

**AN INJURY TO THE CITIZEN, A PLEASURE TO THE STATE:  
A PECULIAR CHALLENGE TO THE ENFORCEMENT OF INTERNATIONAL REFUGEE LAW**

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**INTRODUCTION**

It is a well-established principle of international law that an injury to the citizen is an injury to the state of his or her nationality.<sup>1</sup> Ordinarily, if a non-citizen is injured by the acts of a host state, the state of his or her nationality would seek redress.<sup>2</sup> By definition, a refugee maintains no such relationship. The refugee not only has severed his relationship with the country of his nationality or habitual residence but also fears being persecuted by the government of that country.<sup>3</sup> If that refugee is injured in a country where he sought refuge, then

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<sup>1</sup> Professor Henkin writes: “Long ago, we know, a government which offended a citizen of Rome offended Rome and if an American is abused elsewhere today, the United States is offended.” LOUIS HENKIN ET AL., INTERNATIONAL LAW, CASES AND MATERIALS 596 (3d ed., 1993). Henkin suggests that state responsibility for injury to aliens is not seen as creating rights for the alien as such, but he or she benefits because the law sees an offense to the individual as an offense against the State whose nationality the individual bears. Thus the remedies for violation of these norms are accorded only to the State. *See id.* at 677. The International Court of Justice, in the seminal case *Liechtenstein v. Guatemala*, commonly known as the *Nottebohm* case, said: “[b]y taking up the case of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subject, respect for the rules of international law.” *Liechtenstein v. Guatemala*, 1955 WL 1(I.C.J.), 1955 I.C.J. 4, 24 citing to P.I.C.J., Series A, No. 2, 12, and A/B, Nos 20-21, 17). Elaborating on the individual’s relationship with a state of his nationality in the international context, the court further stated that nationality is “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties....[c]onferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a transition into judicial terms of the individual’s connection with the State which has made him his national.” *Id.* at 23. For a detailed discussion of this issue in the refugee context, see Section V(B), *infra*.

<sup>2</sup> In *Nottebohm*, the ICJ concluded that diplomatic protection of citizens and protection by means of international judicial proceedings constitute measures for the defense of the rights of the State, not the individual as such. *See Liechtenstein v. Guatemala*, 1955 I.C.J. at 23.

<sup>3</sup> The most current definition of a refugee is contained in the 1951 Refugee Convention. The Convention defines a refugee as a person: “owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear unwilling to return to it.” Convention Relating to the Status of Refugees: 189 UNTS 150, *entry into force*: 22 April 1954. at 1(A) (2) [hereinafter *The Refugee Convention*]. In this article, the term “refugee” is used to refer to a person who meets the above criteria regardless of whether or not that person has been recognized as a refugee by any state. It is generally

the country of origin that would have sought redress under normal diplomatic and consular situations certainly would be unwilling or even might be pleased to see the injury occur.

A refugee could be injured in his country of refuge in many different ways. One of the most serious and common injuries that a refugee could sustain occurs when the refugee is sent back to a place where he may face persecution. Under normal circumstances, that is exactly what the country of origin wishes. Generally, this could happen in two different ways: either with full intent and purpose or because of faulty administrative and/or judicial sanction. The consequences of both are absolutely identical. Upon return to his country of origin, the refugee may face severe treatment including death. Countries with well-established systems of asylum adjudication rarely fall under the first category; however, they almost always cannot avoid falling under the second. This article intends to demonstrate the inherent problems of refugee law that make it almost impossible to avoid some faulty administrative and judicial decisions and suggests remedial measures that would help alleviate some of the serious consequences.

The problem of the law of refugee status starts with the definition of a refugee itself. Part I of this article highlights the historical underpinnings of the legal definition of a refugee and puts the political compromise that went into crafting the criteria for refugee status into perspective. Part II deals with the challenges associated with the interpretation of each element of the substantive definition of the Refugee Convention as well as problems of exclusion and cessation of refugee status under the Refugee Convention. Part III critically examines the challenges in defining and applying the burden and standard of proof in refugee status

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understood that recognition of one's refugee status does not make him or her a refugee, but rather declares him or her a refugee. As such, the fact of being a refugee necessarily comes before recognition. Recognition is therefore declaratory, not constitutive. *See* United Nations High Commissioner for Refugees (UNHCR), HANDBOOK ON PROCEDURE AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/IP/4/Eng/REV.1 Reedited January 1992, UNHCR 1979 at Para. 28 [hereinafter HANDBOOK ON PROCEDURES].

determination proceedings (asylum proceedings), which perhaps is the most serious of all challenges. In Part IV, this article highlights the lack of concrete remedies for erroneous decisions and suggests alternative domestic and international remedies to limit the execution of erroneous decisions and mitigate the consequences of refoulment.<sup>4</sup> This article concludes with a summary of observations and recommendations for moving forward.

## I. DEVELOPMENT OF REFUGEE LAW

There have been population movements, large and small scale, throughout the recorded history of mankind.<sup>5</sup> The emergence of movement of population as an international problem demanding reflection first was observable during World War I when millions of people were forced to flee their homes in Europe.<sup>6</sup> The flight of people for safety again appeared in its worst

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<sup>4</sup>The term “refoulment” is derived from the French term ‘refouler’ which stands for the act of returning or sending back. See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 117 (2d ed., 1996). “Non-refoulment” is a fundamental principle of international law, which essentially means that no refugee may be returned to the territories of a country where he or she may face persecution. The principle of non-refoulment is enshrined in several international instruments. The two most important instruments are Article 33 of the Refugee Convention, *supra* note 3 (“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 a particular social group or political opinion.”), and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N.Doc. A/39/51 (1984), entered into force June 26, 1987 [hereinafter Convention Against Torture] (“No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”). Presently, it is generally believed that the principle of non-refoulment has acquired the status of a norm of international law. See, e.g., Statement by Dennis McNamara, Director, Division of International Protection, UNHCR, at the Hebrew University of Jerusalem, The 1951 Convention and International Protection, at 9, available at <http://www.unhcr.org/cgi-bin/texis/vtx/admin/opendoc.htm?tbl=ADMIN&page=home&id=42b80f052> (last visited Nov. 13, 2005). The exact scope and application of this principle has been a subject of immense controversy over the years, particularly as it relates to interception of refugees prior to their arrival in the territories of contracting states. For the current US perspective of this principle see generally *Sale v. Haitian Counsel Center*, 509 U.S. 155, 187 (1993) (concluding that the principle does not apply to refugees interdicted on the high seas). For UNHCR perspective, see Executive Committee (EXCOM) Conclusion No. 22(1981), part II A, Para. 2 (“In all cases the fundamental principle of non-refoulment, including non-rejection at the frontier must be scrupulously observed”); see also conclusion No. 82 (1997), para. D, (iii) (affirming “[t]he need to admit refugees into the territories of states, which includes no rejection at the frontiers without fair and effective procedures for determining status and protection needs”). The same statement is contained in the 1998 EXCOM conclusions. *Id.* (cited in UNHCR, Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea, at 6. para. 18, available at <http://www.unhcr.org/cgi-bin/texis/vtx/home?id=search-Global Consultations> (last visited Nov. 10, 2005)).

<sup>5</sup> HARPO HAKOVIRAT, *THE WORLD REFUGEE PROBLEM* 21 (1991).

<sup>6</sup> *Id.* The number of people uprooted in Europe during WWI has been estimated at about 14 million.

form during World War II.<sup>7</sup> This phenomenon first was contained by the efforts of governments and non-governmental organizations, and at that time it was believed that the problem was solved once and for all;<sup>8</sup> a future intermittence was not contemplated.<sup>9</sup> Regardless of what definition of “refugee” applied in any particular time in history, since World War II it is estimated that approximately 85 million persons have left their countries to seek refuge elsewhere.<sup>10</sup>

Once displacement became a real world problem, the community of nations took initiatives to govern the situation by law and create an international regime for the protection of refugees. The law sought to strike a compromise between a state’s right to control whom it wishes to admit or exclude and the right of human persons to live with safety and dignity, free of fear and horror.<sup>11</sup> For purposes of international law, states have chosen to employ limited criteria to distinguish refugees from among many categories of aliens. The definition of a refugee varied from time to time and place to place. This Part briefly deals with the development of the law of refugee status.

#### **A. Refugee Law Before The Adoption of the 1951 Refugee Convention**

Approaching the problem of forced population movement in legal terms is a relatively recent phenomenon. Before the twentieth century, the international community had little or no

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> There are no clear records showing any indication that the world community had thought of future refugee problems. *See id.*

<sup>10</sup> *Id.* at 22. For example, in the 1950s alone, the following events generated approximately 40 million refugees: the Greek civil war, the Palestinian war, the partition of British India and the Korean War. According to UNHCR, over the years, it has assisted approximately 50 million refugees and other persons of concern. UNHCR Facts, *available at* [www.unhcr.org/facts](http://www.unhcr.org/facts) (last visited Oct. 25, 2005). Currently there are approximately 19.2 million refugees and other persons of concern to the UNHCR. *See id.*

<sup>11</sup> W.GUNTHER PLAUT, *ASYLUM - A MORAL DILEMMA* 6 (1995).

concern for legal regulation of this phenomenon.<sup>12</sup> However, the flight of more than one million Russians between 1917 and 1922 and the flight of hundreds of thousands of Armenians from Turkey during the early 1920s forced European governments to legally recognize the reality of international population movements.<sup>13</sup>

Between 1920 and 1950, a number of international instruments relating to the status of refugees were entered into, most under the auspices of the League of Nations.<sup>14</sup> These instruments<sup>15</sup> each adopted a group or category approach to the definition of “refugee.”<sup>16</sup> Under these arrangements, the necessary conditions to acquire refugee status were: (1) that the person be outside of his country of nationality; and (2) he be without the protection of the country of his nationality.<sup>17</sup> In a 1943 review of the earlier instruments at the Conference of Bermuda, participants introduced an extended mandate that included as refugees all persons, wherever they may be, who, as a result of events in Europe, have had to leave their country of nationality because of the danger to their lives or liberties on account of their race, religion or political

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<sup>12</sup> There has never existed customary international law that authorized the admission of refugees. See JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 1 (1992); see also LOUIS B. SOHN ET AL., *THE MOVEMENT OF PERSONS ACROSS BORDERS*, Studies in Transnational Legal Policy. No.23, 106 (1992). Although such customary law did not exist, provision of sanctuary for those in need has ancient origins. Grahl-Madsen writes: “According to the Bible, Adam and Eve were driven out of Eden and became thereby the first refugees. Mary and Joseph had to seek refuge in Egypt with the child Jesus Christ.” ATEL GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW*, VOL I, 9 (1966). The Old Testament also gives accounts of Cities of Refuge. For example, Moses was commanded to create cities of refuge. The main purpose of these cities of refuge was to provide sanctuary to “manslayers without intent.” See MUSALO, ET AL., *REFUGEE LAW AND POLICY*, 8 (2d ed., 2005). There also existed a Greco-Roman secular concept of refuge. See *id.* at 9. Early Roman Church Council declarations provided sanctuary to fugitive slaves. *Id.* at 10. For a more detailed treatment of ancient origins of the concept of asylum, see generally *id.* at 1-24.

<sup>13</sup> See HATHAWAY, *supra* note 12, at 2.

<sup>14</sup> See GOODWIN-GILL, *supra* note 4, at 4.

<sup>15</sup> The instruments include: The arrangements of May 26, 1926:84 LNTS No. 2004, and June 30, 1928: 89 LNTS No. 2006, the Convention of 28 October 1933:159 LNTS No. 3663 and Feb 10 1938: 192 LNTS No. 4461 and protocol of 14 Sept. 1939: 198 LNTS no. 4634, and the Constitution of International Refugee Organization (IRO) 20 August 1948: 18 UNTS 3.

<sup>16</sup> GOODWIN-GILL, *supra* note 4, at 4.

<sup>17</sup> For example, the arrangement relating to the issue of identity certificates to Russian and Armenian Refugees of 12 May 1926 defines Russian refugees as: “Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the government of the USSR and who has not acquired another nationality.” 84 LNTS No. 2004.

opinion.<sup>18</sup>

A relatively more precise definition, however, emerged after World War II. This was first manifested in the Constitution of the International Refugee Organization (IRO).<sup>19</sup> The IRO included as refugees all victims of the Nazi and Fascist persecution, certain category of persons of Jewish origin, and persons regarded as refugees before the outbreak of the Second World War for reasons of race, religion nationality or political opinion.<sup>20</sup>

Examination of the international refugee definition of the earlier instruments suggests that there were different approaches triggered by the necessity of the particular time in question. Professor Hathaway categorizes each of these approaches into three perspectives: judicial, social and individual.<sup>21</sup> According to Hathaway, the definitions adopted between 1920 and 1935 were in judicial terms because refugee status was designed to substitute a broken link between a person and the state of his nationality; the link that would have offered him protection under normal circumstances.<sup>22</sup>

The refugee instruments adopted between 1935 and 1939, on the other hand, incorporated a social approach: the group of persons categorized as refugees were desperate casualties of

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<sup>18</sup> GOODWIN-GILL, *supra* note 4, at 4 (In 1943 the United Nations Relief and Rehabilitation Administration (UNRRA) was established. One of its functions was to assist displaced persons in liberated countries and repatriation and return of prisoners of war).

<sup>19</sup> IRO was a specialized Agency of the UN. It was established on the 20th of August, 1948, to deal with the problems of forced displacement resulted mainly due to the war. It was later substituted by UNHCR in 1950. *See* GOODWIN-GILL, *supra* note 4, at 4.

<sup>20</sup> IRO Constitution. Text 18 UNTS 3, 2001. The Constitution of the IRO for the first time provided that genuine refugees and displaced persons constitute an urgent problem that is international in scope and character, and that genuine refugees and displaced persons should be assisted by international action either to return to their countries of nationality or former habitual residence, or to find new homes else where. IRO Constitution, Preamble Paras. 2 and 3.

<sup>21</sup> HATHAWAY, *supra* note 12, at 2-5.

<sup>22</sup> In 1929, the Advisory Commission for refugees clearly indicated that the characteristics and essential features of the problem were that persons classified as refugees had no regular nationality and were therefore deprived of the normal protection accorded to regular citizens of a state. *See* HATHAWAY, *supra* note 12, at 3 (*citing* the Report by Secretary General on the Future Organization of Refugee Work, League of Nations Doc. 1930 XIII. 2 (1930)).

socio-political eventualities.<sup>23</sup> The primary objective of these instruments was to ensure the well-being and safety of the refugees so defined.<sup>24</sup> Further, the arrangements made between 1939 and 1950 adopted an individualist panorama.<sup>25</sup> The purpose of refugee status from this perspective is to provide a means for individuals seeking personal freedom from manifest injustices.<sup>26</sup> This perspective presupposes the distrust of authorities who made life intolerable in the refugee's home country.<sup>27</sup>

This individualistic approach continued after 1950 with the creation of the United Nations High Commissioner for Refugees (UNHCR). In 1949, even when the United Nations began to look for a broader approach, member states preferred a narrow definition,<sup>28</sup> which was later revealed in the statute of the UNHCR and the 1951 Refugee Convention. The approach taken by these instruments is discussed below.

## **B. Refugee Law After the Adoption of the 1951 Refugee Convention**

The creation in 1950 of the United Nations High Commissioner for Refugees (UNHCR)<sup>29</sup> and the 1951 adoption of the Refugee Convention<sup>30</sup> were landmark events in the history of the law of refugee status. The basic framework of the refugee law as it stands today

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<sup>23</sup> HATHAWAY, *supra* note 12, at 4.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Apart from those countries that actually had to deal with a large population of refugees, a consensus emerged that a broader category of persons were less of an international problem and did not require international protection. GOODWIN-GILL, *supra* note 4, at 6-7.

<sup>29</sup> The General assembly of the United Nations created the Office of the United Nations High Commissioner for Refugees (UNHCR) by Resolution No. 428(V) of December 1950. As it appears from the Statute of the High Commissioner's Office (an annex to the resolution) its function (mandate) is to provide international protection, under the auspices of the UN, to refugees who fall within the scope of the Statute and seek permanent solution for problems of refugees by assisting Governments. Para. 1. Chapter 1, Statute. Text: UNGA Res. 217 A (III).

<sup>30</sup> Following the General Assembly's Resolution of December 1950 and the convening of the Geneva conference of plenipotentiaries of various states, the Convention on the Status of Refugees was adopted. The conference was held from July 2-25, 1951. According to the Preamble of the Convention, one of the important objectives of the convention is to revise and consolidate previous international agreements relating to the status of refugees and extend the scope. *See* The Refugee Convention, *supra* note 3.

took shape by the 1951 Refugee Convention.<sup>31</sup>

In addition to maintaining protection to persons already considered refugees under earlier instruments,<sup>32</sup> the Refugee Convention extended international protection to any person who:

as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>33</sup>

As it appears from the definition, the Refugee Convention was designed to address refugee problems in Europe<sup>34</sup> in the aftermath of the Second World War.<sup>35</sup> This standard setting Convention not only provided for the criteria for adjudicating refugee status claims,<sup>36</sup> but also specified persons to whom protection shall not extend<sup>37</sup> and situations whereby the Refugee Convention ceased to apply.<sup>38</sup>

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<sup>31</sup> DAVID A. MARTIN, *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S* 1 (David A. Martin ed., 1988).

<sup>32</sup> See HATHAWAY, *supra* note 12.

<sup>33</sup> The Refugee Convention, *supra* note 3, at Art. 1 (A)(2)

<sup>34</sup> For the purpose of this convention, the world events occurring before January 1, 1951

A. Shall be understood to mean either:

a. Events occurring in Europe before January 1, 1951; or

b. Events occurring in Europe or else where before January 1, 1951, and each contracting state shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this convention.

The Refugee Convention, *supra* note 3, Art. 1(B)(1)(a) and (b).

<sup>35</sup> In addition to their desire for the refugee definition to serve strategic political objectives, the majority of the states that adopted The Refugee Convention sought to create a rights regime conducive for the redistribution of the post world war refugee burden from European shoulders. HATHAWAY, *supra* note 12, at 8. (citing Doc. E/AC. 7SR. 166, at 18. August 22, 1950) (footnotes omitted).

<sup>36</sup> These criteria specified in more simple terms are: a) Outside of his country of nationality or habitual residence; b) Unable or unwilling to avail himself of the protection of that country; c) Such inability or unwillingness should be due to a well-founded fear of persecution; d) The fear must be based on one of the five grounds (race, religion, nationality, social group, political opinion).

