration Rules.[185] Repeated practice of granting or denying Convention refugee status or asylum to a claimant has crystallized into a relatively predictable, though informal, administrative procedure.

Ordinarily, an immigration officer will refuse entry to any alien who fails to persuade the officer of his or her admissibility into British territory.[186] This may occur either because the alien lacks proper entry clearance[187] or is excludable under one or more of the various grounds for exclusion noted in the Rules.[188] Appeal in the first case may be taken only outside the United Kingdom, while in the latter situation the alien may appeal before being returned to the country of origin.[189]

Since 1972, however, the Rules allow officers to waive these grounds for exclusion. The Rules prohibit return of an alien to a country in which he or she fears persecution on grounds of race, religion, nationality, membership of a particular social group, or political opinion.[190] In 1980 Parliament specifically impressed upon immigration officers Great Britain's international treaty obligations with respect to refugees. Parliament provided that "leave to enter will not be refused if removal would be contrary to the provisions of the Convention and Protocol relating to the Status of Refugees."[191] Now, whenever an officer believes that an alien who claims to be a refugee may fall within the Convention

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184. TASK FORCE REPORT, *supra* note 146, at 75.

185. Interview with authority on British refugee status determination system (name withheld by request) (1982), *quoted in* Avery, *supra* note 96, at 319 [hereinafter cited as Interview with authority No. 1 on British System].

186. ASYLUM IN EUROPE, *supra* note 29, ¶ 19, at 367.

187. *Id.* ¶ 14, at 366.

188. These include medical unfitness, prior extraditable offense, inability to return to another country after a stay in the United Kingdom, or exclusion that is "conducive to the public good." *Id.* ¶ 19, at 367; G. GOODWIN-GILL, *supra* note 73, at 116.

189. *See* Immigration Act (G.B.), *supra* note 72, § 17; G. GOODWIN-GILL, *supra* note 73, at 117; ASYLUM IN EUROPE,*supra* note 29 ¶ 26, at 368.

190. *See supra* note 76 and accompanying text.

191. Statement of Changes in Immigration Rules, 1980 H.C. No. 394, ¶ 64.

definition, the officer must refer the alien to the Home Office whether or not he or she actually requests asylum, any other applicable exclusionary ground notwithstanding.[192]

Although the Home Office has sole power to grant Convention refugee recognition and asylum, the Immigration Officer at the border makes the initial decision to refer the alien to the Home Office. The border official has discretion to determine the *prima facie* validity of a refugee or asylum claim. After compulsory consultation with the Chief Immigration Officer or Immigration Inspector, the border official may return an alien if he or she determines that the alien's claim is manifestly unfounded.[193] Recently, the Home Office has ordered that *all* refugee or asylum claims be referred to it, regardless of the merits of the claim. Nevertheless, the principle of mandatory referral is not codified in either British statutes or administrative regulations.[194]

Persons entering Great Britain and those in the country illegally will be returned automatically to their country of origin unless they request asylum and can document a well-founded fear of persecution.[195] Both undocumented aliens requesting asylum at a port of entry and illegal aliens who promptly appear at a police station and request asylum must undergo an interview with an Immigration Officer.[196] Resident aliens requesting refugee recognition or asylum are interviewed directly at the Immigration and Nationality Department of the Home Office. The interviewing officers have no particular expertise in refugee or asylum affairs. Rather, they are government workers who deal with all kinds of immigration matters.[197] The transcript from the interview constitutes the predominant ground for refugee status decisions by the

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192. *Id.*

193. ASYLUM IN EUROPE, *supra* note 29, ¶ at 368; Avery, *supra* note 96, at 320.

194. Telephone interview with Roy McDowall, head of Refugee Unit, Immigration and Nationality Dept., Home Office, London, U.K. (Jan. 6, 1983), *cited in* Avery, *supra* note 96, at 320 [hereinafter cited as Second McDowall Interview]; Interview with authority no. 1 on British System, *supra* note 185, *cited in* Avery, *supra* note 96, at 320.

195. ASYLUM IN EUROPE, *supra* note 96, at 367, ¶ 18.

196. *Id.* ¶¶ 27, 29, at 368.

197. UNHCR Representative in the United Kingdom, Note on the Application of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees in the United Kingdom, ¶ 23 at 6 (1978), *cited in* Avery, *supra* note 96, at 321 [hereinafter cited as UNHCR Note on Convention and Protocol Application in the United Kingdom].

Home Office. The transcript contains the alien's responses to a number of standard questions and then outlines in detail the gravamen of the asylum claim.[198] The alien may not read or correct the transcript, but is normally given an oral opportunity to augment any of his or her responses.[199]

Within the Home Office, the Refugee Unit, composed of twelve civil servants with minimal prior refugee experience, usually makes refugee status determinations without personally interviewing the alien.[200] In addition to the transcript, the decision-making officer has at his or her disposal a collection of human rights information sources from various agencies and from the British Foreign Service.[201] Reliance on Foreign Service information is allegedly responsible for certain political bias in recent decision-making. This bias has resulted in inconsistent determinations for refugees from different countries who are otherwise similarly situated.[202] Additionally, one official has cited the Refugee Unit's screening of all security-risk aliens from entry as the potential cause of a relatively restrictive attitude toward refugee recognition.[203]

The head of the Refugee Unit must review denials of refugee status before handing them down.[204] Because only properly documented aliens may remain in Great Britain to appeal an unfavorable refugee or asylum decision, the vast majority of refugee claimants effectively are precluded from appellate review while

198. Second McDowall Interview, *supra* note 194, *cited in* Avery, *supra* note 96, at 321.

199. *Id.*

200. Telephone interview with Roy McDowall, head of Refugee Unit, Immigration and Nationality Dept., Home Office, London, U.K. (Dec. 9, 1982), *cited in* Avery, *supra* note 96, at 322 [hereinafter cited as First McDowall Interview].

201. *Id.*

202. For example, applicants from Poland, Afghanistan, and Uganda reportedly receive refugee status even if the Convention criteria are not technically met. Until very recently, Iranian applicants, however, were still being deported to Iran, despite bona fide Convention refugee claims. Interview with authority on United Kingdom refugee status determination system (name withheld by request) (1982), *cited in* Avery, *supra* note 96, at 323 [hereinafter cited as Interview with Authority no. 2 on U.K. System].

203. Second McDowall Interview, *supra* note 194, *cited in* Avery, *supra* note 96, at 322; Interview with Authority no. 1 on U.K. System, *supra* note 185, *cited in* Avery, *supra* note 96, at 322.

204. First McDowall Interview, *supra* note 200, *cited in* Avery, *supra* note 96, at 322.

still in Great Britain.[205] Thus, refoulement of denied claimants to countries of persecution is entirely possible. A recent judicial decision allowing persons denied entry to remain in Great Britain and appeal an unfavorable decision when an appeal from abroad would place them at risk has mitigated the potentially drastic effect of such preclusion.[206]

Aliens may appeal to an immigration appeals adjudicator, before whom they may lodge a personal appearance. The adjudicator, usually not an attorney, utilizes information sources similar to those the Refugee Unit uses.[207] A limited right of further appeal to the Immigration Appeals Tribunal is permitted only under certain circumstances and with leave of either the adjudicator or the Tribunal. An alien may also appeal to the Immigration Appeals Tribunal in cases involving an arguable point of law.[208] As with initial appeals to the adjudicator, an alien by judicial decision has leave to appeal to the Tribunal:

> where an adjudicator has dismissed an appeal by a person who is in the United Kingdom, if the authority is satisfied that the country or territory to which he or she is to be removed is one to which he is unwilling to go owing to the fear of being persecuted there for reasons of race, religion, nationality, membership of a particular social group or political opinion.[209]

This provision clearly represents additional protection against refoulement. After exhausting the administrative review process, the alien may seek review on points of law in the court system from the divisional through the superior courts.[210]

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205. Telephone interview with Maureen Connelly, Senior Counselor, United Kingdom Immigrants Advisory Service, Refugee Unit, Home Office, London, U.K. (Aug. 23, 1982), *cited in* Avery, *supra* note 96, at 320 [hereinafter cited as Connelly Interview]. *See generally* G. GOODWIN-GILL, *supra* note 73, at 119.

206. See R. v. Chief Immigration Officer, Gatwick Airport, ex parte Kharrazi, [1980] 1 W.L.R. 1396, discussed *infra* at text accompanying note 369.

207. Telephone interview with Mark Patey, Immigration Appeals Adjudicator, (Dec. 9, 1982) and other staff member (Oct. 22, 1982), Immigration Appeals Office, London, U.K., *cited in* Avery, *supra* note 96, at 324-25 [hereinafter cited as Immigration Appeals Office Interview].

208. Immigration Appeals (Procedure) Rules §§ 14(1), (2)(a), 1972 STAT. INST. No. 1684 [hereinafter cited as Immigration Appeals (Procedure) Rules (G.B.)]; *see also* ASYLUM IN EUROPE, supra *note 29, ¶ 26, at 368.*

209. Immigration Appeals (Procedure) Rules (G.B.), supra *note 74, § 14(2)(b).*

210. UNHCR Note on Refugee Status Procedures, supra note 155, *cited in*

While the largely uncodified administrative system of Great Britain may provide no guarantees against abuse by officials who determine refugee status, the latitude of discretion built into the system can work in the refugee's favor. Persons denied Convention refugee recognition for failure to meet the technical requirements of the definition are frequently granted asylum nonetheless.[211] This status protects the asylee from refoulement but does not necessarily vest him or her with the various substantive rights accorded Convention refugees. Additionally, persons denied both refugee status and asylum occasionally win permission to remain. This permission is purely discretionary on the part of the Home Secretary and is not found in the Immigration Rules. It does not, however, permanently shelter the alien against refoulement.[212]

D. France

When an alien arrives at the French border directly from the country of persecution without travel documentation or with improper documentation, the *Police des Frontières* (Border Police) are compelled, under instructions of the Minister of the Interior, to issue that alien a safe conduct pass to the *Préfecture* (domestic police station) for the locality of his or her intended residence.[213] Indeed, French law explicitly protects any person claiming refugee status from instantaneous rejection at the border without a written decision.[214] In the case of those seeking asylum French law places sole decision-making power in the hands of the Minister of the Interior.[215] Aliens entering illegally also must report immediately to the *Préfecture* to request asylum.[216] The Police will assess the prejudicial impact of the length of any delay in view of the alien's circumstances.[217] For aliens carrying some form of doc-

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Avery, *supra* note 96, at 324.

211. ASYLUM IN EUROPE, *supra* note 29, ¶ 33, at 369.

212. *Id.* ¶ 37, at 369-70.

213. *Id.*, ¶ 24, at 124; UNHCR Rep., Note on Convention and Protocol Application in U.K., *supra* note 197, Annex IV (Circular No. 74-378, from the Minister of the Interior of France to Prefects), at 1-2 (1978), *cited in* Avery, *supra* note 96, at 289.

214. *See* Loi No. 81-973 du 29 octobre 1981, *supra* note 88.