<sup>37</sup> These are persons who are believed either to have protection from other agencies such as the United Nations Relief and Work Agency, including those who have acquired the nationality of the asylum country, or those who are believed to be undeserving of international protection for crimes that they are believed to have committed in their countries of origin. See The Refugee Convention, *supra* note 3, at Art. 1. For a detailed discussion of this topic see Sec. III. B. *infra*.

<sup>38</sup> This situation could be due to the refugees own voluntary act or due to a change of circumstances. See The

After the adoption of the Refugee Convention, however, refugee situations began to appear in various parts of the world due to causes that could not be linked to pre-1951 events.<sup>39</sup> This necessitated the revision of the Convention to give it a universal application and adjust it to new refugee situations.<sup>40</sup> The 1967 United Nations Refugee Protocol removed the temporal and geographic limitation of the 1951 Refugee Convention.<sup>41</sup> Presently about 141 states in all parts of the world are parties to the 1951 Convention and/or the 1967 Protocol.<sup>42</sup>

In the 1960s and 1970s, the focus of attention shifted to the African continent. Precipitating this shift was the number of people increasingly displaced as a result of the emergence of newly-independent nations within the former colonial boundaries that had cut across language and ethnic cleaves.<sup>43</sup> In Asia, similarly, large scale displacements also followed decolonization.<sup>44</sup>

As the large number of people displaced because of war or civil strife continued to grow in different parts of the world, the applicability of the somewhat narrow and individualistic criteria of the Statute of the UNHCR<sup>45</sup> and the Refugee Convention became subjects of great controversy.<sup>46</sup> However, the necessity to revisit the existing legal framework has been

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Refugee Convention, at Art. 1 (D), (E), (F). For a detailed discussion of this issue, see Section IV. *infra*.

<sup>39</sup> PAUL WEIS, THE REFUGEE CONVENTION OF 1951, COMMENTARY (1995) at IX. One of the major exoduses that occurred immediately after World War II was the displacement from Hungary in 1956. *Id.*

<sup>40</sup> *Id.* at 2.

<sup>41</sup> The UN Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, *entered into force* Oct. 4, 1967.

[hereinafter The Refugee Protocol]. The Refugee Protocol is an independent legal instrument that incorporates the 1951 refugee convention by reference. States may be parties to either or both instruments. The United States, for instance, is a party only to the Protocol.

<sup>42</sup> UNHCR Global Report, 2002, *available at* [www.unhcr.org/cgi-bin/texis/vtx/publ/openssl.pdf](http://www.unhcr.org/cgi-bin/texis/vtx/publ/openssl.pdf) (last visited Oct. 25, 2005.)

<sup>43</sup> DAVID A. MARTIN, *supra* note 31, at 2.

<sup>44</sup> For example, in 1971, the civil war in Pakistan resulted in the displacement of approximately 10 million people. *See id.* at 2-3.

<sup>45</sup> The Statute of the UNHCR defines a refugee in the same way as the 1951 Refugee Convention does, except that it does not contain membership to a social group as one of the grounds of persecution. *See* Chapter II A (ii) of the Statute, an annex to GA Resolution 319 A (IV) of Dec. 1949.

<sup>46</sup> The controversy relates to whether or not the applicability of the definition tends to require a particularized inquiry to decide whether the person or group of persons to which he belongs is subject to a focused threat of persecution.

somewhat diverted by, among other considerations, the General Assembly's consecutive authorization of the UNHCR to assist refugees that fall within the competence of the Statute as well as those who may not strictly fall under the Statute's mandate but who nevertheless are regarded as refugees.<sup>47</sup>

At the regional level, however, an attempt was made to reformulate the legal framework to include within the definition of a refugee those forced to leave their countries owing to causes other than the grounds stated in the Refugee Convention. The prime demonstration of such modification is found in the Organization of African Unity's definition of a refugee.<sup>48</sup> The OAU Convention Relating to the Specific Aspects of Refugee Problems in Africa extends protection, not only to refugees so considered in the sense of the 1951 Refugee Convention and the 1967 Protocol, but also to any person outside of his country "owing to external aggression, occupation, foreign domination or events seriously disturbing public order."<sup>49</sup> Similarly, the Organization of American States (OAS) recommended, in the Declaration of Cartagena,<sup>50</sup> a definition that includes persons who have fled their country of nationality because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflict, massive violation of human rights or other circumstances which have seriously disturbed public order.<sup>51</sup> Although the approach taken by these regional organizations has not been adopted in a universal legal instrument, various recommendations, resolutions, and

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*See* MARTIN, *supra* note 31, at 3.

<sup>47</sup> *See, e.g.*, UN GA Resolution NO. 3455, 9 Dec.1975 (humanitarian assistance to Indo-Chinese displaced persons).

<sup>48</sup> Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45 *entered into force* Sept. 10, 1969 [hereinafter *The OAU Convention*].

<sup>49</sup> *Id.* at Art. I.

<sup>50</sup> The Declaration, which usually is called the Cartagena Declaration on Refugees, was adopted in 1984 by members of the Organization of American States (OAS). Text OAS/ Ser.L/V/II.66, Doc. 10, Nov. 1, pp.190-93.

<sup>51</sup> *Id.* Chapter III. Para. 3.

declarations<sup>52</sup> demonstrate the concern and importance of protecting such category of persons.

Accordingly, today there seems to have emerged two classes of refugees: refugees who have fled individualized persecution based on Refugee Convention grounds and refugees who were forced to leave their homes due to generalized violence or a serious disturbance of public order. Those in the former category commonly are called Convention or Human Rights Refugees, and those in the latter sometimes are called Humanitarian or Humanitarian Law Refugees.<sup>53</sup>

Based on the recent practice of states and international organizations, therefore, the term 'refugee' in current usage not only includes those individuals who qualified for refugee status due to a well-founded fear of persecution based on Convention grounds, but also includes large groups of persons who crossed an international frontier for reasons traceable to armed conflicts and economic and socio-political changes that made life at home intolerable.<sup>54</sup> It should be noted, however, that the legal consequences and the benefits attached thereto depend on the particular type of legal status accorded to each particular category of refugees.<sup>55</sup>

As evident from the above discussion, states party to the 1951 Refugee Convention and/or The 1967 Protocol excluded all persons except those who met the carefully crafted refugee definition from the regime of international protection. The definition, on its face, excludes the vast majority of the 20 million refugees in the world today. Only a small fraction of these refugees could qualify for Convention Refugees status. The identification of refugees who

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<sup>52</sup> These include United Nations General Assembly Resolutions that authorized the UNHCR to assist such a category of persons. *See, e.g.*, UNGA res.1784(XVII), Dec. 7, 1962 (requesting the UNHCR to assist Chinese refugees in a mass displacement situation).

<sup>53</sup> *See* Kay Hailbronner, *Non-refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking*, in MARTIN, *supra* note 31, at 125; *see also* GOARN MELANDER ET AL., THE TWO REFUGEE DEFINITIONS 1-4 (1987).

<sup>54</sup> *See* GOODWIN-GILL, *supra* note 4, at 29-30.

<sup>55</sup> *See id.* at 30.

qualify for Convention status has been an extremely difficult task around the world. Problems of interpretation and application of various legal terminologies employed by the Refugee Convention significantly contributed to this challenge. The following section analyzes the challenges associated with the identification of the category of persons to whom the Convention purports to offer protection and demonstrates the inevitability of erroneous decisions that may lead to dramatic consequences.

### **III. ANALYSIS OF THE REFUGEE DEFINITION UNDER THE 1951 REFUGEE CONVENTION**

The provisions of the Convention consist of inclusion clauses that define the criteria that a claimant for refugee status must satisfy to be recognized as a refugee and exclusion and cessation clauses that stipulate conditions of denial and loss of refugee status, respectively.<sup>56</sup> Each one of these clauses employs technical legal terminologies, and set their own criteria. A discussion of the difficulties relating to the application of each one of the important terminologies follows.

#### **A. Requirements of Refugee Status**

According to Article 1 A(2) of the 1951 Convention Relating to the Status of Refugees, the term "refugee" applies to any person who:

. . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it<sup>57</sup>

Under this definition, at least four requirements must be met: (1) The asylum seeker must be outside of his country of nationality or habitual residence; (2) he must have to have a well-

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<sup>56</sup> For the discussion of exclusion and cessation clauses see Sections B and C, *infra*.

<sup>57</sup> The Refugee Convention, *supra* note 3, at Art. 1(A)(2).

founded fear; (3) the fear must be of persecution, and (3) the feared persecution must arise from one of the stated grounds. Adjudicators around the world have had great difficulty determining the exact scope and application of these terms. This section highlights the difficulties associated with the application of the concepts represented by these terms and shows how faulty decisions are practically unavoidable.

*1. Outside of the Country of Nationality or Habitual Residence*

Owing to several considerations such as state sovereignty and the principle of non-intervention,<sup>58</sup> the Refugee Convention makes it a requirement that a person must first set foot on foreign soil in order to be eligible for international protection.<sup>59</sup> International protection in this sense includes granting of asylum,<sup>60</sup> which entitles the refugee to a number of rights including the right not to be returned<sup>61</sup> to the country where his life or liberty might be threatened.<sup>62</sup>

Although the whole notion of the institution of asylum is protect persons fleeing

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<sup>58</sup> For example, The International Court of Justice, in the Colombian-Peruvian case, said that a decision to grant diplomatic asylum involves a derogation from the sovereignty of that state. It withdraws the offender from the jurisdiction of the territorial state and constitutes an intervention in matters that are exclusively within the competence of that state. Such a derogation from territorial sovereignty cannot be recognized unless a legal basis is established in each particular case. C. NEALE RONNING, *DIPLOMATIC ASYLUM* 5 (1965) (citing the Colombian-Peruvian Asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950. at 266). “Whether or not national governments will yield their external sovereignty in our life time to make international governments possible...one basic fact emerges from our study. It is the individual, not the sovereign state, that is the end purpose of the new legal order that has been erected in our generation under the title of human rights.” HATHAWAY, *supra* note 12, at 32 n.18, (quoting J. JOYLE, *THE NEW POLITICS OF HUMAN RIGHTS*, II. 225 (1978)). Hathaway says, “As the authority of the international community over human rights has increased with the passage of time, so too has the reach of refugee law expanded, at least tentatively, to protect some internal refugees.” *Id.* When Professor Hathaway says “internal refugees,” he is referring to internally displaced persons (IDPs). The reference to tentative expansion is exemplified by the UNHCR’s involvement to support the IDPs on some accessions by the authorization of the General Assembly of the UN.

<sup>59</sup> The Refugee Convention, *supra* note 3, at Art. 1(A)(2).

<sup>60</sup> The word asylum may have a double meaning. It may mean a place or territory where one is not subject to seizure by one’s pursuers, or it may mean protection or freedom from such seizure. In international law the term is used in the latter sense. ATEL GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW*, VOL. II, 3 (1972).

<sup>61</sup> See *supra* note 4 for a brief discussion of the principle of non-refoulement.

<sup>62</sup> See, for example, The Refugee Convention, *supra* note 3, at Arts. 12-24, for other rights of a refugee.

persecution,<sup>63</sup> the freedom that the Convention purports to grant is limited to some geographic locations, i.e., the person first must be lucky enough to escape the persecution aimed at him.<sup>64</sup> The existence of this criterion excludes two categories of persons who otherwise meet every criteria for refugee status except for their presence in certain geographic locations: those who have moved from place to place within the boundaries of a state and are unable to get themselves out of that state<sup>65</sup> and those who have taken temporary refuge in places that traditionally are regarded as inviolable sanctuaries, such as religious and diplomatic premises.<sup>66</sup>

The operative assumption is that international refugee law cannot be applied to rescued individuals or groups of persons in fear of persecution unless they avail themselves of the protection of another country, which in most cases is dependent on fortuitous circumstances. The decision to exclude these categories of persons has valid theoretical and practical foundations. Through this requirement, however, the Refugee Convention begins narrowing down the category of persons that would benefit from its provisions, not because these persons are undeserving of protection, but because of theoretical and practical reasons. The following sections critically analyze the difficulties associated with the identification of persons whom the Convention seeks to protect.

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<sup>63</sup> See Section III (A)(3) *infra*, for a discussion of the meaning of the term persecution.

<sup>64</sup> “It follows from the principle of territorial supremacy and integrity of state that, once a person sets foot on foreign soil, he has implicitly found asylum, in the sense that he is no longer subject to (lawful) seizure by the authorities of the country from which he has fled.” GRAHL-MADSEN, *supra* note 60, at 4.

<sup>65</sup> Persecution by local governments tolerated by the central government or persecution by non-government agents in a particular area may force the person to flee internally. For a brief discussion of agents of persecution, see Section 2, *infra*.

<sup>66</sup> See GRAHL-MADSEN, *supra* note 60, at 6 (discussion of temporary refuge in the traditional sense); *see also* PLAUT,

## 2. *Well-Founded Fear*

According to the Convention's definition, the alien's<sup>67</sup> inability or unwillingness to return should be based on a well-founded fear of being persecuted.<sup>68</sup> The term well-founded is a manifestation of the state's desire to maintain the objective assessment of both the genuineness and justifiableness of the claimant's subjective perception of the situation in his country of origin.<sup>69</sup> According to this definition, what the claimant feels about his situation is only the first step.<sup>70</sup> Anyone who claims refugee status may have his own "fear," whether it is well-founded or not; however, legal recognition depends on the views of the authorities of a receiving state. The main question remains whether or not an objective assessment of a subjective fear is practicable in refugee situations. Although the Convention provides this criterion, it does not outline a clear standard of adjudication.<sup>71</sup> As a result, it has remained a subject of inconsistent interpretation and application. Some adjudicators require that the claimant shows past persecution to prove that he may become a victim of future persecution if he returns to the same

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*supra* note 11, at 17.

<sup>67</sup> Although, in this article, there is some reluctance to use the term "alien" to signify a human person from another nation, widespread use in statutes and academic literature makes it almost impossible to completely avoid its use. The connotations are obvious. See Kevin R. Johnson, "Aliens" and US Immigration Laws: *The Social and Legal Construction of Non-Persons*, 28 U. MIAMI INTER-AM L. REV. 263 (1996-97) (arguments regarding the negative connotations of this term); see also Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 GEO. IMMIGR. L.J. 1, n. 64 (2001) (Professor Pistone says that she remembers being terribly offended when referred to as an alien by Japanese authorities in connection with her visa application to work in Japan. The only meaning that she has attributed to the term alien as a college student was "creatures from other planets.").

<sup>68</sup> See The Refugee Convention, *supra* note 3, at Art. I (A)(2).

<sup>69</sup> See HATHAWAY, *supra* note 12, at 68. Different refugee status adjudicators have, on many occasions, given varying interpretations. This of course is a direct reflection of the drafting and negotiating process of the Convention. This suggests that the majority of contracting states favored a vague standard that could be interpreted according to the wishes of the parties independently. For example, the United States Representative proposed, in the drafting process, that the standard should simply be "because of fear of persecution" or "because of persecution." U.N. Doc. E/ AC. 32/ L.4, UN Doc. E/ AC. 34/ January 18, 1950. The delegation of France supported a standard of "justifiable fear," and the British delegation supported "[s]erious apprehension based on reasonable grounds of persecution." U.N. Doc. E/ AC 32/ L3, January 17, 1950; see also HATHAWAY, *supra* note 12, at 66-69; James C. Hathaway, *the Evolution of Refugee Status in International Law, 1920-1950*, 33 I.C.L.Q. 348, 374-379 (1984) (discussing a history of the term).

<sup>70</sup> See GRAHL-MADSEN, *supra* note 12, at 174.

<sup>71</sup> See HATHAWAY, *supra* note 12, at 75.

place.<sup>72</sup> Others contend that past persecution can only help as a presumption of future persecution and thus the possibility of future persecution still must be proven.<sup>73</sup>

Atel Grahl-Madsen writes that whether or not a person will become a subject of persecution if he is returned to his country of origin should be assessed on the merits of each individual case.<sup>74</sup> A number of considerations need to be taken into account including the political situation of the individual, his active opposition, background, and the general situations prevalent in his country.<sup>75</sup> The use of this test as a tool for determining refugee status is not uncommon among different adjudicators.<sup>76</sup> For example, the Immigration Appeals Board of Canada, in the *Rouzbeh Amjadishad*<sup>77</sup> case, pointed out that subjective fear is capable of objective assessment as long as the person claiming refugee status demonstrates his case consistently, plausibly, and credibly, including specific events or persons intervened in his life to create an irrepressible feeling of a physical or a psychological threat against him.<sup>78</sup>

According to this approach, the claimant's own testimony may be adequate as long as it is consistent, plausible, and credible. In 1990, The Justice Department of the United States issued a regulation, elaborating the "well-foundedness" test of the 1980 Refugee Act:<sup>79</sup>

In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual

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<sup>72</sup> See GRAHL-MADSEN, *supra* note 12, at 176 (citing the decision of the German adjudicators in the 1950s).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 181.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 181-188 (citing cases).

<sup>77</sup> HATHAWAY, *supra* note 12, at 72 (citing Immigration Appeals Board Decision M85-1935, May 13, 1987).

<sup>78</sup> *Id.* at 72 (citing 4 per M. Dore Accord Kaul Garcia Zavala, Immigration Appeals decision 81-1222, C.L.I.C. notes 45, 10, June 29, 1982).

<sup>79</sup> Pub. L. No. 96-212, 94 Stat. 102 (1980) [hereinafter Refugee Act] (codified at Immigration and Nationality Act, 8 U.S.C. 1101, *et. seq.*, (1994)) [hereinafter INA].

residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and  
(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.<sup>80</sup>

Under this standard, sufficient proof of a well-founded fear consists of evidence that: (1) there exists a certain identifiable and targeted group; (2) that certain categories of persons are its members; and (3) the applicant is one of such members. The United States Board of Immigration Appeals (BIA) and the different courts of appeal also have given differing interpretations.<sup>81</sup> In *INS v. Stevic*,<sup>82</sup> the U.S. Supreme Court required “evidence establishing that it is more likely than not that the alien would be subject to persecution.”<sup>83</sup>

The Court of Appeals of Great Britain, in *Koyaziakaja v. Secretary of State for the Home Department*,<sup>84</sup> decided by majority vote that the standard of proof that corresponds to the Convention’s “well-founded” fear test evidence of “a reasonable degree of likelihood” of persecution.<sup>85</sup> According to the majority opinion, this standard of proof, which follows from

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<sup>80</sup> 8 C.F.R. § 208.13(b)(2)(i).

<sup>81</sup> For example, in *Flevertinor v. INS*, the immigration judge interpreted the “well-founded” fear test to mean “likelihood” of persecution. In the same case, the court of appeals employed a “probable persecution” test. *Flevertinor v. Immigration and Naturalization Service (INS)*, 585 F.2d 129, 132-34 (5th Cir. 1978). In *Mritineaus v. INS*, a “clear probability” of persecution test was used. *Mritineaus v. INS*, 556 F. 2d 306, 307 (5th Cir. 1977). In *Daniel v. INS*, the Court used a “probability of persecution” test. *Daniel v. INS*, 528 F.2d 1278, 1279 (5th Cir. 1976). In *Remaclud*, the BIA used a “reasonable fear” test. *Remaclud*, 14 I. N. December 429, 434 Board of Immigration Appeal (BIA 1973).

<sup>82</sup> *INS v. Stevic*, 467 U.S. 407 (1984).

<sup>83</sup> 467 U.S. at 430. The respondent’s argument in this case was that “A fear of persecution is ‘well-founded’ if the evidence establishes some basis in reality for the fear. This would appear to mean that so long as the fear is not imaginary i.e., if it is founded in reality at all . . . it is well-founded. A more moderate position is that so long as an objective situation is established by evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable probability.” *Id.* at 425. In this case, the Court distinguished the “well-founded fear” standard used in applications for asylum and instead employed a “more likely than not” standard, traditionally used in applications for withholding of deportation (under 243(h) of the Immigration and Nationality Act of 1980), which requires a “clear probability of persecution.” *See id.*

<sup>84</sup> RE MADDISON MA, GREAT BRITAIN IMMIGRATION APPEALS (LONDON: HMSO [1995-1st Quarter] IMMAR1-156 at 1-5.

<sup>85</sup> *Id.* at 9.

*Secretary of State v. Sivakumar*,<sup>86</sup> assesses both past occurrences of persecution and the likelihood of future persecution.<sup>87</sup> The minority opinion, however, suggested that the truth or falsity of the alleged past persecution should be assessed with the normal civil standard of the balance of probability, but that the future threat of persecution should be assessed on the basis of a "likelihood of persecution" standard.<sup>88</sup> In this case, one of the judges, Lord Diplock, concerning the problem of the usage of such terminologies, said:

I wouldn't quarrel with the way in which the test was stated by the magistrate or with the alternative way in which it was expressed by the Divisional Court " a reasonable chance", "substantial grounds for thinking", "a serious possibility", I see no significant difference between these various ways of describing the degree of likelihood of the persecution.<sup>89</sup>

In *INS v. Cardoza-Fonseca*,<sup>90</sup> the U.S. Supreme Court revisited the "more likely than not" standard set by *INS v. Stevic*<sup>91</sup> and held that "so long as an objective situation is established by the evidence, it need not show that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."<sup>92</sup> In reaching this conclusion, the Supreme Court took note of the analysis provided by the UNHCR Handbook on Procedure and Criteria for Determining Refugee status.<sup>93</sup> The handbook notes that generally, the applicant's fear ought to be considered well-founded if he or she can establish, to a reasonable degree, that his or her continued stay in the country of origin has become intolerable to him because of the reasons stated in the definition and the same state of affairs still prevail.<sup>94</sup> *Atel Grahl-Madsen*, as cited by the Supreme Court,

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<sup>86</sup> *See id.*

<sup>87</sup> *Id.* at 1.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 2.

<sup>90</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

<sup>91</sup> *INS v. Stevic*, 467 U.S. 407 (1984)

<sup>92</sup> *See Cardoza-Fonseca*, 480 U.S. at 440.

<sup>93</sup> HANDBOOK ON PROCEDURES, *supra* note 3. The court noted that the explanation in the UNHCR handbook has no force of law that could bind the INS with reference to the asylum procedures of Sec. 208(a) of the INA. *Id.* at 439.

<sup>94</sup> *Id.*

indicated what he considers to be a typical case of well-founded fear. He provides the following example:

Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp . . . in such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return.<sup>95</sup>

In line with this, the Court concluded that "[t]here is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening."<sup>96</sup>

This is perhaps the clearest articulation of the well-founded fear test of the Refugee Convention. However, it has not made the process of refugee status determination significantly easier. Adjudicators must determine, based on extremely limited evidence (often the claimant's testimony alone), that the refugee would have a 10 percent chance of being shot or tortured or persecuted in any other manner. In reality, it is extremely difficult to find a simple pattern like the "every tenth male adult" model, because the behavior of persecutors in most parts of the world often is varied, irregular and unpredictable. The difficulty associated with the burden and standard of proof is discussed in section IV below.

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<sup>95</sup> *Id.* at 431 (citing GRAHL-MADSEN, *supra* note 12).

<sup>96</sup> *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 439 (1987); *see also* INS v. Stevic, 467 U.S. 407 (1984). In those cases the Supreme Court ruled that Article 33.1 (non-refoulement) of the Convention does not extend to everyone who meets the definition of a refugee. The benefit of this provision would only attach when two requirements are met: the refugee shows that he or she has a well-founded fear of being persecuted, and that his or her life "would be threatened" if deported. *See* Cardoza-Fonseca, 480 U.S. at 440-41. Withholding of deportation thus is subject to a much stricter scrutiny in the United States. The U.S. currently is the only jurisdiction that does not consider all refugees to be eligible for non-refoulement. *See* MUSALO ET AL., *supra* note 12, at 80. Similar language is used in the non-refoulement provision of the Convention Against Torture. "No State shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." *See* Convention Against Torture, *supra* note 4, at Art. 3(1). This Convention was implemented in the US by the Foreign Affairs Reform and Restructuring Act of 1998 (Pub L. 105-277, 112 Stat. 268-821). Regarding the burden and standard of proof, Sec. 208.18 (a)(2) states: "The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal."

### 3. *Persecution*

According to the Refugee Convention, the well-founded fear must be of “persecution.”<sup>97</sup> Because the Convention does not explain what acts or omissions constitute persecution, the definition of persecution has remained a subject of great contention. For example, should a person seeking asylum because he fears being imprisoned for one month for political reasons be recognized as a refugee? Or should a person who has been denied a scholarship due to his race be granted refugee status elsewhere? Or a young person who flees to escape national military service? Different adjudicators and commentators have given differing interpretations of what might constitute persecution.

The two common interpretations of the term “persecution” can be categorized as liberal and restrictive. The restrictive interpretation suggests that persecution means only “deprivation of life and physical freedom.”<sup>98</sup> A physical attack must be sufficient to cause the victim’s death or loss of physical freedom in order to constitute persecution.<sup>99</sup> Paul Weis, on the other hand, puts forward a liberal interpretation of persecution and suggests that the term persecution should be interpreted in light of the developing human rights concepts.<sup>100</sup> At the very least, he suggests, there should be a nexus between persecution and the failure on the part of the states to observe basic human rights. He cites the Preamble to the Convention, which contains the principle that refugees shall enjoy fundamental rights and freedoms, to give credence to the view that violation

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<sup>97</sup> The term persecution appeared for the first time in the draft of the Constitution of the International Refugee Organization (IRO), later included in the statute of the UNHCR in 1950 and the Refugee Convention. Eduardo Arboceda et al., *The Convention Refugee Definition in the West: Disharmony of Interpretation and Application*, 5 INT’L J. OF REFUGEE L. No.1, 78 (1993).

<sup>98</sup> GRAHL-MADSEN, *supra* note 12, at 193 (quoting ZINK). Elaborating on this interpretation, Zink suggests that one can invoke the threat to life if he is forced to live unemployed without any means of livelihood. *See id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See* WEIS, *supra* note 39, at XVII. Clearly the concept of persecution cannot have remained unaffected by subsequent developments in the law relating to human rights. Any meaning given to the concept of persecution must take into account the existing general human rights standards. *Id.*

of certain human rights “may either constitute persecution per se, or are evidence thereof.”<sup>101</sup>

According to Weis, the following acts may constitute persecution: serious disadvantages including jeopardy to life, physical integrity or liberty, discrimination, detention, confinement and banishment, and general denial of certain human rights.<sup>102</sup> Nevertheless, Paul Weis does not suggest how severe these acts or denials must be. On this point, Grahl-Madsen argues that there should be a standard for the existence of at least a minimum degree of severity and concludes that imprisonment for a three month period or more might constitute persecution, but deprivation of liberty for ten days does not.<sup>103</sup>

Judicial interpretations also have been varied. For example, in *Klawitter v. INS*,<sup>104</sup> the Court of Appeals for the Sixth Circuit decided that unwanted sexual advances may not constitute persecution if the behavior is a reflection of the perpetrators’ interest in the victim rather than an attempt to persecute her based on protected grounds.<sup>105</sup> On the other hand, in *Lazo-Majano v. INS*,<sup>106</sup> the Court of Appeals for the Ninth Circuit granted asylum to a Salvadorian woman who had been sexually abused by an army officer.<sup>107</sup> In this case, the court recognized sexual assault as a measure of persecution for political opinion, because the petitioner had asserted her political belief that men should not have dominion over women.<sup>108</sup> The response by some European adjudicators to the rape victims of Bosnian Serb forces was completely different. Sexual assault

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at XVIII.

<sup>103</sup> GRAHL-MADSEN, *supra* note 12, at 201 (citing to German Cases, for example, Case 182 VIII55 May 28, 1957). The Court concluded in this case (2156 II/55 April 1957) that detention for three months and interrogation for more than fifteen times for political reasons constitutes persecution. *See id.* at 198.

<sup>104</sup> *Klawitter v. INS*, 970 F.2d 149 (6th Cir. 1992)

<sup>105</sup> *Id.* at 151, 154. The applicant was a Polish woman who alleged that she was sexually abused by the authorities of the Polish government because she refused to join the Communist Party. This decision disregards sexual abuse as a persecutory action, and the immigration judge and the BIA did not consider the assault as a result of political motives. *See id.*

<sup>106</sup> *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

<sup>107</sup> Her belief that men should not have dominion over women was regarded as a political opinion. *See id.*

<sup>108</sup> *See Lazo-Majano v. INS*, 813 F.2d 1432, 1436 (9th Cir. 1987).

consistently has been rejected as a persecutory measure.<sup>109</sup> For example, Austrian adjudicators characterized rape as just one general dreadful predicament, not persecution in the sense of the Refugee Convention.<sup>110</sup>

Concerning gender related persecution, the Canadian Immigration and Refugee Board (IBR) adopted a radically different approach.<sup>111</sup> In the landmark case of Kedra Hassen Farah,<sup>112</sup> a Somali citizen alleged that her ten-year old daughter would face ritual female genital mutilation should she return to Somalia.<sup>113</sup> The Immigration and Refugee Board granted Farah, her ten-year old daughter, and her seven-year old son refugee status based on three different types of persecution, which the IBR identified in the course of the proceeding.<sup>114</sup>

The mother, Kedra Hassen Farah, was granted refugee status because, if she returned to Somalia, the Somali National Court would have applied Islamic Law<sup>115</sup> and would have granted custody of her children to her ex-husband. That act would have violated Farah's rights as a parent, which are recognized by Article 16 of the Universal Declaration of Human Rights (UDHR).<sup>116</sup> For example, she should have equal rights during marriage and in case of its dissolution.<sup>117</sup> Accordingly, Farah may have suffered psychological trauma because she would

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<sup>109</sup> See Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 241 (1996).

<sup>110</sup> *Id.* The other ground for the denial of the Bosnian rape victims was the reluctance of the adjudicators to consider them as belonging to a certain social group. *See id.*

<sup>111</sup> Canada has adopted the 1951 Refugee Convention, and the Immigration and Refugee Board (IRB) is an administrative body empowered to adjudicate refugee status claims. For a detailed discussion of gender related persecution, see Kris Ann Balser Moussette, *Female Genital Mutilation and Refugees in the United States--A Step in the Right Direction*, 19 B.C. INTL & COMP. L. REV. 353 (1996).

<sup>112</sup> Moussette, *supra* note 111, at n.1 (citing Kedra Hassen Farah, Convention Refugee Determination Decisions No. T93-12198, T93-12199, T93-12197 at 7, 10 (May 10, 1994)).

<sup>113</sup> The IRB applied guidelines issued by the chairperson in accordance with section 65(3) of the Canadian Immigration Act (Ottawa Canada March 9, 1993). *See id.*

<sup>114</sup> *Id.*

<sup>115</sup> *See id.* at 378.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* Article 16 of the UDHR provides that: "Men and women of full age, without any limitation due to race, nationality or religion have the right to found a family, they are entitled to equal rights in marriage, during marriage and at its dissolution." UNGA Res. 217 A(III) December 10, 1948.

have been unable to protect her daughter from genital mutilation.<sup>118</sup>

Her ten-year old daughter also was granted refugee status,<sup>119</sup> on the grounds that (1) undergoing genital mutilation would violate her right to personal security as a human person, provided for under Article 3 of the UDHR,<sup>120</sup> and (2) genital mutilation violates the United Nations Convention on the Rights of the Child,<sup>121</sup> and in particular Article 24, which protects children from traditional practices prejudicial to children's health.<sup>122</sup> Finally, her seven-year old son also was granted status on the basis that if he returned to Somalia he may be "removed from the care and nurture of his mother."<sup>123</sup>

In short, in this case, the following three acts were considered persecutory: (1) undue denial of child custody because of the trauma that may follow and the feeling of inability to protect one's child undergoing harmful physical pain, particularly genital mutilation;<sup>124</sup> (2) female genital mutilation;<sup>125</sup> and (3) denial of a child's right to the care and nurture of a mother.<sup>126</sup>

United States Immigration Judge, Kendall Warren,<sup>127</sup> also has adopted a similar approach in Lydia Omowvnmí Oluloro's application for suspension of deportation<sup>128</sup> in March 1994. Even

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<sup>118</sup> Moussette, *supra* note 111, at 378-79.

<sup>119</sup> *See id.* at 379.

<sup>120</sup> *Id.* at 380 (Article 3 of the UDHR states "Everyone has the right to life liberty and security of the person. Adopted and Proclaimed by General Assembly Resolution 217 A (III) of December 10, 1948. *See also* Convention on the Rights of the Child, *entered into force*, September 9, 1990. (Article 24 of the Convention on the Rights of the Child states "Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.")

<sup>121</sup> *See* Moussette, *supra* note 111, at 380.

<sup>122</sup> *See id.*

<sup>123</sup> *Id.* In this case the three of them were categorized as belonging to different social groups.

<sup>124</sup> *See id.* at 378.

<sup>125</sup> *See id.* at 379.

<sup>126</sup> *Id.*

<sup>127</sup> Deportation proceedings, Portland Oregon, No A72 147 491 at 20 ( March 23, 1994) Oral decision. *See id.* at 389.

<sup>128</sup> Moussette, *supra* note 111, at 389. The Judge in fact believed that there was a strong likelihood that Oluoro's daughters would be subjected to FGM if returned to Nigeria. Her two children were United States citizens and her husband also was a permanent resident with whom she did not have a good relation. She is a 32-year-old native

if the judge did not specifically mention and rule on each type of persecutory measure cited in the Farah case,<sup>129</sup> he characterized female genital mutilation as a "cruel, painful and dangerous" act<sup>130</sup> and granted an order of suspension of deportation of the claimant Ms. Oluloro,<sup>131</sup> a Nigerian citizen who claimed refugee status mainly for fear of her daughter's being subjected to mutilation should she return to Nigeria.<sup>132</sup>

According to the 1995 guidelines issued by the Immigration and Naturalization Service, a woman who has a well-founded fear of genital mutilation may successfully claim political asylum in the United States.<sup>133</sup> The U.S. Board of Immigration Appeals (BIA) also determined that FGM is a severe treatment that must be considered as a measure of persecution.<sup>134</sup> No circuit court ever has disagreed with this conclusion.<sup>135</sup> The Courts of Appeal for the Seventh and Ninth Circuits have, in fact, given their express approval.<sup>136</sup>

In *Abay v. Ashcroft*<sup>137</sup>, the Court of Appeals for the Sixth Circuit recently granted asylum to a mother who proved a well-founded fear of her daughter's genital mutilation.<sup>138</sup> The court's reasoning was similar to Canada's Farah case. It said that the governing principle of interpretation in favor of refugee protection demands that the mother be granted asylum.<sup>139</sup> This

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Nigerian. *See id.*

<sup>129</sup> *See id.* at nn.84-86.

<sup>130</sup> *See id.* at 390.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* US Circuit courts have not yet allowed the granting of asylum to parents of children granted asylum based on FGM. Some immigration courts have however allowed parents derivative status. This is becoming a subject of intense debate. *See generally* Wes Henricksen, *Abay v. Ashcroft: The Six Circuit's Baseless Expansion of INA Sec. 101(A)(42)(A) Revealed A Gap in Asylum Law*, 80 WASH. L. REV. 477, 482 (May 2005).

<sup>133</sup> *See id.* at 354.

<sup>134</sup> 21 I. & N. Dec. 357, 365 (B.I.A. 1996)

<sup>135</sup> *See* Henricksen, *supra* note 132, at 482.

<sup>136</sup> *See* Nwaokolo v. INS, 314 F.3d 303, 309 (7th Cir. 2002); Balogun v. Ashcroft, 374 F.3d 492, 499 (7th Cir. 2004); *Azanor v. Ashcroft*, 364 F.3d 1013, 1018-19 (9th Cir. 2004). In *Cardoza-Fonseca v. INS*, the Ninth Circuit held that the term persecution signifies more than "just restriction on life and liberty." *Cardoza-Fonseca v. INS*, 767 F. 2d 1448, 1452 (9th Cir. 1985).

<sup>137</sup> *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004).

<sup>138</sup> *See id.* at 640.

<sup>139</sup> *Id.*

derivative type of status remains controversial.

The examples cited above demonstrate that the concept of ‘persecution’ can be understood in many different ways. Even though there were many instances where the term has been interpreted in favor of claimants, especially whenever gender-related persecutions were involved as in the cases of Kedra Hassen Farah<sup>140</sup> in Canada and *Abay*<sup>141</sup> in the United States, often ‘persecution’ is interpreted to the detriment of refugee status claimants. It is much easier for the adjudicator to decide that a certain act does not amount to persecution than for the claimant to convince a court that it does, unless the act is manifestly atrocious and barbaric by nature. Even when manifestly atrocious acts such as rape are concerned, some adjudicators seem to have found a way to deny status, as in the case of the Bosnian Serb victims. Again, the use of the term “persecution” to denote a wide range of possibilities of jeopardy that a person may face directly reflects nations’ desire to retain a flexible policy of judging every instance according to their own standards.<sup>142</sup>

Whether the drafters of the Refugee Convention assumed that the persecutor only could be a government and its agents, or whether the drafters instead intended to include non-government actors is unclear. The Convention provides only, “a well-founded fear of persecution” without any reference to the nature of the persecutor. Apparently, this phrase presupposes an identifiable agent that should carry out the persecution. The government or the ruling party could be identified as the persecutor.<sup>143</sup> A problem may, however, arise when the feared persecution is perpetrated by non-state agents, either parties whose acts are tolerated by the government or parties that the government is unable to control. Whenever the acts clearly

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<sup>140</sup> *Id.* (citing Convention Refugee Determination Decision No. T93 - 12199- 12197 (May 1994)).