215. *See* Décret No. 82-442 du 27 mai 1982, *supra* note 90.

216. ASYLUM IN EUROPE, *supra* note 29, ¶ 24,at 124. The illegal asylum seeker must present himself or herself without delay to the authorities as mandated by Convention art. 31(1).

217. *Id.* "[I]n no case will a protracted clandestine sojourn be accepted." *Id.*

umentation the procedure is slightly different.[218]

At the *Préfecture*, the examining officers generally issue an asylum seeker some form of temporary residence permit which may bear the notation that the holder has requested asylum.[219] Occasionally, however, the alien is issued a convocation to report for an interview, where he or she may be assisted by both counsel and an interpreter.[220]

Although an alien seeking refugee status who enters unlawfully or without documentation is rarely refused admission at the border or upon prompt appearance at the local *Préfecture*, an alien of this type may be denied admission if (1) he arrives from a third country where he could have requested asylum but failed to and, if returned there, runs no risk of refoulement, or (2) a third country has already granted him asylum.[221]

Upon receiving a temporary residence permit, the alien then applies for Convention refugee status to OFPRA,[222] the governmental entity responsible for the initial determination of both Convention and mandate refugee status.[223] The composition of OFPRA is consistently impressive in terms of expertise and experience in refugee affairs. The Director of OFPRA is appointed by the Minister of Internal Affairs for a three-year tenure and must be a senior official with a minimum of five years experience in charge of an embassy or Consulate General.[224] The Director is as-

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218. Properly documented aliens must report to the *Préfecture* and request refugee recognition before the expiration of their French visitor's visa. Aliens who have already been recognized as refugees in a third country may have already received a French resettlement visa in that country. In that case, the alien must report to the *Préfecture* within eight days to obtain a residence permit valid for one year. The alien will be advised to request a *Certificat de réfugié* from OFPRA. *See infra* text accompanying note 230. If the alien did not receive a resettlement visa before entering France, he or she must explain this failure and the reasons for leaving the country of asylum. *See generally* ASYLUM IN EUROPE, *supra* note 29, ¶¶ 17-21, 23, at 123-24.

219. *Id.* ¶¶ 21, 26, at 124-25.

220. *Id.* ¶ 28, at 125.

221. *Id.* ¶ 31, at 125-26.

222. Office Français de la Protection des Réfugiés et Apatrides.

223. Loi No. 52-893 du 25 juillet 1952, *supra* note 85, art. 2. *See also supra* note 87 and accompanying text. OFPRA is "a public establishment endowed with a legal personality and financial and administrative authority." *Id.* art. 1 (author's translation).

224. UNHCR Note on Convention and Protocol Application in U.K., *supra* note 197, Annex III ¶ 14, at 4 (Procedures for Determination of Refugee Status in Four European Countries), *cited in* Avery, *supra* note 96, at 290.

sisted by an Advisory Council that gives general advice on running the office and determining refugee status. This council is composed of representatives from most of the government ministries.[225] The Director appoints OFPRA officers for renewable, one-year terms. Most of these officers have been attorneys with experience in human rights law and who are reasonably knowledgeable about the Convention criteria for refugee determination. Each officer is responsible for processing only claims from a particular geographical region.[226]

Although OFPRA officers have discretion to recognize immediately the refugee status of aliens whose claims are clearly meritorious, they usually arrange an interview with the alien.[227] The interview both tests the alien's credibility and allows him the opportunity to supplement his submitted documentation orally and thus present a more cogent case. The recommendation of the interviewing OFPRA officer is usually of great weight in the final determination of refugee status. This determination is rendered without discussion or debate. The head of the particular OFPRA geographical division must review the decision, after which the Director reviews it.[228] OFPRA bases its decisions on the alien's application and corroborating documentation, the interview, and outside human rights information because OFPRA has no central data-collecting personnel. Often officers have had to garner their own information from the media and from human rights organizations.[229]

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225. *See* Loi No. 52-893 du 25 juillet 1952, *supra* note 85, art. 3.

226. Telephone interview with OFPRA officer (name withheld by request), Paris, Fr. (Aug. 12, 1982), *cited in* Avery, *supra* note 96, at 290; [hereinafter cited as First OFPRA Officer Interview; telephone interview with OFPRA officer (name withheld by request), Paris, Fr. (Aug. 23, 1982), *cited in* Avery, *supra* note 96, at 290 [hereinafter cited as Second OFPRA Officer Interview]; telephone interview with UNHCR Branch Officer (name withheld by request), Neuilly-Sur-Seine, Fr. (July 15, 1982), *cited in* Avery, *supra* note 96, at 290 [hereinafter cited as First UNHCR Branch Officer Interview].

227. First OFPRA Officer Interview, *supra* note 226, *cited in* Avery, *supra* note 96, at 290.

228. Letter from OFPRA officer (name withheld by request), Paris, Fr. to Christopher L. Avery (Sept. 30, 1982), *cited in* Avery, *supra* note 96, at 291 [hereinafter cited as First OFPRA Letter]; First OFPRA Officer Interview, *supra* note 226, *cited in* Avery, *supra* note 96, at 292.

229. Amnesty International has recently estalbished contact with OFPRA. Telephone interview with Erica Menard, Amnesty International French Section Paris, Fr. (Aug. 1, 1982), *cited in* Avery, *supra* note 96, at 292 [hereinafter cited

A favorable refugee determination entitles the alien to a *Certificat de Réfugié* (Refugee Certificate) that is valid for three years and renewable for five-year periods.[230] As manifested by the tenor of recent French judicial decisions, authorities are inclined to grant refugee status to an alien who, after residing in a third country for a long period of time, has not been recognized there as a refugee or accorded equivalent protection.[231]

In the view of the Ministry of the Interior, refugee recognition is not necessarily synonymous with a right to reside in France.[232] However, the issuance of the *Certificat* almost always results in the grant of both a permanent residence permit and asylum.[233] In the exceptional cases in which, for example, a recognized Convention refugee is not granted asylum because of certain confidential information in the hands of the authorities, the refugee will be given time to find another country of asylum.[234]

Both a negative decision from OFPRA and a failure by OFPRA to notify the alien for four months authorize the alien to appeal to the *Commission des Recours* (Commission of Appeals).[235] The *Commission* consists of a representative from OFPRA, UNHCR, and the *Conseil d'Etat* (Council of State), with the representative from the latter serving as chairperson. This appeal must be taken within one month. Review at the *Commission* level is painstaking and meticulous. The *Commission* first examines newly adduced evidence and OFPRA's comments on the alien's appellate statement. A government officer then makes a summary presentation of the case concluding with his or her recommendation for disposition. The alien may address the *Commission* at this point, and OFPRA may rebut.[236] If the alien is unsuccessful, he or she can

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as Menard Interview]; First OFPRA Officer Interview, *supra* note 225, *cited in* Avery, *supra* note 96, at 292.

230. ASYLUM IN EUROPE, *supra* note 29, ¶ 42, at 127.

231. *See, e.g.*, Judgment of Jan. 16, 1981, Conseil d'Etat statuant au contentieux, France. Decision No. 20527. *See also* ASYLUM IN EUROPE, *supra* note 29, ¶ 43, at 127-28.

232. Melander, *Refugee Recognition*, *supra* note 7, at 169.

233. *Id.*; ASYLUM IN EUROPE, *supra* note 29, ¶ 44, at 128.

234. ASYLUM IN EUROPE, *supra* note 29, ¶ 79, at 133. Ministerial instructions forbid the denial of asylum because of the labor situation, the alien's lack of skills or the threat to public health. *Id.*

235. *Id.* ¶ 45, at 128.

236. First OFPRA Officer Letter, *supra* note 228, *cited in* Avery, *supra* note 96, at 293; telephone interview with officer of the *Commission des Recours* (name withheld by request), Paris, Fr. (Sept. 17, 1982), *cited in* Avery, *supra*

appeal to the *Conseil d'Etat statuant au contentieux* (Council of State as Supreme Administrative Court) within two months.[237]

In international law the term refoulement broadly refers to the return of a refugee to a state in which the refugee fears persecution. In French law, however, the term exclusively contemplates rejection at the border, with "expulsion" being the blanket reference to return of a refugee at any other time.[238] In French administrative practice, an alien claiming refugee status may be neither rejected nor expelled to the country of persecution, even if his or her claim is denied.[239] The Minister of the Interior may expel a Convention refugee to a third country, however, when the refugee's presence in France seriously threatens public order.[240]

In compliance with the mandate of article 32 of the Convention that expulsion of refugees, if undertaken at all, must be in accordance with due process of law, France affords refugees threatened with expulsion a plethora of procedural safeguards. The refugee receives notice in the form of a summons fifteen days in advance of the proposed expulsion and has a right to a public hearing by a consultative commission comprised of judges and senior officials.[241] In the event of an expulsion decision, the refugee again has the right to appeal to the *Conseil d'Etat statuant au contentieux*.[242] In addition, the refugee may attack the decision as *ultra vires* in the *Tribunal Administratif* (Administrative Tribunal).[243] These formal guarantees may be suspended only in case of dire urgency when immediate expulsion is absolutely necessary for the security of the state or the public. Even then, however, the refugee has recourse to the *Tribunal Administratif* to contest the propriety of the decision.[244]

On a comparative level, France has one of the most detailed and formal refugee eligibility procedures in the world. The refu-

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note 96, at 293 [hereinafter cited as *Commission* Officer Interview]; Goodwin-Gill, *Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees*, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 291, 311 (1982).

237. ASYLUM IN EUROPE, *supra* note 29, ¶ 58, at 130.
238. *Id.* ¶ 55, at 129-30.
239. *Id.* ¶ 56, at 130.
240. *Id.* ¶ 57, at 130.
241. *Id.*; Loi No. 81-973 du 29 octobre 1981, *supra* note 88, art. 5.
242. ASYLUM IN EUROPE, *supra* note 29, ¶ 58, at 130.
243. *Id.* ¶ 59, at 130.
244. *Id.* ¶ 60, at 130.

gee determination is closely related to the grant of asylum, but the correlation between the two is not perfect. While some refugees are not granted permanent asylum for the reasons mentioned above, other refugees who do not meet the Convention refugee or even UNHCR mandate[245] criteria are granted permanent asylum.[246] The asylum decision in France is not irrevocable and is reviewable for reasons other than the cessation of refugee status as defined in article I(C) of the Convention.[247]

E. Italy

Italy's restricted territorial application of the Convention refugee definition results in rather disparate treatment of Europeans and non-Europeans seeking refugee status and asylum. Although Italy is not bound under the Convention to grant refugee status to non-Europeans and thus, may deny them entry, the Italian Government acknowledges and adheres to the doctrine of nonrefoulement as a general principle of customary international law.[248] Thus while non-Europeans seeking to enter the country legally as refugees are rarely granted that status,[249] they are infrequently returned at the border to the country of persecution.[250] Even non-Europeans illegally in Italy who are seeking refugee status are not, as a matter of administrative practice, returned to a country of persecution, though they do face expulsion to the borders of a neighboring European country or to their country of first haven en route to Italy.[251] Legal non-European refugees are allowed to remain temporarily in Italy and are referred to the UNHCR representative in Rome where they may qualify for mandate refugee recognition. Non-European mandate refugees are ul-

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245. For a discussion of refugees falling within the mandate of the UNHCR, see *supra* note 100 and accompanying text.