<sup>141</sup> *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004).

<sup>142</sup> See GRAHL-MADSEN, *supra* note 12, at 193; see also HATHAWAY, *supra* note 12, at 99, nn.1-19.

are tolerated by the government, the controversy could be minimal.<sup>144</sup> The greatest controversy arises whenever a person faces a serious jeopardy to his life due to acts of non-government agents.

The response to this situation has also been varied. Austrian adjudicators, for example, repeatedly have denied status to Bosnian Serb rape victims on the ground that the situation does not fit in the context the Convention.<sup>145</sup> The Austrians claim that there should be a government and that the claimant should fear persecution by that government.<sup>146</sup> On the other hand, some adjudicators have recognized that a person may have a valid refugee status claim under the Convention if he finds himself unprotected while there is a serious threat to his life so long as the threat is nationwide.<sup>147</sup>

In many jurisdictions, flight from generalized violence or civil wars is not perceived as being protected under the Convention.<sup>148</sup> This is of course one of the reasons why refugees who flee generalized violence are not regarded as Convention refugees in most refugee receiving nations.<sup>149</sup>

#### 4. *Grounds of Persecution*

The Convention provides for the protection of persons who have a well-founded fear of persecution based on any of five reasons: race, religion, nationality, a particular social group or

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<sup>143</sup> See GRAHL-MADSEN, *supra* note 12, at 189-191.

<sup>144</sup> See D. Cross, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125, 1139 (1980).

<sup>145</sup> See Fitzpatrick, *supra* note 109, at 240.

<sup>146</sup> *Id.*

<sup>147</sup> See GOODWIN-GILL, *supra* note 14, at 74. For example, in *Acosta* (Int. Doc. No.2986 (March 1, 1985)) the Immigration Appeals Board of the United States recognized the idea that as far as the person is not safe in his country, international protection is in fact required; however, the BIA added that the claimant must have exhausted every means in his home country, i.e., he should fear persecution nationwide. *See id.* at 74 n.189.

<sup>148</sup> *See id.* at 75.

<sup>149</sup> However, this category of persons can be regarded as convention refugees in Africa in the context of the OAU Convention Relating to the Specific Aspects of Refugee Problems in Africa, because the OAU Convention defines a refugee as any person outside of his country due to any event disturbing public order. This category of persons can be called African Convention Refugees. *See* OAU Convention, *supra* note 48, at Art. I.

political opinion. Human beings can face persecution for various reasons; however, the category of persons that the Convention identifies as deserving of protection as refugees are persons who are persecuted for reason of these five categories. The selection criteria might be understood from the historical context.<sup>150</sup> The meaning of each one of the five grounds has been a subject of many scholarly studies and writings. Although immense controversies are involved in ascertaining the exact meanings of all of these grounds, this article deals only with the grounds of social group and political opinion to demonstrate the difficulty in adjudication.

a. Membership in a Particular Social Group

One of the most obscure and immensely controversial concepts contained in the Convention definition of a refugee is the concept of “a particular social group.” There is no indication in the Convention as to who exactly should be the beneficiary of this reference.<sup>151</sup> Atel Grahl-Madsen says that whenever a person is likely to suffer persecution merely because of his background, he should get the benefit of the present provision,<sup>152</sup> and he cites these examples: nobility, capitalists, business men, professional people, and farmers.<sup>153</sup> UNHCR proposes that this category should encompass persons “with similar background, habits or social status.”<sup>154</sup> In *Matter of Acosta*, the U.S. BIA interpreted the term “social group” to mean “persecution that is directed toward an individual who is a member of a group of persons all of whom share common immutable characteristics.”<sup>155</sup> Based on the Board’s definition, Hathaway argues that it is appropriate to categorize the members of the following groups as members of the same social

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<sup>150</sup> See GRAHL-MADSEN, *supra* note 12, at 217.

<sup>151</sup> See *id.* at 157.

<sup>152</sup> GRAHL-MADSEN, *supra* note 12, at 219.

<sup>153</sup> See *id.*

<sup>154</sup> See UNHCR, HAND BOOK ON PROCEDURES, *supra* note 3.

<sup>155</sup> *Matter of Acosta*, 19 I&N Dec.211 Board of Immigration Appeals (1985)

group: gender,<sup>156</sup> sexual orientation,<sup>157</sup> family,<sup>158</sup> class or cast<sup>159</sup> and voluntary associations.<sup>160</sup>

On one occasion, the UNHCR proposed to its executive committee a resolution to call upon contracting states to consider women as a particular social group as the term is contained in the Convention definition.<sup>161</sup> However, for fear that such an interpretation “would imply criticism of certain religious beliefs or social or cultural practices,”<sup>162</sup> the Committee did not adopt the proposed resolution as it was,<sup>163</sup> but instead simply proposed that states may adopt such an interpretation.<sup>164</sup> The Canadian IBR, by guidelines adopted in March of 1993, elaborated on gender based persecution.<sup>165</sup> According to the guidelines, “a large number of people in general cannot constitute a particular social group but a group such as women who face [genital mutilation] constitutes a particular social group because that group suffers or will suffer severe discrimination or harsh or inhuman treatment that distinguishes it from the general population.”<sup>166</sup> Bulgarian and Ecuadorian women vulnerable to domestic abuse and raped single women with a child born out of wedlock are some of the examples of the beneficiaries of the

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<sup>156</sup> See HATHAWAY, *supra* note 12, at 162-63.

<sup>157</sup> See *id.* at 163-64 (detailed discussion of this category).

<sup>158</sup> See *id.* at 164-65 (detailed discussion of this category).

<sup>159</sup> See *id.* at 166-67 (detailed discussion of this category).

<sup>160</sup> See *id.* at 167-69 (detailed discussion of this category).

<sup>161</sup> Kristine M. Fox, *Note and comment: Gender persecution: Canadian Guidelines after a model for refugee Determination in the United States*, 11 ARIZ. J. INT'L & COMP. LAW at 133 (citing Anders B. Johnson, *The International Protection of Women Refugees: A Summary of Principal Problems and Issues*, 1 INT'L J. REFUGEE L. 221, 222 (1989)).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See Moussette, *supra* note 112, at 369.

<sup>166</sup> See *id.* at 370. Moussette comments: "The persecution occurs because they are women: Everyday, thousands of women are beaten in their homes by their partners, and thousands more are raped assaulted and sexually harassed. And these are the less recognized forms of violence. In Nepal, female babies die from neglect because parents value sons over daughters, in Sudan, girls' genitals are mutilated to ensure virginity until marriage; and in India, young brides are murdered by their husbands when parents fail to provide enough dowry. In all of these instances, women are targets of violence because of their sex. This is not random violence; the risk factor is being female." *Id.* at n.166.

IBR's definition of "social group."<sup>167</sup>

In the case of Kedra Hassen Farah,<sup>168</sup> the IBR identified and used three types of social groups to grant refugee status to Kedra H. Farah and her two minor children. These groups are: the group that the mother belongs to, i.e., single mothers; the group to which the ten-year old girl belongs i.e., female minors at risk for FGM; and the group to which the seven year old boy belongs, minors that may be detached from their mothers.<sup>169</sup>

On the other hand, the Austrian authorities on many occasions denied Bosnian Serb rape victims refugee status, among other reasons, on the grounds that the victims do not belong to any identifiable social group in the sense of the Convention.<sup>170</sup> The Canadian Supreme Court in *Attorney General v. Ward*<sup>171</sup> identified three possible categories of social groups: (1) groups possessing "innate or unchangeable characteristics;" (2) voluntary associations for reasons that are fundamentally important to their dignity; and (3) people associated with a former voluntary status.<sup>172</sup>

In *Sanchez-Trujillo v. INS*,<sup>173</sup> the Court of Appeals for the Ninth Circuit rejected a claim by Salvadorian young men who feared persecution because they belonged to a young working male group who were eligible for military service in El Salvador.<sup>174</sup> Here, the court defined a particular social group to mean "a collection of people closely affiliated with each other who are

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<sup>167</sup> *Id.* at n.180.

<sup>168</sup> *Id.* (citing Convention Refugee Determination Decision No. T93-121198, T93-12199, T93-12197 at 10 (May 10, 1994)),

<sup>169</sup> *See id.*

<sup>170</sup> *See* Fitzpatrick, *supra* note 109, at 240.

<sup>171</sup> *Id.* at n.208 (citing 103 D.L.R. 4th 1, 37 (1993)).

<sup>172</sup> *See id.* at 376. The Court then categorized gender under the first definition. However, in *Ward*, the Court decided that the respondent, Ward, did not belong to any of the three groups and denied him refugee status. Ward was a former member of a para-military terrorist organization, the Irish National Liberation Army (INLA), and he based his claim on his membership in INLA. He claimed that as a member he was assigned to guard the organization's hostages whom he released because they were to be executed and as a result he was tortured and finally sentenced to death, which he managed to escape. *Id.*

<sup>173</sup> *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1572 (9th Cir. 1980).

actuated by some common impulse or interest”<sup>175</sup> and concluded that there never can be a social group that could be identified as “young working class males.”<sup>176</sup> The Eighth Circuit also employed this definition.<sup>177</sup>

The Court of Appeals for the Third Circuit adopted the definition of “common immutable characteristics” used by the BIA, and based on this definition, the Third Circuit characterized sex as a social group category.<sup>178</sup> To the contrary, the Ninth Circuit and the Second Circuit have expressly held that sex by itself is not sufficient to constitute an identifiable social group.<sup>179</sup> Although a certain degree of clarity has been attained, particularly with regards to gender related persecution, the exact meaning of the term social group remains controversial.

b. Political Opinion

A person qualifies for refugee status if he has a well-founded fear of being persecuted because of his political opinion. Like the definition of “social group,” the exact meaning of political opinion also has been a source of enormous confusion and uncertainty. Atel Grahl-Madsen argues that political opinion covers persons who are alleged or known to hold opinions contrary to or critical of the policies of the government or the ruling party.<sup>180</sup> Goodwin-Gill suggests that “a typical ‘political refugee’ is one pursued by the government of a State or other entity on account of his or her opinions, which are an actual or perceived threat to that government or its institutions, or to the political agenda and aspirations of the entity in question.”<sup>181</sup> Whenever the matter is so categorical that a person belongs to a certain opposition

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<sup>174</sup> *Id.* at 1572.

<sup>175</sup> *See id.* at 1576.

<sup>176</sup> *Id.*

<sup>177</sup> *See, e.g.,* Safaire v. INS, 25 F.3d 636, 640 (8th Cir. 1994).

<sup>178</sup> *See, e.g.,* Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993).

<sup>179</sup> *See* Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1980).

<sup>180</sup> *See* GRAHL-MADSEN, *supra* note 12, at 221.

<sup>181</sup> GOODWIN-GILL, *supra* note 4, at 49.

party and he fears persecution for the same reason, there could be little controversy. A problem arises whenever a person's cannot be clearly categorized as opposing or supporting certain policies because of his neutrality.

Judicial interpretations of "political opinion," as protected by the Convention, have been inconsistent. For example, the Court of Appeals for the Ninth Circuit in *Bolanos-Hernandez v. INS*<sup>182</sup> held that political neutrality can be considered to be a political opinion that would entitle a person to refugee status.<sup>183</sup> The same court held differently in its decision in *Zepeda-Melendez v. INS*.<sup>184</sup> In *Zepeda-Melendez*, the court opined that the applicant, a Salvadorian man who lived in a house that guerrillas used by day and government forces by night, and who refused to join either political group, faced no different danger than other non-committed Salvadorians in the country.<sup>185</sup> Thus the applicant was not at risk because of political opinion.

In *Campos-Guardado v. INS*,<sup>186</sup> the applicant was raped immediately after her uncle was killed and also was threatened with death if she ever exposed the rapists. The Court of Appeals for the Fifth Circuit held that she did not qualify for refugee status because the threat was not due to her political opinion but because of the applicant's personal situation.<sup>187</sup> Contrary to the Fifth Circuit's decision, the Ninth Circuit, in *Lazo-Majano v. INS*,<sup>188</sup> held that a man who persecuted a woman who opposed his dominion could be considered as having persecuted her because of her political opinion.<sup>189</sup>

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<sup>182</sup> *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1984). In this case, the applicant was an El Salvadorian man who alleged that he did not want to remain as a member of a right wing party and resisted joining the guerillas, which put his life in jeopardy. *See id.*

<sup>183</sup> *See id.*

<sup>184</sup> *Zepeda Melendez v. INS*, 741 F.2d 285 (9th Cir. 1984).

<sup>185</sup> *Id.* at 290.

<sup>186</sup> *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987).

<sup>187</sup> *Id.* at 289-90.

<sup>188</sup> *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987)

<sup>189</sup> *Id.*

In *INS v. Elias-Zacarias*,<sup>190</sup> Justice Scalia, writing for the majority, said that:

Elias-Zacarias appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion. That seems to us not ordinarily so, since we do not agree with the dissent that only a “narrow, grudging construction of the concept of ‘political opinion’ . . . would distinguish it from such quite different concepts as indifference, indecisiveness, and risk averseness.”<sup>191</sup>

In this case, the Supreme Court held that forced participation in military service does not necessarily constitute persecution on account of political opinion.<sup>192</sup>

The Canadian authorities also have given differing interpretations to the concept of political opinion. For example, the Immigration and Refugee Board of Canada in the Azam Faceed Narine case<sup>193</sup> decided that, because the applicant had not demonstrated that he was a central figure in the political movement, he did not qualify for refugee status on the ground of political opinion.<sup>194</sup> In another case, the Board decided in favor of an Iranian woman who refused to wear the chador and perform Islamic functions or rituals, on the ground that her refusal could be considered an anti-government position that could be viewed as political.<sup>195</sup>

As demonstrated above, “social group” and “political opinion” represent concepts that are very difficult to consistently apply in varying circumstances. The results of past adjudications have, by and large, been dependent on the judicial philosophy and political opinions of the adjudicators. As a result, inconsistency in application remains a challenge.

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<sup>190</sup> 502 U.S. 478 (1992).

<sup>191</sup> *See id.* at 483 (citation omitted). Although the court did not decide this issue in this case, it has given a strong indication that it may not regard neutrality as holding a political opinion. In response to the applicant’s claim that guerrilla forces would take him against his will and kill him, Justice Scalia replied: “It is quite plausible, indeed likely, that the taking would be engaged in by the guerrillas in order to augment their troops rather than show their displeasure; and the killing he feared might well be a killing in the course of resisting being taken.” *See id.* at n.2.

<sup>192</sup> *Id.* at 482.

<sup>193</sup> *See HATHAWAY, supra* note 12, at 153 n.128 (citing Azam Faceed Narine, Immigration Appeal Board Decision V79-614, C.L.I.C. Notes 15.15, at 5 (December 5, 1979)).

<sup>194</sup> *Id.* at 153.

<sup>195</sup> *Id.* at 155 n.141.

## B. Denial and Loss of Refugee Status

Section A looked at the criteria for assignment of refugee status under the Refugee Convention. The difficulty associated with the interpretation of the key terms also has been discussed in some detail. This section deals with the problems involved in the adjudication of the denial of refugee status despite the fulfillment of all the requirements of the Convention, and loss of refugee status after it has already been granted.

### 1. Denial of Refugee Status

Article 1(D), (E), and (F) of the Convention provide for the exclusion of certain categories of persons who otherwise would be entitled to the benefits of the Convention. These categories of persons are: (1) persons already receiving United Nations protection and assistance;<sup>196</sup> (2) persons who are not considered to be in need of international protection because they have rights and obligations of nationals of the asylum country;<sup>197</sup> (3) persons with respect to whom there are serious reasons to believe that they have committed crimes against humanity, war crimes and crimes against peace;<sup>198</sup> (4) persons with respect to whom there are serious reasons to believe have committed serious non-political crimes prior to their admission to the country of refuge;<sup>199</sup> and (5) persons who have been guilty of acts contrary to the purposes

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<sup>196</sup> The Refugee Convention, *supra* note 3, at art. 1D. This provision essentially refers to the Palestinian refugees who were under the operation of the United Nations Relief and Work Agency (UNRWA) in the Middle East. Because the UNRWA already was operational when the Convention was adopted, the parties agreed to exclude the Palestinians from assistance and protection by other UN Agencies, in particular the UNHCR. The UNRWA was established by the General Assembly of the United Nations Resolution No. 302(IV), December 8, 1949. Its operation is limited in the Middle East countries, in particular, Jordan, Syria, Lebanon and the Gaza-strip. See HATHAWAY, *supra* note 12, at n.100.

<sup>197</sup> The Refugee Convention, *supra* note 3, at art. 1E. This provision was designed primarily to exclude refugees and expellees of German ethnic origin in the Federal Republic of Germany who, by virtue of Article 116 of the Basic Law, were Germans and who, although not possessing German nationality, were treated as if they were German nationals. See Paul Weis, *The Concept of the Refugee in International Law*, 87 JOURNAL DU DROIT INT'L 929, 978 (1960). However, its current importance is doubtful.

<sup>198</sup> The Refugee Convention, *supra* note 3, at art. 1F(a). See discussion *infra* section a.

<sup>199</sup> *Id.* at art. 1F(b). See discussion *infra* section b.

and principles of the United Nations.<sup>200</sup> Because most adjudicative problems of current importance relate to a refugee's past crimes, this section considers only the third and fourth categories.

a. Persons Who Are Believed to Have Committed Crimes against Peace, War Crimes and Crimes against Humanity

These are persons who are believed to be undeserving of international protection even if they meet the criteria for refugee status.<sup>201</sup> Two main policy considerations underlie the formulation of this provision: (1) these persons may be criminals and as such do not deserve protection<sup>202</sup> and (2) these persons possibly could be dangerous to the community of the asylum country.<sup>203</sup>

The international instruments<sup>204</sup> referred to as defining a war crime or a crime against humanity include the London Charter of the International Military Tribunal, an annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis concluded on the 8th of August 1945.<sup>205</sup> Article VI of this charter defines crimes against

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<sup>200</sup> *Id.* at art. 1F(c). At the Conference of Plenipotentiaries in 1951, the French delegation suggested that the "provision was not aimed at the man-in-the street, but at persons occupying government posts, such as heads of States, ministers and high officials....[Whenever] mention was made of a refugees, that was to say of victims of persecution, it was because it was assumed that there were also authors of such persecution. By a turn of events the persecutor might himself become a refugee." GRAHL-MADSEN, *supra* note 12, at 283. (quoting representative of the French delegation, Remarks at the Conference of the Plenipotentiaries (1951), UN doc. E/AC.7/SR. 166,6.)