246. These persons are classsified as *bénéficiares d'asile* or *asiles*. They represent an insignificant number of France's refugees today. *See* ASYLUM IN EUROPE, *supra* note 29, ¶¶ 13, 75.

247. Melander, *Refugee Recognition*, *supra* note 7, at 173.

248. ASYLUM IN EUROPE, *supra* note 29, ¶ 15, at 218. Article X(1) of the Italian Constitution states that "Italy's legal system conforms with the generally recognized principles of international law." CONST. art. X(1) (Italy), *reprinted in* 7 A. BLAUSTEIN & G. FLANZ, *supra* note 83, at 3.

249. Only two non-European groups have been accorded large-scale refugee status. *See infra* text accompanying note 338.

250. ASYLUM IN EUROPE, *supra* note 29, ¶¶ 10, 15, 18, at 218-19.

251. *Id.* ¶ 18, at 219.

timately resettled in a third country.

Refugees from Eastern Europe are prime candidates for Convention refugee status in Italy. Upon requesting asylum at the border, the refugee without documentation is sent immediately to the refugee Reception Center in Latina until officials process and reach a decision on the asylum claim.[252] Long-standing Italian practice dictates that European refugees requesting asylum at the border, even those without documentation, will not to be returned to countries in which they would face persecution, unless the Minister of the Interior approves.[253] The Minister normally will mandate procedural safeguards. The refugee usually prepares his asylum request at the Reception Center.

Asylum seekers who enter with valid travel documents or who have been lawfully present in Italy for more than six months need not report to the Center. These groups apply for asylum at the *Questura* (alien police).[254] The alien is interviewed there by a police officer in the presence of an interpreter. The officer completes a police report in the form of a questionnaire that the alien reads and signs. The questionnaire includes the refugee's reasons for fleeing the home country.[255] Then the entering asylum seekers are sent to Latina; applicants already residing in Italy are not.

The *Commissione Paritetica di Eligibilita* (Joint Eligibility Commission) is the administrative organ charged with the determination of Convention Refugee Status. The three-member *Commissione* is composed of the UNHCR representative in Italy and a high-ranking official from both the Ministry of Foreign Affairs and the Ministry of the Interior.[256]

The *Commissione* sits in Latina to hear the asylum requests of those detained at the Reception Center. It grants each applicant an interview. The decision about whether the alien qualifies as a Convention refugee is made on the basis of the asylum request and the applicant's interview responses. These responses may

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252. An alien may stay outside the center, however, if he or she can afford to or is supported by voluntary agencies. *Id.* ¶ 30, at 221.

253. *Id.* ¶ 14, at 218.

254. *Id.* ¶ 12, at 218.

255. Interview with authority on Italian refugee status determination system (name withheld by request) (1982), *cited in* Avery, *supra* note 96, at 301 [hereinafter cited as Interview with authority no. 1 on Italian System].

256. *Id.*; *but see* ASYLUM IN EUROPE, *supra* note 29, ¶ 20, at 219 (suggesting that the *Commissione* is composed of four members, two of which are from the UNHCR).

confirm, correct, or extend the alien's previous written statements.[257] The *Commissione* sitting in Rome reviews applications of refugee claimants already residing in Italy and reaches its determinations primarily on the basis of the statements contained in the police report.[258] The *Commissione* grants interviews only when it deems them necessary.[259] The *Commissione's* sources of information regarding political conditions in an applicant's home country are extremely limited. Aside from the asylum request or police report that the alien submits, *Commissione* members must generally rely on their own outside knowledge.[260]

Italian administrative procedure does not include a formal right to appeal a denial of refugee status or asylum.[261] Nevertheless, the *Commissione* reserves the right to review its decision in light of newly adduced evidence.[262] Aliens granted refugee status are entitled to a Convention Travel Document,[263] while those denied that status are issued an Italian alien's passport.[264] No quotas or numerical limits on refugee admission exist in Italian law.[265]

V. COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

A. Interpretation of the Convention Definition of Refugee

The administrative interpretation and application of the Convention definition of refugee in the United States has been traditionally subject to both subtle and not so subtle political distortion. The intimate involvement of the policy-making wing of the State Department in the INS refugee and asylum determination

257. ASYLUM IN EUROPE, *supra* note 29, ¶ 22, at 219.

258. *Id.*

259. Letter from UNHCR Branch Office in Rome, Italy to Christopher Avery (Dec. 20, 1982), *cited in* Avery, *supra* note 96, at 300 [hereinafter cited as UNHCR Italian Branch Office Letter].

260. Members' personal information sources may include publications of the UNHCR and the Association for the Study of the World Refugee Problem and, in certain cases, information from the Italian police. Interview with authority no. 1 on Italian System, *supra* note 255, *cited in* Avery, *supra* note 96, at 301.

261. UNHCR Note on Refugee Status Procedures, *supra* note 156, ¶ 77, at 11, *cited in* Avery, *supra* note 96, at 301; ASYLUM IN EUROPE, *supra* note 29, ¶ 25, at 220.

262. UNHCR Note on Refugee Status Procedures, *supra* note 156, ¶ 77, at 11, *cited in* Avery, *supra* note 96, at 301.

263. ASYLUM IN EUROPE, *supra* note 29, (24,P) at 220.

264. *Id.*

265. *Id.* ¶ 29, at 220.

process causes this distortion. The extent of the State Department's involvement is unique among Western countries and the overall result has been the infiltration of geopolitical considerations into what is, essentially, a humanitarian act. Therefore, refugee claimants from Communist dominated countries have a much easier time attaining Convention refugee status and asylum than those from non-Communist countries.[266] The role of the UNHCR, which congressional reports have frequently suggested should be augmented, is almost negligible in the formulation of State Department advisory opinions.[267]

Trends in United States case law subsequent to the enactment of the Refugee Act of 1980 have not heralded much hope for change. The legislative history of the Act recognizes that the refugee definition in section 201(a) is new in United States law and that it "is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol."[268] Although the Protocol had technically become a part of the supreme law of the land with the United States accession and Senate ratification in 1968, most courts and the BIA refused to acknowledge that the treaty took precedence over or had any impact on United States domestic refugee law.[269] Prior to acces-

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266. Consider, for example, the plight of Salvadorans and Haitians. Although the number of grants of asylum to Salvadorans has increased steadily, only 627 Salvadorans were granted political asylum out of a total of nearly 21,000 applications received in fiscal years 1981 through 1984. Haitians have fared even worse. Out of 3,332 applications filed during the same time period, only 39 Haitians have received asylum. The majority of these applications have not yet been acted upon. A relatively small number have been withdrawn or otherwise closed. By contrast, refugees from the USSR are granted asylum at a rate of over 50% and refugee status at a rate of over 90%. Asylum figures for refugees from most Eastern European countries are comparable with over 70% receiving refugee status. These figures are taken from official statistics of the INS, Department of Justice. For a pre-1980 Refugee Act discussion of ethnic and ideological discrimination in United States refugee policy, see Hanson, *supra* note 123.

267. *See, e.g.*, HAITIAN EMIGRATION, *supra* note 106, at 13 ("[b]ecause of the UNHCR's experience in determining whether persons are 'political refugees' within the meaning of the U.N. Convention and Protocol Relating to the Status of Refugees, the Department of State should consult the UNHCR prior to rendering any advisory opinions to INS on a particular case.").

268. H.R. CONF. REP. No. 781, 96th Cong., 2d Sess. 20, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 160, 161.

269. *See, e.g.*, Pierre v. United States, 457 F.2d 1281 (5th Cir. 1977); *see also* Frank, *Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States*, 11 INT'L LAW. 291 (1977) (accession to the Protocol has not

sion, most United States courts held that an alien unlawfully in this country had to prove a clear probability of persecution to escape deportation and refoulement.[270] In practice, this meant that the alien had to prove that it was more likely than not that he or she would be singled out for persecution if returned to his or her home country. Aliens seeking entry at the border from either a Communist country or the Middle East had to show only "good reason" for a fear of persecution.[271] After United States accession to the Protocol, most United States decisions continued to reconcile the Protocol's seemingly more lenient well-founded fear of persecution test with the more rigorous clear probability standard.[272]

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substantially affected United States law on refugees). The Fifth Circuit's decision in Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977), is unique in this area. While reversing and remanding for reconsideration the deportation of a Haitian refugee claimant, the court declined to suggest that the Protocol "profoundly alters American refugee law." *Id.* at 997. Instead, it stated that the Attorney General's broad grant of discretion in pre-1980 section 243(b) "must now be measured in light of the United Nations Protocol Relating to the Status of Refugees. . . ." *Id.* at 996. The court noted its belief that "our adherence to the Protocol reflects or even augments the seriousness of this country's commitment to humanitarian concerns, even in this stern field of law." *Id.* at 997.

270. *See, e.g.*, Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); Lena v. INS, 379 F.2d 536 (7th Cir. 1976); *In re Joseph* 13 I. & N. Dec. 70 (B.I.A. 1968).

271. *See, e.g., In re Ugricic*, 14 I. & N. Dec. 384 (Dist. Dir. 1972); *In re Adamska*, 12 I. & N. Dec. 201 (Reg. Commissioner 1967). This double standard arose from differing constructions of two separate provisions of the pre-1980 statute: sections 203(a)(7) and 243(h). *See* 8 U.S.C. §§ 1153(a)(7), 1253(h) (1982).

272. For example, the BIA in *In re Dunar*, 14 I. & N. Dec. 310 (B.I.A. 1973), based its decision that the Protocol did not modify the clear probability test on the canon of construction disfavoring repeals by implication unless the treaty is absolutely inconsistent with prior legislation and the earlier statute cannot be enforced without derogating from the later treaty. *Id.* at 313 (*citing* Cook v. U.S., 288 U.S. 102, 118 (1933) and Johnson v. Browne, 205 U.S. 309, 321 (1907)).