<sup>201</sup> The provision reads:

The provisions of this convention shall not apply to any person with respect to whom there is serious reason for considering that he has committed a crime against peace, a war crime or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes.

The Refugee Convention, *supra* note 3, at art. 1F(a).

<sup>202</sup> See HATHAWAY, *supra* note 12, at 214.

<sup>203</sup> *Id.*

<sup>204</sup> Instrument(s) in the plural suggests that there is at least more than one such instrument. The other instruments (other than the London Charter which is referred below) could be the Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 (1948), available at <http://www.unhchr.ch/udhr/lang/eng.htm>, for it refers to serious non-political crimes (although it does not define them), and the Convention on the Prevention and Punishment of the Crime of Genocide, approved Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter The Genocide Convention]. See generally GRAHL-MADSEN, *supra* note 12, at 272; see also GOODWIN-GILL, *supra* note 4, at 98.

<sup>205</sup> The London Charter, Aug. 8, 1945, 82 U.N.T.S. 279.

peace as including “planning, preparation, institution or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”<sup>206</sup> War crimes include “murder, ill-treatment or deportation to slave labor . . . killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”<sup>207</sup> Crimes against humanity include “murder, extermination, enslavement, deportation . . . or persecution on political, racial or religious grounds.”<sup>208</sup>

This exclusion clause thus applies to any person who is believed to have committed any of these acts. The language of this provision is mandatory, and hence if a state believes that a person has committed any of these acts, the state cannot grant refugee status even if it wishes to do so.<sup>209</sup> In addition, states need not prove that the person has committed the acts or is in fact guilty of the allegation; it is enough that there are serious grounds for considering it to be so.

The greatest difficulty relates to ascertaining what constitutes serious grounds for considering that the individual committed a crime. The Convention does not provide for how this issue should be considered, so states apply their own standards. Further, a number of issues of criminal law must be addressed prior to denying a person’s refugee status on these grounds. What makes the inquiry extremely difficult is that the adjudicator must essentially consider events that might have occurred at some unknown location, and in an unknown time and manner. There almost always is no evidence, only allegations and suspicions.

The standard of “serious reasons for considering” is not a very well defined concept. According to the UNHCR, the criminal standard of proof, i.e. “beyond reasonable doubt” need

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<sup>206</sup> *Id.* at art. VI(a).

<sup>207</sup> *Id.* at art. VI(b).

<sup>208</sup> *Id.* at art. VI(c).

not be met; conversely, the preponderance of the evidence standard employed in civil cases might be too low a threshold.<sup>210</sup> UNHCR suggests that “[g]iven the rigorous manner in which indictments are put together by international criminal tribunals, however, indictment by such bodies, in UNHCR’s view, satisfies the standard of proof required by Article 1F.”<sup>211</sup>

States employ differing criteria in this respect. Evidence of involvement in criminal conduct of this nature usually comes from the applicants’ own statements. In the absence of such statements, identification of “a serious reason for considering” that the applicant has committed war crimes or crimes against humanity is extremely difficult unless the applicant is a well-known political figure. Precisely because of this difficulty, cases elaborating this standard are limited. The available case law deals primarily with whether some known conduct (whether known because of the applicant’s admission or otherwise) constitutes an excludable offense.

For example, in one Australian case, a Liberian man involved in the civil war stated the following in his application: “I took part in about 6 of these riots and although I did not wish to kill anybody, I knew either I had to shoot them or I would be shot. However, I always avoided shooting anyone in the head or chest because I knew that would mean instant death for them, instead aiming only at their legs or arms.”<sup>212</sup> This claimant essentially admitted that he might have killed people, although he claimed to have done so under duress. The court determined that the claimant’s acts constituted war crimes or crimes against humanity; however, it accepted his duress argument. The Australian court observed that the applicant “attempted to lessen the impact of the orders to kill by shooting in a manner to avoid killing anyone,” and found the

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<sup>209</sup> See GOODWIN-GILL, *supra* note 4, at 98-99.

<sup>210</sup> UNHCR Guidelines on International Protection, *Background Note on The Application of The Exclusion Clauses: Article 1F of the 1951 Convention Relating to The Status of Refugees*, 15 INT’L J. REFUGEE L. 502, 541 (2003).

<sup>211</sup> *Id.*

<sup>212</sup> MUSALO ET AL., *supra* note 12, at 706.

claims plausible and credible.<sup>213</sup> However, there certainly was a serious reason to consider that this claimant has committed a crime. The only piece of evidence, apart from country condition reports, is the applicant's own statement, and credibility was the determining factor. The difficulty associated with credibility determination is discussed under section V below.

The United States does not have a statutory equivalent to this Refugee Convention provision. The closest provision to this bar is what is commonly known as the "Persecutors of Others Bar."<sup>214</sup> The US Immigration Act provides: "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."<sup>215</sup> The Attorney General and, ultimately, the U.S. courts must determine whether or not an applicant has been involved in the persecution of others, and must make this determination based essentially on evidence presented by the claimant. Again, the case law mainly addresses the extent of criminal culpability based on the claimant's own statements and some scant evidence.

For example, in *Matter of Rodriguez-Majano*,<sup>216</sup> the claimant testified that he was forcibly recruited to a guerrilla force opposing the Salvadorian government.<sup>217</sup> The claimant admitted to having received military training and giving cover to others in the group while they

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<sup>213</sup> *Id.* at 711-12. The Canadian Immigration Appeals Board in the Felix Salatiel Nuñez Veloso case gave a similar decision. It considered the issue of the actual criminal responsibility of an applicant and decided that the particular applicant, a Chilean torturer, had committed the crime under duress and thus the exclusion clause did not apply to him. Immigration Appeal Board Decision 79-1017, C.L.I.C. Notes 11.5 (Aug. 24, 1979) (*quoted in* HATHAWAY, *supra* note 12, at 218). Hathaway says, "Yet the Board failed to inquire whether the human suffering induced by Mr. Nuñez Veloso's actions outweighed the risk to his own well-being, an essential finding for exculpation under the doctrine of coercion." *Id.*

<sup>214</sup> See MUSALO ET AL., *supra* note 12, at 721.

<sup>215</sup> 8 U.S.C. § 1101(a)(42)(B) (1982).

<sup>216</sup> *Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811 (BIA 1988), *reprinted in part in* MUSALO ET AL., *supra* note 12, at 722-25.

<sup>217</sup> MUSALO ET AL., *supra* note 12, at 723.

burned cars.<sup>218</sup> The immigration judge determined that was a sufficient ground to exclude him from refugee status because the claimant's involvement constituted acts of persecution.<sup>219</sup> The BIA, however, reversed the decision, stating that "[w]e do not believe Congress intended to restrict asylum and withholding only to those who had taken no part in armed conflict . . . harm resulting from generalized civil strife is not persecution."<sup>220</sup>

Again, the main body of evidence that the BIA relied on was the claimant's statement. His credibility was essentially outcome determinative. The importance of credibility in asylum proceedings is discussed in Section V below in some detail.

b. Persons Who Are Believed to Have Committed a Serious Non-Political Crime

Article 1F(b) of the Convention states that "[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a serious non-political crime outside the country of refuge prior to the admission to that country as a refugee."<sup>221</sup>

In addition to the problems this provision shares with Article 1F(a) discussed above, this provision also poses a very critical problem of interpretation because adjudicators must determine what constitutes a "serious non-political crime." No authoritative definition of this term exists. The concern behind this provision seems to be that common fugitives from justice may abuse the institution of asylum.<sup>222</sup> Nonetheless, identification of these groups is an extremely difficult task both in terms of ascertaining facts and in terms of categorizing crimes as

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.* In addition to this ground, the immigration judge's denial was based on credibility issues. The judge did not find the claims claim to having been forcibly recruited credible because, according to the judge, other background information suggested that forcible guerrilla recruitment did not begin until after the date that the claimant alleged to have been recruited. *See id.* at n.2.

<sup>220</sup> *Id.* at 724-25.

<sup>221</sup> The Refugee Convention, *supra* note 3, at art. 1F(b).

serious and non-serious, political and non-political.

Commentators and legal authorities vary in their understanding of “serious crime” for purposes of refugee status. Grahl-Madsen says a crime is serious when it warrants a substantial penalty, including the death penalty or deprivation of liberty for several years.<sup>223</sup> He adds that it could also be a crime of a more trivial nature but perpetrated in such a manner that its very wickedness makes its perpetrator liable to a penalty more severe than the penalty that is ordinarily imposed for such crimes.<sup>224</sup> Goodwin-Gill suggests that crimes are deemed serious when they are perpetrated against physical integrity, life and liberty.<sup>225</sup> The UNHCR proposes that the following acts can be characterized as serious crimes: homicide, rape, child molestation, wounding, arson, drug trafficking, and armed robbery.<sup>226</sup> Paul Weis suggests that what has to be measured is whether “the criminal character of the individual outweighs his refugee character.”<sup>227</sup> The Convention, however, leaves this determination to the discretion of the states, and states apply it according to their domestic standards. Thus crimes may be considered serious in one state and non-serious in others.

Determination of the political nature of the crime is the other problem. Definitionally, political offenses include “an attack on the political order of things established in the country where committed and even to include offenses committed to obtain any political object.”<sup>228</sup> However, even when the attack clearly is on the “political order,” the classification could be problematic. Goodwin-Gill comments that the nature and purpose of the offense must be examined in light of the motive, specifically: whether the offense was committed out of genuine

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<sup>222</sup> See HATHAWAY, *supra* note 12, at 221.

<sup>223</sup> GRAHL-MADSEN, *supra* note 12, at 297.

<sup>224</sup> *Id.* at 294.

<sup>225</sup> GOODWIN-GILL, *supra* note 4, at 105.

<sup>226</sup> *See id.*

<sup>227</sup> GRAHL-MADSEN, *supra* note 12, at 297 (quoting Paul Weis, UN Doc. HCR/INF/49.29).

political motive or merely for personal reasons, whether its commission was directed at the modification of the political organization or the structure of the state, and whether there was a direct causal nexus between the crime committed and its alleged political object.<sup>229</sup> He concludes that: “The political element should in principle outweigh the common law character of the offence, which may not be the case if the acts committed are grossly disproportionate to the objective, or are of an atrocious or barbarous nature.”<sup>230</sup>

The US equivalent of this provision follows the Convention verbatim.<sup>231</sup> Adopting the standard quoted above, in *McMullen v. INS*<sup>232</sup> the Court of Appeals for the Ninth Circuit denied relief to a former Irish Republican Army member who was involved in the bombing of two military barracks, training of militants, and coordination of illegal arms smuggling.<sup>233</sup> In *Aguirre-Aguirre v. INS*,<sup>234</sup> the claimant testified that he took part in the burning of ten buses and the messing of several stores as a means of demonstrating against the Guatemalan government.<sup>235</sup> The BIA denied refugee status based on these acts.<sup>236</sup> The Ninth Circuit disagreed and reversed, but the U.S. Supreme Court ultimately upheld the BIA’s original finding, holding that the BIA could permissibly deny refugee status because of non-political crimes without consideration of the claimant’s risk of political persecution upon return to his home country.<sup>237</sup>

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<sup>228</sup> BLACK’S LAW DICTIONARY 1319 (4th ed. 1951).

<sup>229</sup> GOODWIN-GILL, *supra* note 4, at 105-06.

<sup>230</sup> *Id.* The UNHCR adopts a similar approach. For details, see HANDBOOK ON PROCEDURES, *supra* note 3.

<sup>231</sup> See INA § 208(b)(2)(A)(iii) (codified as amended, 8 U.S.C. § 1158(b)(2)(A)(iii) (Supp. V 1999)).

<sup>232</sup> 788 F.2d 591 (9th Cir. 1986), *reprinted in part in* MUSALO ET AL., *supra* note 12, at 726.

<sup>233</sup> *Id.*

<sup>234</sup> 121 F.3d 521 (9th Cir. 1997), *reprinted in part in* MUSALO ET AL., *supra* note 12, at 727.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 732. Another reason for the Supreme Court’s reversal was the Ninth Circuit’s consideration of the UNHCR Guidelines, which provide that the risk of persecution must be balanced with the claimant’s conduct. According to the Supreme Court, the Handbook’s Guidelines are not binding, and as such may not be strictly followed. *See id.* at 733.

As is evidenced from the forgoing, the facts warranting denial of refugee status based on commission of crimes also has been a subject of inconsistent interpretation and application. Guidance is needed to clarify the meaning and the legal tests that properly should apply in such cases.

## 2. *Loss of Refugee Status*

The Convention contains clauses that provide for situations where a recognized refugee might lose his status as a refugee. These clauses are commonly referred to as cessation clauses. According to the cessation clauses contained under Article 1C of the Convention, a person may cease to be a refugee based on his own voluntary acts or based on a change of circumstances.<sup>238</sup> Further, Article 1C. 5 of the Convention provides that if the circumstances that forced a refugee out of his country no longer persistent, then the refugee ceases to be a refugee.<sup>239</sup> In the sense of this provision, it is appropriate to consider changes including the collapse of a regime that the refugee antagonized, the secession of a territory, and the victory of a rebel movement to be clear evidence of change of circumstances that may give rise to the revocation of one's refugee status.<sup>240</sup>

When the situation is clear, such as when a refugee belonged to a certain persecuted political group and the group seizes power, allowing the refugee to return without fear, the

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<sup>238</sup> The Refugee Convention, *supra* note 3, at art. 1C. This provision states:

The convention shall cease to apply to any person falling under the terms of section A if ... he can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.

*Id.* The other grounds include: "(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily re-acquired it; or (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) He has voluntarily re-established himself in the country which he left or out side of which he remained owing to fear of persecution." *See id.* The meanings of these provisions are less controversial. As such, a discussion is not included in this article.

<sup>239</sup> *Id.* The only exception is a compelling reason to refuse to go back due to reasons arising out of the former persecution. *See id.*

<sup>240</sup> *See* GRAHL-MADSEN, *supra* note 12, at 401.

application of this provision is not problematic. However, because most situations are not as clear and categorical as this, the application of this provision inevitably involves serious difficulties with regards to what circumstances must change and to what extent. Hathaway writes:

First the change must be of substantial political significance, in the sense that the power structure under which persecution was deemed a real possibility no longer exists. The collapse of the persecutory regime, coupled with the holding of genuinely free and democratic elections, the assumption of power by a government committed to human rights, and a guaranty of fair treatment for enemies of the predecessor regime by way of amnesty or otherwise, is the appropriate indicator of a meaningful change of circumstances.<sup>241</sup>

Even if there is agreement that a change of circumstances, as referred to in the Convention, should include all these factors or should be interpreted this way, the state of refuge still must determine whether elections are free and fair and whether the new government is committed to human rights. Such determinations are, in most cases, dependent on the relationship that the country of refuge may have with the new government of the refugee's home country.

One of the greatest challenges in this area is the lack of consensus among evaluators of human rights records and the genuineness of elections and institutionalization of democratic systems of countries that had produced refugees for a long time.

One good example of a possible abuse is the declaration by the Libyan President Colonel Moammar Kadafi in 1993. He declared that the Israeli-Palestinian Peace Agreement changed the circumstances in connection with which the Palestinians were accepted as refugees in Libya, and hence over 30,000 of them had to be repatriated to the West Bank and the Gaza Strip.<sup>242</sup>

Objective assessment of change of circumstances is exceedingly problematic. Often United States adjudicators rely on State Department Human Rights Reports and related news

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<sup>241</sup> HATHAWAY, *supra* note 12, at 200 (footnotes omitted).

sources. For example, in *Quevedo et al. v. Ashcroft*,<sup>243</sup> the Court of Appeals for the First Circuit affirmed the BIA's denial of asylum on change of circumstances grounds. The claimant was a Guatemalan citizen who belonged to a political movement that signed a peace accord after thirty-six years of civil war.<sup>244</sup> The court essentially relied on a 1996 U.S. State Department Human Rights Report and some related reports, which stated that the situation had changed for the better after the peace accord.<sup>245</sup> The court recognized that there were still some problems but nonetheless considered the situation safe enough for the claimant to return.<sup>246</sup> The court quoted the claimant as saying: "[b]ecause with a paper and a pencil there is never going to be peace in one country . . . ."<sup>247</sup> The court did not accept the claimant's rationale. Nevertheless, a question might be asked: how often do nations jump from decades of civil war to a democratic order with the signing of a peace accord?

A very good example demonstrating the misuse of change of circumstances is *Roble v. Canada*.<sup>248</sup> In *Roble*, the Canadian Federal Court of Appeals rejected an application by a Somali refugee on a change of circumstances grounds.<sup>249</sup> The applicant claimed refugee status based on fear of persecution by the security forces of former Somali President Ziad Barre. While the case was still being considered, the Barre government toppled. The Court, however, considered the change of circumstances sufficient to deny refugee status.<sup>250</sup> Interestingly, the

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<sup>242</sup> See Frederick B. Baer, *International Refugees as Political Weapons*, 37 HARV. INT'L L.J. 243, 244 (1996).

<sup>243</sup> 336 F.3d 39 (1st Cir. 2003).

<sup>244</sup> *Id.* at 41-42.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 42.

<sup>248</sup> *Roble v. Canada* (Minister of Employment and Immigration), No. A-1101-91, 47 A.C.W.S. (3d) 823 (Fed. Ct. App. Apr. 25, 1994), available at 1994 A.C.W.S.J. LEXIS 70543; also available at [http://www.refugeecaselaw.org/cases\\_files/CORE%20COLLECTION/case\\_651\\_1.pdf](http://www.refugeecaselaw.org/cases_files/CORE%20COLLECTION/case_651_1.pdf) (last visited Nov. 11, 2005).

<sup>249</sup> See *id.* at 43-45.

<sup>250</sup> The claimant knew that the change was not for the better but for the worse; however, he was not sure as what would happen to him. The court held that against him. His testimony was as follows: "COUNSEL: Do you think the fact that you worked for a government agency such as the airlines could cause you some difficulties now in

change turned out to be for the worse. Although the circumstances were obvious even at that point, evidently the court completely overlooked the magnitude of the Somali problem. That is not a very uncommon phenomenon in refugee status adjudications.

#### **IV. BURDEN AND STANDARD OF PROOF IN REFUGEE STATUS DETERMINATIONS**

Almost all jurisdictions require that the claimant for refugee status prove that he or she is a refugee.<sup>251</sup> In the United States, a person seeking asylum must prove that he or she is a refugee by proving past persecution or a well founded fear of future persecution because of race, religion, nationality, membership to a social group or political opinion.<sup>252</sup>

This burden requires proving each and every essential element of the claim. The difficulty associated with ascertaining the exact meanings of these elements has been discussed in Section III above. This section discusses the difficulty associated with proving the facts.

The set of circumstances that often leads to a person's flight to safety almost invariably prevent the collection of evidence that may help prove facts. That makes refugee status adjudication a unique type of legal proceeding, which purports to determine the occurrence or non-occurrence of alleged events in some distant place based primarily on the claimant's own statement. As a result, credibility constitutes the most important factor in refugee status determination. It could fairly be said that asylum jurisprudence is by and large a credibility jurisprudence.

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Somalia? CLAIMANT: It is possible. It is possible that those who are opposed to the government might inflict me with some harm, but I do not know for sure." *See id.* at 22. The court concluded that "The applicant's submission that there was insufficient evidence to support the conclusion of an effective and durable change of circumstances is therefore unfounded." *Id.* at 46.

<sup>251</sup> *See, e.g.*, Canadian Immigration and Refugee Protection Act, Consolidated Statutes and Regulations, Part II, Div. 2, § 100(4), available at <http://laws.justice.gc.ca/en/1-2.5/64943.html#rid-64998> (last visited Nov. 14, 2005).

<sup>252</sup> 8 U.S.C.A. § 1158 (West 2005). A related but separate relief under 8 U.S.C.A. § 1231 (West 2005) is withholding of removal. To be eligible for withholding of removal, a person must prove that his life or liberty would be threatened if he or she is returned to his country of origin. Under this category, the person must prove a clear probability of persecution. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 440-41 (1987); *see also INS v. Stevic*, 467

Determining one's credibility is an exceedingly difficult task. The Immigration and Naturalization Service (INS, now called Bureau of Citizenship and Immigration Services, BCIS) regulations state: "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."<sup>253</sup>

The various circuit courts generally have endorsed variations of the same proposition. For example, the Court of Appeals for the Seventh Circuit ruled that an asylum applicant's exclusive reliance on his own testimony to establish a well-founded fear of persecution "in itself is not necessarily fatal to his petition, but it places a premium on the content of that testimony."<sup>254</sup> The Court of Appeals for the Ninth Circuit consistently disapproved any mandatory requirements for corroboration as long as the claimant's statement is credible.<sup>255</sup>

The Real ID Act<sup>256</sup> maintained the rule that the applicant's credible testimony may be sufficient to sustain the burden of proof; however, it reversed the Ninth Circuit's ruling on corroboration. The Act states:

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U.S. 407, 428 (1984). The INS regulations provide: "The burden of proof is on the applicant for asylum to establish that he or she is a refugee." 8 C.F.R. § 208.13(a) (2000).

<sup>253</sup> INS Regulations, 8 C.F.R. § 208.13(a) (2000); *see also* Korniejew v. Ashcroft, 371 F.3d 377 (7th Cir. 2004).

<sup>254</sup> INA § 101(a)(42)(A) (codified as amended, 8 U.S.C. § 1101(a) (2000)). *See also* Ahmed v. Ashcroft, 348 F.3d 611 (7th Cir. 2003), *cited in* Kurtis A. Kemper, Annotation, *Necessity and Sufficiency of Evidence Corroborating Alien's Testimony to Establish Basis for Asylum or Withholding of Removal*, 179 A.L.R. Fed. 357 at 79 (West 2002-2005).

<sup>255</sup> Disapproving any BIA requirements that corroborating evidence be produced where it is reasonably expected and no explanation is given for its non-production. *See* summaries of Lopez-Cabrera v. INS, No. 98-70047, 2000 U.S. App. LEXIS 23403 (9th Cir. Sept. 14, 2000) and Vizcardo-Llamas v. INS, No. 99-70713, 2001 U.S. App. LEXIS 21810 (9th Cir. Oct. 10, 2001), *cited in* Kemper, *supra* note 254, at 72. However, the Court of Appeals for the Ninth Circuit has ruled that failure to produce available relevant corroborative evidence may give rise to an inference that it might be unfavorable. *See* Omoregbee v. INS, No. 93-70883, 1995 U.S. App. LEXIS 29349 (9th Cir. Aug. 3, 1995), *cited in* Kemper, *supra* note 254, at 72. *See also* Ladha v. INS, 215 F.3d 889, 899 (9th Cir. 2000) ("We are not free to consider as an open question whether the BIA has hit upon a permissible interpretation of the INA, for the law we must follow is already set out for us: this court does not require corroborative evidence.") (internal quotation and citation omitted); *see also* Cordon-Garcia v. INS, 204 F.3d 985, 992-93 (9th Cir. 2000) ("This court recognizes the serious difficulty with which asylum applicants are faced in their attempts to prove persecution, and has adjusted the evidentiary requirements accordingly.") (citation omitted).

<sup>256</sup> The Bill, labeled H.R. 418, passed in the House of Representatives on February 10, 2005. It was attached to the emergency spending bill on Iraq and Tsunami aid (H.R. 1268) and then passed by the House. On May 10, the Act was passed by the U.S. Congress and then signed into law by President Bush on May 11, 2005. *See* Human Rights First, *Real ID Act Endangers People Fleeing Persecution*,

[w]here the trier of fact determines, in the trier of fact's discretion, that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence without departing the United States. The inability to obtain corroborating evidence does not excuse the applicant from meeting the applicant's burden of proof.<sup>257</sup>

According to this new law, even if the trier of fact is convinced that the applicant's testimony is credible, he or she may require additional evidence. The applicant's inability to obtain the evidence could be fatal to his or her case. This particular rule is a significant addition to the applicant's burden of proof.

The Real ID Act makes it clear that "there is no presumption of credibility,"<sup>258</sup> and provides some guidance as to how credibility must be determined. It states:

The trier of fact should consider all relevant factors and may, in the trier of fact's discretion, base the trier of fact's determination on any such factor, including the demeanor, candor, or responsiveness of the applicant or witness ... the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim.<sup>259</sup>

Precisely because of the obvious additions to the burden of proof on asylum applicants, the Act was a subject of widespread criticism by human rights and immigrant groups.<sup>260</sup> The

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[www.humanrightsfirst.org/asylum/asylum\\_10\\_sensenbr.asp](http://www.humanrightsfirst.org/asylum/asylum_10_sensenbr.asp) (last visited Nov. 3, 2005).

<sup>257</sup> The Real ID Act of 2005 § 101(b)(ii) (codified as amended in scattered sections of 8 U.S.C.A. § 1158-1282 (West 2005)).

<sup>258</sup> *Id.* § 101(a)(3), adding new INA § 208(b)(1)(B)(iii).

<sup>259</sup> *Id.* § 101(c), adding new INA § 240(c)(4)(C).

<sup>260</sup> *See, e.g.*, Letter from over 50 Asian Pacific American Organizations to 'Senator' (Apr. 11, 2005), <http://www.humanrightsfirst.org/asylum/pdf/realid/apasenatesignon-041205.pdf> (last visited Nov. 3, 2005); Letter from National Network to End Violence Against Immigrant Women to 'Senator' (Mar. 29, 2005), <http://www.humanrightsfirst.org/asylum/pdf/realid/antiviolence-033005.pdf> (last visited Nov. 3, 2005); Letter from over 80 organizations and individuals to 'Senator' (Apr. 7, 2005), <http://www.humanrightsfirst.org/asylum/pdf/realid/over80-opp-040705%20.pdf> (last visited Nov. 3, 2005). The Act also was the subject of extensive press coverage. *See, e.g.*, Dawn Herzog Jewell, *Death Sentence? Immigration bill could jeopardize asylum seekers, critics say*, CHRISTIANITY TODAY, Mar. 8, 2005, available at <http://www.christianitytoday.com/ct/2005/004/3.26.html>; Lin Piwowarczyk, Op-Ed, *Unwelcome Mat*, BOSTON GLOBE, Feb. 25, 2005, available at [http://www.boston.com/news/globe/editorial\\_opinion/oped/articles/2005/02/25/unwelcome\\_mat/](http://www.boston.com/news/globe/editorial_opinion/oped/articles/2005/02/25/unwelcome_mat/); Editorial, *On*

provisions that attracted more intense criticism are the corroboration provision, indicated above, and the reliance on demeanor as indicative of credibility. For example, commenting on the inclusion of demeanor as an element of credibility, Human Rights First observed that “[u]nder the Real ID Act, refugees will be denied asylum [b]ecause they do not look a judge in the eye ... or [b]ecause they cannot talk about rape with a male immigration officer.”<sup>261</sup> Human Rights First concludes that demeanor is a poor indicator of credibility because people from different cultures have different manners of communicating with authority figures.<sup>262</sup> Even without cultural differences, psychological studies have found that reliance on demeanor is a poor method of determining the truth or falsity of utterances.<sup>263</sup> Other studies have shown that in criminal investigation cases, trained police officers performed slightly better than chance, but absolutely no better than untrained personnel.<sup>264</sup>

The Act also raises the standard of review with respect to corroboration. It states: “No court shall reverse a determination made by a trier of fact with respect to availability of corroborating evidence ... unless the court finds that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.”<sup>265</sup> This addition clearly subjects the standard of review for the legal question of whether or not corroborating evidence is needed to a

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*Guard America*, N.Y. TIMES, Feb. 15, 2005, at A18, available at <http://www.nytimes.com/2005/02/15/opinion/15tue3.html?ex=1142744400&en=394621cc6e2c29d7&ei=5070>; Doris Meissner, Commentary, *Not Broke, Don't Fix*, WASH. TIMES, Feb. 20 2005, available at <http://www.washingtontimes.com/commentary/20050219-092415-7342r.htm> (last visited on Nov. 3, 2005).

<sup>261</sup> See Human Rights First, *Real ID Act Endangers People Fleeing Persecution*, [www.humanrightsfirst.org/asylum/asylum\\_10\\_sensenbr.asp](http://www.humanrightsfirst.org/asylum/asylum_10_sensenbr.asp) (last visited Nov. 3, 2005).

<sup>262</sup> *Id.*

<sup>263</sup> See Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 INT'L J. REFUGEE L. 293, 308 (2001), cited in Michael Kagan, *Is the Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 379 n. 45 (2003).

<sup>264</sup> See Alders Vrij & Samantha Mann, *Telling and Detecting Lies in a High-Stake Situation: The Case of a Convicted Murderer*, 15 APPLIED COGNITIVE PSYCHOL. 187 (2001), cited in Kagan, *supra* note 263, at 379 n.46.

<sup>265</sup> The Real ID Act, *supra* note 257, § 101(d), amending INA § 242(b)(4)(D).

simple deferential standard that ordinarily applies to factual questions.<sup>266</sup> This would essentially mean that an immigration judge's findings of credibility and availability of corroborating evidence would remain unchallenged.

The Act's modification of the existing standard of review for clear questions of fact is minor. Current law states: "The administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."<sup>267</sup> Interpreting this provision, the Supreme Court, in *INS v. Elias-Zacarias*,<sup>268</sup> found that reversal of factual determinations by a reviewing court is warranted only when the evidence compels such a reversal. It is not sufficient that the evidence may support a contrary finding, but rather that the evidence must compel a contrary conclusion.<sup>269</sup>

Regardless of the specific statutory and judicial guidance concerning the review of factual findings of immigration judges, the reality is that the findings of immigration judges almost invariably stand. The recent restructuring of the BIA has made the deferral to immigration court findings nearly mandatory. Introducing the reform, former Attorney General John Ashcroft, in a statement issued on August 23, 2002, said: "[T]he regulations bring the Board's standards of review into conformity with appellate courts throughout the country, which address legal issues de novo (anew) while deferring to the factual findings of lower courts. Prior to these reforms, the Board had routinely addressed factual questions de novo . . . ."<sup>270</sup> The

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<sup>266</sup> See INA § 242(b)(4)(B) (codified as amended, 8 U.S.C. Sec. 1252(b)(4)(B) (2000)).

<sup>267</sup> *Id.*

<sup>268</sup> *INS v. Elias-Zacarias*, 502 U.S. 478, 484 (1992).

<sup>269</sup> Writing for the majority, Justice Scalia said: "And if he seeks to obtain judicial reversal of the BIA's determination, he must show that the evidence he presented was so compelling that no reasonable fact-finder could fail to find the requisite fear of persecution." *Id.* at 483-84.

<sup>270</sup> Press Release, U.S. Department of Justice, Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures (Aug. 23, 2002), [http://www.usdoj.gov/opa/pr/2002/August/02\\_eoir\\_489.htm](http://www.usdoj.gov/opa/pr/2002/August/02_eoir_489.htm) (last visited Nov. 4, 2005).

reform also reduced the number of BIA judges reviewing each case from three to one.<sup>271</sup>

The result of this reform was dramatic: it increased the BIA's adjudicative efficiency by almost 100 percent.<sup>272</sup> What that efficiency indicates is a subject of immense controversy.

Evidently, the BIA's asylum grant rate went down from 23 percent in 2001 to 2 percent in 2002.<sup>273</sup> Within the first six months alone, the backlog went down from 56,000 to 47,000.<sup>274</sup>

Statistics show that currently about 224 immigration judges<sup>275</sup> receive more than 270,000 cases a year.<sup>276</sup> Among them, more than 56,000 of the cases seek relief in the form of asylum.

According to official statistics, less than one quarter of them actually are granted asylum.<sup>277</sup>

Appeal to the BIA has become a futile exercise, with only 2 percent to 4 percent grant rates.<sup>278</sup> In fact, a series of policy and administrative changes effected since 2001 have caused asylum applications to decline significantly. According to BCIS statistics, in fiscal year 2001, 103,499 applications were received. By 2002 that number had fallen to 89,726. By the year

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<sup>271</sup> *Id.* The BIA originally had five judges altogether, but that number was increased to 23 in 2002 to implement the new procedures. The number was subsequently reduced to 11. See U.S. Department of Justice Executive Office For Immigration Review, *Fiscal Years 2005-2010, Strategic Plan*, at 6 (Sept. 2004), <http://www.usdoj.gov/eoir/statspub/FinalTEREOIRStrategicPlan2005-2010September%202004.pdf> (last visited Nov. 2, 2005) [hereinafter *Strategic Plan*].

<sup>272</sup> U.S. Department of Justice, *Fact Sheet, Board of Immigration Appeals: Final Rule*, at 2 (Aug. 23, 2002), <http://www.usdoj.gov/eoir/press/02/BIARulefactsheet.pdf> (last visited Nov. 3, 2005) [hereinafter *Fact Sheet*].

<sup>273</sup> See U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, vol. I, at 34, [http://www.uscif.gov/countries/global/asylum\\_refugees/2005/february/Volume%20I.pdf](http://www.uscif.gov/countries/global/asylum_refugees/2005/february/Volume%20I.pdf) (last visited Oct. 2005) [hereinafter *Report on Asylum Seekers vol. I*].

<sup>274</sup> *Id.*

<sup>275</sup> See *Strategic Plan*, *supra* note 271, at 6.

<sup>276</sup> *Fact Sheet*, *supra* note 272, at 2.

<sup>277</sup> U.S. Department of Justice Executive Office for Immigration Review, Office of Planning, Analysis and Technology, *Immigration Courts FY 2004 Asylum Statistics* at 9, <http://www.usdoj.gov/eoir/eoia/FY04AsyStats.pdf> (last visited Oct. 2005). The exact figures for 2004 are: 56,609 asylum applications were adjudicated; among them, 10,839 were granted and 20,867 were denied. The remaining applications were withdrawn, abandoned, or classified under the category of "other." Only a very small percentage were granted conditional relief. See *id.*

<sup>278</sup> See *Report on Asylum Seekers vol. I*, *supra* note 273, at 34, 56. For example, in 2002, only 19 of 1251 appeals were sustained; in 2004, only 49 of 2879 were sustained. See *id.* Some suggest that the reason for the decline results from the change in the composition of the BIA judges with the removal of five who were considered liberal. See, e.g., Tanya Weinberg & Ruth Morris, *Gatekeepers: Who Gets Asylum? Experts Warn Bias Might Be Swaying Judges' Decisions*, S. FLA. SUN-SENTINEL, July 3, 2005, available at [http://www.uscirf.gov/mediaroom/news/news\\_archive/2005/july/07032005\\_gatekeepers.html](http://www.uscirf.gov/mediaroom/news/news_archive/2005/july/07032005_gatekeepers.html) (last visited Nov. 5, 2005).

2003, it had fallen further to 42,705 i.e., less than 50 percent of what it was in 2001.<sup>279</sup> The 2004 volume was by far the lowest it has been since the enactment of the 1980 Immigration Act,<sup>280</sup> which brought the US in compliance with the 1967 UN Refugee Protocol.<sup>281</sup>

According to the US Commission on International Religious Freedom, there is a great disparity between the grant rates of individual judges.<sup>282</sup> One extreme example is the disparity in the grant rates of a South Florida immigration court. While one judge averaged a lower than 2 percent grant rate, another judge within the same court averaged about a 75 percent grant rate.<sup>283</sup> This is a prime demonstration of the role of subjective assessment of objective fear. Because this phenomenon is very well known among immigrants and immigration lawyers, in the majority of cases, for all practical purposes, the results of cases are known by the mere fact of their assignment to one judge or another.

The Commission said that, in nearly 40 percent of immigration judge decisions where relief was denied, the ground for denial was inconsistency between the claimant's testimony and his or her prior statements to an immigration inspector or an immigration officer.<sup>284</sup> In nearly one-quarter of denials, the ground was lack of credibility because of added details.<sup>285</sup>

Commenting on cultural differences regarding what is considered an important detail in life,

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<sup>279</sup> See U.S. Dept. of Homeland Security, *Yearbook of Immigration Statistics: 2003, Refugees and Asylees* at 50 (table 12), <http://uscis.gov/graphics/shared/statistics/yearbook/2003/2003RA.pdf> (last visited, Nov. 4, 2005) [hereinafter *Yearbook of Immigration Statistics*]; see also Press Release, Human Rights First, *Human Rights First Condemns Passage of Real ID Act Punishing Victims of Persecution, Core American Principles Sacrificed in Largely Unnoticed Law* (May 11, 2005), [http://humanrightsfirst.org/media/2005\\_alerts/asy\\_0511\\_realid.htm](http://humanrightsfirst.org/media/2005_alerts/asy_0511_realid.htm) (last visited Oct. 2005).