In Kashani v. INS, 547 F.2d 376 (7th Cir. 1977), the Seventh Circuit held that an alien claiming withholding of deportation and asylum must meet the standard of proof under the Protocol that pre-1980 section 243(h) required: a clear probability of persecution. The court noted that "the well-founded fear standard contained in the Protocol and the 'clear probability' standard which this Court has engrafted onto section 243(h) will in practice converge." *Id.* at 379. The court explained with circular reasoning that any difference in application between the Protocol, which contains no grant of discretion, and the withholding of deportation provision, which expressly grants the Attorney General broad discretion to withhold deportation, "has been effectively removed by the Attorney

A potential turning point in judicial interpretation of the Convention refugee definition occurred in 1982, when the United States Court of Appeals for the Second Circuit held in *Stevic v. Sava*[273] that passage of the Refugee Act mandated a lowering of the refugee claimant's burden of proof of persecution. The case involved the marriage of a Yugoslav visitor to a United States citizen who was killed five days later. After deportation proceedings had been initiated, Stevic claimed asylum and withholding of deportation on the basis of his purported membership in an emigre anti-Communist group. Although Stevic had presented evidence of the Yugoslav Government's hostility toward other members of his group, including his father-in-law, upon their return to Yugoslavia, the BIA dismissed his asylum claim on the ground that he had not presented any evidence indicating that he would be singled out for persecution. Noting the Act's new refugee definition, its creation of a uniform legal test for refugees, and the removal of the Attorney General's discretion to authorize withholding of deportation if the alien meets the refugee definition, all of which derive directly from the Protocol, the court explained:

> We believe . . . that the Refugee Act of 1980 calls upon courts, in construing the Act, to make an independent judgment as to the meaning of the Protocol. Both the text and the history of that document strongly suggest that asylum may be granted and, . . . deportation must be withheld, *upon a showing far short of a "clear probability"* that an individual will be singled out for persecution.[274]

The court, however, declined to elaborate on the new test, stating simply that it must emphasize "the fear of the applicant as well as the reasonableness of that fear" and courts must look to legislative intent, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* and experience in applying the standard to specific cases.[275] In the next several years United States courts began increasingly to follow the Second Circuit's lead in *Stevic* and apply the more subjective well-founded fear of persecution standard to claims by aliens for withholding of depor-

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General's policy of always withholding deportation when a clear probability of persecution is shown." *Id.* The net effect was the Seventh Circuit's reverse incorporation of the United States domestic standard into Protocol article I.

273. 678 F.2d 401 (2d Cir. 1982).

274. *Id.* at 409 (emphasis added).

275. *Id.*

tation and asylum.[276]

The liberalizing effect of the *Stevic* decision upon United States interpretation of the Convention refugee definition proved to be short-lived. In June 1984 a unanimous United States Supreme Court reversed the Second Circuit and decided in *INS v. Stevic*[277] that, even after the enactment of the Refugee Act of 1980, an alien must show a "clear probability," rather than merely a "well-founded fear," of persecution to qualify for mandatory withholding of deportation under section 243(h) of the INA. After analyzing the text of the provision and the structure and the legislative history of the Act, the Court concluded that although Congress, by amending the United States statutory definition of "refugee," intended to lower the standard of proof required of aliens seeking *admission* as refugees to a well-founded fear of persecution, it did not intend that every alien who qualifies as a refugee under the Protocol and the amended United States statutory definition also be entitled to the mandatory withholding of deportation remedy. To support this conclusion, the Court cited numerous congressional statements that United States accession to the Protocol would not entail large scale modification to the existing United States statutory scheme because both the President and the Senate believed that the Protocol was largely consistent with existing law.[278] According to the Court, the persistent refusal of numerous courts of appeals to apply a lesser standard of proof in refugee and asylum cases from 1968 through 1980 supports its finding that accession to the Protocol was not intended to effect major changes in United States law.[279] Consequently, the Court did not view the Refugee Act as necessary to conform United States domestic law with Protocol mandates but merely as intended to "revise and regularize the procedures governing the admission of refugees into the United States."[280]

Although the Court may be technically correct in its textual and legislative history analysis and in its conclusion that Congress intended different standards of proof to apply to refugee claim-

276. *See, e.g.*, Minwalla v. INS, 706 F.2d 831 (8th Cir. 1981); Reyes v. INS, 693 F.2d 597 (6th Cir. 1982). The Third Circuit, however, expressly rejected the new test. *See* Marroquin-Manriquez v. INS, 699 F.2d 129 (3d Cir. 1983); Rejaie v. INS, 691 F.2d 139 (3d Cir. 1982).

277. 104 S. Ct. 2489 (1984).

278. *Id.* at 2494-95.

279. *Id.* at 2495-96.

280. *Id.* at 2498.

ants seeking admission, which under United States law is discretionary, and those seeking withholding of deportation, which is now mandatory, it overlooks the United States failure to comply entirely with its obligations under the Protocol. The Court pointedly states:

> Section 203(e) of the Refugee Act of 1980 amended the language of § 243(h), *basically conforming it to the language of Art. 33 of the United Nations Protocol.* The amendment made three changes in the text of § 243(h), but none of these three changes expressly governs the standard of proof an applicant must satisfy or implicitly changes that standard. *The amended § 243(h), like Art. 33, makes no mention of a probability of persecution or a well-founded fear of persecution.* In short, the text of the statute simply does not specify how great a possibility of persecution must exist to qualify the alien for withholding of deportation. To the extent such a standard can be inferred from the bare language of the provision, it appears that a likelihood of persecution is required.[281]

While the Court correctly points out that the text of the statute does not specify the quantum of proof of persecution an alien must show to be entitled automatically to withholding of deportation, it is mistaken in stating that article 33 of the Convention also fails to specify the relevant degree of proof. Article 33 forbids any signatory from refoulement of *refugees*, defined therein as those persons manifesting a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a social group. Thus, despite the Court's rather offhand assertion to the contrary, article 33 *does*, by reference to "refugee," incorporate the well-founded fear standard in its ban on return of refugees.

Although the Court admits that the 1980 amendment "basically conform[ed] [the withholding provision] to the language of Art. 33 of the United Nations Protocol," the net effect of its decision in *Stevic* is to perpetuate an unusual dichotomy that is unique to United States refugee law. According to the Court's interpretation of United States refugee law, aliens seeking admission as refugees at the border must show only a well-founded fear of persecution, while those already in this country requesting asylum and the withholding of deportation must prove that, on the basis of objective evidence and more likely than not, they will be singled

281. *Id.* at 2496-97 (emphasis added) (footnotes omitted).

out for persecution in their home country. This result, even if it correctly effectuates the intent of Congress, runs counter to both the letter and the spirit of articles 1 and 33 of the Convention.

Like the refugee status decision-making entities in Canada and Great Britain, some United States courts have concluded that severe economic deprivation may constitute persecution and thus, form the basis for a refugee claim. An early case, *Dunat v. Hurney*,[282] held that an earlier version of the United States statute that authorized asylum on the basis of a fear of physical persecution[283] encompassed economic sanctions that deprived a person of all means of earning a living. The court refused to repatriate a Yugoslav claimant who showed that he would be barred from employment because of the practice of his Roman Catholic faith. According to the court, the "denial of an opportunity to earn a livelihood in a country . . . is the equivalent of a sentence to death by means of slow starvation and nonetheless final because it is gradual."[284] The Ninth Circuit declared that the "deliberate imposition of substantial economic disadvantage upon an alien" would suffice to sustain an asylum claim.[285]

Judging from the United States treatment of Haitian and Salvadoran refugee claimants,[286] these early judicial pronouncements on economic persecution have gone largely unheeded in recent years. The once broad construction of the term "persecution," clearly in line with the humanitarian spirit of the Protocol and Refugee Act of 1980, has seemed to wither in the face of conflicting foreign policy goals and adverse public opinion.[287]

A distinctive feature of refugee definition interpretation in the United States is that United States law always places the burden of showing a clear probability or well-founded fear of persecution

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282. 297 F.2d 744 (3d Cir. 1961).

283. Immigration and Nationality Act of 1952 § 243(h), 8 U.S.C. § 1253(h), *repealed by* Act of Oct. 3, 1965, § 11(f), 79 Stat. 911 (currently codified as amended by Refugee Act of 1980, 8 U.S.C. § 1253(h)).

284. 297 F.2d at 746; *see also* Soric v. Flass, 303 F.2d 298 (7th Cir. 1962).

285. Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969); *see also* Minwalla v. INS, 706 F.2d 831, 835 (8th Cir. 1983); Berdo v. INS, 432 F.2d 824, 847 (6th Cir. 1970).

286. *See supra* note 266 and accompanying text.

287. For a recent treatment of the myriad domestic factors affecting United States refugee policy, see Teitelbaum, *Right Versus Right: Immigration and Refugee Policy in the United States*, 59 FOREIGN AFF. 21 (1980).

upon the alien.[288] Nothing in the law or practice of other Western asylum-granting countries precludes the use of rebuttable presumptions that an alien's fear of persecution is well-founded if certain human rights violations are endemic to a particular country.[289] Indeed, the *UNHCR Handbook* actually contemplates the use of presumptive assessments of Convention refugee status.[290]

Administrative flaws also distort the accuracy of Convention refugee assessment in the United States. A major problem is the "enforcement mentality" of many INS officials and the resulting widespread criticism of their handling of asylum claims.[291] Additionally, the INS officers' and Immigration Judges' relative lack of expertise or knowledge concerning refugee and human rights matters and the virtually total avoidance of any information sources except State Department advisory opinions prevent refugee status decisions which comport with both reality and humanitarian goals. Despite the general competence of the BIA's members, this initial review body does not always provide an effective check on errors below because of its vulnerability to executive intervention by Justice Department officials.[292] Although BHRHA asylum officers rely heavily on State Department advisory opinions, they are given no standardized guidelines on the application of the Convention refugee definition to particular claims.[293]

Although the United States traditionally has been the most generous refugee receiving country in the world,[294] its interpreta-

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288. *See, e.g.*, 8 C.F.R. § 208.5 (1985) (asylum applications); McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981) (request for withholding of deportation); Reyes v. INS, 693 F.2d 597 (6th Cir. 1982) (request for withholding of deportation).

289. Scanlan, *Regulating Refugee Flow*, *supra* note 106, at 628.

290. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 44, at 13 (1979) [hereinafter UNHCR HANDBOOK].

291. One legal writer has stated that the INS is "highly responsive to domestic economic pressures" and has characterized it as a "bastion of restrictionism." Hanson, *supra* note 123, at 136.

292. *See supra* note 137 and accompanying text.

293. *See supra* note 121 and accompanying text.

294. In fiscal year 1984, for example, the United States accorded refugee status to 73,932 persons. For fiscal year 1983 the figure was 73,651. Since at least 1980, the annual refugee approval rate has been well over 60,000. Figures taken from official statistics of the INS, Department of Justice. UNITED STATES DEPARTMENT OF JUSTICE, INS 1983 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 74 (1983); Bland Interview, *supra* note 118.

tion of the Convention refugee definition has been inconsistent with and has often fallen short of its international legal obligations. Even though the United States ostensibly enacted the Refugee Act of 1980 to render its refugee law more consonant with the mandates of the Protocol, the subsequent Supreme Court response of refusing to lower the refugee claimant's burden of proof of persecution in withholding cases enhances the overwhelming effect of political entanglements in United States refugee decision-making.

Canadian case law on the interpretation of the Convention refugee definition consists almost exclusively of IAB opinions. These opinions traditionally have been remiss in clearly elucidating consistent guidelines for evenhanded application of the refugee definition. The IAB has on occasion made clear that international jurisprudence requires the Convention definition "to be applied strictly."[295]

The IAB has been consistent in its construction of the phrase "well-founded fear." The IAB has uniformly held that the term contains both subjective and objective components. According to the IAB a refugee claimant's fear of persecution is well-founded if it is reasonable under the circumstances surrounding the claim.[296] This construction of the term resembles that employed by courts and decision makers in many other Western countries and is in apparent accordance with the criteria set forth in the *UNHCR Handbook*.[297]

In the opinion of the IAB, the precise meaning of the term "persecution," however, is difficult to ascertain. In *Severe v. Minister of Manpower and Immigration (M.M.I.)*,[298] a case involving a refugee claimant who was a member of a socialist theater group in Haiti, the IAB explained that "mere apprehension about possible future hardships and maltreatment is not sufficient" to consti-

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295. M.M.I. v. Diaz-Fuentes, [1974] 9 I.A.C. 323, 329. *See also* Severe v. M.M.I., [1975] 9 I.A.C. 42.

296. *See Diaz-Fuentes*, [1974] 9 I.A.C. at 329 (IAB held that these words "are subject to an objective assessment. . . ."); *see also* Mingot v. M.M.I., [1975] 8 I.A.C. 351, 356 ("[F]ear, even well-founded or reasonable fear, is a subjective feeling within the person who experiences it. Its compelling and constraining power can vary in intensity from one person to another and should be evaluated in the light of the particular circumstances of each case. However, this assessment must be made objectively by the court. . . .").

297. UNHCR HANDBOOK, *supra* note 290, at 11-14.

298. *See Severe*, [1975] 9 I.A.C. 42.

tute persecution within the meaning of the Convention.[299] The IAB also made the harsh pronouncement that "this concept is always associated with the ideal of constant infliction of some mental or physical cruelty."[300] As a result, despite adducing evidence that leaders of the theater group had been brutalized repeatedly and arrested by police, and that the claimant had been forced to go into hiding for several years in order to escape arrest, the IAB denied the claimant Convention refugee status. By contrast, a Yugoslav refugee claimant who was sought by police because of his illegal membership in a Croatian anti-Communist cultural and political association was granted Convention refugee status.[301] This case and *Severe*, are hard to reconcile because of their factual similarity.

The IAB denied refugee status to another Haitian in *Mingot v. M.M.I.*[302] The applicant was a shopkeeper who supplied uniforms to the police and, as the evidence showed, was persistently tormented by them. The IAB's view was that "[t]he apprehension or calculation of the hardships which may be the lot of an entire group . . . and the reasonable desire to improve one's condition in life, either psychologically, socially or morally, are not sufficient justification for the Court to exercise its discretionary powers."[303]

The explanation for this inconsistency may lie not in the realm of legal distinctions or statutory construction, but in the ideological biases of the IAB. Although not as obviously subject to political manipulation as the INS in the United States, the IAB does appear to engage in subtle forms of ethnic discrimination by generally responding more favorably to claims from non-Western applicants. In the words of one commentator:

> The Board appears to be sympathetic toward East European anti-Communists, perhaps because these claimants have accepted Western ideology, perhaps because of the Board's understanding of the conditions of life in these countries . . . . Countries with anti-Communist leanings and major participants in the multi-national capitalist economic systems seem incapable of producing refugees under the present Canadian interpretation of the Convention

299. *Id.* at 46-47.
300. *Id.* at 47.
301. Bilic v. M.M.I., [1974] 10 I.A.C. 413.
302. [1975] 8 I.A.C. 351.
303. *Id.* at 367.

definition.[304]

IAB decisions reveal that economic deprivation may, under certain circumstances, constitute persecution and, thus, entitle the alien to Convention refugee status. Despite the IAB's categorical exclusion in *Severe* of "difficult economic conditions" from the ambit of persecution, recent cases have held that "the systematic blocking of jobs may constitute a form of harassment equivalent to persecution."[305] Economic proscription must be systematic; sporadic or occasional discrimination will not suffice.[306] Economic persecution does not encompass mere discrimination in hiring[307] or forced submission to unpleasant or discriminatory working conditions.[308] Moreover, a recent Canadian governmental study noted that a well-founded fear of persecution may relate to economic considerations in the Immigration Act's definition of Convention refugee.[309]

With respect to the Convention definition's grounds for persecution, the narrow construction that IAB opinions have accorded the term "social group" has effectively eliminated the term's use as an independent ground for finding persecution. According to Canadian case law a "social group" must (1) voice political opinions, be a persecuted religious sect or a racial minority,[310] and (2) be persecuted directly by governmental authorities.[311] An alien meeting these requirements could claim Convention refugee protection from persecution alternatively on grounds of race, religion, or political opinion.[312]

Until recently, the IAB had read into the Convention definition

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304. Wydrzynski, *supra* note 59, at 175-76; *see also* Howard, *supra* note 151, at 367. *But see* Avery, *supra* note 96, at 271 (suggesting that the Canadian system is generally not criticized for ideological discrimination).

305. Jose Sebastian Cartes Soto v. M.M.I., 2.13 C.L.I.C. Notes of IAB Decisions (Immigration Appeal Board, Apr. 28, 1978), *quoted in* Hathaway & Schelew, *Persecution by Economic Proscription: A New Refugee Dilemma* 28 CHITTY'S L.J. 190, 191 (1980).

306. *See, e.g., Zolaikha Ramprashad,* 6.17 C.L.I.C. Notes of IAB Decisions (Immigration Appeal Board, Apr. 2, 1979), *quoted in* Hathaway & Schelew, *supra* note 305, at 191 n.13.

307. *Id.*

308. *See, e.g., Mingot,* [1975] 8 I.A.C. 351.

309. TASK FORCE REPORT, *supra* note 146, at xi.

310. Belfond v. M.M.I., [1975] 10 I.A.C. 208, 222.

311. Thomas v. M.M.I., [1974] 10 I.A.C. 44.

312. *See* Wydrzynski, *supra* note 59, at 180.

the requirement, similar to that of United States refugee law, that an alien's firm resettlement in a third country prior to arrival in Canada would be fatal to his or her claim for Convention refugee status.[313] In assessing these claims, the IAB focused on the alien's relationship with the country of former residence rather than with the country from which the alien had originally fled. The Canadian Federal Court of Appeals reversed this trend in *Hurt v. M.M.I.*[314] The court declared that the proper inquiry in assessing Convention refugee claims was the applicant's relationship with the country which had prompted the original emigration. The claimant's relationship with the country of temporary residence was relevant as one of many factors considered in the evaluation of a refugee claim.

The RSAC's exclusive reliance on the interview transcript is the most glaring and most widely criticized administrative defect in Canada's determination of refugee claims. RSAC's failure to interview refugee applicants has a potentially restrictive effect on Convention definition interpretation. Both the absence of comment by the interviewing officer about the alien's credibility at the interview and the inability of the decision makers to assess the alien's demeanor have lead to widespread conjecture about the merits of the refugee's claim. In short, a transcript does not reflect "the history and motives of an applicant."[315] This problem is compounded by the examining officers' lack of knowledge of human rights and, more importantly, by the RSAC members' lack of "familiar[ity] with the Convention refugee definition . . . [and] the applicable legal principles."[316] The screening processes at the RSAC level and then at the IAB level increase the chances that a bona fide Convention refugee will be denied a hearing on his or her claim summarily.

Despite its flaws, the Canadian system has much to recommend it. In recent years the Canadian Government has implemented various experimental improvement and training programs to upgrade refugee decision-making and to increase the active role of

313. *See, e.g.*, Harmaty v. M.M.I., [1976] 11 I.A.C. 202; Haidekker v. M.M.I., [1977] 11 I.A.C. 442; Kovar v. M.M.I., [1973] 8 I.A.C. 226. *See generally*, Wydrzynski, *supra* note 59, at 170-73.

314. [1978] 2. F.C. 340 (C.A.).

315. TASK FORCE REPORT, *supra* note 146, at 126 (Appendix E: Submission by the UNHCR Branch Office, Canada, to the Task Force on Immigration Practices and Procedures).

316. *Id.* at 127.

the UNHCR representative in the refugee status determination process. Additionally, the 1982 RSAC Guidelines on Refugee Definition and Assessment of Credibility will provide much needed guidance to RSAC members in applying the Convention refugee criteria to a claim. The Guidelines may also work both to standardize the inconsistencies in the IAB's reasoning and to broaden the IAB's application of the Convention refugee definition by expressly overruling certain of its restrictive holdings.

Regardless of the restrictiveness with which the Convention refugee definition is interpreted in Canada,[317] section 6(2) of the Immigration Act of 1976 provides for the admission on humanitarian grounds of displaced or persecuted aliens not technically meeting the Convention criteria. Moreover, although the government sets annual quotas on refugee admissions, Canadian refugee practice allows many other groups whose members may not qualify as Convention refugees to receive refugee status. Canada has admitted substantial numbers of refugees in this manner.[318] This

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317. Between 20% and 35% of RSAC recommendations in recent years have been positive (1980: 263 of 1003 applications; 1981: 407 of 2080; 1982: 582 of 2851; 1983: 1003 of 2677; 1984: 1128 of 3541). Figures taken from Minister of Employment and Immigration, Government of Canada, *Refugee Perspectives: 1985-86* (1985); telephone interview with Brian Coleman, Librarian, RSAC, Hull, Quebec, Can. (Aug. 23, 1985).

318. Since 1979 the Canadian Government has established an annual refugee quota of approximately 10,000-12,000 planned admissions per year, with particular sub-quotas for selected broad geographic areas. In 1984 for example, the quota was set at 12,000 refugees and was divided as follows: Central America (2,500); Southeast Asia (3,000); Europe (2,300); Africa (1,000); Middle East (800); Other (400). The remaining 2,000 constitute a reserve to be allocated to any unforeseen refugee emergency. The 1985 refugee quota provides for 11,000 refugee admissions plus a reserve. Although the absolute quota numbers have remained fairly constant, commentators have noted a recent shift in geographic allocation from Eastern Europe to areas where refugees face the "greatest need." These areas include Central America and El Salvador. *See* Campbell, *Canada's 1984 Refugee Resettlement Plan, in* UNHCR, REFUGEES 34 (Geneva Jan. 1984). The refugee quota includes both Convention refugees and those admitted as members of the so-called "designated classes." The members of the three current designated classes, though not qualifying for Convention refugee status, are admitted into Canada as refugees. These classes are (1) self-exiles mainly from Eastern Europe, (2) political prisoners and oppressed persons mainly from Latin America, and (3) Indo-chinese.

Refugee admissions in Canada, however, always greatly exceed the annual refugee quota, because of the existence of three other methods of attaining refugee status or asylum outside the operation of the quota. These methods include (1) application for asylum by aliens already in Canada, (2) sponsorship by private

far-reaching discretionary admission provision for non-Convention refugees makes Canadian refugee practice similar to that of Great Britain and France.

Perhaps more than in any other country, the practical interpretation of the Convention refugee definition in Great Britain is intimately bound up in the uniquely informal and flexible administrative refugee status determination process. Inherent in this built-in flexibility are forces which simultaneously tend to expand and constrict the breadth of the definition. Many critics of the British system contend that "the flexibility acts more often than not against the individual and that the secrecy surrounding instructions to Immigration Officers precludes any real assessment of such a system."[319] Obvious difficulties exist in trying to locate an alleged error of law or procedure in this nebulous ad hoc system.