<sup>280</sup> See *Yearbook of Immigration Statistics*, *supra* note 279, at 50. According to UNHCR, this trend has been noted in all developed countries since 2001. See *Refugees by Numbers* (2005 Edition), <http://www.unhcr.org/cgi-bin/texis/vtx/basics/opendoc.htm?tbl=BASICS&id=3b028097c#Asylum%20seekers> (last visited Nov. 1, 2005).

<sup>281</sup> See Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981) (for a detailed discussion of the legislative history).

<sup>282</sup> See *Report on Asylum Seekers vol. 1*, *supra* note 273, at 56.

<sup>283</sup> Weinberg & Morris, *supra* note 278. Commenting on such disparity, Professor David Marin said: "One's comfort level can't be very high with this kind of inconsistency." See *id.*

<sup>284</sup> *Id.*

Michael Kagan, who had a chance to observe refugee status determinations in Egypt, said that Sudanese refugees often struggled to remember their birthdates or wedding dates because such events are neither recorded nor considered important in southern Sudanese society.<sup>286</sup>

The writer of this article also encountered refugees in East Africa who had to struggle to remember the number, names, and ages of their children. These situations do not create any serious adjudicative problems in Africa because almost invariably, refugees flee well known and recognized hardships and as such the UNHCR considers them *prima facie* refugees. However, the refugees face problems in trying to establish their refugee status for resettlement to third countries that may use different cultural standards.

Under the existing system in the United States, in the great majority of asylum cases a single immigration judge's determination of the credibility of a claimant essentially determines the outcome once and for all. As indicated above, determining a witness's credibility is a very difficult task. The law, particularly the Real ID Act, provides detailed guidance but assumes perfection in whoever makes the factual determinations of these difficult cases. Just Law International, commenting on the provision of Real ID Act regarding judicial review said:

Section 101 presumes absolute perfection on the part of the Immigration Judge: perfection in temperament, in wisdom, in clarity of insight, and in understanding of human nature. Only perfect human beings could ever wield such a complete and unreviewable power of life and death over their fellow human beings without risking grave error. Yet real-life experience is full of evidence that few, if any, such God-like persons have ever served as Immigration Judges.<sup>287</sup>

The greatest difficulty arises when an applicant attempts to embellish his or her real story

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<sup>285</sup> *Id.*

<sup>286</sup> Kagan, *supra* note 263, at 386. In fact, failure to remember one's birthday or, for that matter, the birthdays of parents or siblings could clearly be grounds for denial in some immigration courts.

<sup>287</sup> Just Law International, P.C., Critical Analysis of Section 101 of The Real ID Act of 2005 ii (Mar. 15, 2005), <http://www.jubileecampaign.org/home/jubilee/FINAL-RIDA.pdf> (last visited Oct. 23, 2005) [hereinafter P.C.].

and unwittingly imports inconsistency into that story. Even if the true story is strong enough to warrant recognition, once any inconsistency is detected in the statement, adjudicators would be inclined to deny the case. That is because the inconsistent statement not only damages the credibility of the applicant as a witness but also creates a sense that the applicant is an untrustworthy person who does not deserve the kind exercise of discretion. Theoretically, honesty is not an element of refugee status; however, in practice, dishonesty is almost always fatal.

Professor Hathaway argues that indeed “an individual can be untruthful and still be a Convention refugee.”<sup>288</sup> He provides an interesting example: an adjudicator obtains sufficient documentary evidence that proves the identity of the claimant and the situations surrounding his persecution that meet all the requirements of the Convention. In this case, the adjudicator is left without any alternative but to grant the case even if the claimant provides false testimony or, for that matter, fails to testify at all.<sup>289</sup>

Along the same lines, Just Law International stated: “real-life experience is full of deserving applicants who have, at some point in their lives, stretched the truth, failed to speak with accuracy, failed to prevent misquotation, or relied upon false documentation for some purpose . . . everyone has friends or relatives who see things a little differently than they do.”<sup>290</sup>

It then concluded that any one of these real life situations could result in a death sentence for a

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<sup>288</sup> James C. Hathaway, *Understanding Refugee Protection as Human Rights Protection*, paper presented at EU Presidency Seminar entitled, ‘International Protection Within One Single Asylum Procedure,’ organized by the Swedish Migration Board, the EU Commission and the U.S. Department of State, in Norrköping, Apr. 23-24, 2001. Reproduced in the Report from the Seminar published by the Migration Board, *cited in* Brian Gorlick, *Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status*, 15 INT’L J. REFUGEE L. 357, 360 n.6 (2003).

<sup>289</sup> *Id.*

<sup>290</sup> Just Law International, P.C., *supra* note 288, at iii.

genuine refugee.<sup>291</sup> Other refugee advocates suggest that refusing to believe the stories of refugees is a method of accepting refugee protection in principle and denying it in practice.<sup>292</sup>

Presently, too much emphasis is placed on “consistency” and “credibility” in asylum adjudications around the world. That might be the best that could be done under the circumstances; however, as this section shows, there are some serious shortcomings in these life and death decisions.<sup>293</sup> The following section recommends some possible alternative solutions that may alleviate the consequences of possible erroneous decisions.

## V. ALTERNATIVES

Asylum adjudications everywhere face the very serious adjudicative challenges discussed in Sections III and IV above. As these sections have demonstrated, the regime of refugee protection instituted by the Refugee Convention is incapable of preventing a significant number of erroneous decisions. Given the dramatic consequences of such decisions, it is indeed essential

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<sup>291</sup> *Id.*

<sup>292</sup> See David Matas, *Credibility of Refugee Claimants*, 21 IMMIGR. L. REP. 2D 134 (1994), cited in Kagan, *supra* note 263, at 368 n.4.

<sup>293</sup> Asylum proceedings involve negative presumptions and biases, especially if a refugee comes from a nation that can be termed as economically underdeveloped. It is commonly presumed that the refugee’s migration is a movement for economic benefits or personal convenience. If for example, a refugee comes to the U.S. and alleges that his government will slay him should he return because he was a chairman of an opposition group, the judge or the immigration officer might tend to assume that, had this person been a chairman, he would have supporting documents. If he produces documents, the judge might doubt how the person managed to collect all the documents while he was facing death or any kind of severe punishment. A very good example is a case cited by Professor Margulies, who wrote: An immigration judge made an adverse credibility finding about a client who had been part of a band of politically active youths in a Haitian town (before the September, 1991 coup against Jean Bertard Aristid). The basis for the adverse credibility finding was that the young man “before fleeing his village, had taken the time to say goodbye to his mother. The judge was incredulous. How could someone in fear of his life devote precious time to say goodbye to loved ones?” See Peter Margulies, *Difference and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives*, 6 ST. THOMAS L. REV. 135, 137 (1993). In denying a claim in another interesting case, an INS official stated: “The claimant said his father was murdered. He had a newspaper article showing a picture of someone he said was his father and two other men in Iran being lynched. But I don’t know if it’s his father. He’s also got an affidavit from a friend who was present describing the executions. But the friend could be lying.” Davalene Cooper, *Promised Land or Land of Broken Promise? Political Asylum in the United States*, 76 KY. L.J. 923, 931 n.75 (1988) (quoting Arthur C Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REFORM 243, 253 (1984)).

that there be an alternative to the outright execution of all of the decisions while clearly knowing that some of the refugees might be genuine but failed to prove it under the existing system. This Section offers possible alternatives to the finality and imperfect execution of refugee status decisions with a view to alleviating some of the serious consequences.

#### **A. Domestic Alternatives**

Today, asylum seekers everywhere need not only prove that they have a well-founded fear of being persecuted but also must overcome negative presumptions, including the presumption that they are not economic migrants or terrorists. It is fair to say that asylum-seekers are presumed undeserving until they present their cases consistently, plausibly, and credibly to the satisfaction of the adjudicator. The previous sections have demonstrated the difficulties that asylum seekers face in making their cases. Because of such difficulties, it is often said that refugee status determination proceedings unwittingly favor those who are educated, well-traveled and multilingual.<sup>294</sup> Most of those who fail to articulate their cases are removed to places where they maybe subjected to severe treatment.

The Congressional Commission for International Religious Freedom said that *bona fide* asylum-seekers who navigate the adversarial expedited removal process without the assistance of legal counsel are particularly vulnerable to being incorrectly removed.<sup>295</sup> The statistics more than confirm this conclusion: from 2000 to 2004, 25 percent of represented asylums-seekers subjected to expedited removal were granted relief but only 2 percent of unrepresented asylum-seekers under the same circumstances were granted relief.<sup>296</sup> In concrete terms, tens of

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<sup>294</sup> See, e.g., Kagan, *supra* note 263, at 386.

<sup>295</sup> See U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, vol. II at 251, [http://www.uscirf.gov/countries/global/asylum%5Frefugees/2005/february/ERS\\_RptVolII.pdf](http://www.uscirf.gov/countries/global/asylum%5Frefugees/2005/february/ERS_RptVolII.pdf) (last visited Oct. 2005).

<sup>296</sup> See *Report on Asylum Seekers vol. I*, *supra* note 274, at 34, 56.

thousands of foreign persons are expeditiously removed from the US to their countries every year.<sup>297</sup>

Having conducted the most systematic and comprehensive study on a sub-set of asylum-seekers, those in expedited removal procedures, the Congressional Commission essentially concluded that the existing system is not capable of preventing the erroneous removal of genuine refugees to places where they may face persecution.<sup>298</sup> No systematic study has ever been conducted to gather information regarding the situations of persons who had been removed to places where they claimed they would be subject to persecution. Undoubtedly, under the existing system of asylum adjudication, genuine refugees are included among those who are sent back and face persecution.

Given the undeniably significant error rate of asylum adjudications, the least that could be done is to treat rejected asylum-seekers no less favorably than ordinary undocumented immigrants. For immigration enforcement purposes, asylum-seekers, even those who are not in detention, are easy targets for removal because their identities and address are very well documented.<sup>299</sup> They are more likely to be removed than the average undocumented immigrant

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<sup>297</sup> For example, in 2001, 69,055 foreign persons were expeditiously removed; in 2003, 43,336 were removed. *See id.* at 32.

<sup>298</sup> *See id.* at 50-76. This study was the first of its kind. It dealt with issues in great depth and presented its findings in clear terms. The Commission's final conclusion reads: "This study has provided temporary transparency to expedited removal – a process which is opaque not only to the outside world, but even within the Department of Homeland Security. As a result of this transparency, serious – but not insurmountable – problems with expedited removal have been identified." *See id.* at 76. No similar studies have been conducted with respect to affirmative asylum proceedings. It is believed that some of the most serious problems noted in the expedited removal proceedings, particularly the proceedings before immigration judges and the Board of Immigration Appeals, would be more or less similar.

<sup>299</sup> Immigration enforcement in general varies significantly from state to state. For example, the Congressional Commission for International Religious Freedom reported that although some INS districts release almost all of detained asylum seekers from custody while their claims are being adjudicated, other districts release almost none of them. The report indicated a remarkable disparity with this regard. While the Harlingen, Texas district released 97.6% of detained asylum-seekers from custody, the New Orleans district released only 0.5% of the detained asylum-seekers. Every other district falls somewhere in between. *See Report on Asylum Seekers vol. 1, supra* note 273, at 33.

just because they attempted to use legally available avenues.

To minimize the dramatic consequences of sending refugees back into the hands of those who may kill or torture them, extending temporary protected status to those who fail to meet the strict requirements of the law but present claims that are not clearly fraudulent would be consistent with the humanitarian objective of the Refugee Convention. The main objective of this temporary status would be to impose a moratorium on removal of unsuccessful asylum-seekers until such time that the benefits of the impending immigration reform is sufficiently defined.<sup>300</sup> For example, the benefits anticipated under the McCain-Kennedy “Secure America and Orderly Immigration Act” or even President Bush’s proposed “Fair and Secure Immigration Reform Act” could be extended to cover refugees under temporary protected status.<sup>301</sup>

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<sup>300</sup> In July 2001, at an INS naturalization ceremony, President Bush stated: “Immigration is not a problem to be solved, [but] a sign of a confident and successful nation . . . [n]ew arrivals should be greeted not with suspicion and resentment, but with openness and courtesy.” President George W. Bush, remarks at the INS Naturalization Ceremony (July 10, 2001) (transcript available at <http://www.whitehouse.gov/news/releases/2001/07/20010710-1.html>), *quoted in* Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 5 (2001).

<sup>301</sup> The McCain-Kennedy bill would amend INA § 101(a)(15)(H) to add a new visa category for workers who wish to come to the U.S. temporarily. The proposed category is called “H-5A.” The benefit would extend to family members of the visa holder. *See* American Immigration Lawyers Association, *The Secure America and Orderly Immigration Act, Section-by-Section Analysis*, at 5 § 301 (2005), <http://www.shusterman.com/pdf/mccain605.pdf> (last visited Mar. 20, 2006). The visa would be granted for a period of three years with a possibility of renewal. *Id.* at § 302. Beneficiaries also would be eligible for adjustment after four years of employment. *Id.* at 7 § 306. The other proposed provision would add a new INA § 250A for a new visa category called “H-5B” for the benefit of the already existing undocumented immigration population. *See id.* at 12 § 701. The proposed bill would entitle such persons to live and work in the U.S. for a period of six years. *Id.* at 13. Such persons may apply for adjustment provided they meet the following criteria: (1) meet employment requirement; (2) pay application fees and additional \$1,000 penalty; (3) are admissible under immigration laws; (4) fulfill medical examination requirements; (5) show proof of payment of taxes; (6) demonstrate knowledge of English and American civics; (7) pass security and criminal background checks; and (8) register for selective service, if otherwise applicable. *See id.* at 13. This proposed bill does not exclude persons already in removal proceedings or those ordered removed from the benefits of H-5B visa category including the possibility of adjustment. The bill proposes to accept 400,000 workers from other countries for the first year under H-5A category with a possibility of a 20% increase the next year. *See id.* at 6. President Bush’s guest worker program, on the other hand, anticipates a three-year renewable permit and encourages return after some years of service. It proposes a mechanism of addressing financial and other needs of foreign workers when returning to their countries. The guest worker program does not completely rule out the possibility of applying for citizenship through existing mechanisms. It is, however, unclear what added advantages such authorizations would grant the beneficiaries as far as their path to citizenship is concerned. *See* Press Release, White House - Office of the Press Secretary, Fact Sheet: Fair and Secure Immigration Reform (January 7, 2004), <http://www.whitehouse.gov/news/releases/2004/01/20040107-1.html> (last visited Nov. 5, 2005). In fact, Senator McCain argues that there is no significant difference between his proposal and President Bush’s proposal. Speaking to reports on the subject, he said: “If you think it’s different in some key aspects, you’ll have to point them out to

Evidently, some sort of immigration overhaul is inevitable. Predicting the exact political compromise that could be achieved might be difficult; however, it is easy to anticipate that some variations of President Bush's and McCain-Kennedy proposals likely will be enacted into law. There is no legal or socio-economic justification to treat persons who were considered to have failed to present a refugee status claim consistently and credibly less favorably than any other undocumented economic immigrant. What is fair and consistent with the underlying humanitarian objective of refugee protection is that persons who unsuccessfully sought asylum are not made ineligible to immigration benefits that the general illegal immigrant population is likely to be entitled to. Humanity demands that removal of refugees who were unable to present their cases with the required level of consistency but who may be genuine refugees be halted. This is particularly important with respect to refugees who come from places with very well known authoritarian and abusive systems.

## **B. International Alternative**

Human rights norms represent the best examples of norms of international law that require internal application.<sup>302</sup> The obligations states undertake in international human rights

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me.” See Stephen Dinan, *McCain-Kennedy bill opens citizenship path*, WASH. TIMES, May 13, 2005, <http://www.washtimes.com/national/20050512-111803-6952r.htm> (last visited Nov. 7, 2005).

<sup>302</sup> The views and practices of states always have been different regarding the application of international law in the municipal arena. The relation between international law and domestic law has been a subject of great controversy over the ages. One proposition is that international law and domestic law are completely different regimes, and thus some sort of transformation is required in order for international law to be applied in the domestic arena. The other argument is that both legal systems are just parts of one uniform legal system in which international law is superior in the hierarchy, and thus domestic laws should always confirm to international law. HENKIN ET AL., *supra* note 1, at 153. Although some states require enabling acts for the application of international law in their domestic courts, others give effect to international treaties without any such enactments. In most countries, their constitutions provide for the status of international agreements in their domestic systems. See *id.* at 153-193. While some international treaties need not be applied internally, others are without value unless applied internally. *Id.* at 153. Since the very nature of human rights norms demands the domestic application of the standards, most human rights conventions so authorize. For example, Article 2 of the International Covenant on Civil and Political Rights (ICCPR) provides: “where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” ICCPR, art. 2, *adopted* Dec. 16, 1966, *available at*

laws are exclusively domestic by nature.<sup>303</sup> Except when a treaty expressly provides as to how it should be implemented, states determine the specific mechanisms to carry out their obligations.<sup>304</sup> Some treaties make a specific reference regarding what should be done at the domestic level, however others leave implementation open to the discretion of states.<sup>305</sup> Whenever a treaty provides for what states should do in the domestic sphere, such provisions become the obligation. When a treaty is silent about the application of its provisions within the member states, the inevitable result is inconsistent application.

The Refugee Convention is an international agreement that does not express the obligation of the parties to apply the provisions in the domestic arena in any particular fashion. However, some signatories have undertaken international obligations to accord the benefits enshrined in the Convention to persons considered refugees.

Generally, international law governs the relationships between and among states, not the relations between states and individuals.<sup>306</sup> Even though individuals can be beneficiaries of rights and obligations created by international law, they cannot be repositories of rights and obligations as such.<sup>307</sup>

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[http://www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm) (last visited Mar. 2006). "Article 2 creates duties on the part of the state parties with respect to the domestic application and guaranteeing of all rights in the covenant. It gives expression to the principle that the implementation of human rights under international law is primarily a domestic matter; international implementation is essentially limited to supervision of domestic measures." MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY 27 (1993). A similar provision is also contained in The Genocide Convention, *supra* note 204, at art. 5.

<sup>303</sup> See NOWAK, *supra* note 302, at 27.

<sup>304</sup> See HENKIN ET AL., *supra* note 1, at 153.

<sup>305</sup> *Id.*

<sup>306</sup> S. PRAKASH SINHA, ASYLUM AND INTERNATIONAL LAW 62 (1971). "The proponents of object theory maintain that the individual has no rights and duties of his state under international law, and that he, as its object derives benefits from it and suffers its burdens only as an incidence of the rights and duties of his state under this law." *Id.* (footnotes omitted). "Certain writers suggest that the individual is occasionally even a subject of international law, as when states enforce this law up on him as part of their municipal law." *Id.* For a detailed discussion of the position of individuals in international law, see HENKIN ET AL., *supra* note 1, at 374-94. See also, MANUEL R. GARCIA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 7-23 (1956).