The positive effects of Great Britain's largely discretionary system are readily apparent. First, each year a sizeable number of persons who technically do not fall within the Convention definition of refugee but who show valid reason for not returning to their country of origin may be granted asylum without being adjudicated refugees. Second, a relatively high proportion of asylum seekers are permitted to stay in Great Britain without being granted asylum.[320] Last, unlike the refugee and asylum procedures of other countries, no automatic denial of or reluctance to grant refugee status or asylum to aliens who have resided or been firmly resettled in third countries before seeking this status in

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groups, and (3) admission on special "humanitarian grounds" under section 6(2) of the Immigration Act, *see supra* text accompanying note 318, for victims of civil disturbances (e.g., El Salvador, Bangladesh, Poland, Sri Lanka, Lebanon, Iran).

Canada admitted a total of over 20,000 refugees in 1984, 17,775 in 1983, and 22,215 in 1982. Figures taken from *id.*; Globe and Mail (Toronto), May 28, 1984, at 5; MINISTER OF EMPLOYMENT AND IMMIGRATION, GOVERNMENT OF CANADA, REPORT TO PARLIAMENT ON THE REVIEW OF FUTURE DIRECTIONS FOR IMMIGRATION LEVELS 8-9 (1985); MINISTER OF EMPLOYMENT AND IMMIGRATION, GOVERNMENT OF CANADA, ANNUAL REPORT TO PARLIAMENT ON IMMIGRATION LEVELS: 1980 20-21 (1980).

319. F. D'SOUZA, THE REFUGEE DILEMMA: INTERNATIONAL RECOGNITION AND ACCEPTANCE, 12 (Minority Rights Group Report No. 3, 1980).

320. *See supra* note 211 and accompanying text. Nevertheless, one commentator has characterized British asylum policy as strict. *See* Melander, *Refugee Recognition in Western European States, supra* note 7, at 172.

Great Britain exists.[321]

Other administrative factors may also give rise to less than correct assessments of refugee status. As in other countries, the general lack of expertise and formal training of both border and interviewing officials at the Immigration and Nationality Department[322] increases the potential for inaccurate and summary recommendations in complex cases. The virtual disallowance of personal appearances before the decision-making Refugee Unit of the Home Office and that body's exclusive reliance on an interview transcript which the alien is not afforded an opportunity to read or correct perpetuate any communication barriers or misunderstandings that occur at the initial interview. The responsibility of the Refugee Unit for screening security-risk aliens also allegedly produces a cautious and restrictive interpretation of the Convention definition.[323] Last, critics have stated that personnel at both the decision-making and appellate levels place disproportionate reliance on British Foreign Ministry Reports. The reports are general in nature and do not consider individual situations adequately. Rather, they reflect larger foreign policy goals. The result is blanket refugee status for applicants of certain countries unfriendly to the United Kingdom regardless of whether they actually meet the Convention criteria. This bias parallels the bias of the United States' system.[324] British policy, however, may diverge from the practice in the United States of giving blanket denials for applicants from allied countries.

The British procedure for determining refugee status includes administrative checks on conclusory and ill-considered refugee decisions. First, the head of the Refugee Unit must review all negative refugee determinations by a unit officer before the determinations can be issued. Second, the UNHCR representative reviews every case and may intervene at the appellate level on behalf of the alien.[325] Third, to counterbalance the Immigration

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321. Connelly Interview, *supra* note 205, *cited in* Avery, *supra* note 96, at 326.

322. No formal training program exists for new officers. They receive "on desk training" in British refugee status procedures and are given a copy of the UNHCR HANDBOOK. First McDowall Interview, *supra* note 199, *cited in* Avery, *supra* note 96, at 322.

323. *See supra* note 203 and accompanying text.

324. *See supra* note 202 and accompanying text. *Cf.* quotation about United States practice, *supra* text accompanying note 123.

325. UNHCR, Note on Refugee Status Procedures, *supra* note 155, ¶ 151, at

Appeals Adjudicators' lack of general training in international refugee law, the alien may as a matter of right enter a personal appearance in the appeal to prove the likelihood of his or her persecution upon return to the country of origin.

Despite the allegedly restrictive interpretation of the Convention definition, including the element of a well-founded fear of persecution, the Home Office has broadly construed this phrase in the past to include severe economic proscription. A relatively recent work on British asylum practice has cited a quotation of the Home Secretary made over twenty years ago. "[P]olitical asylum is granted only when there are strong grounds for believing that the life or liberty of the applicant would be in serious danger if he returned to his country *or that he would be subjected to persecution of such a nature as to render life insupportable.*"[326] In this regard, the British interpretation is analogous to that of several United States Circuit Courts and the Canadian RSAC.

Despite the administrative and interpretive strictures that exist in British refugee status decision-making, the majority of persons claiming refugee status are accorded favorable treatment. In recent years, well over half of all claimants, if not recognized as Convention refugees, were granted asylum nonetheless. An undetermined percentage of those denied both refugee status and asylum were permitted to remain at least temporarily in Great Britain.[327]

Among the European parties to the Convention, France traditionally has been the most liberal in accepting refugees from all areas of the world without regard to ethnicity, color, or religion.[328] The broad constitutional right to territorial asylum, the abun-

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20, *cited in* Avery, *supra* note 96, at 325.

326. Mr. Henry Brooke, Nov. 28, 1962, *Hansard*, 668 H.C. Debs., col. 429, *quoted in* Thornberry, *Dr. Soblen and the Alien Law of the United Kingdom*, 12 INT'L & COMP. L.Q. 414, 436 (1963), *reprinted in* Fong, *Some Legal Aspects of the Search for Admission into Other States of Persons Leaving the Indo-Chinese Peninsula in Small Boats*, 1981 BRIT. Y.B. INT'L L. 53, 93 (emphasis added).

327. In 1981, out of a total of 2689 claims, 1359 applicants were granted Convention refugee status and 278 were granted asylum without refugee status. The ratio of positive refugee and asylum claims to total claims was approximately 62.5%. Telephone interview with Roy McDowall, head of "Refugee Unit," Immigration and Nationality Department, Home Office, London, U.K. (Jan. 31, 1983) *cited in* Avery, *supra* note 96, at 325-26 [hereinafter cited as Second McDowall Interview].

328. F. D'SOUZA, *supra* note 319, at 13.

dance of laws granting various types of refugee status to different categories of claimants, and the administrative practice of granting asylum to certain persons who do not meet the convention or UNHCR refugee definition manifests France's liberality.[329] This attitude has been carried over into French administrative interpretation of the Convention refugee definition. For example, in stark contrast to the figures of most other Western countries, the proportion of positive refugee status determinations to total claims has been as high as seventy-four percent.[330]

The overall excellence of the French refugee determination system and its relative independence both prevent it from becoming an instrument of foreign policy and contribute to the breadth with which the Convention refugee definition is interpreted. Although more frequent and more direct participation by the local UNHCR representative in OFPRA decision-making might be beneficial,[331] OFPRA officers who determine Convention and UNHCR refugee status generally possess a respectable level of background human rights knowledge and expertise in the standards for applying the Convention definition of refugee. Moreover, each OFPRA officer reviews claims only from a particular geographic area. This allows for individual specialization and enhances the accuracy of processing claims from that region.

A major flaw in the system is that OFPRA renders decisions based solely on the impressions and recommendation of the interviewing officer without discussion or debate. Because the Minister of the Interior must appoint a high-ranking foreign officer as OFPRA Director and because the Director may replace OFPRA officers at the termination of their one-year appointment,[332] the possibility of government intrusion into the workings of OFPRA

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329. *See supra* text accompanying notes 245-47.

330. In 1982 for example, 15,614 of 21,154 refugee determinations were positive. Telephone interview with Georges Fieschi, Director of OFPRA, Paris, Fr. (Jan. 31, 1983), *cited in* Avery, *supra* note 96, at 295. These figures might include determinations of mandate refugees for which OFPRA is also responsible.

331. The UNHCR representative in Paris only contributes human rights information at the request of OFPRA and, at the appellate level, contributes only factual information, not judgments about the existence of persecution in a given country. Letter from UNHCR Branch Officer in France (name withheld by request), Neuilly-Sur-Seine, Fr. to Christopher Avery (Oct. 8, 1982), *cited in* Avery, *supra* note 96, at 294; First UNHCR Branch Office Interview, *supra* note 226, *cited in* Avery, *supra* note 96, at 294.

332. Avery, *supra* note 96, at 296.

exists. This infrastructure promotes the possibility of making refugee determinations subservient to larger political ends, as in the United States.

However, the *Commission des Recours* constitutes a check on possible abuses in the French system. A highly-qualified independent review body that includes a UNHCR representative, the *Commission* conducts hearings that are more in the nature of de novo proceedings. The *Commission* ultimately reverses ten to twenty percent of all negative OFPRA decisions usually because it decides that OFPRA has been too restrictive.[333] This large-scale reversal of decisions below undoubtedly accounts for the extraordinarily high proportion of positive Convention refugee status determinations. A recent example of *Commission* activism involves its reversal of numerous denials of Convention refugee status to Haitians. OFPRA allegedly was unaware of the extent of interplay between politics and economics in Haiti.[334] Because Haiti and France have historically been on friendly terms, this example evidences the predominately nonpolitical and nondiscriminatory nature of French refugee status adjudication.

Recent trends in French society may affect the current broad interpretation of the Convention refugee definition. Growing economic problems, terrorism on French soil between members of inimical refugee groups, and a dramatic rise in immigration[335] all show signs of exacerbating the growing xenophobia in France. Indeed, speculation abounds that France's traditional reputation as a land of asylum may become tarnished.[336]

Italy's continued imposition of a geographic limitation on the Convention refugee definition results in disparate treatment for Europeans and non-Europeans. This distinction has caused al-

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333. Interview with authority on French refugee status determination system (name withheld by request) (1982), *cited in* Avery, *supra* note 96, at 293.

334. *Id.* at 293-94.

335. For instance, the number of persons possessing refugee status in France increased from 94,765 at the end of 1976 to 145,000 at the end of 1981. *See* Dupont-Gonin, *Annexe: La Règlementation Française*, 455 PROBLÈMES POLITIQUES ET SOCIAUX 33 (1982).

336. *See, e.g.*, *Les Réfugiés Politiques en France*, Le Monde (Paris), Jan. 18, 1981. Indeed, recent changes in France's administrative refugee decision-making system have clarified procedures, in order to prevent imposters from obtaining refugee status. However, these changes have, on balance, retained France's profound respect for the principle of asylum. *See* Circulaire du Ministre du 17 Mai relative aux demandeurs d'asile, 1985 J.O. 3777.

most blanket preclusion of non-Europeans from Convention refugee status and the durable and extensive protections inherent in that status. Refugee recognition for all European claimants is not standard practice in Italy.[337] In recent years, Italy has accorded Convention refugee status on a large scale to only two non-European groups: Chileans fleeing the fall of the Allende regime in 1973 and Indochinese "boat people" rescued in Southeast Asia.[338]

Reportedly, although non-European refugees are tolerated in Italy, the Italian Government is taking all steps possible to stem the tide of future immigration of non-Europeans.[339] Two dangers attend the non-European refugee's position in Italy. First, brutality against these refugees is a frequent occurrence. Second, if the non-European cannot avail himself or herself of broad UNHCR mandate refugee protection, which is inapplicable to purely economic refugees,[340] he or she may be subject to immediate expulsion to a neighboring country or to the country of first haven.[341] These two factors render the non-European refugee's situation in Italy extremely precarious and violate the spirit, if not the letter, of Italy's international legal obligations under the Convention.

Moreover, Italy's limited Convention refugee definition appears inconsistent with the expansive right of asylum seemingly granted to *all* persons in article X of the Italian Constitution "under conditions laid down by law." Although no eligibility procedure has been established yet to decide if a person who is refused Convention refugee status will be considered a refugee within the ambit of article X, Italian case law has guaranteed the alien's right to assert an asylum claim in the absence of the requisite implementing legislation.[342] The Italian gloss on the Convention refugee definition clearly dampens the efficacy of the constitutional right of asylum ostensibly given to all foreigners suffering persecution[343] by effectively denying the exercise of that right to foreigners

337. In the recent past, Italy has only granted asylum to approximately 10% to 15% of European refugee claimants. Letter from F. Fiume, Director of the Division for Assistance to Refugees, Ministry of the Interior, Government of Italy to C. Avery (Feb. 6, 1984), *cited in* Avery, *supra* note 96, at 302.

338. ASYLUM IN EUROPE, *supra* note 29, ¶ 8, at 217-18.

339. *Id.* ¶ 18, at 219.

340. *See* Maynard, *The Legal Competence of the United Nations High Commissioner for Refugees*, *supra* note 100, at 420.

341. ASYLUM IN EUROPE, *supra* note 29, ¶ 18, at 219.

342. *See supra* note 97 and accompanying text.

343. *See supra* text accompanying notes 96-97.

other than Europeans.

Several administrative flaws pose obstacles to a fairer assessment of refugee status. These include the dearth of human rights information made available to the members of the *Commissione*, the infrequency of personal appearances by refugee claimants before the *Commissione*, and the general unavailability of appeal from an unfavorable refugee decision to a separate entity. One administrative strength that may compensate partially for the unavailability of background country information is the presence of a UNHCR representative on the *Commissione*.

B. Nonrefoulement Under Article 33

Despite the alleged apathetic attitude of many INS officials, instances of refoulement of aliens meeting the Convention refugee criteria do not appear deliberate and conscious in the United States. Rather, they are a function of faulty interpretation of the refugee definition that results both from administrative flaws and the pervasive presence of politics in the United States system. The recent massive influx of refugees from the Caribbean and Central America tempted the INS to abuse the refugee determination and asylum processes by excluding entire national groups regardless of the merits or validity of their individual refugee claims.[344] Despite the Supreme Court's 1984 decision in *INS v. Stevic*[345] which required aliens seeking mandatory withholding of deportation to show a clear probability of persecution, the Refugee Act of 1980 portends salutary development of the United States law on nonrefoulement of refugees. Prior to the Act, the Attorney General, through his delegate the INS, had complete discretion to determine whether an alien would be subject to persecution if returned to the home country.[346] The Attorney General was not required to withhold deportation of the alien if he

344. Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980) is a recent case in point. In *Civiletti*, a United States District Court found that the INS had set up a review process which was merely *pro forma*, "for the sole purpose of expediting review of Haitian . . . applications, and expelling Haitians from the United States." *Id.* at 511. The court noted with disdain that none of the refugee claimants was afforded basic procedural due process rights such as the right to counsel and a hearing. *Id.* at 524.

345. 104 S. Ct. 2489 (1984); *see supra* text accompanying notes 277-81.

346. For the text of the provision prior to amendment in 1980, see *supra* note 40.

found that the alien would be subject to persecution. Thus, refoulement or nonrefoulement of refugees prior to 1980 rested solely within the unfettered discretion of the Attorney General. United States courts deferred to executive discretion in deportation cases and unequivocally refused to substitute their independent judgment for that of the Attorney General.[347] The attitude that judicial intervention was only warranted when the Attorney General abused his discretion prevailed.[348]

In 1981, the Court of Appeals for the Ninth Circuit broke this tradition of judicial noninterference in *McMullen v. INS*.[349] In *McMullen*, the court assessed the impact of the Refugee Act's new requirement of *mandatory* nonrefoulement of persons whom the Attorney General determined Convention refugees. The court concluded that this change mandated closer judicial scrutiny of the Attorney General's findings of fact regarding refugee status. The petitioner claimed that he would be murdered if returned to Ireland because of his desertion from the provisional wing of the Irish Republican Army. The court found its probe into and ultimate reversal of the BIA's deportation order justified under the Refugee Act's amendment of the withholding of deportation provision. The court noted that

> [t]he role of the reviewing court necessarily changes when the charge to the agency changes from one of discretion to an imperative. . . . The new [withholding of deportation provision] removes the absolute discretion formerly vested with the Board. A factual determination is now required and the Board must withhold deportation if certain facts exist. This change requires judicial review of the Board's factual findings if the 1980 amendment is to be given full effect. Agency findings arising from public, record-producing proceedings are normally subject to the substantial evi-

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347. *See, e.g.*, Blazina v. Bouchard, 286 F.2d 507 (3d Cir. 1961), *cert. denied*, 366 U.S. 950 (1961). *See generally* Comment, *supra* note 51, at 371-72 nn.75-79.

348. Such abuses included denial of procedural due process, Chi Sheng Liu v. Holton, 297 F.2d 740 (9th Cir. 1961); misapplication of the statute, INS v. Stanisic, 395 U.S. 62 (1969); and arbitrary and capricious decision-making. *See supra* note 270; *see also* Kasravi v. INS, 400 F.2d 675 (9th Cir. 1968); Asghari v. INS, 396 F.2d 391 (9th Cir. 1968); Namkung v. Boyd, 226 F.2d 385 (9th Cir. 1955).

349. 658 F.2d 1312 (9th Cir. 1981). After this decision, the BIA reconsidered its earlier decision and again found McMullen to be deportable. The Ninth Circuit, applying the substantial evidence test, recently affirmed this finding. *See* McMullen v. INS, No. 84-7468, Slip op. (9th Cir. Apr. 25, 1986) (*"McMullen II"*).

dence standard of review.[350]

Despite the Supreme Court's approval of the clear probability standard in *Stevic*,[351] the practical effect of *McMullen* on subsequent refugee claims in the United States may prove salutary. To avoid refoulement, an alien must still meet the clear probability standard when proving that he or she would face persecution if returned to the country of origin. According to *McMullen*, however, the alien may demand that the Attorney General produce substantial evidence to the contrary to render a finding of deportability.[352] The alien no longer must demonstrate the more difficult administrative abuse of discretion standard.[353] Thus, the *McMullen* decision curtails the Attorney General's power to deport by imposing standards on his factual determination which are subject to augmented judicial review.[354] The net effect of *McMullen* is a moderate limitation on the government's capacity to use its fact-finding power to establish grounds for deportation.[355] This judicial constraint on executive discretion may both increase impartiality in refugee decision-making and bring United States refugee practice more into line with both the spirit and the letter of Convention and Protocol mandates. Yet, until the United States undertakes a judicial or legislative reexamination and lowers the standard for withholding the deportation of refugees from clear probability to well-founded fear of persecution, United States refugee practice will not be completely free of violations of the nonrefoulement principle.

After the Minister or the IAB recognizes an alien's Convention refugee status, an adjudicator initiates the final inquiry on whether the refugee is nonetheless inadmissible into Canada because he or she poses a threat to Canadian security or public or-

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350. *Id.* at 1316, *citing* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971).

351. 104 S. Ct. 2489 (1984); *see supra* text accompanying notes 277-81.

352. Comment, *supra* note 51, at 375.

353. The vast majority of United States courts have followed *McMullen* in adopting the substantial evidence test for review of deportation orders resulting from denial of withholding of deportation requests. *See, e.g.*, Zepeda-Melendez v. INS, 741 F.2d 285 (9th Cir. 1984); Zavala-Bonilla v. INS, 730 F.2d 562 (3d Cir. 1984); Reyes v. INS, 693 F.2d 597 (6th Cir. 1982); Sarkis v. Nelson, 585 F. Supp. 235 (E.D.N.Y. 1984). *But see* Marroquin-Manriquez v. INS, 699 F.2d 129 (3d Cir. 1983) (abuse of discretion is proper standard of review).

354. Comment, *supra* note 51, at 377.

355. *Id.*

der or has engaged in certain serious criminal conduct.[356] If this inquiry fails to reveal grounds for denial of residence in Canada, then the adjudicator "shall, notwithstanding any other provision of [the] Act or the regulations, allow that person to remain in Canada."[357] This provision is the fundamental safeguard against refoulement in Canadian law.

The minority of Convention refugees falling within the inadmissible classes has no right to remain in Canada. Indeed, under the Act, they may be returned to a country where their lives or freedom would be threatened on account of race, religion, nationality, political opinion or membership in a particular social group.[358] Two limiting provisions mitigate this draconian result. First, the Minister himself must consent to the return when the possibility of refoulement exists.[359] Second, all inadmissible Convention refugees may attempt to appeal to the IAB on a question of law or fact. Furthermore, a Convention refugee falling within certain of the inadmissible classes is allowed to invoke the IAB's appellate review "on the grounds that, having regard to the existence of compassionate or humanitarian considerations, the person should not be removed from Canada."[360] However, Convention refugees whose appeals do not survive the Board's prescreening process on legal or factual grounds[361] and who do not qualify to invoke the IAB's humanitarian appellate jurisdiction may be subject to refoulement at the discretion of the Minister.

Canada's legislative decision to incorporate the Convention definition into the Immigration Act and, at the same time, deprive certain persons adjudicated Convention refugees of the mandatory article 33 right of nonrefoulement is flatly inconsistent with the humanitarian spirit of the Convention. The grounds for inadmissibility after Convention refugee adjudication are nebulous. To determine whether the refugee poses a threat to Canadian security, the adjudicator must speculate about the possibility that the refugee will engage in subversive or criminal behavior in the future. Because this final inquiry process is subject to abuse,

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356. *See supra* note 62 and accompanying text.
357. Immigration Act (Can.), *supra* note 58, § 47(3).
358. *Id.* § 55.
359. *Id.*
360. *Id.* § 71(a), 72(1)(a), 72(2)(d).
361. *Id.* § 71(a). *See supra* note 176 and accompanying text.

one commentator has suggested that removal might be ordered for political reasons, for example, when the claimant is from a Western country friendly with Canada.[362]

The questionable practice of selective nonrefoulement under color of Canadian law will continue uncorrected as long as other provisions of the Convention, particularly the article 33 proscription on refoulement, remain technically unincorporated into Canadian law. Because treaties are not self-executing in Canada, article 33 is of no binding force as a mandatory supplement to the Act's incomplete protection against nonrefoulement. Therefore, a select commission has recently advised the government to respect the Convention's provisions "as a matter of policy" and to ensure that the Minister gives effect to the unincorporated remainder of the Convention "which is not in direct contradiction with the Act."[363] The Canadian government's resolution to heed or ignore this counsel will determine the extent of the future alignment of Canada's nonrefoulement practices with its obligations as a signatory to the Convention.