<sup>307</sup> See PRAKASH SINHA, *supra* note 306, at 68. However, there have been instances where individuals were held responsible for acts they have committed as individuals. The best example for this is the trial of the Nazi German

Generally, there are limited *individual* complaint mechanisms in place in the international arena. Examples include the Optional Protocol to the International Covenant on Civil and Political Rights, which grants individuals a chance to submit complaints to the Human Rights Committee.<sup>308</sup> Also, the European Convention on Human Rights provides a mechanism whereby individuals may petition against any violation by any contracting state to the European Commission of Human Rights.<sup>309</sup> Lastly, the Committee Against Torture also has a mechanism for individual complaints.<sup>310</sup> International agreements, including human rights conventions, focus on states' obligations towards one another except in the above cited and related instances.<sup>311</sup>

As discussed above, with the growth of international human rights law, states' actions toward persons within their jurisdictions are increasingly becoming a matter of international concern. The international instruments cited above do not make a distinction between citizens and non-citizens; they simply include everyone who falls within state jurisdiction.<sup>312</sup> Thus it could be argued that all aliens, including refugees, are beneficiaries of these provisions as long as they remain in the territories of the contracting states.

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officials before the International Military Tribunal at Nuremberg between 1945 and 1946 in accordance with the London Charter. The London Charter was concluded on August 8, 1945, among the nations of United Kingdom, France, the United States of America and the Union of Soviet Socialist Republic. *See supra* note 204.

<sup>308</sup> Article 2 of the Optional Protocol, Dec. 16, 1966, 999 UNTS 302, reads: "Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration."

<sup>309</sup> *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, at art. 25 [hereinafter *The European Human Rights Convention*].

<sup>310</sup> The Committee Against Torture is a body of independent experts who monitor the observance of obligations undertaken by state parties to the Convention Against Torture. *Convention Against Torture, supra* note 4. Under the Convention Against Torture, all state parties are required to submit period reports. The Committee may consider interstate complaints. In addition to these traditional methods of monitoring, the Committee is given authority to look into individual complaints of torture or cruel and degrading treatments. *See* Office of the United Nations High Commissioner for Human Rights, *Monitoring the prevention of torture and other cruel, inhuman or degrading treatment or punishment*, <http://www.ohchr.org/english/bodies/cat/> (last visited Nov. 11, 2005).

<sup>311</sup> *See* HENKIN ET AL., *supra* note 1, at 595.

<sup>312</sup> *See, e.g.*, *The European Human Rights Convention, supra* note 309, at art. 1.

It is, however, the earliest development of international law that a foreign state's treatment of an alien under its jurisdiction is the concern of the alien's country of origin.<sup>313</sup> An injury to a citizen of a certain state has always been considered an injury to that state.<sup>314</sup> Professor Henkin writes: "Long ago, we know, a government which offended a citizen of Rome offended Rome and if an American is abused elsewhere today, the United States is offended."<sup>315</sup> He adds that it was a widely accepted principle that injustice to a stateless person was not considered a violation of international law because no state was offended to invoke a remedy for such injury.<sup>316</sup>

By the same token, because a refugee is by definition a person who is outside of his country due to a fear of persecution either perpetrated or tolerated by the government of his home country, naturally that government would not come to his rescue if the refugee is abused elsewhere. To the contrary, under normal refugee circumstances, an injustice done to the refugee would even please the refugee's home government. And of course, in the normal course of dealings, it is rather the admission and good treatment of refugees that is considered a manifestation of ill-will towards the country of origin and is usually considered as an unfriendly act that may, at times, jeopardize the relations between states.

For example, writing for the majority in *INS v. Juan Anibal Aguirre-Aguirre*,<sup>317</sup> Justice Kennedy noted:

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<sup>313</sup> HENKIN ET AL., *supra* note 1, at 596.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* "State responsibility for injury to aliens, for example, is not seen as creating rights for the alien under international law, he or she benefits because the law sees an offense to the individual as an offense against the state whose nationality the individual bears, remedies for violation of these norms are accorded only to the state." *Id.* at 595. "If the alien has suffered an injury as a result of a violation of a substantive rule of international law attributable to a foreign state of which he or she is a national may assert, on the state-to-state level, a claim against the offending state that is based on the injury to the alien." *Id.* at 677.

<sup>317</sup> 526 U.S. 415 (1999).

A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.”<sup>318</sup> The UNHCR also says that on a practical level, governments regard the grant of asylum as a political statement and can be an irritant to inter-state relations.<sup>319</sup>

Indeed, diplomatic repercussions are at the forefront of the system of refugee protection worldwide.

This being the political reality of refugee protection, it is fair to conclude that an injury to a refugee is a pleasure to the state of his nationality. Precisely because of this systematic peculiarity, over the last half-century that the Convention has been in operation, not a single case was referred to the International Court of Justice for adjudication.<sup>320</sup>

A very important aspect of the Convention is the recognition of the UNHCR as a supervisory body. To this effect, Article 35(1) of the Convention states:

The contracting states undertake to cooperate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention <sup>321</sup>

As far as refugees are concerned, the UNHCR is thus the only possible substitute for the traditional diplomatic protection that states provide to their citizens in foreign lands. Evidently,

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<sup>318</sup> *Id.* at 425. The acts in question included rioting, burning buses, smashing windows, attacking police cars, etc., to protest government policies. *See id.* at 418.

<sup>319</sup> Executive Committee of the High Commissioner’s Programme, Sub-Committee of the Whole on International Protection, Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees – Some Basic Questions, UN Doc. EC/1992/SCP/CRP.10, 15 June 1992, at 9, *cited in* WALTER KALIN, SUPERVISING THE 1951 CONVENTION ON THE STATUS OF REFUGEES: ARTICLE 35 AND BEYOND 13 n.72 (2001), <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b3357a69> (last visited Oct. 2005).

<sup>320</sup> *See* KALIN, *supra* note 319, at 30. Theoretically, other state parties to the Convention may regard themselves as victims of a violation by another state party, particularly when violation relates to norms of *erga omnes* nature; however, they have absolutely no incentive to actively pursue remedies on behalf of refugees who are not their nationals. *See id.* at 19. Thus no case has ever been brought by any state for the benefit of any refugee anywhere, and the UNHCR Executive Committee said that it is unlikely that such a case may be brought in the future. *See id.* at 30.

however, the UNHCR's existing obligations, coupled with a fear of endangering relations with host governments, has had a significant impact on the UNHCR's ability to supervise the due implementation of the Convention.<sup>322</sup> As a result, the need to design a better mechanism for meaningful supervision and enforcement of the Refugee Convention is admittedly long overdue.<sup>323</sup>

The Executive Committee of the UNHCR, on occasion, has outlined various options to boost monitoring of implementation and also has suggested a new mechanism for third party monitoring of the Convention.<sup>324</sup> It outlined several requirements that this mechanism must meet. The requirements include: independence and expertise, objectivity and transparency, inclusiveness, operationality, and complementarity.<sup>325</sup> Employing these criteria, it recommended the establishment of a Sub-Committee on Review and Monitoring to carry out refugee protection reviews to identify obstacles to the implementation of the Convention and achieve a more effective implementation of these principles.<sup>326</sup>

The Executive Committee's proposals are limited to mechanisms that the committee members deemed feasible, but these are not necessarily the best mechanisms to achieve compliance. By the committee's own statements, the best mechanism of ensuring compliance is the introduction of an individual complaint procedure to a newly created treaty body.<sup>327</sup> The Commission identified three major problems with creating a new body: (1) adherence would not

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<sup>321</sup> The Refugee Convention, *supra* note 2, at art.35(1).

<sup>322</sup> *See* KALIN, *supra* note 319, at 13.

<sup>323</sup> *See id.* at 39.

<sup>324</sup> *See id.* at 28-35.

<sup>325</sup> *See id.* at 29.

<sup>326</sup> *See id.* at 33. The Sub-Committee would operate by way of a team of experts who would review identified situations and issue reports which would be transmitted to the States as a public document. In addition, it is recommended that the Sub-Committee on Review and Monitoring would initiate a discussion for the establishment of a judicial body that may issue advisory opinions on issues of refugee law. *See id.*

<sup>327</sup> *See id.* at 27. "The possibility for individuals to petition a judicial or quasi-judicial body at the international level

be universal because states following more restrictive lines would not be willing to ratify an additional Protocol establishing this mechanism; (2) rejected asylum-seekers in Europe and America would use this mechanism to prolong their deportation, and it immediately would be overwhelmed; and (3) it would weaken the UNHCR's existing possibilities of taking up protection matters with governments.<sup>328</sup>

Despite these possible shortcomings, however, an individual complaint system is the only truly effective mechanism that would ensure compliance to a significant degree. However, the feasibility of the individual complaint procedure is extremely doubtful for yet another reason. State parties are unlikely to subject the decisions of their courts or administrative agencies to a review by an international body. Consequently, the best option to prevent the refoulment of genuine refugees seems to be an independent review by the UNHCR (whether through a sub-Committee or any other mechanism) of final removal orders with two major objectives: (1) to determine if the person ordered deported is a person of concern to UNHCR under its mandate; and (2) to look for another state party that might be willing to take him or her before the removal order is executed from the first country.

This proposal is feasible because it does not create a new treaty body or a new mandate. It utilizes, more effectively, UNHCR's existing legal mandate and strengthens its infrastructure in developed countries without compromising its humanitarian assistance work in the developing world. This proposal also would utilize the UNHCR's expertise and strong partnership with human rights bodies and regional intergovernmental and non-governmental agencies for the effective delivery of its international protection service.

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regarding alleged violations of their rights as guaranteed by an international convention or treaty is often regarded as the most effective form of monitoring." *See id.*

<sup>328</sup> *See id.* at 32-33.

Implementing this proposal could be difficult, notably because it would impose a financial burden and because of the possibility of large caseloads. The financial constraints could be overcome through new fundraising initiatives for this particular purpose; also, fees could be charged to the potential beneficiaries who might be willing and able to share some of the cost associated with their application and relocation process. The caseload could be minimized by defining strict criteria for review of final removal orders. The review could focus on issues affecting large numbers of refugees as well as on determinations of facts and country condition assessments contrary to the UNHCR's general findings and understandings.

This review process would minimize the number of refugees who may be erroneously sent back to their countries of origin. Using these procedures, the UNHCR may implement the principle of burden sharing by facilitating orderly relocation of persons of concern to other countries who might be willing to accept the refugees and give them a second chance.<sup>329</sup> At

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<sup>329</sup> It must be noted that this is entirely different from the resettlement programs from refugee camps in developing countries to willing developed countries. This attempts to minimize the possibility of sending genuine refugees because of faulty administrative decisions in developed countries by giving such refugees a second chance to present their cases to UNHCR and then to authorities of a second state. For example, a refugee who has been ordered to be removed from the U.S. by the BIA may petition to the UNHCR. If UNHCR determines that that person falls under its mandate or in some way regards him or her as a person of concern, it may endeavor to facilitate his or her transfer to other nations that might be willing to take him or her. The reality is that asylum-seekers rejected in the U.S. sometimes find refuge in Canada and vice-versa. This was particularly so prior to the Canada-U.S. Safe Third Country Agreement, signed on December 5, 2002 as part of the Smart Border Action Plan. Canada-U.S. Safe Third Country Agreement, Dec. 5, 2002, *available at* <http://www.cic.gc.ca/english/policy/safe-third.html> (last visited Mar. 2006) [hereinafter Safe Third Country Agreement]. Although this agreement significantly decreased the number of claimants, particularly in Canada, it does not completely preclude the reconsideration of adjudicated cases by the authorities of the other country when deemed appropriate. *See id.* at art. 6. UNHCR's involvement in such endeavor would ensure an orderly and transparent transfer of refugees from places where they are not recognized for different reasons to places where they may be welcome. For example, Canada maintains a moratorium on removal to designated countries—Afghanistan, Burundi, Democratic Republic of Congo, Haiti, Iraq, Liberia, and Rwanda. Canadian Council for Refugees, *Safe Third Country Agreement: Impact on Refugee Claimants, Frequently Asked Questions* (Oct. 18, 2005), <http://www.web.net/~ccr/s3cFAQ.html> (last visited Mar. 2006). In situations where an unsuccessful asylum-seeker in the U.S. might be at a serious risk of being sent back to these countries, UNHCR might facilitate the asylum-seeker's transfer to Canada. This possibility is not completely ruled out under the Safe Third Country Agreement. Article 9 of the agreement provides: "Both Parties shall, upon request, endeavor to assist the other in the resettlement of persons determined to require protection in appropriate circumstances." Safe Third Country Agreement, *supra*, at art. 9. In fact, the parties have agreed to invite the UNHCR in their review process. *See id.* at art. 8. As such, UNHCR could play a significant role. It is very well known that Canada has a significantly higher rate of approval than the U.S. for certain groups. For example, in the year 2001, about 60% of

times, even elaborate systems of criminal proceedings, aided with twelve jurors, convict innocent people. As indicated throughout this article, the possibility of erroneous decisions in asylum proceedings where mostly one person makes factual findings using elusive standards with little or no review is undoubtedly significant. Hence, asylum-seekers rejected by a one person system deserve a second chance.

### CONCLUSION

The Refugee Convention selects a narrowly defined category of persons for protection. It employs strict criteria which *inter alia* exclude the great majority of refugees in mass-exodus situations. The core requirements of the Refugee Convention that are designed to select the category of persons as deserving of international protection are themselves extraordinarily elusive. The burden and standards of proof are replete with serious flaws both in their formulation and in their application. Asylum adjudicators attempt to determine claims for refugee status using such elusive standards and extremely limited evidence. The only evidence is often exclusively the statement of the claimant. Most genuine claims tend to be consistent and credible. However, some genuine refugees inevitably encounter serious difficulties in presenting their cases with the requisite level of consistency and credibility. With the growth of asylum jurisprudence, adjudications have become increasingly adversarial. In some cases, the humanitarian object and purpose of the Refugee Convention are completely overlooked.

The approval rates of immigration judges vary significantly and without plausible explanation. A singular person's findings of fact usually stand unchallenged because of the great

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the persons who claimed refugee status in Canada arrived in Canada from the U.S.; in 2002 the number was 72%. See Maria McClintock, *US-Canada Safe Third Country Agreement*, CALGARY SUN, May 7, 2002, cited in Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT'L J. REFUGEE L. 567, 582 (2003). In actual numbers that is approximately 15,000 applicants. The reverse was just 200. See *id.* One of the most important reasons is the difference in the approval rating of the two countries. This signifies that there are refugees who may be considered as such in one country but

deference accorded to the factual findings of immigration judges. New asylum policies changed approval rates significantly within a very limited period of time. Refugees with legal representation enjoy a significantly higher rate of approval. By the mere fact of being refugees, they are entitled to no diplomatic protection by any state. Their injuries invariably remain without redress. Most litigate their cases with their liberties restrained under an imminent threat of deportation.

In view of all these factors, it cannot be concluded with a significant degree of confidence that asylum adjudication is a system of jurisprudence without substantial flaws. Undoubtedly, genuine refugees are included among those whose claims are rejected everyday. For example, in *Pasha v. Gonzales*, Judge Richard Posner unequivocally concluded that the performance of federal agencies dealing with asylum cases “is too often inadequate” and “depressing.”<sup>330</sup> The Court of Appeals for the Fourth Circuit similarly concluded that there was a “disturbing pattern” of mishandling of asylum cases by the immigration court that sent refugees back to countries where they could face persecution.<sup>331</sup>

Humanitarianism demands that a solution be sought to accommodate the needs of such

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not in the other.

<sup>330</sup> See *Pasha v. Gonzales*, 433 F.3d 530, 531 (7th Cir. 2006) (“At the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals and with the defense of the BIA’s asylum decisions in this court by the Justice Department’s Office of Immigration Litigation.”). Twelve days after this decision, Attorney General Alberto Gonzales wrote a letter to all immigration judges acknowledging the problem that Judge Posner noted. The Attorney General said: “I have watched with concern the reports of immigration judges who fail to treat aliens appearing before them with appropriate respect and consideration and who fail to produce the quality of work I expect from employees of the Department of Justice.” Richard Acello, *Immigration Court Review Ordered, Attorney General Questions Quality of Work, Lack of Respect*, ABA JOURNAL e-REPORT, Jan. 20, 2006, <http://www.abanet.org/journal/ereport/j20immig.html> (last visited Mar. 2006). According to the United States Courts’ Administrative Office, the number of appeals filed challenging the findings of the BIA rose up a staggering 515% since the restructuring of the BIA. *Id.* For example, the number of such appeals in the Court of Appeals for the Second Circuit rose from a mere 170 to 2,632 from 2001 to 2004, an increase of 1,448%. *Id.* According to the New York Times, immigration cases involving asylum accounted for about 17% of all federal cases in the year 2004. Such cases accounted for about 3% in the year 2001. The report indicates that in New York and California, nearly 40% of all federal cases are immigration related. See Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

refugees. Unfortunately, it is very difficult to identify the genuine refugees among rejected asylum-seekers because these refugees are exactly the persons that the system failed to identify in the first place. However, if it means that some unworthy individuals would be included in any possible accommodations, such might be a price that humanity needs to pay.

This article outlined two possible alternative accommodations: a temporary solution in the context of the United States immigration situation and an international alternative. In the U.S., it is suggested under Section V(A) above that removal of those rejected asylum-seekers who have presented claims that are not clearly fraudulent be temporarily halted until such time that the exact specifications of the likely immigration overhaul are determined. These categories of persons could possibly be entitled to some temporary or substitute immigration status to which the general undocumented immigrant population also might be entitled. These refugees are unlikely to be treated less favorably than the general undocumented population mainly because a contrary treatment would effectively penalize immigrants who attempted to use the legal avenues.

The international alternative, discussed in Section V(B) above, suggests that the UNHCR should facilitate the transfer of persons whom it determines as persons of concern, under its Statute or otherwise, to places where they may be recognized as refugees prior to the execution of their removal order. This suggestion calls for the UNHCR to take an increased monitoring role. It is quite evident that numerous instances exist where refugees who fled similar or even identical set of circumstances are recognized in one system but rejected in another. The UNHCR must attempt to help refugees explore this narrow window of hope. In reality, refugees explore such options anyway, albeit in a gravely dangerous and disorderly manner. In such

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<sup>331</sup> Liptak, *supra* note 330.

circumstances, neither the host states nor the refugees win. A second chance for refugees would, in all earnest, serve the interest of both humanity and order.