Great Britain's Immigration Rules as amended in 1980 specifically prohibit denial of entry to a person if "it appears to the Immigration Officer" that the person essentially falls within the Convention and Protocol definition of refugee and return of the alien would violate the terms of those instruments.[364] The efficacy of this proscription is undermined seriously, however, by the discretion vested in nonexpert border officials to determine prima facie validity of a refugee claim and, after minimal consultation, to return aliens whose claims are manifestly unfounded, in the official's opinion. The lack of a system of mandatory referral of *all* refugee or asylum claims increases the potential for nonrefoulement violations at the border and bestows virtually no protection upon refugees seeking entry. Although newly promulgated instructions from the Home Office require referral to it of all claims,[365] the difficulty of policing aliens' applications at the border and the virtual impossibility of discovering violations through returned aliens may reduce the effectiveness of these directives.

Apart from the specter of possible instances of refoulement at

362. *See, e.g.*, Wydrzynski, *supra* note 59, at 157, 187.
363. TASK FORCE REPORT, *supra* note 146, at xi.
364. *See supra* notes 77-78 and accompanying text.
365. *See supra* note 194 and accompanying text.

the border, the Immigration Rules offer some measure of protection against refoulement to aliens who have been granted leave to enter or are in the country illegally. In apparent compliance with Convention article 31, aliens who enter irregularly will not be returned to the country of origin automatically, provided they request asylum and can prove a well-founded fear of persecution.[366] This Immigration Rule evidently makes no mention of the requirement that the alien present himself "promptly" as does article 31. In this circumstance, British regulations grant protection in excess of that required by the Convention.

Before 1980, the rules on appellate review stated that aliens without proper documentation could appeal denial of leave to enter for negative refugee or asylum decisions only from abroad. These rules created grave risks of widespread violations of the Convention nonrefoulement provision because the vast majority of refugee claimants fell within this category and were returned mandatorily.[367] Although the Rules also forbid deportation orders that would send the alien to a country to which he is unwilling to go because of a well-founded fear of persecution,[368] the prior denial of refugee status necessitated a finding of no well-founded fear. Thus, any unfavorable decision at the Refugee Unit level effectively deprived a refugee claimant of nonrefoulement protection, and mistakes at that level resulted in the refoulement of bona fide refugees.

The 1980 decision in *Regina v. The Chief Immigration Officer, Gatwick Airport, ex parte Kharrazi*[369] altered this situation by allowing persons without proper documentation to remain in Great Britain to lodge an appeal if their return abroad to appeal would be likely to result in persecution. This judicial action appears to round out British compliance with its international nonrefoulement obligations by according protection to all groups possibly threatened with nonrefoulement.

The French legal interpretation of refoulement encompasses rejection of an alien only at the border. The French system distin-

366. *See supra* note 195 and accompanying text.

367. Note that the Immigration Act (G.B.), ¶ 17, gives an alien in this position the right to appeal the choice of country to which he or she will be deported only if the alien is also claiming that he or she did not need documentation to enter. Thus, refugee claimants can very rarely, if ever, avail themselves of this statutory appeal right.

368. *See* ASYLUM IN EUROPE, *supra* note 29, ¶ 57, at 373.

369. [1980] 1 W.L.R. 1396; *see supra* note 206.

guishes between refoulement and expulsion, with the latter used to denote rejection subsequent to entry.[370] The authorities in France have propounded a remarkably thorough set of safeguards against the return of an alien in either situation to a country where persecution would likely result. In theory, an alien is *never* to be returned to a country of persecution, even if expelled by decree of the Minister of the Interior for posing a threat to public order. A rejected alien may be sent to a third country only if the border officials have proof either that the alien has applied for asylum elsewhere or that the alien is or was eligible for asylum in the third country in light of the alien's prolonged residence there.[371] Two recent French decrees protect all other persons claiming refugee status or asylum from rejection before consideration of their claims, regardless of whether the claim is colorable. Refugee claimants may not be denied refugee status without a written decision, knowledge of the right to contact someone to assist them, and a mandatory one-day delay period.[372] Refugee claimants seeking asylum are guaranteed that only the Minister, any not a subordinate, may deny their asylum claim.[373]

Although in French law and administrative practice the principle of nonrefoulement is regarded as inviolable in theory, the practice of French border officials does not always comport with this ideal. Refugee assistance agencies have reported occasional cases of immediate refusal of asylum seekers and refoulement at the border. While more or less deliberate "mistakes" are made by subordinate officials, this conduct is "contrary to prevailing ministerial instructions."[374] It also clearly violates the well-established state practice of extending both application of the Convention and the customary right of nonrefoulement to aliens *seeking* refugee status or asylum.[375]

Despite the narrowness of the Italian interpretation of the Convention refugee definition, Italy compares favorably in its diligent attempts to avoid refoulement of any person both at the border and after a subsequent denial of refugee status or asylum, regardless of country of origin or the merits of the claim. Eastern

370. *See supra* text accompanying note 238.
371. *See supra* text accompanying note 221.
372. Loi No. 81-973 du 29 octobre 1981, *supra* note 88.
373. Décret No. 82-442 du 27 mai 1982, *supra* note 90.
374. ASYLUM IN EUROPE, *supra* note 29, ¶ 30, at 125.
375. *See supra* text accompanying notes 28-32.

Europeans coming directly from countries in which they allegedly face persecution may not be refused entry at the border without the express consent of the Minister of the Interior.[376] Eastern Europeans who are allowed to enter or who are legally in Italy whose refugee claims are eventually denied normally are not returned to their countries of origin but are permitted to remain in Italy pending resettlement in a third country.[377]

Italy has accorded these safeguards to non-Europeans. Given Italy's accession to the Convention subject to the geographic restriction, article 33 of the Convention and the traditional European state practice that the right of nonrefoulement accrues well before refugee determination arguably binds Italy to refrain only from refoulement of European claimants seeking Convention refugee status.[378] The Italian government, however, has extended this protection to non-European claimants for two closely related reasons. First, the Italian Constitution's directive that the country's legal system conform to the "generally recognized principles of international law"[379] contemplates nondiscriminatory application of the customary international legal principle of nonrefoulement of refugees. Second, the choice not to return non-Europeans to countries of persecution may be the result of the government's implicit acknowledgement that Convention article 33 represents not merely a multilateral treaty provision, contractual in nature and limited in scope, but reflects a codification of the customary principle of nonrefoulement. Although their chances of receiving Convention refugee status are negligible, non-Europeans are rarely rejected at the border. If they cannot qualify for UNHCR status, they run the risk of expulsion, but almost never to the country of persecution.[380]

VI. CONCLUSION

The determination of which persons fall within the Convention definition of refugee is affected significantly by political factors in all of the countries discussed in this paper, with the possible exception of France. The extent to which the refugee decision is politicized, however, varies widely among these countries. Politi-

376. *See supra* text accompanying note 253.
377. ASYLUM IN EUROPE, *supra* note 29, ¶ 10, at 218.
378. *See, e.g., id.* ¶ 15, at 218.
379. *See supra* note 248.
380. *See supra* text accompanying note 250.

cal motivations seem to weigh most heavily in the United States, where blanket countrywide recognition of Convention refugee status to applicants from Communist-bloc countries and denials of that status to applicants from allied countries or right-wing regimes abound. The existence or nonexistence of a well-founded fear of persecution often seems superfluous or irrelevant. In addition, the United States Supreme Court has ensured that aliens within its borders seeking relief from deportation as refugees must continue to meet a more rigorous standard of proof than that prescribed by the Convention.

In Canada and Great Britain, similar discriminatory application of the Convention definition occurs, though to a lesser extent. In Canada, the trend clearly is to deny refugee status to those from anti-Communist countries. Canada does not recognize, however, all applicants from Communist countries regardless of threatened persecution. Great Britain routinely adjudges refugees from countries with hostile governments to be Convention refugees regardless of technical compliance with Convention criteria. These countries have also indicated a willingness to recognize systematic and intentionally imposed economic deprivation as political persecution. In practice, however, the high standard for this economic persecution renders it a relatively uncommon basis for the grant of Convention refugee status. Finally, Italy's almost exclusive application of the Convention to refugees from Eastern Europe indicates a bias dating back to its accession to the Convention and Protocol.

Administrative defects in the refugee determination systems of these countries tend to perpetuate the pervasiveness of extra-legal concerns in the recognition of Convention refugee status. In the United States, Canada and Great Britain, reliance on government agencies' reports on human rights conditions in certain countries potentially allows foreign policy considerations to continue to permeate local interpretation of the Convention definition. In all five countries, the initial decision makers' lack of familiarity with Convention criteria and their application to specific situations diminishes the possibility of uniform interpretation of the Convention definition in the future.

Attempts at depoliticization have been forthcoming in recent years. In the United States, the courts have broadened the scope of judicial review of deportation orders of aliens claiming persecution. In Canada, the government has initiated various reform programs and propounded firm guidelines for application of the Con-

vention refugee definition. The Italian Government promises to extend its application of the definition to non-European refugees. Perhaps these countries are at last beginning to recognize that, in international law, recognition of Convention refugee status and the often concomitant grant of asylum to political refugees "is a peaceful and humanitarian act and so it cannot be regarded as unfriendly by any other state including the state of which . . . the refugee is a national."[381]

Most of the five countries fare better with respect to nonrefoulement. French and Italian administrative regulations and practice and ministerial instructions provide extensive safeguards for those denied Convention refugee status. Judicial action in Great Britain, Italy and, to a lesser extent, the United States, has begun to mitigate the effects of any gaps in the statutory framework for those systems regarding nonrefoulement of unsuccessful Convention refugee claimants. Only in Canada and the United States do significant loopholes in the legislative framework continue to remain uncorrected. Canada has not incorporated article 33 into its domestic law. While the United States has done this, its domestic law, as construed by the United States Supreme Court, imposes a much more onerous burden of proof upon aliens seeking asylum and relief from deportation than is permissible under the Convention. The United States, however, does grant refugee status at the border upon a claimant's showing of a well-founded fear of being persecuted.

Many instances of nonrefoulement logically occur as a result of inaccurate interpretation of the Convention refugee definition because the person not adjudged a refugee under Convention article 1(a)(2) technically may not be entitled to article 33 protection against refoulement in countries that ignore nonrefoulement as a customary principle of international law. As attempts are made to interpret the Convention definition on more strictly legal and humanitarian bases, the danger of instances of refoulement should decrease proportionately.

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381. Oda, *The Individual in International Law*, in MANUAL OF PUBLIC INTERNATIONAL LAW 469, 491 (Sorenson, ed. 1968); *see also* Weis, *Human Rights and Refugees*, 10 INT'L MIGRATION 20 (1972).